

Sold down the River



How did Transnet come to sell a huge piece of prime real estate in Cape Town, worth R200m, for just R3.5m?

TRANSNET MAY BE ABOUT to sell off a 14.8ha slice of prime Cape Town real estate for around R200m less than it's worth. The option to buy Liesbeek Park (locally known as The River Club), for R3.5m, is tucked away in the highly-suspect 2008 lease agreement between Transnet Property (Propnet) and lessee Frederick Robertson's Business Venture Investments. And the company has, we have learned, apparently made overtures to Transnet, seeking to exercise the option.

Given the extraordinary circumstances surrounding the signing of an earlier lease agreement in 2000, and a new, 2008 version of it, okayed by Propnet acting head Johan Nel against strong legal advice, and contrary to government regulations – and the fact that Transnet is selling off so-called “non-core” assets, there is a strong chance that such a sale might yet go through in the near future.

The gravity of how Transnet's

assets have, over the past decade, been stripped, to the benefit of political elites, has never been generally appreciated. The latest evidence of systematic abuse of this public company lies in a string of very dodgy deals involving the sale or lease of Transnet properties to “well-connected” consortiums. The River Club deal is but one of these.

Frederick Robertson was the point man in the original tender that won the 75-year lease to develop the land, back in 2000. (He was also, at the time, then Finance Minister Trevor Manuel's confidante and financial adviser – and a close friend of then Transport Minister Dullah Omar.)

Robertson's Liesbeek Leisure (Pty) Ltd put in a valuation of R3.5m, and offered to pay Transnet a rental of R35,000 per month. A competing tender came in from Grinaker Property Development/Sancino Projects Limited, offering a rental of R3.08m per month – based on a valuation of the land of around R103m – but Robertson

nevertheless “won” the tender.

Robertson might have been the face of the deal back in 2000, but his Liesbeek Leisure (Pty) Ltd was in partnership for the lease with Brimstone Investment Consortium – whose key figures was none other than Tshamano Phaswana, Professor Jakes Gerwel and Dr Patricia Gorralla, at the time all members of the Transnet board.

Phaswana's name appears to have been kept out of the spotlight in the 2000 lease deal. Phaswana was subsequently elected chair of the Transnet board. It was during his tenure that Robertson first approached Propnet with a request that he be permitted to sign over the lease to another tenant. It would appear that the Robertson/Phaswana partnership had been unable to secure the required capital to begin developing Liesbeek Park, probably due to the fact that no potential investors were included as partners in the 75-year lease.

Perhaps, too, Phaswana opted out to avoid the potentially damaging public exposure of his conflict of interest. It's therefore possible that Phaswana had some hand in pressuring Transnet officials to accept the cession of the lease – because under pressure they clearly were.

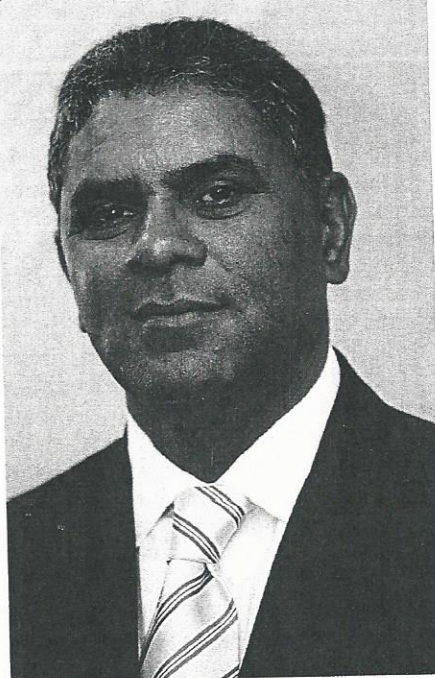
The push for a new lease arrangement began in December 2007, when Gil da Silva, Propnet Cape Town's regional manager, received a letter from Liesbeeck Leisure, requesting permission to sell Liesbeeck Leisure Club's business interests, including the lease, to Business Venture Investments (Pty) Ltd. Listed as shareholders of this latter company are: 50% Commlife Properties Services (owned by Frederick and Ulpha Robertson), 40% Swish Property Group (owned by developer Giancarlo Lanfranchi) and 10% Applemint Properties 54 (owned by Swiss-born Gerhard Gous). The Robertsons also have some interests in the Swish Property Group through Swish Property Eight. In essence Robertson was seeking to sell the Liesbeeck Park lease and development proposals to himself, but now with his funding partners included in the deal.

