

# Judicial Commission of Inquiry into State Capture Report: Part IV

Vol. 4: The Capture of Eskom



This is the report of the Judicial Commission of Inquiry into allegations of State Capture, Corruption and Fraud in the Public Sector including organs of state, also known to the public and the media as the Zondo Commission

Chairperson: Justice RMM Zondo  
Chief Justice of the Republic of South Africa

Report of the Judicial Commission of Inquiry into State Capture: Part IV: Vol. 4



Judicial Commission  
of  
Inquiry into Allegations

of

State Capture, Corruption and Fraud in the  
Public Sector Including Organs of State

Report: Part IV

Vol. 4: The Capture of Eskom

Chairperson: Justice R.M.M Zondo  
Chief Justice of the Republic of South Africa

## VOL 4

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## **BRAKFORTEIN COLLIERY**

### **Introduction**

1936. On 10 March 2015, Eskom concluded a Coal Supply Agreement with Tegeta for the supply of a total quantity of 13 950 000 tons of a blend of seam 4 lower and seam 4 upper coal, from Tegeta's Brakfontein Colliery (Brakfontein Colliery). The agreed contract price was R3.7 billion for the contract duration of ten years, commencing on 01 April 2015 to 30 September 2025.

1937. The manner in which Eskom awarded the Brakfontein Coal Supply Agreement to Tegeta must be considered in this section of the Report.

1938. Evidence obtained by the Commission in relation to this matter, include:

1938.1. affidavit and oral evidence of Mr Daniel Mashigo;

1938.2. affidavit and oral evidence of Mr Johann Andries;

1938.3. oral evidence of Mr Gert Opperman;

1938.4. affidavit of the late Dr Mark van der Riet;

1938.5. affidavit of Dr Ayanda Nteta;

1938.6. affidavit of Mr Matshela Koko;

1938.7. affidavit of Ms Kiren Maharaj;

1938.8. affidavit of Ms Eshari Singh;

1938.9. affidavit of Mr Kwenzokuhle Magwaza;

1938.10. affidavit of Mr Happing Masuku; and

1938.11. affidavit of Mr Sello Sethowa.

### **Early attempts to get coal supply contracts for Gupta mining companies**

1939. “Brakfontein” is the shorthand name for a coal mine in Delmas, Mpumalanga. At the time relevant to the facts in this matter, the mine was owned by Tegeta, a Gupta-owned entity, whose directors were, amongst others, Ms Ragavan, Mr Ravindra Nath (Mr Nath) and Mr Ashu Chawla (Mr Chawla).

1940. From around 2011, Tegeta (and its predecessors i.e., Idwala Coal Crypts (Pty) Ltd) approached Eskom many times to get coal supply contracts; first from their Vierfontein Colliery (Vierfontein) and later from their Brakfontein Colliery. According to Mr Johann Bester, the then General Manager for Fuel Sourcing within the Primary Energy Division (PED) at Eskom, Vierfontein was considered an unsuitable supplier due to certain environmental compliance issues but the coal procurement team at Eskom were wary of how they dealt with Tegeta. This was because they were aware that it was linked to the Guptas, and there was pressure to engage with them that “may have come from above”. A legal opinion was sought to validate their decision not to contract with Vierfontein, but the team were also required to go to the private residence of the former Eskom Group CEO, Mr Brian Dames (Mr Dames), to explain why they did not want to pursue the contract, and to reassure they had done things correctly.<sup>1552</sup>

1941. Approaches were also made to Eskom to contract for coal from the Brakfontein mine, initially around 2012, but not using the name Tegeta, but through entities using the

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<sup>1552</sup> Transcript 11 March 2019, p 108-109.

names “Goldridge”, “Arctos” and “Idwala Crypts”, which Mr Johann Bester termed as “frontmen”.<sup>1553</sup> Brakfontein, however, did not comply with water licence requirements, resulting in Eskom not being able to continue negotiations with them. However, on 22 December 2014 a water use licence was signed off for Brakfontein.

### **Internal Pressure on Eskom Officials**

1942. In March 2014, Mr Johann Bester was required to urgently call the entire PED team together to meet the then Eskom Board Chairman, Mr Tsotsi, despite parts of his team being located across Mpumalanga which meant that they would struggle to get there that day. Mr Tsotsi apparently berated the team for 20 minutes and then walked off stage. He complained of two specific aspects: (1) they were frustrating black-owned transporters and putting Eskom at risk, and (2) they were frustrating emerging miners. He apparently gave no further details and gave no opportunity for a reply.<sup>1554</sup>

1943. Mr Johann Bester testified that, as they exited the meeting afterwards, the then Head of Primary Energy, Ms Kiren Maharaj (“Ms Maharaj”), informed him that there was a lot of toxicity amongst the Executive team at that stage and that they had to be very careful. Mr Johann Bester mentioned that Ms Maharaj was very principled and would not soften her demands for coal transport cost savings, and this was making her a lot of enemies.<sup>1555</sup> She would later be essentially pushed out of Eskom, with none other than Mr Koko as the driving force behind that conduct. In her affidavit to the Commission, dated 22 September 2021, Ms Maharaj had this to say regarding her departure from Eskom:

“I was employed at Eskom Holdings SOC Ltd (hereinafter referred to as ‘Eskom’) from October 1996 until 31 March 2015. On 21 July 2014, I was wrongfully and unfairly

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<sup>1553</sup> Transcript 11 March 2019, p 111.

<sup>1554</sup> Exhibit U4, p10.

