

Challenges facing the Expert Accountant

- with a specific focus on report writing and testifying in criminal matters

August 2021



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Challenges facing the Expert Accountant – with a specific focus on report writing and testifying in criminal matters

- What is an expert witness
- The South African Forensic Accountant
- An investigation under extreme circumstances
- Appointment of Forensic Accountant
- Working with SAPS
- Tainted Evidence
- The Expert Witness Report
- Presenting Evidence in Court and Cross Examination

Expert Witness

- Expert witness for whom?
- Expert witness for the prosecution?
- Expert Witness for the defence?
- How about unbiased expert witness for the truth?

What is an Expert Witness

- In theory, the expert witness is called upon to provide objective assistance to the court.
- In practice some say it is a person who is expected to say whatever can “reasonably” be said on behalf of the client who paid the fees.
- One expert made cynical by his exposure to the legal profession suggested that an expert witness is “chosen” not for their wisdom or sagacity but for their willingness to say in the simplest, clearest, least tentative way what a particular side wants said.

What is an Expert Witness (contd...)

In *Menday v Protea Assurance Co Ltd* Addleson J said: (1)

“In essence the function of an expert is to assist the Court to reach a conclusion on matters on which the Court itself does not have the necessary knowledge to decide. It is not the mere opinion of the witness which is decisive but his ability to satisfy the Court that, because of his special skill, training or experience, the reasons for the opinion which he expresses are acceptable... However eminent an expert may be in a general field, he does not constitute an expert in a particular sphere unless by special study or experience he is qualified to express an opinion on that topic. The dangers of holding otherwise – of being overawed by a recital of degrees and diplomas – are obvious; the Court has then no way of being satisfied that it is not being blinded by pure ‘theory’ untested by knowledge or practice. The expert must either himself have knowledge or experience in the special field on which he testifies (whatever general knowledge he may also have in pure theory) or he must rely on knowledge or experience of others who themselves are shown to be acceptable experts in that field.”

(1) 1976 (I) SA 565 (E) 569

The South African Forensic Accountant

Known by many names including:

- Fraud examiner
- Fraud auditor
- Forensic auditor
- Financial crime investigator
- Forensic investigator

What the Forensic Accountant is can be best described by Justice Squires in State vs Shaik.

“Van der Walt was plainly an impartial witness who simply described chapter and verse, in extraordinary detail, the evidence that he culled from the mass of documents given to him to investigate. In one or two aspects that he expressed an opinion, there was nothing amiss about so doing, but we have not relied on any of this”.

Appointment of Forensic Accountants

- Who has appointed you and for what purpose:
 - Private sector client
 - State entity (municipality, provincial/national departments, university, etc.)
 - SAPS
 - NPA
- Terms of appointment:
 - Mandate/scope – specific area of investigation
 - Changes in scope of work
 - Basis of billing and limit on fees
 - Who do you report to
- Becoming more common for a firm to be appointed but with a specific person to be the expert who will testify.

Working with SAPS

- If a criminal investigation, team needs to be lead by the investigating officer.
- Forensic Accountant can't perform the functions of the SAPS. Examples of which are:
 - Apply for subpoenas
 - Serve subpoenas
 - Apply for search warrants
 - Execute search warrants
 - Take warning statements
- Forensic Accountant can:
 - Review and analyse all seized documents
 - Interview potential witnesses
 - Draft affidavit for witnesses
 - Analyse computer evidence

If in doubt
don't do it

Access to information in Criminal Docket

What type of information/evidence:

- Complainants documents
- Subpoenaed bank documents
- Seized documents, computers, cell phones etc.

Complainants documents:

- Usually have access to this before it gets into docket
- Can be used for disciplinary, civil and criminal proceedings

Subpoenaed/Seized evidence

- Can only be used for criminal proceedings until presented in court.
- Work with copies
- Don't write/highlight on original
- All originals to be uniquely referenced
- Know the source of all documents

Tainted Evidence

- Fruit of the Poisoned Tree:
 - **If supporting documents not admitted then report useless.**
- Chain of Custody after seizure of documents:
 - Misfiled
 - Damaged
 - Destroyed
 - Who had custody at all times.
- Technical and procedural irregularities pursuant to the issue of the warrant itself:
 - Normally outside the control of forensic auditor but you become tainted by being associated with the matter.

The Expert Witness Report

ACFE – Reporting Standards:

“A first-rate written report is based on a first-rate investigation”

- Preparation – deficiencies in performing the investigation are likely to be very evident when preparing the report.
- Characteristics of a Good Report:
 - Accuracy
 - Clarity
 - Impartiality and relevance (**report all facts without bias**)
 - Timeliness.

Quotes from Electoral Court Judgement

Case no EC 05/14

- “The PwC report describes the conduct of the respondent as incurring luxurious expenditure. That finding, having regard to the failure of the respondent to follow procurement procedures, is fully justified and I also agree with it.”
- “This is borne out by the subsequent finding in the PwC report (an expert forensic report) that the transaction was subject to too high an interest rate. There is nothing to controvert the detailed and reasoned evidence contained in the PwC report.”
- “Each of the findings in the PwC report is consequently factually correct.”