The Transnet Property management committee met to consider the request, and mandated Gil da Silva to seek legal opinion from Propnet's external counsel, Abdul-Rashid Essop of attorneys Jan S de Villiers. On 5 June 2008 Da Silva wrote to acting CEO Nel: "As I mentioned to you yesterday and at previous meetings of the Transnet Property management committee, this is a complex matter with a long history. Eddie Seaton and Rob Billett were members of the adjudication committee that awarded the development lease to Liesbeeck Leisure Properties and they can fill you in as far as the history is concerned.

"*Inter alia*, concerns that have been raised by our attorney, Abdul-Rashid Essop, are: Proper tender and adjudication procedures may not have been followed; Such alleged improper procedures may render the development lease null and void; Transnet may be sued by the unsuccessful tenderers if it agrees to the cession; The terms and spirit of the development lease may not be complied with if the cession is agreed to."

Da Silva concluded by reminding Nel: "My personal estimate is that Transnet could lose anything between R200m and R500m as a result of this deal with Liesbeeck Leisure Properties. Abdul has indicated that he is preparing a report on this matter, but this is a complicated matter and I recommend that Transnet Group Legal gets involved."

The following day, Da Silva dispatched another email to Nel, this time



Frederick Robertson, Trevor Manuel's confidante and personal financial adviser

copying it to executives Eddie Seaton, Siyabulela Mapoma, Marius Nel and Christopher Wells: "As I previously suggested to you, I do recommend that Transnet Group Legal get involved, because this is a complex matter with a long history.

"Please note that I don't have the authority to authorise any cession or assignment. In terms of Transnet's lease policy, cession must be approved by Transnet Group Tax and Transnet Group Legal. My role is to obtain sufficient information and to understand the issues and implications.

"Someone at Transnet would have to eventually sign off the approval of this

cession or assignment (should this be the course that is agreed and decided upon). Given the potential opportunity loss to Transnet (running into potentially hundreds of millions of rands), this is a serious decision to make. Perhaps this matter should be referred to Ernst & Young for investigation.

"My personal view is that Transnet needs to (at least) put itself in a position that will allow it to renegotiate key terms and conditions, so that Transnet does not suffer such a large opportunity loss, if any."

Days later, on 9 June 2008, Da Silva got backing for his position when attorney Essop sent an email to Marius Nel, Propnet's legal adviser: "On the merit, our opinion is that Transnet, in terms of the lease, does not have any obligation to cede or assign said lease. Clause 14.2 of the lease has been misinterpreted or incorrectly applied by Hofmeyr/Riverclub. [Robertson's sale of business to himself was prepared by attorneys Hofmeyr Herbstein & Gihwala Inc.] Our advice to Transnet is that they can in any event cede or assign the lease should they wish to, and that they can use this opportunity to negotiate better terms with the new party. The cession clause only deals with the development brief and not cession of the lease."

Attorney Essop added: "Johan Nel is not sure whether we interpreted the clause correctly and after meeting with Eddie Seaton and Gil da Silva, they felt it best that we appoint a



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senior advocate to have a look at the lease.”

In response to the attorney’s email, legal adviser Marius Nel wrote back (on the same day) to Essop: “Please proceed with opinion from SC. Can we expedite, seeing that the Group CEO is involved. [...] I have discussed the matter with my CEO Johan Nel, and will in the interim peruse all the documents/facts at my disposal so that we can properly brief SC herein.”

What are we to make of the oblique references to a “history” and the almost nonchalant assertion that “the Group CEO” (Maria Ramos) was “involved”? At this point in *noseweek’s* investigations, no other references to her involvement have been discovered, although her relationship with Trevor Manuel had already been established, and Manuel and Robertson remained close friends.

Not trusting that his legal adviser would communicate his reservations

such a delegation of the tenant’s obligations to the proposed new tenant, Business Venture Investments.” For some R15,000 or so in fees, Albertus obviously did his best.