<sup>1555</sup> Transcript 11 March 2019, pp 115/10 to p116/20.

suspended by Mr Matshela Koko (“Mr Koko”) and my suspension was the subject of a dispute referred to the CCMA. After mutual agreement between Eskom and myself, I officially resigned on 31 March 2015”.<sup>1556</sup>

1944. Mr Johann Bester stated that he was later on that day told by Ms Daniels that Mr Tsotsi was unhappy with the progress on the Coal Supply Agreement for Tegeta/Brakfontein and on the cost savings that Ms Maharaj wanted to secure on coal road truck transporting.<sup>1557</sup> Mr Johann Bester described that he and his colleagues were “gobsmacked as to the complete lack of respect for proper protocol” and that it was abnormal for a chair to address staff directly, without even having gone through the chief executive and without that person there.<sup>1558</sup>

1945. Mr Koko testified that Ms Daniels also came to him and said that the contract that Mr Tsotsi told staff they were delaying was the Tegeta-Brakfontein contract.<sup>1559</sup>

1946. Mr Johann Bester recalled that, when Mr Vusi Mboweni took over as Acting Head of Primary Energy, he began trying to interfere with how technical teams were making progress on coal sampling and site visits that were needed in order to conclude coal contracts with Brakfontein. Mr Johann Bester had counselled him that the teams should be allowed to do their job and was concerned about the impact of applying such pressure on them.<sup>1560</sup>

### **Eskom’s Primary Energy Division**

1947. Critical responsibilities of Eskom’s PED include, inter alia, Coal Sourcing which falls under the Coal Operations division (Coal Operations). Within Coal Operations there is

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<sup>1556</sup> Ms Kiren Maharaj’s affidavit.

<sup>1557</sup> Exhibit U4, p10.

<sup>1558</sup> Exhibit U4, p11. Note that March 2014 was CEO Brian Dames’ last month – perhaps this emboldened Mr Tsotsi to feel he could command the staff this way.

<sup>1559</sup> Transcript 2 December 2020, p 266.

<sup>1560</sup> Transcript 11 March 2019, pp 118-119.

a division known as Fuel Sourcing, which is responsible for coal procurement. Once coal has been procured and the contracts signed, the said contracts are handed over to Coal Operations for management.

1948. Coal Operations is responsible for managing coal contracts. By way of example, Coal Operations ensures that the coal procured and delivered at the relevant power stations meets the specifications for the said power stations as per the coal contracts signed between Eskom and the service providers. Below is an organogram of Eskom's PED as at the time of the conclusion of the Coal Supply Agreement between Tegeta and Eskom:

PRIMARY ENERGY DIVISION				
SENIOR GENERAL MANAGER				
Mr Vusi Mboweni				
WATER Nadda Govender	FINANCE Senior Manager	COAL SOURCING <b>Mr Johan Bester</b>	OPERATIONS <b>Mr Dan Mashigo</b>	LIQUID, FUELS AND NATURAL ENERGY
		COAL SOURCING <b>Dr Ayanda Nteta</b>	COAL OPERATIONS	Later taken to commodity sourcing
			LABORATORIES	
			GEOLOGISTS	
			LAB TECHNICIANS	

1949. PED was then a division of Group Technology and Commercial, headed by Mr Koko from 2014.

1950. In 2011, Ms Maharaj was appointed the Divisional Executive of PED. Following her suspension in July 2014, Mr Mboweni, then Senior General Manager: PED, was requested by Mr Koko to act in her position. Mr Mboweni was telephoned by Mr Matjila, then acting Group CEO, with the same request for Mr Mboweni to assume the role of

Acting Divisional Executive: PED, which Mr Mboweni accepted, effective 07 August 2014.<sup>1561</sup>

1951. Mr Johann Bester, in his position as General Manager: Fuel Sourcing, reported to Mr Mboweni, whilst Dr Nteta, Senior Manager: Fuel Sourcing, reported to Mr Johann Bester. The entire PED reported to Mr Koko, as Group Executive: Technology and Commercial. In his affidavit, Mr Johann Bester explained that in his capacity as General Manager: Fuel Sourcing, he was responsible for the commercial negotiations for the contracting of coal supply to Eskom.<sup>1562</sup>

#### **Tegeta's offer and negotiations with Eskom in 2014**

1952. After failed attempts in 2012, Tegeta returned in 2014, once again, with an unsolicited offer to supply coal to Eskom. Various meetings ensued between Eskom's officials and representatives of Tegeta, in the name of Goldridge Trading (Pty) Ltd ("Goldridge"), who had advised that Goldridge was the owner of the Brakfontein mine through Tegeta. Tegeta later explained that Goldridge was not the owner of the mine, but a contractor at Brakfontein who had access to coal.<sup>1563</sup>

1953. About six meetings were convened prior to the conclusion of the Coal Supply Agreement on 10 March 2015. The meetings were held on the following dates:

1953.1. 09 May 2014;

1953.2. 10 July 2014;

1953.3. 23 September 2014;

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<sup>1561</sup> Exhibit U4 file 3, Part 1, Mr Bester's affidavit, p5/8.

<sup>1562</sup> Exhibit U4, file 3, *id* p5.

<sup>1563</sup> Exhibit U4 Treasury Report, p2

1953.4. 23 January 2015;

1953.5. 30 January 2015; and

1953.6. 10 March 2015.