Your Report could end up in the newspaper



Malema allegedly spent millions on clothes, car, farm and booze



EXTRAVAGANT: Former ANC

A FORTRESS report reveals that Julius Malema, used the Potlako Family Trust account as his personal piggy bank, splashing almost R200 000 on designer clothes and R11 500 of the five-star Twelve Apostles hotel.

Some R15 million was deposited into the trust's bank account through two cheques, and Malema was apparently the sole beneficiary.

The money, held by the crown trustee, the late brother of a man who appeared to have acquired an expensive lease for only the last and three days in life.

Almost a quarter of a million was transferred into his personal account.

The report, by audit firm PwC, reveals that the former ANC Youth League leader spent R201 000 on clothes at an Italian boutique store and more than R21 000 on Louis Vuitton designer clothes, already with money from the consulting firm On Point Business, which is at the centre of corruption investigations by various state agencies, including the police and the ICC.

A company, which was a supplier of clothing to On Point staff, already paid more than R20 000 to Malema. Malema's attorney, Trevor White, says the report.

"This was the first report received by the Asset Forfeiture Unit (AFU) to indicate an order on a bill from the Limpopo province owned by Gwema Properties, allegedly owned by Malema's On-Point business partner Louis Chagwanja. The order instructs Gwema Properties from selling the property pending the finalisation of the asset forfeiture case."

On-Point was a consortium of two companies - White's and another

A 150.00

NASA

CONTRACT SAFETY BOOT

TOOL SAFETY

Quoted 4-11

THE WITNESS

THURSDAY, FEBRUARY 7, 2015

R5,70 (SINCL VAT) SUBSCRIBERS FROM R4,55

I BUY CARS AND BAKKIES OLD OR NEW

PHONE AJAY

082 966 2384

Toddler killed by runaway grader

His father's pain • The driver's distress

Socialite couple's bling seized

Mpisanes: Luxury cars attached again and this time they may lose the mansion

BRITT MORRIS

SOCIALITE Sbu and Shaheen Mpisane are on the back of losing all their property - and starting yesterday, their luxury vehicles were added to the list. In a day-long operation, the Asset Forfeiture Unit carted off some of the couple's multi-million rand assets under the eyes of Pietermaritzburg's court house.

The couple's assets were seized under the eyes of Pietermaritzburg's court house. The couple's assets were seized under the eyes of Pietermaritzburg's court house.



A BMW 550i was the first car removed from the Mpisanes' luxury home in La Lucia.



A Mercedes-Benz car was also removed from the Mpisanes' home.



A Porsche Panamera Turbo.



A Porsche Cayenne Turbo.

The couple's assets were seized under the eyes of Pietermaritzburg's court house. The couple's assets were seized under the eyes of Pietermaritzburg's court house.



A Ferrari Scaglietti 412.



A silver Rolls Royce Phantom.



A silver Rolls Royce Phantom.



A Dodge Ram was also driven away from the Mpisanes' home in La Lucia.

The couple's assets were seized under the eyes of Pietermaritzburg's court house. The couple's assets were seized under the eyes of Pietermaritzburg's court house.



abandoned



which it should have only charged R100.

The Mercury understands that the other firm deposited into the account for Mpisane was a loan from the Development Bank of South Africa (DBSA) to assist in buying the Royal Hotel in Pietermaritzburg.

But at that time he was able to prove that he had repaid the loan to Mpisane.

Documents examined by forensic auditor Trevor White reveal that the Mpisanes were used to pay Mpisane's creditors, including payments to Yare SA on behalf of Blue Security - a company owned by him and his wife - and Varsity on behalf of the Obsolescent Family Trust, which apparently controls the business of his firm.

While it was legitimate money, questions were raised as to how Mpisane had secured the money from the government, including payments to Yare SA on behalf of Blue Security - a company owned by him and his wife - and Varsity on behalf of the Obsolescent Family Trust, which apparently controls the business of his firm.

It is alleged that in using the DBSA after initially being given a loan to buy the hotel by colleagues Sipho Buthelesi, centre, and Mda Nkomo in the picture. CONA MEMORANDUM

State attorney Anthon Steynberg told the court the state did not oppose bail and suggested that the Mpisanes be released on R200 000 bail. Each of the other four paid R10 000. Bail is allegedly the "master plan" for the Mpisanes. The state was ordered to surrender their passports and interfere with investigations and not evade trial. The case was set down for December 11 at the Pietermaritzburg Regional Court.

State attorney Anthon Steynberg told the court the state did not oppose bail and suggested that the Mpisanes be released on R200 000 bail. Each of the other four paid R10 000. Bail is allegedly the "master plan" for the Mpisanes. The state was ordered to surrender their passports and interfere with investigations and not evade trial. The case was set down for December 11 at the Pietermaritzburg Regional Court.