Many thousands of legal opinion rands down the line (apparently Jan S de Villiers billed Transnet around R150,000 for attorney Essop’s opinion), Johan Nel and his crew at Transnet Head Office must have decided that their legal consultants weren’t worth their salt, no matter what they’d been paid. In an email dated 22 June 2008, Nel demanded of Da Silva: “Gil, Please provide me with report by close of business on Wednesday 25 June 2008, detailing all the steps taken to address the request for cession by Liesbeeck Leisure Properties (Pty) Ltd, supported with copies of relevant documentation.” A confused Da Silva reportedly called his boss to enquire what he was supposed to do, given his lack of authority in the matter – and the negative

legal opinions obtained.

On the set deadline of 25 June 2008, Nel once again wrote to Da Silva: “Gil, I have to have this report by 8am Monday morning, even if it does imply that you have

to work over the weekend.”

Da Silva didn’t wait for the weekend: in a three-page email to Johan Nel, dated 26 June, and attaching the various legal opinions that had been paid for by Transnet, he outlined why he couldn’t offer any guidance:

“In any event leases that extend beyond five years require the approval of the Department of Public Enterprises according to a directive from the Minister. There are therefore limits to Transnet’s authority. The case of Liesbeeck Leisure Properties (Pty) Ltd (the River Club) involves cession, assignment, sub-letting and a lease duration of 75 years. I do not therefore have the delegated authority to make decision with regards to the request from Liesbeeck Leisure Properties (nor does Rob). Moreover, neither Rob nor I had or have the delegated authority to take any steps to address the request for cession by Liesbeeck Leisure Properties (Pty) Ltd.”

Having failed to get the Cape Town office to do his dodgy work for him, on 9 July 2008 Johan Nel wrote to Terry Dickinson of Liesbeeck Leisure Properties informing him of Transnet’s willingness to consent to the cession – but subject to re-negotiated terms and conditions, including the re-valuation of the property and provision of new sureties.

Nel’s offer was quickly rejected, in a letter (on a River Club letterhead) in which Don Boyce and Terry Dickinson of Liesbeeck Leisure Club claimed that the company had already invested “over R17m in loan capital, and many more millions by way of reinvestment of trading surpluses, into the business infrastructure and the planning process”. (On what, one wonders, had they spent all that money?)

After declaring that “The new tenant’s BEE credentials are impeccable”, they went on to threaten that there was now “a very real danger that the proposed transaction [would] be abandoned by the new tenant due to the time taken to formalise the requested cession”. They proceeded to suggest that the River Club would, if the “new tenant” withdrew, “suffer quantifiable damages and [would] unfortunately be forced to contemplate seeking compensation from Transnet”.

Robertson’s company was threatening to sue Transnet for damages for not playing along. Yes folks, as the saying goes – “You and I, we know nothing!”. And, sure enough, the guys at Transnet, ignoring all legal opinion, agreed to play along. It took them a few months, but in November 2008, Johan Nel conceded to the group’s demands: “I confirm that Transnet has decided to waive the requirement to amend [the terms of] the lease.”

The cession of the lease (with option to buy for just R3.5m intact) was ultimately signed by Christopher Wells, as Group Chief Financial Officer. This, of course directly contravened the Ministerial directive that such leases be approved by the Department of Public Enterprises.

Johan Nel did respond to a message from *noseweek*, but it turned out he had assumed we wanted to hear his spiel about Transnet’s new R93bn infrastructure programme. No, we said – it’s about the River Club lease. And that was the end of that conversation. Group Chief Financial Officer Christopher Wells did not respond to a request for comment or explanation. **W**

So, a company that wants to sell its lease to itself threatens to sue Transnet for damages for not playing along

appropriately, that same day Johan Nel, writing as “Acting Head of Transnet Property” dispatched another email to his executives: “We are trying to get Snr Counsel’s opinion. It is however important to provide them with complete documentation.” But if “acting head” Nel hoped to get away with impropriety, he must have been less than pleased to receive the opinion of advocate MA Albertus, SC.

Albertus began by offering some lessons in basic terminology: “Before answering the question at hand with reference to the contents of the lease agreement, it is important to observe the distinction between the legal concepts, delegation and cession.”

The Senior Counsel then spent five paragraphs providing the lesson, before concluding: “In sum, there is no obligation upon Transnet to sign the proposed agreement, to the extent that it contemplates the substitution of the tenant with a new tenant, implying as