1954. The meetings that took place in 2014 were all chaired by Dr Ayanda Nteta on behalf of Eskom. She was accompanied by various Eskom officials at each meeting. Goldridge/Tegeta was represented by Mr Nath and Mr Satish Mudaliar (Mr Mudaliar). These meetings focused principally on the evaluation and assessment of Tegeta's documents relating to its unsolicited offer to Eskom, to determine what Tegeta's coal service entailed and whether it was in line with Eskom's coal requirements in regard to coal quality and quantity. The negotiations of 2014 led to a formal offer letter from Tegeta, submitted to Dr Nteta, on 23 September 2014.

1955. In 2015 the negotiations with Tegeta were led by Mr Johann Bester and culminated in the conclusion of the Brakfontein Coal Supply Agreement on 10 March 2015.

1956. The meetings and negotiations of 2014, including the formal offer made by Tegeta in September 2014 (which is more fully considered below), all took place in circumstances where the Eskom officials were failing to comply with Eskom policies and, on the other hand, Tegeta was not in possession of a water use licence and was not compliant with environment-related legislative requirements and its mining activities had been suspended.

### **Procedural Flaws**

1957. The procurement of the coal supply from Brakfontein Colliery was secured by means of an unsolicited offer and was thus received outside of a competitive tender process. This process, although permissible in terms of the Eskom Procurement and Supply

Management Procedure: 32-1034 (the Procurement Procedure),<sup>1564</sup> had to comply with clause 3.4.5.8 of the Procurement Procedure which required unsolicited offers to be referred to the SDL Department for supplier pre-qualification and registration. Only once evaluated and pre-qualified after application, the supplier could be given a vendor number confirming registration on the Eskom supplier database and could be considered for any future tenders/enquiries.

1958. Further, the Procurement Procedure enjoined Eskom employees approached with an unsolicited offer to immediately refer the supplier to the SDL Department within the Group Commercial Division to engage in this registration process without further representation, engagement or commitment.<sup>1565</sup>

1959. These Eskom policy requirements were not complied with. Dr Nteta and her team failed to refer Tegeta's unsolicited offer to the SDL Department for supplier pre-qualification and supplier registration, without making any further representation, engagement or commitment to Tegeta. Instead, Dr Nteta and her team did the exact opposite. They continued to engage with Tegeta and ultimately committed Eskom to Tegeta's unsolicited offer without ever referring it for pre-qualification and registration.<sup>1566</sup>

1960. Eskom officials have asserted that the Tegeta offer was negotiated and accepted pursuant to a mandate to negotiate and conclude contracts on a medium-term basis for the supply and delivery of coal to various Eskom power stations for the period October 2008 to March 2018, dated 11 September 2008 (2008 Medium Term Mandate), as well as the Board Tender Committee decision on 03 December 2010 to extend and expand that mandate to contract for the life of the mine, extend current contracts and confer

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<sup>1564</sup> Dated 19 May 2014, EB15 p594 & p664.

<sup>1565</sup> *Id.* cf: PWC Report, p983.

<sup>1566</sup> *Id.* p988 para 5.17.

powers on the Divisional Executive, PED, with powers to sub-delegate, to execute the Board Tender Committee decision (2010 Medium Term Mandate Extension).

1961. In terms of the above position, Eskom introduced a 'medium-term mandate' in 2008 that allowed coal to be procured up until 2018 on a one-to-one basis, as opposed to an open tender process. The term was later extended (in 2010) to apply to the remaining life of the mine, in certain cases. The Board Tender Committee essentially gave upfront approval to this after there were coal shortages in 2008 which contributed to load-shedding, which apparently led to blanket emergency procurement provisions being instituted.<sup>1567</sup>

1962. The Mid-Term Coal Supply Strategy and the 2010 Medium Term Mandate Extension specified Contracting Principles and Standards for the negotiating teams and coal supply agreements and standards for the process and contracts in the areas of, inter alia, legislative compliance, coal quantities, coal qualities, price and contract price adjustments. In terms of these principles, Eskom was precluded from contracting with suppliers who did not operate legally. Suppliers were required to give warranties that they have sufficient coal reserves to meet contractual quantities. A supplier's stockpiles needed to be pre-certified and its coal comply with the coal quality requirements specific to the power station. Suppliers had to commit to Eskom's Coal Quality Management Procedure (CQMP) and Eskom had the right to monitor and audit compliance with the CQMP on a monthly basis. An Eskom-appointed independent laboratory would do an analysis of the contractual samples.<sup>1568</sup>

1963. During the negotiations, the Eskom officials raised concerns regarding Tegeta's mining activities taking place in close proximity to a stream that was a sensitive environmental area, and that a wall that had been constructed upstream to prevent water had

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<sup>1567</sup> Transcript 11 March 2019, pp 98-90; Transcript 26 February 2019, pp 82-83.

<sup>1568</sup> PWC Report, Exhibit U4, file 3, p986.

collapsed leading to flooding of the mine works. Eskom officials requested Tegeta to provide an authorization from the relevant authorities allowing mining to take place through a wetland and diversion of a stream.

1964. Tegeta acknowledged that mining was taking place very close to a stream and that it had been fined for contravening environmental regulations. However, Tegeta subsequently sought to change this position by explaining that the mine referred to was Vierfontein and not Brakfontien.<sup>1569</sup>

1965. Until 22 December 2014, Eskom was engaging with Tegeta on Tegeta's proposal and subsequent written offer in September 2014, when Tegeta did not have a Water Use Licence and could therefore not conduct mining activities. Even after having been issued with the Water Use Licence, it was determined by the Department of Water and Sanitation that Tegeta had failed to comply with certain conditions of the licence.<sup>1570</sup>

1966. When asked by Eskom to provide a recently mined sample for quality testing, Tegeta officials explained that the mining was suspended apparently in order to sell the existing stockpile before recommencing any mining. This request was made at the meeting of 10 July 2014,<sup>1571</sup> when Tegeta could clearly not meet that request, as it was precluded from mining due to lack of a Water Use Licence. Its explanation for the suspension of mining was therefore questionable.