The Expert Witness Report

- The work of a forensic accountant is divided into three parts:
 - 1) An investigation where the facts are gathered, lays the foundation for any opinion.
 - 2) Writing a report incorporating the facts upon which the opinion is based.
 - 3) Testifying about the contents of the report
- The report should follow a set format:
 - Cover page
 - Index
 - Define abbreviations and terminology
 - Authors details and experience
 - Mandate
 - Caveats
 - Anyone else who assisted
 - Issues being investigated
 - Work performed and evidence gathered
 - Summary/Conclusions.

Cover Page

In the matter between:

THE STATE

And

TOLLO NKOSI
UMSO CONSTRUCTION
ALICE MOGOLTANE
ROBERT NEMAVHOLA

ACCUSED 1
ACCUSED 2
ACCUSED 3
ACCUSED 4

REPORT OF TREVOR SEAN WHITE

Dated	28 February 2013
Specialist field	Chartered Accountant and Forensic Auditor
On behalf of the Prosecution	The Director of Public Prosecutions
On the instruction of	The Department of National Treasury
Subject matter	Investigation conducted into the awarding of a contract to UMSO Construction: Contract: RAL/T624/2010: The Construction of New Steel Bridge over the Olifants River between Penge and Mankele, in the Sekhukhune District of Limpopo Province by the Roads Agency Limpopo



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Index

Report of Trevor White
Chartered Accountant and Forensic Auditor

The State v Tollo Nkosi and others

ABBREVIATIONS AND TERMINOLOGY	1
AUTHOR'S DETAILS	1
Name	1
Personal details	1
Experience and qualifications	1
MANDATE AND ISSUES TO BE INVESTIGATED	2
Appointment	2
Background	4
BASIS OF INVESTIGATION	4
Execution of fieldwork and gathering of information	4
Sources documents	4
DETAILED PROCEDURES AND FINDINGS	5
Applicable Legislation and Procurement Policy and Procedures	5
Background	10
Initial introduction to RAL and interviews conducted	11
Interview with Mr Nemavhola	12
Interview with Ms Mogotlane	16
Examination of payment information and procurement documentation relating to the "Mankele Bridge Project"; contract RAL/T624/2010	19
Payments made to Vela VKE	19
Payments made to UMSO Construction	20
Budget Vote Speech dated 18 March 2010	22

Abbreviations

Report of Trevor White
Chartered Accountant and Forensic Auditor

The State v Tollo Nkosi and others

ABBREVIATIONS AND TERMINOLOGY

The following are abbreviations and terminology that have been used in this report:

<i>Abbreviated name/ terminology</i>	<i>Full name and/or description</i>
Administrator	Mr Monde Tom
BAC	Bid Adjudication Committee
BAS	Basic Accounting System
BEC	Bid Evaluation Committee
BK Bridges	BK Bridges (Pty) Ltd
Cele	Mr Dumisani Cele, Director, Specialised Audit Services, National Treasury
CEO	Chief Executive Officer
CFO	Chief Financial Officer
CIPRO	Company and Intellectual Property Registration Office
Department of Roads and Transport	The Limpopo Provincial Government Department of Roads and Transport
EXCO	Executive Committee RAL
GM	General Manager
Konki	Mr Lungile John Konki, BK Bridges (Pty) Ltd
Mabasa	Mr Ephraim Mabasa, Deputy Director, Supply Chain Management, National Department of Transport; seconded to Limpopo Department of Roads and Transport
Mahlangu	Mr Sipiwe Mahlangu, Deputy Director, Specialised Audit Services, National Treasury
Mogotlane	Ms Alice Mogotlane, Chief Executive Officer, Roads Agency

References in the margin refer to
appendix numbers

PricewaterhouseCoopers

Caveats

Report of Trevor White Chartered Accountant and Forensic Auditor

The State v Gaston Savoi and others

- 4.003 I am not required to and did not undertake an audit in terms of the International Standards on Auditing. The scope of my work was limited to a review of the documentary evidence made available to me and enquiries undertaken to address issues identified in the execution of the investigation undertaken. I have not verified the authenticity or validity of the records and documents provided to me, unless otherwise stated.
- 4.004 This report has been prepared solely for use in the criminal matter registered with the SAPS; Durban Central CAS 1538/01/2009. It may also with the prior written consent of the Director of Public Prosecutions be used in any civil or disciplinary proceedings that the KZN LG & TA may wish to initiate. It may not be suitable for any other purpose and it should not be used, reproduced or circulated for any other purpose without my prior written consent. It should be a condition of such consent, if given, that PricewaterhouseCoopers and myself accept no responsibility to that third party and that such third party will hold PricewaterhouseCoopers and myself harmless in respect of any consequences of such disclosure. Whether or not I have given consent, PricewaterhouseCoopers and myself will not accept liability or responsibility to any other party who may gain access to this report.
- 4.005 I have included information relevant to the investigation and related circumstances but cannot conclude on the completeness of such information as the possibility exists that not all-relevant information and documentation was made available to me. Any documentation or information brought to my attention subsequent to the date of this report, which will affect the findings detailed herein, will require my findings to be adjusted and qualified accordingly.
- 4.006 This report contains hearsay evidence based on interviews conducted with individuals and affidavits/ warning statements taken by the SAPS. I deem the aforementioned evidence to be appropriate to sketch the full picture of the allegations raised.

