7 February 2022

Zondo final report – Gama reinstatement was result of political meddling

The state capture commission has concluded that the Transnet board's decision to reinstate Siyabonga Gama as CEO of its subsidiary Transnet Freight Rail (TFR) in early 2011 – after he had been dismissed for misconduct – was a pre-determined one, with a high probability that it was instructed by former president Jacob Zuma. The commission has also recommended that law enforcement agencies investigate whether or not Zuma and former public enterprises minister Malusi Gigaba unduly influenced the board in this respect.

Former board chairperson Mafika Mkwanazi – who had himself taken office just weeks before, in December 2010 – led his colleagues astray by misrepresenting the merit of the charges on which Gama had been dismissed the previous year, pleading unfairness on the part of the disciplinary process that found him guilty on three charges of misconduct. The result of this, according to the second report of commission chairperson Acting Chief Justice Raymond Zondo, is that Gama's later promotion to group CEO secured a continuation of the capture of Transnet by companies linked to the Guptas.

Zondo writes: "The evidence as a whole justifies a finding that the decision to reinstate Mr Gama was pre-determined and there was no sustainable legal advice in support of the decision to reinstate, or any objective review of the fairness of Mr Gama's dismissal, and the process followed did not set out to achieve this."

He further finds fault in the board's decision to side-line Bowman Gilfillan (now Bowmans), the attorneys who had represented Transnet in the disciplinary process, on the insistence of Mkwanazi. His actions, writes Zondo, were borne out of an instruction from Gigaba when he met with Mkwanazi on the occasion of the latter's appointment as chairperson around November 2010.

According to Mkwanazi's testimony before the commission, Gigaba told him that one of the first tasks of the new board would be to seek a solution to the Gama matter and see how reinstatement could be achieved. The motivation behind this, Mkwanazi recalled in his testimony, was no different from the argument Gama himself and his supporters had used in their public protest against his dismissal: there was a double standard being pursued, as white executives at Transnet who had made the same transgressions in the past had not suffered the same fate as Gama.

At the time Mkwanazi and the rest of the board took office, Bowman Gilfillan (as it was known then) was in the process of preparing, on behalf of Transnet, for the process of retrieving legal costs for its North Gauteng High Court defence of Gama's dismissal, having been sued by Gama for unfair dismissal in 2010. The court ruled against Gama and ordered him to pay costs of Transnet's attorneys. By the time the board decided to reinstate him, however, Transnet had agreed to void the costs due to the company, and in addition pay Gama the equivalent of his own legal fees, on top of reinstating the benefits he had lost since his suspension in 2009. In total, the report notes, Gama was paid in excess of R13-million on top of his reinstatement.

Gama was investigated by the board that preceded Mkwanazi's, in 2009, for misconduct relating to overstepping in a procurement decision while he was TFR CEO. He signed off on a security contract that had been awarded to a company owned by former cabinet minister Siphiwe Nyanda – General Nyanda Security (GNS) as it was known at the time – on a confinement basis, despite the contract value (around R18-million) being above his delegation of authority. He was subsequently suspended, while a parallel process by Transnet's attorney sought to retrieve monies paid to GNS in terms of the contract. The cost of the contract had also grown over time due to several irregular extensions, according to Chris Todd of Bowmans, who also testified on his company's role in the process of retrieving monies paid to GNS.

The board in the meantime were pressed to make a finding on whether Gama's dismissal had been unfair. Zondo notes that they failed to interrogate the charges on which he was investigated, as well as Gama's admissions in relation to some of the charges, during his disciplinary enquiry.

"The first charge was that Mr Gama authorised the irregular conclusion of a contract by confinement (after cancelling an open bid process) for the provision of security services (at an ultimate cost of more than R95-million) by GNS … in excess of his delegation of authority (R10-million). The chairperson [of the disciplinary committee] found Mr Gama guilty on this charge in that he negligently authorised the conclusion of the contract and signed it without reading it and negligently failed to take appropriate steps to investigate the irregularities associated with the halting of an open tender process."

The second charge involved Gama's failure to secure Transnet's interests in a separate procurement process, where another division, Transnet Engineering (TE), had initially been earmarked to handle the engineering, assembly and maintenance of some 50 "like new" locomotives bought from Electro Motive Division. "The chairperson found that Mr Gama was negligent in failing to secure a contractual term which provided for TE to perform all the local work," notes Zondo.

"The third charge upheld by the chairperson was that during the investigation into his conduct and the various proceedings, Mr Gama had made statements critical of the motives, conduct and integrity of senior executives of Transnet and members of the board, which were unjustified, unreasonable, calculated to cause harm and had led to irretrievable breakdown in the trust relationship between Transnet and Mr Gama as CEO of TFR."

A greater effort should have been made to allow the board to process the details and merit of each charge, argues Zondo, so as to make an informed decision about Gama's eligibility for re-instatement. However, Mkwanazi deliberately left Bowman Gilfillan out of the new process – probably on the basis that they would have advised against it – and the board then appointed Denys Reitz, from whose brief certain details were also omitted. Furthermore, the involvement of Siyabonga Mahlangu, Gigaba's special advisor at the time, in the intricate details of this process and the later one in which Transnet concluded a settlement arrangement with Gama, indicated possible political interference.

"The process followed in reaching the settlement agreement, the decision to reinstate, the terms of the settlement agreement and the payments of costs falling outside the terms of the settlement agreement were all indefensible. There are two possible explanations for this: i) Mr Mkwanazi and the board were legitimately wrong; or ii) there was an instruction to reinstate Mr Gama which accounts for the complete capitulation in negotiations."

Both Gigaba and Mkwanazi denied that the process was informed by an instruction from Zuma. "However, a conspectus of the evidence overall, especially the indefensible terms of the settlement agreement … and the fact that the board permitted Mr Gama to apply for the position of GCEO when he had recently been dismissed as CEO of TFR for serious acts of misconduct, strongly indicate that political interference was probably at play," writes Zondo.

Earlier in the report, Zondo explored the evidence of Gigaba's predecessor, Barbara Hogan, who testified in 2018 that Zuma had refused to acknowledge candidates interviewed and recommended by the board in two separate recruitment processes. This because he insisted on Gama's appointment, despite the latter being under investigation at the time. Hogan told the commission that she believed that her removal from the portfolio, and replacement by Gigaba, had to do with her own refusal to submit to Zuma's demand.

"Mr Mahlangu's conduct accords with the probabilities that President Zuma's support for Mr Gama continued after the appointment of Mr Gigaba," writes Zondo.

Useful links:

[Zondo Commission website](#)

Corruption Watch's [Zondo Commission update page](#)

[Transnet](#)