1967. The size of Tegeta's stockpile was estimated at 70 000 to 75 000 tons. Throughout the negotiations, Eskom officials expressed concern with Tegeta's coal quality. Eskom required the supply of a total quantity of 65 000 tons of a blend of Seam 4 Lower (S4L) and Seam 4 Upper (S4U) coal for its Majuba Power Station. Eskom's chemical test

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<sup>1569</sup> National Treasury Report, Exhibit U4, file 3, p1094/4.7

<sup>1570</sup> *Id* p1097/5.10.

<sup>1571</sup> *Id* p1094/4.11 to 4.12.

results of Tegeta's coal samples showed that both S4U and the blended product (of S4U and S4L) did not meet specifications.<sup>1572</sup> Only S4L was compliant, but for other Eskom Power Stations and only marginally for the Majuba Power Station. However, if only S4L could be used, the resource estimate was insufficient to sustain the quantity required for the Majuba Power Station over the life of the contract.

1968. Despite the above issues, Eskom officials negotiated a price with Tegeta for both S4L and the blended product, even though the blended product was not suitable for Eskom's Majuba Power Station.

1969. Tegeta had initially requested R17 per Gigajoule (GJ) for S4L and R15/GJ for the blended product, which Mr Johann Bester regarded as too high when compared to other coal suppliers for similar specification coal. Tegeta's revised offer was R13.50/GJ on a five-year contract, supplying 65 000 tons per month from Brakfontein. This revised offer was made at the meeting of 30 January 2015 to which Eskom agreed, with a proposed start date of 01 April 2015, but subject to a successful combustion test.<sup>1573</sup> Tegeta never passed the test.

1970. The final conclusion of the agreement was on 10 March 2015, on completely different terms regarding contract price, contract duration and coal quantity.

### **Tegeta's First Written Offer to Eskom**

1971. On 23 September 2014 Tegeta submitted what it called a commercial offer to Eskom, by email from Mr Mudaliar to Dr Nteta (also referred to by her previous surname "Ntshanga"), on 4th lower seam (S4L) coal from the Brakfontein mine at R17 a GJ, for a monthly minimum of 40,000 tonnes to a maximum of 70,000 tonnes. This offer was

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<sup>1572</sup> Fundudzi Report, Exhibit U4, file 3, p1168/6.11.50

<sup>1573</sup> *Id* p1096.

made subsequent to the meeting held on the same day, 23 September 2014, and was in a letter signed by Mr Nath. In its relevant form, the letter reads:

“Kindly refer to the meeting we had with you in the captioned matter. In this connection please find below the details of our commercial offer for the supply of coal to ESKOM:

Seam Offered: 4th Lower Seam;

Quantity Offered (In Mt):

Minimum – 4000 Mt;

Maximum – 7000 Mt

Quality: ....

Rate Offered per Mj: R17.00.”

1972. During October 2014 this offer was followed by Tegeta’s last ditch attempt to have S4U coal samples, which it alleged was freshly mined, tested and accepted by Eskom. The alleged new samples still failed the chemical analysis test.<sup>1574</sup>

1973. On 06 November 2014 Mr Nath sent an email to Dr Nteta in which he inquired if Eskom had finalised reviewing the master Coal Supply Agreement it could provide a copy to Tegeta for perusal. Dr Nteta replied the next day, on 07 November 2014, providing Tegeta with a template of a Coal Supply Agreement for its input, and explaining that the provision of the template did not in any way create an obligation on Eskom’s part to purchase the coal from Tegeta, either then or in the future. Dr Nteta maintained this position before the Commission and explained that she provided the template to Tegeta “so that they could familiarise themselves with it as new suppliers to Eskom”. However, Ms Daniels said that it was irregular for Eskom to provide an editable version of the

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<sup>1574</sup> Fundudzi Report, *supra* p1164 & p1167/6.11.45.

template to a supplier for input. Ms Daniels said that a Coal Supply Agreement could be shared only after it had been finalised and in a PDF format.<sup>1575</sup>

1974. Mr Johann Bester explained that the Brakfontein contract was a relatively small contract and was considered a Medium-Term contract of 10 years or less. He said that ordinarily, the managers themselves would be able to conclude negotiations for such a contract but in this case the negotiations apparently proved difficult or were protracted. This apparently moved Mr Mboweni to instruct Mr Johann Bester to intervene and conclude the negotiations with Tegeta by the end of the week ending 30 January 2015, the previous negotiations meeting having taken place on 23 January 2015.<sup>1576</sup>

1975. A meeting was arranged by Dr Nteta for Friday, 30 January 2015, for Mr Johann Bester to meet with Mr Nath. The meeting was convened at Eskom, in a boardroom in the Executive Suite that, Mr Johann Bester explains, was almost directly opposite Mr Koko's office and one or two doors from Mr Mboweni's office. Mr Johann Bester said that he found it unusual for PED to meet suppliers in the Executive Suite when there was no Eskom executive involved. This suggested to him that "Tegeta was clearly getting special treatment" and that "the stakes were high".<sup>1577</sup>

1976. Mr Mboweni had told Mr Johann Bester not to agree to a price higher than R15 a GJ; and in the actual meeting Mr Johann Bester offered the Tegeta representatives R12.50 a GJ. In response to Mr Johann Bester's offer, Mr Nath and his team excused themselves from the meeting to make a call to Tegeta's board of directors to obtain a mandate to adjust their initial coal price of R17.00 p/GJ. Mr Johann Bester went back to his office.