Assistance

C. BASIS OF INVESTIGATION

6.000 Execution of fieldwork and gathering of information

6.001 Members of my staff have assisted me in the execution of fieldwork and gathering of information necessary to compile this report, however, where an opinion is expressed in this report it is my own opinion.

Practical tips for Expert reports

(remember who is going to use the report: judge and lawyers)

- Cover page
- Contents page
- Headers on each page
- Pages numbered
- Paragraphs numbered
- Clear headings
- Glossary
- Short sentences and paragraphs
- Double spacing or space and a half
- Margins wide enough for written comments
- Clear references to supporting documents/annexures
- Annexures to be clearly numbered and referenced

Practical tips for Expert reports (contd...)

(remember who is going to use the report: judge and lawyers)

- Files to be clearly numbered
- Use graphics where ever possible – (Jurors recall 10% of what they hear, but they recall 85% of what they hear and see)
- Chronology
- Summary of findings/conclusions/opinions
- Date report
- Sign report
- Use language a non expert can understand
- The report should be able to stand alone ie. contain everything the judge would need
- Qualifications and experience to be set out clearly
- Easy for judges and lawyers to use.

Numbering/ References

Report of Trevor White
Chartered Accountant and Forensic Auditor

The State v Tollo Nkosi and others

inclusive of VAT.

Minutes of the Contracts and Planning Committee meeting held on 23 March 2011 at 10:00

A32

8.102

The minutes of the Contracts and Planning Committee held on 23 March 2011 reflects the following under item 9.4 "Approval of extension of contract: Mankele road & bridge":

A32/9

1) "The CEO presented the report to the committee to approve for additional funds to cover for extension for the construction of the Mankele road and bridge";

2) "She reported that management in its sitting of the 07 March 2011 deliberated and recommended the approval on the extension of contract RAL/T624/2010 for the construction of Mankele Bridge and road in the Sekhukhune District of Limpopo Province. She moved that the committee approve the additional funding of R17,759,673.83, for the construction of pavement layers and surfacing on Mankele road";

3) "Ms Seboko seconded the motion";

4) "Resolution 298

It was resolved that the committee approve the additional funding of R17,759,673.83 for the construction of pavement layers and surfacing on the Mankele road".

8.103 I have not been provided with any signed Board Minutes where the said increase was ratified.

Acrow Corporation of America letter dated 4 April 2011 addressed to Tollo Nkosi, UMSO Construction

B13

8.104 The said letter was seized by the SAPS from UMSO electronic records and the subject of the said letter is "Supply Acrow 700XS Panel Bridge quote no. EXS1010096- Launching Components". The writer Bill Killeen has provided a

References in the margin refer to
appendix numbers

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Cross referencing

MINUTES OF CONTRACTS & PLANNING COMMITTEE MEETING HELD ON 23 MARCH 2011 AT 10:00

1. OPENING AND WELCOME

The Chairperson declared the meeting opened and the quorum duly constituted. She welcomed all members present and urged members to participate fruitfully.

2. ATTENDANCE REGISTER

COMMITTEE MEMBERS

Ms. K Maswanganyi	Chairperson
Ms. MM Seboko	Board Member
Ms. MM Maponya CA (SA)	Board Member (Chairperson: Audit & Risk Committee)
Ms. MA Mogotlane	Chief Executive Officer

IN ATTENDANCE

Ms. BL Mathebula	Senior Manager: Legal Services & Acting Company Secretary
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ATTENDANCE BY INVITATION

Mrs. M Venter CA (SA)	Acting CFO
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3. APOLOGIES

Ms. MMM Thindisa	Board Member
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4. CONFIRMATION OF AGENDA

The agenda was adopted with the following changes:

Item 8.2: Update on the Business Case-Addendum to be dealt with as the first item on the agenda under item 6.

5. DECLARATION OF INTEREST I.T.O SECTION 234(1) OF THE COMPANIES ACT AND SECTION 50 (3)(A) OF THE PFMA

The declarations of interest and oath of secrecy forms were signed and there was no disclosure of interest made by the committee members.

Cross referencing

A32/9

Specialist and Project Managers to assess the damage. The results confirmed that there is an urgent need to reconstruct a new structure as the collapsed one proved insufficient and costly to reconstruct.

She reported that management engaged Sanyati Civil Engineering who are contractors on Project RAL/T533/2010 which is closer to the collapsed bridge. The total estimated cost to reconstruct the bridge and 936 approach road is R 26 164 923.76 inclusive of contingencies and VAT.

She moved that the committee approve the extra work order under Project RAL/T533/2010 of R 26 164 923.76 for the emergency reconstruction of Sebilwane River Bridge and approach roads on road D4213 in the Sekhukhune District of Limpopo Province.

Ms. Seboko seconded the motion.

RESOLUTION 297

It was resolved that the committee approve the extra work order under Project RAL/T533/2010 of R 26 164 923.76 for the emergency reconstruction of Sebilwane River Bridge and approach roads on road D4213 in the Sekhukhune District of Limpopo Province.

9.4 Approval of extension of contract: Mankele road & bridge

The CEO presented the report to the committee to approve for additional funds to cover for extension for the construction of the Mankele road and bridge.