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<sup>1575</sup> *Id*, p1166/6.11.31

<sup>1576</sup> Mr Bester's affidavit, *supra* p12/26.

<sup>1577</sup> *Id*, p12/27.

1977. Before the meeting could reconvene, Mr Johann Bester learned from Dr Nteta that there had been “a lot of shouting” at the Executive Suite, between senior Eskom management, and that “people were very upset”. At resumption of the meeting, Tegeta made a counter-offer of R13.50 per GJ, which Mr Johann Bester accepted, for a five-year contract to commence on 01 April 2015, at R13.50 p/GJ for 65 000 tons of coal per month, a blended product, from Brakfontein Colliery, subject to certain conditions. The conditions included BEE compliance, compliance with technical coal requirements and a combustion test, compliance with all Eskom policy and procedures (including Vendor registration) and Eskom having a right of first refusal to additional coal from Tegeta’s adjacent property (called Brakfontein Extension Colliery) that was still being developed.<sup>1578</sup> All this was confirmed in Mr Johann Bester’s letter to Mr Nath dated 12 February 2015.<sup>1579</sup>

1978. As already stated, Eskom accepted the offer for a blended product, despite the chemical test results showing that the product was not compliant and not suitable for the Majuba Power Station.

1979. Prior to Eskom’s offer on 12 February 2015, Mr Johann Bester had responded to Tegeta’s offer of 23 September 2014, by letter dated 30 January 2015 addressed to Mr Nath. In that letter Mr Johann Bester essentially made a counter-offer to Tegeta and advised that the negotiations were subject to, inter alia, a duly signed Coal Supply Agreement, and compliance with Eskom’s combustion test and coal specifications for the Majuba Power Station.

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<sup>1578</sup> Transcript 11 March 2019, pp 120-126. Bester’s affidavit supra p12/27 & annexure “JAB/Z13” p98.

<sup>1579</sup> Exhibit U4, Annexure “JAB/Z13” p98.

## Tegeta's Increased Offer

1980. Mr Nath responded by letter dated 03 February 2015, in which Tegeta offered to supply Eskom with higher volumes of coal, viz. 100 000 tonnes per month, effective from 01 October 2015, on the basis that the Brakfontein Extension would be operational by then. The letter also requested a ten-year contract, as opposed to five years, and leniency to meet Eskom's black ownership definition of 50% plus one share in a phased manner over a period of three years.

1981. It was to this offer that Mr Johann Bester responded by letter dated 12 February 2015 above, amending the Eskom's offer of 30 January 2015, but keeping to the contract duration of 5 years and coal quantity of 65 000 tons p/m, subject to the conditions already referred to. However, his stance was to be short lived.

1982. Email exchanges between Mr Nath and Mr Rajesh "Tony" Gupta show that they were not happy with Eskom's stance in refusing to commit to a 10-year contract and responded by email dated 13 February 2015, addressed to Dr Nteta. In the said email, Mr Nath made certain statements and proposals to have the offer amended. He explained that Tegeta required a ten (10) year contract in order to satisfy its funders, as Tegeta's loan period was going to be for more than seven years; that Tegeta would in the initial five years of Coal Supply Agreement supply 65 000 tons from Brakfontein Colliery and in the remaining five years, supply coal from Brakfontein Extension Colliery. He proposed, inter alia, the following changes to Mr Johann Bester's offer of 12 February 2015, which were all later accepted by Eskom:

1982.1. Changing the Coal Supply Agreement term from 5 years to 10 years (clause 10.4 of the Coal Supply Agreement);

- 1982.2. Supplying coal from both the Brakfontein Colliery and Brakfontein Extension Colliery (clause 2.1.37 of the Coal Supply Agreement);
- 1982.3. Keeping the coal quantity at 65 000 tons p/m from April 2015 to September 2015, but increasing it to 100 000 tons p/m from October 2015 to September 2020, when the Brakfontein Extension became operational. Eskom increased the quantity to 113 000 tons p/m (clause 10.4 of the Coal Supply Agreement);  
and
- 1982.4. Deleting one of the conditions in Mr Johann Bester's letter requiring compliance with Eskom's technical requirements and confirmation that Brakfontein Extension could produce saleable tons prior to the contract being extended to 10 years (under clause 14 of the Coal Supply Agreement).

1983. Mr Johann Bester relented and agreed to all the changes proposed by Tegeta and, in fact, offered more. In an email dated 09 March 2015 at 19h08, the night before the Coal Supply Agreement was signed, Dr Nteta wrote to Mr Nath:

“Goodday, please find attached draft contract. We have tried to accommodate your comments where possible.

As indicated, our legal advisor is to review the changes that we discussed during our operational meeting this afternoon. Please note that we have increased your monthly tonnage to 113 000 tons, with a variance on the max and min.”

1984. On 10 March 2015, Mr Mboweni signed the Coal Supply Agreement on behalf of Eskom and Mr Nath signed it on behalf of Tegeta.

1985. In his affidavit to the Commission, Mr Johann Bester stated:

“I always knew that there was interest in the Tegeta/Brakfontien contract from higher up, even since 2012, but significant pressure and focus came from the start of 2015, Brakfontein by then had its water use licence and we had run out of legal excuses

to keep batting them away. From the beginning of 2015 we had to provide Mr Matshela Koko with weekly progress reports. I also suspected that Mr Koko was engaging Ms Ayanda Nteta directly, although she reported to me. He never directly put pressure on me, but he did on her. Mr Vusi Mboweni at one stage instructed me to finish off the commercial pricing negotiations before the end of the week and a number of weeks later told me to get the agreements ready to sign within 48 hours or he would find someone else to do it.”<sup>1580</sup>

1986. He further stated:

“I saw Mr Mboweni’s threat of finding someone else to do my job as moving someone into my role that would just do as they were told. I reasoned that if I allowed Mr Mboweni to replace me, it would allow him and his handlers to dictate terms and would have put the next layer of employees below me under the same threat. So I figured I would try and get the best outcome under the circumstances, get the contract agreed but with all the conditions that we needed to protect Eskom.”<sup>1581</sup>

1987. The “conditions” he refers to is in fact one condition precedent or suspensive condition in clause 10.2 of the Coal Supply Agreement in terms of which Eskom and Tegeta had agreed that the Coal Supply Agreement was subject to the fulfilment or waiver of such condition that “by no later than 16h00 on 31 March 2015, the Supplier [Tegeta] had completed and reported a successful combustion test for coal supply to Majuba Power Station”. If the condition was not fulfilled or waived by the stated date, clause 10.3 provided that the remaining provisions of the Coal Supply Agreement “shall never become effective”.<sup>1582</sup>

1988. Mr Johann Bester testified that Eskom’s coal supply agreements are long and complex, and that normally he would not expect a new counterparty to sign within three months

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<sup>1580</sup> Mr Bester’s affidavit, Exhibit U4 *supra* at p13/30.

<sup>1581</sup> *Id* p13/31.

<sup>1582</sup> CSA, Exhibit U4, p648-649/10.

because they are not experienced with the contracts.<sup>1583</sup> Mr Johann Bester believed that Mr Mboweni's pressure was coming "from above".<sup>1584</sup>

1989. The Coal Supply Agreement was thus concluded despite the following:

- 1989.1. No financial assessment had yet been done on Tegeta when the contract was signed on 10 March 2015. In fact, a financial assessment was compiled by KPMG just a month later in April 2015, which stated that Tegeta: "is not relatively sound enough financially to be awarded a contract of R4.3 billion for the supply of coal to Majuba Power Station over a period of ten years". Mr Mashigo, former Acting Head of Primary Energy at Eskom, confirmed that the assessment should have been done beforehand, and had that been done, the contract would "definitely not" have been entered into.<sup>1585</sup> It is notable that Tegeta did indeed stop supplying coal to Eskom in February 2018, as it was placed under business rescue, only three years into the 10-year contract;<sup>1586</sup>
- 1989.2. In addition, the mining right for Brakfontein (not the extension) was due to expire in October 2020, well before the expiry date of the 10-year contract, i.e. 31 March 2025;
- 1989.3. The mining right for the Brakfontein Extension Colliery was valid from March 2014 to March 2024, but was not yet being mined at that time nor was the coal tested to establish what kind of coal quality Eskom would receive and whether it was suitable for Eskom's Majuba Power Station; and

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<sup>1583</sup> Transcript 11 March 2019, p 149 line 1-15.

<sup>1584</sup> Transcript 11 March 2019, p 150 line 10.

<sup>1585</sup> Transcript 26 February 2019, pp 111-118.

<sup>1586</sup> Transcript 26 February 2019, p .121.

1989.4. The Brakfontein coal had previously been subjected to technical tests and failed these initial tests, save for the S4L coal, which was found to be suitable for use only at certain power stations.

1990. Mr Johann Bester observed that the date when the Coal Supply Agreement was signed, 10 March 2015, was the day before four Eskom senior executives were suspended, on 11 March 2015.<sup>1587</sup> He believed that the reason the concluding of the Coal Supply Agreement under so much pressure was that it needed to be done before the executives could be suspended, specifically Mr Koko, who needed to keep the pressure on PED to get the contract through and that Mr Koko's suspension was just a ruse.

1991. Mr Koko responded to this in his evidence before the Commission by saying that the contract was in fact "Mr Tsotsi's work". Mr Koko also referred to the meeting in March 2014 when Mr Tsotsi berated Eskom staff over shortcomings in securing contracts for coal suppliers and which he was subsequently told was really motivated by Mr Tsotsi's desire for the Gupta's Tegeta to get a Brakfontein coal supply contract.<sup>1588</sup>

### **Brakfontein Coal Still Fails the Test**

1992. As already stated, the Coal Supply Agreement was subject to a condition precedent that Tegeta conducts a successful combustion test by 4pm on 31 March 2015. However, this was not done, and it appears that no-one at Eskom checked this, including Mr Johann Bester who stated in his affidavit that he and Eskom Legal had incorporated conditions into the Coal Supply Agreement in order to protect Eskom.<sup>1589</sup> His resignation from Eskom was only later, on 20 July 2015, the day when Mr Koko returned from suspension.

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<sup>1587</sup> Namely, Mr Tshediso Matona, Ms Tsholofelo Molefe, Mr Dan Marokane and Mr Matshela Koko.

<sup>1588</sup> Transcript 2 December 2020, p 266.

<sup>1589</sup> Transcript 11 March 2019, p 156/20; Transcript 11 March 2019, p 19-21.