She reported that management in its sitting of the 07 March 2011 deliberated and recommended the approval on the extension of contract RAL/T624/2010 for the construction of Mankele bridge and road in the Sekhukhune District of Limpopo Province.

She moved that the committee approve the additional funding of R 17 759 673.83, for the construction of pavement layers and surfacing on the Mankele road.

Ms. Seboko seconded the motion.

RESOLUTION 298

It was resolved that the committee approve the additional funding of R 17 759 673.83 for the construction of pavement layers and surfacing on the Mankele road.

P

File Numbering



Experts CV

Report of Trevor White
Chartered Accountant and Forensic Auditor

The State v Tollo Nkosi and others

A. AUTHOR'S DETAILS

1.000 Name

1.001 Trevor Sean White.

2.000 Personal details

2.001 I am a male with identity number 6611245014087, 45 years old. I am a director of PricewaterhouseCoopers Advisory Services (Pty) Ltd, 102 Stephen Dlamini Road, Berea, Durban with telephone number (031) 2712000.

3.000 Experience and qualifications

3.001 I joined Price Waterhouse in 1989, and was admitted as a director of PricewaterhouseCoopers on 1 July 1998, following the merger of Price Waterhouse and Coopers and Lybrand. I am presently a director in the Forensic Services Department of PricewaterhouseCoopers (PwC) specialising in the Public Sector.

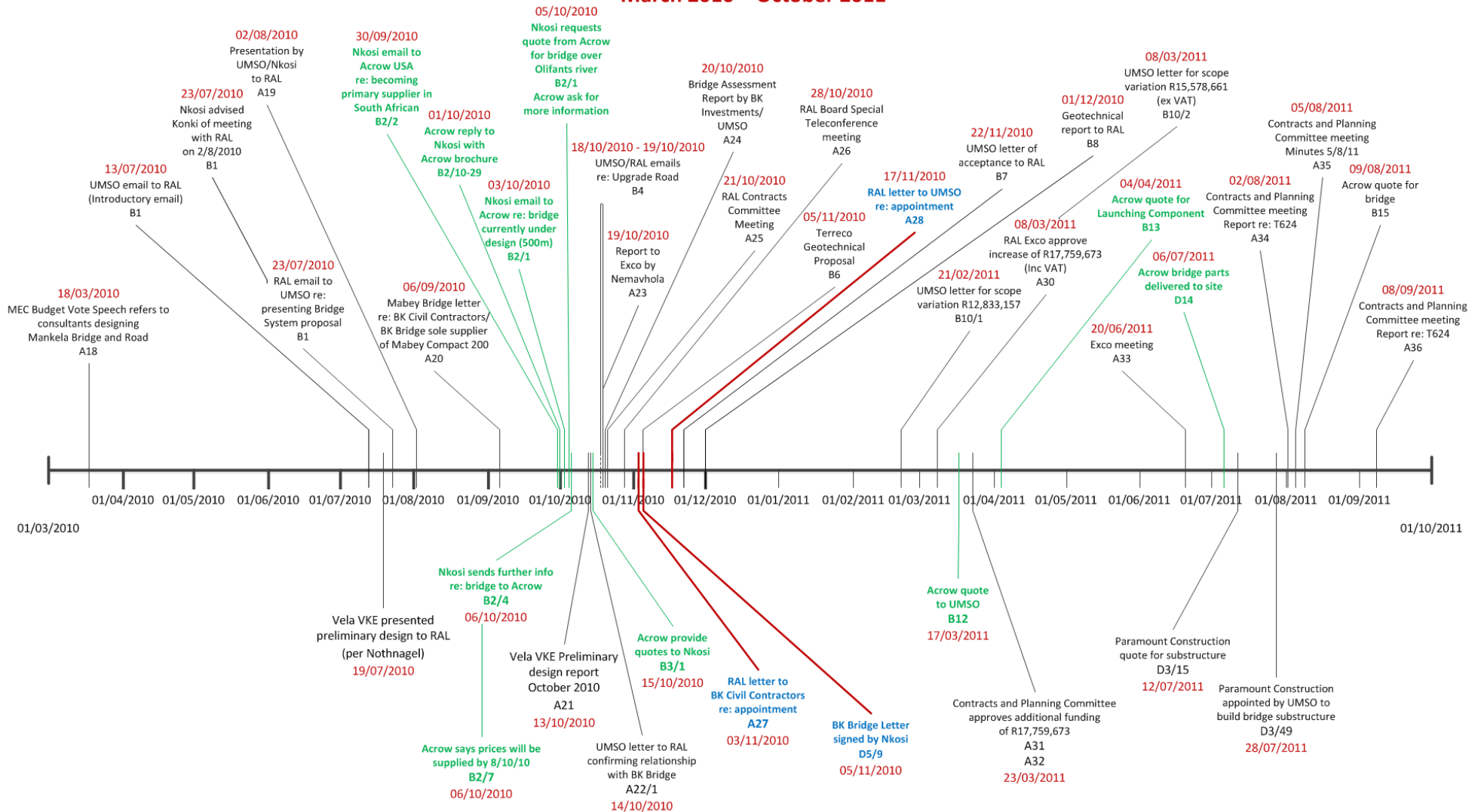
3.002 I have conducted numerous fraud investigations for both public and private sector clients and have given evidence in the South African High Court and the Regional Court and in the Lesotho High Court. I have also presented evidence to a Commission of Enquiry, the Commission for Conciliation, Mediation and Arbitration ("CCMA") and at various disciplinary hearings. I am trained in auditing techniques and hold a Bachelor of Commerce degree and Post Graduate Diploma in Accountancy from the former University of Natal Durban. I was also admitted as a member of the South African Institute of Chartered Accountants in 1992. I am a Certified Fraud Examiner, being admitted as a full member of the Association of the Certified Fraud Examiners, a Texas based organisation, in 1998. I have been involved in a number of business valuations and performance audits. My specialist field is Forensic Auditing and as such, I have extensive experience in analysing, reviewing and verifying financial information and accounting records. I have also chaired three investigative Commissions of Enquiry into Fraud and Corruption in Swaziland.