1993. Clause 10.2.1 of the Coal Supply Agreement specifically required Tegeta to have completed and reported a successful combustion test by not later than 31 March 2015, failing which the remaining provisions of the Coal Supply Agreement would never become effective. The net result is that, in the absence of compliance by Tegeta (or waiver by Eskom, for which there is no evidence that Eskom did exercise), the Coal Supply Agreement never came into effect.

1994. Mr Gert Opperman explained during his evidence that the usual approach was for a combustion test to be done before signing a Coal Supply Agreement to check that the coal was of a suitable quality for the power station intended to be contracted for. It is unusual, he said, to put a condition precedent in a contract that by a certain date and time such a test needs to have been done. The test had to be done prior to signing of a Coal Supply Agreement in order to determine the suitability of the coal prior to the conclusion of the agreement.<sup>1590</sup> All the due diligence that needed to be done in order to sign a new contract with a mine are the responsibility of the Fuel Sourcing team in PED. Only once the contract is signed and ready for implementation, does it get handed over to the contract management team.<sup>1591</sup>

1995. Eskom's failures did not end there. Eskom also failed to enforce a clause marked 22.10 (immediately under clause 23) of the Coal Supply Agreement. This clause required drainage tests to be conducted by not later than 30 days after the first Delivery of Contract Coal.<sup>1592</sup> This was important to determine the Equilibrium Moisture content of coal and the stockpile drainage period required for coal to attain such Equilibrium Moisture. The first delivery of coal from Brakfontein was on 07 April 2015. The minutes of the monthly technical liaison meeting dated 13 May 2015 show that a date for drainage tests still needed to be scheduled. This meant that Eskom and Tegeta had

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<sup>1590</sup> Transcript 11 March 2019, p 18 line 15 – p19.

<sup>1591</sup> Transcript 11 March 2019, p 28-29.

<sup>1592</sup> CSA, Exhibit U4 *supra* p664.

failed to conduct drainage tests within 30 days after first delivery of coal.<sup>1593</sup> Mr Mashigo confirmed in his affidavit that the test was abandoned after inconclusive results.<sup>1594</sup>

1996. It is worth noting that the error in the numbering of clause 22.10 is not the only one in the CSA. There are also two separate and unrelated clauses that are both marked number 10. This may give credence to Mr Johann Bester's evidence that the Coal Supply Agreement was drafted in great haste.

1997. Eskom failed to enforce clause 22.2 of the Coal Supply Agreement which required the Supplier to have acceptable auto-mechanical sampling equipment for the purposes of sampling and analysing coal to determine its quality.<sup>1595</sup> The auto-mechanical sampling equipment was not available for a period of more than 12 months from 01 April 2015. The minutes of the monthly technical liaison meeting dated 10 February 2016 confirm this non-compliance.<sup>1596</sup> In terms of clause 21.5.3, no manual sampling of stockpiles was allowed. Auto-sampling was required.

1998. Eskom failed to strictly enforce clause 14 of the Coal Supply Agreement which required that the "Contract Coal to be supplied from both Brakfontein and Brakfontein Colliery Extension must at all times comply with Eskom's technical and coal supply agreements".<sup>1597</sup> The clause provided further that "if these requirements do not render compliance for supply to Majuba Power Station, Eskom reserves the sole and exclusive right to call upon a material breach, as provided for in this Agreement". Despite delivery of non-compliant coal by Tegeta, Eskom failed to exercise this right.

1999. Eskom continued, after the conclusion of the Coal Supply Agreement, to conduct coal analysis and combustion tests in respect of the blended coal samples that Tegeta

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<sup>1593</sup> Fundudzi Report, Exhibit U4 *supra* p1198-p1199.

<sup>1594</sup> Mr Mashigo, Exhibit U4, p137.

<sup>1595</sup> CSA, Exhibit U4 *supra* p663.

<sup>1596</sup> National Treasury Report, BRAK *supra* p1111/12.6.

<sup>1597</sup> CSA, Exhibit U4 *supra* p655.

proposed to supply to Eskom. This was after various coal analysis results, in June 2014 and October 2014, in respect of the same blended coal samples, had indicated that the blended coal was not suitable for Majuba Power Station.<sup>1598</sup> Presumably, Eskom wanted to find justification for concluding the Coal Supply Agreement in respect of the non-compliant blend product.

2000. Two technical tests were conducted, and the results recorded in two reports, one dated 12 March 2015 and the other April 2015. The March report concluded that sending a mixed Brakfontein S4U/S4L blend to, inter alia, Majuba Power Station was not recommended, as there was a high probability that the mix would frequently exceed Majuba rejection specifications. This was attributed to the poorer quality of S4U, which the report said exceeded Majuba rejection specifications.<sup>1599</sup>

2001. The April report also recommended that only S4L be sent to Majuba Power Station and not the S4U.<sup>1600</sup> This report also recorded: "When Hardgrove is considered in the overall assessment, based only on the laboratory analysis then the March 2015 sample is not suitable for all power stations as the required mill throughput to meet full load will not be achieved".

2002. The above goes to showing that Eskom, acting in patent breach of the Coal Supply Agreement, allowed Tegeta to make deliveries of blend coal without prior confirmation that the coal was compliant with Eskom's quality specifications. The full combustion test that would have determined the quality of the coal and its suitability to the Majuba Power Station was not done, as required by clause 10.2 of the Coal Supply Agreement, and

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<sup>1598</sup> Fundudzi Report, Exhibit U4 *supra* p1170.