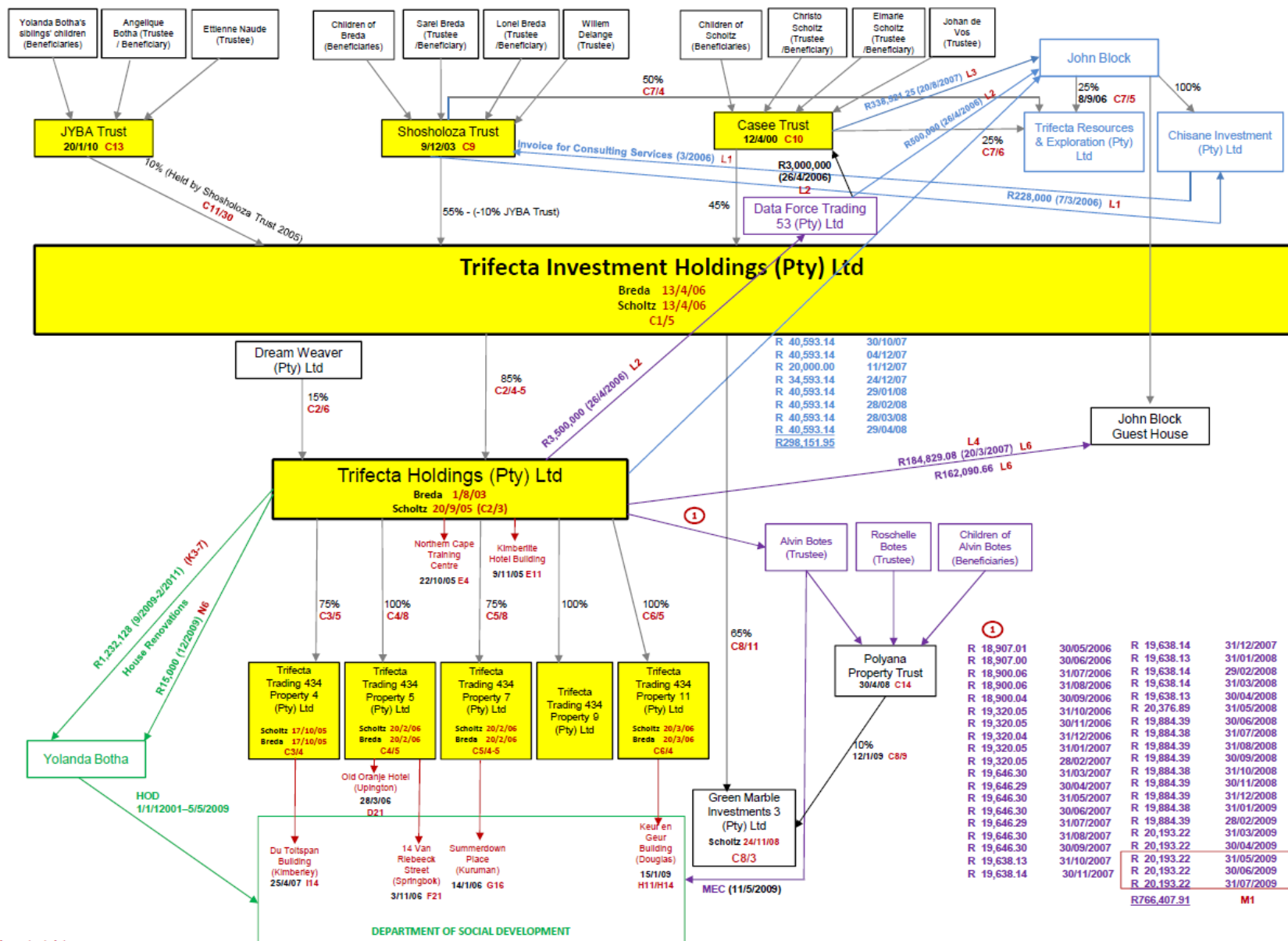
References in the margin refer to
appendix numbers

PricewaterhouseCoopers

STATE vs NKOSI AND OTHERS

Timeline of Key Documents March 2010 – October 2011





Important dates
Breda died 9/3/2009

Testifying under extreme circumstances





Presenting Evidence in Court and Cross Examination

- This is the ultimate test
- Many forensic accountants (experts) have never had this experience
- This is what sets a forensic accountant apart from an accountant or auditor
- Expert witnesses are engaged because of their experience testifying before (chicken and egg situation)

What preparations to make before going to court

i. Technical

- Agree fees and basis of charging
- Detailed briefing/consultation with prosecutor
- Review all evidence in case and supporting report
- Ensure you are in agreement with prosecutor on how evidence in chief will proceed
- Find out what the first question will be
- Ensure your notes, exhibits, reports etc in good order
- Identify the strengths and weaknesses in your evidence
- Prepare potential questions and answers for cross examination
- Review your report thoroughly (including annexures)
- Tell the prosecutor any specific questions you want him to ask you

What preparations to make before going to court (contd...)

ii. Practical

- Bring a spare, clean copy of your report
- Contact telephone numbers
- Dress (appropriate court clothes)
- Accommodation arrangements
- Lunch arrangements
- Make sure exhibits are available
- Meeting point at court
- Transport arrangements/parking
- Venue
- Date and time required
- What is the judge like
- What is the defence counsel like

What preparations to make before going to court (contd...)

iii. Personal

- Decide how you want to come across
- Practice your introduction

If you were a lawyer, what techniques would you use to disconcert a witness

- Pick on personal attributes
- Twist what you say
- Appear demeaning
- Appear disinterested in what you are saying
- Ask the same question in a number of ways
- Ask you a question out of context
- Come back to the same point at a later stage
- Home in on weaknesses (need to have prepared answers for these)
- Typo's in report
- Hypothetical questions
- Interruptions
- Attack your qualifications and experience
- Closed questions – yes or no

If you were a lawyer, what techniques would you use to disconcert a witness (contd...)

- Attack your foundation of facts
- Focus on unimportant points
- Theatricals
- Sarcasm
- Bullying
- Getting personal
- Keep asking you to speak up
- Keeping asking you to slow down
- Start at any place in the report
- Silence – waiting for you to fill the uncomfortable gap

Strategies employed in Cross Examination

- Discrediting the witness
- Terms of engagement
- Bias
- Fees
- Contradiction
- New information
- Safety/Good guy
- Sounding board
- Support opposing sides theory
- Confrontation



Directing your answers to the Decision Maker

- As soon as you enter the witness box, align your feet directly to the judge. If your back is to the defence lawyer, then all the better!
- Do not move your feet. Twist at the hips until facing the questioning lawyer. Listen carefully to the question the lawyer is asking. When he has finished his question, and not before, turn back to face the judge.
- This is your natural, comfortable position and your feet will remind you to face the judge. You are now making eye contact with the judge or at least looking in his direction if he is making notes. You cannot see the lawyer at this stage and so his looks of disbelief do not apply! Answer slowly and clearly.
- Sometimes you will be seated to give your evidence. Use the same principles as if you were standing.

Experts will appear credible when they follow these suggestions

- Speak clearly and audibly
- Refrain from using professional jargon
- Use simple terms to describe findings and opinions
- Address the specific questions asked, do not go off on a tangent or volunteer more than a question asked
- Do not verbally fence with defence attorney
- Maintain a professional demeanor
- Be calm and deliberate when responding to questions
- Dress conservatively
- Hair neatly combed, shoes shined
- Use graphs, charts and other visual aids if they help
- Do not read from notes, if you can avoid it

Experts will appear credible when they follow these suggestions (contd...)

- If you have a document to introduce make sure enough copies are available and quickly retrievable.
- Don't hem and haw or stammer.
- Retain composure when a tough or complex question is asked.
- Ask for repetition or clarification if do not fully understand the question.
- If you do not know the answer say so, don't guess.
- Do not stare off into space or at the floor or ceiling.
- Do not raise your voice in anger if the defence attorney tries to bait you.
- Be honest.
- Don't invent.
- Don't inflate.
- Don't evade.

Key Overarching Concept—Will You Contradict Yourself?

Skilled Trial Counsel

- will pour over every assertion you have made about the relevant topics and incorporate your prior statements verbatim into questions designed to compel you to either: (i) agree (**which gives counsel the admission he wants**) or (ii) disagree (**which gives counsel the opportunity to impeach you by showing that you are testifying/speaking differently now than you did on a prior occasion**)
- will not be terribly interested in figuring out how these inconsistent statements might be explained or reconciled by such things as the availability of new data, key factual differences in the cases, or other factors that reveal a lack of tension or conflict—this is the nuance and context that you will have to supply
- *pay extremely close attention* to every word in the question to make sure it is verbatim (or virtually indistinguishable from) your prior statement because if it is not, it may provide a basis for you to disagree with impunity
- *Assume that counsel knows the answer to the question he is asking*

Be Prepared For the Microscope—Have the Answers And Responses to Such Questions As:

- Did you personally gather the data? read the data? (*implying that if others gathered the data, they should be testifying because you lack personal knowledge regarding or sufficient command of the matter*)?
- Who formulated the assumptions? assessed their reasonableness?
- Did you commit any errors in reaching your opinion? What corrections?
- Did you omit any data, evidence, facts in rendering your opinion?
- Can we tie the bases for your opinions to facts/admissible evidence?
- Did you personally create or select the models used?
- Are the building blocks of your opinion (models/methodology) tested? accepted in the relevant community? free from problematic error rates? in existence prior to the instant case? peer reviewed?
- Did you personally perform the calculations? verify the calculations?
- Did you personally draft the reports? Are they consistent?
- Have you changed any of your assumptions, methodologies or opinions?

Be Prepared for Land Mines

- Pay attention to every word in opposing counsel's question as if each one has enormous significance—*because it does*
 - *you're being **paid** for your testimony, correct?*
 - *you spoke to **your lawyer** before this case?*
 - ***all things being equal**, you would agree that ?*
 - ***you** have an interest in the outcome of this matter, right?*
 - *your **wish** here is to convince the judge that the accused is guilty?*
- Be leery of invitations to agree with “possibilities.”
- Be suspicious of open-ended questions—why would opposing counsel want to seemingly relinquish control?
- Pay careful attention to opposing counsel's characterization of your opinion—*So what you're saying is; Let me clarify . . .*
- Beware of the compound question (*e.g.*, and, but, or)—only answer one question at a time.

Be Prepared for Land Mines (*cont'd*)

- Pay close attention to your word choice—*I imagine, I suppose, my assumption would be, etc.*—opposing counsel may try to seize upon such language to suggest uncertainty and equivocation in your opinions.
- Be on the look out for “cherry picking” questions where counsel:
 - (i) selectively includes only a portion of your prior statement and invites you to agree with this incomplete assertion;
 - (ii) shows you only a sentence or part of a discussion in a document without reading the passage in context; or
 - (iii) asks you to affirm the applicability of one principle in a given field without taking into account other applicable principles.
- Watch out for invitations to agree with absolute statements: *You would agree that it is always . . . , one never should*
- Invitations to fill the silence
- Make sure counsel is actually posing a question—*My understanding is . . . , My sense is that*

Further Tips Re Preparing For Cross-Examination

- Handling the One-Word Answer Box—True-False, Yes-No, Right-Wrong
 - Determine if the question is truly capable of being answered in this fashion or if doing so would force you to provide a misleading or incomplete response (preserve your credibility as a reasonable person).
 - Determine if the question can be answered in this limited fashion with the preface “under the specific facts as you’ve described them” (underscores the limitations of the response which may not exist in reality).
 - Determine if qualifiers are appropriate following a yes or no question including “generally speaking”, “in some instances”, “however, there are exceptions etc.”
 - However, **be careful** when using these qualifiers because opposing counsel may use them to expand your cross-examination or make you appear uncertain about your opinion, or seek to gain a concession that his expert’s conclusions can be correct in those exceptional instances that you identify.

Further Tips Re Preparing For Cross-Examination (*cont'd*)

- Handling the Hypothetical Question
 - If the question permits, you can note that the hypothetical
 - does not bear any relationship to the actual facts of the case.
 - is a very rare or unusual occurrence.
 - is not one you have ever encountered in your career.
 - runs counter to best practices, applicable policies or other guidance that informs your opinion.
 - If applicable (and permissible under the circumstances), you can note that the hypothetical is incomplete and cannot be answered.
 - If applicable (and permissible under the circumstances), you can note that the hypothetical is incomplete yet could be answered by adding the missing components (which may provide an opportunity for you to complete the hypothetical and reinforce your strongest points).
 - You can also politely decline to engage in sheer speculation.

Preparing For Cross-Examination

Ten Commandments For Experts

1. Do not get rattled, defensive, angry, or argumentative, and don't be afraid to make reasonable concessions—remain composed, be yourself—*persuade the Judge, not opposing counsel*.
2. Do not overstate your opinion or give knee-jerk endorsements of other people's opinions/work.
3. Never guess or assume (*e.g.*, that you and opposing counsel have a common understanding of the terms in his question).
4. Make sure you finish your answer but never interrupt, be afraid of saying you don't understand a question, or speak before fully hearing the entire question.
5. Always read the entire document before answering questions about it.
6. Never let the examiner control the pace.
7. Always carefully reflect before answering questions; give counsel a chance to object.
8. Only answer the precise question posed as concisely as possible and don't volunteer or fill in silence (the role of the academic v the role of an expert witness).
9. Never be afraid to limit questions to your area of expertise/engagement and to state the limited scope of your opinion (avoid the deep water)—remember “I don't know” may be the end of your answer.
10. Never be afraid to admit you were wrong and correct it— Always tell the truth.

Conclusion

- You are only as good as the last time you testified. A reputation that has taken years to build can be destroyed in one session of cross examination if you are not adequately prepared and furnished with the facts you are going to testify about.
- No fee is worth taking a chance you will tarnish or destroy your reputation.
- Your Opinion is your own – along with your Integrity and Reputation