<sup>1599</sup> *Id* p1193/6.14.8.

<sup>1600</sup> *Id* p1196/6.14.23.

was ultimately removed as a condition precedent of the contract, as will be shown below.

2003. On 20 April 2015 Mr Gert Opperman took over as the contract manager for the Brakfontein supply to Majuba Power Station.

### **Removal of Combustion Test Requirement**

2004. Just a little over a month after the Coal Supply Agreement came into effect, Eskom and Tegeta agreed to amend the coal quality specifications in the Coal Supply Agreement and effected the amendment by way of a First Addendum to the Coal Supply Agreement. The agreement was reached in a letter from Mr Johann Bester, dated 11 May 2015, but signed off by him on 12 May 2015.<sup>1601</sup> A comparison of this letter with Mr Johann Bester's letter of 12 February 2015,<sup>1602</sup> reveals that a clause requiring "full combustion tests to be conducted on all proposed coal prior to delivery and acceptance by Eskom" was omitted from his letter of 12 May 2015. The clause had been included in the original contract using double asterisks and a footnote; but now was excluded.

2005. When asked about this exclusion or omission of the clause, Mr Johann Bester said that he could not recall the instance specifically and speculated that "there may not have been a specific intention to remove that clause", if the intention was simply to replace the table of quality specifications.<sup>1603</sup> Notably, another clause that used a single asterisk and a footnote had not been removed. This may point to the removal of the clause, requiring full combustion tests prior to delivery and acceptance of coal by Eskom having been intentional. This clause was important to protect Eskom.

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<sup>1601</sup> Exhibit U4 *supra* p804.

<sup>1602</sup> Exhibit U4 *supra* p98.

<sup>1603</sup> Transcript, 11 March 2019 p 159 line 2-20.

### Tegeta seeks an amendment to supply more coal

2006. Hardly three months into the contract, Tegeta approached Eskom to start providing more coal than was originally contracted for. It proposed to supply 200 000 tonnes more coal p/m from October 2015 to the end of the contract.<sup>1604</sup> The offer was made by letter dated 19 June 2015, following a meeting Tegeta and Eskom had on the same day.<sup>1605</sup> In the letter, Tegeta requested to be informed of Eskom's acceptance of its offer and, quite tellingly stated, "to facilitate us to order for the required equipment and development infrastructure accordingly". Quite clearly, Tegeta lacked adequate resources to comply with all of the terms of the Coal Supply Agreement, as evident from the exposition above.

2007. In response to Tegeta's offer, Dr Nteta emailed to Mr Nath a letter signed by Mr Johann Bester on 24 June 2015. That letter stated as its purpose the recording of some of the material terms that were agreed at the meeting of 19 June 2015.<sup>1606</sup> The letter mentioned that coal would be supplied from Brakfontein Colliery Extension, and the volume increased to 200 000 tonnes per month from October 2015. Significantly, it also stated that the coal "must comply with the relevant Eskom specifications and will be determined once the full combustion test is successfully completed for the proposed product". The letter repeated the requirement under the 'Contract Conditions' that the coal supplied "must comply with Eskom's technical requirements and Eskom's coal supply requirements, including but not limited to Eskom's full combustion test", failing which or if the requirements do not render compliance for supply to Eskom, Eskom shall outright reject the proposal and no modification of the coal supply agreement shall be

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<sup>1604</sup> Exhibit U4, p808. Mr Bester, Transcript *id* p162 line 12-25.

<sup>1605</sup> *Id* p808, letter from Tegeta.

<sup>1606</sup> Exhibit U4, p809-811.

entered into.<sup>1607</sup> Mr Gert Opperman stated he was not involved in this, despite being the manager of the contract.<sup>1608</sup>

2008. As already stated, Mr Johann Bester's letter was emailed by Dr Nteta to Mr Nath on 24 June 2015 at 09h27. Mr Nath forwarded it to Mr Rajesh "Tony" Gupta on the same day at 10h07, along with a draft letter noted "as discussed".<sup>1609</sup>

2009. At 10h20, on 24 June 2015, Mr Nath replied to Ms Nteta by email in which he thanked her for Mr Johann Bester's letter, but stated:

"However, from our bankers' purposes we need (sic) letter on the enclosed lines. Kindly help in this regard."<sup>1610</sup>

2010. Attached to his email was a draft of Tegeta's preferred version of the letter it would like to receive from Eskom.<sup>1611</sup> It was abnormal for Eskom to receive drafts of its letters from suppliers.<sup>1612</sup> Tegeta's draft letter removed key aspects of Mr Johann Bester's letter above that were meant to protect Eskom, principally that the proposed coal would be subject to a full combustion test successfully completed, the requirement for compliance with all policies and procedures, as well as compliance with governance processes, and that additional volume would only be taken if needed by the relevant power station. Tegeta's draft also removed a provision that the proposed terms were subject to a duly signed modification to the current agreement.<sup>1613</sup>

2011. On 25 June 2015, Mr Johann Bester signed another letter premised on the new version of Tegeta's aforesaid draft.<sup>1614</sup> Mr Johann Bester claimed not to remember this or why

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<sup>1607</sup> See also Mr Bester, Transcript *supra* pp168-188.

<sup>1608</sup> Transcript 11 March 2019, p 31/10-25.

<sup>1609</sup> BRAK *supra* file4 p809 & p812. Transcript 12 March 2019, p 6.

<sup>1610</sup> *Id* p813.

<sup>1611</sup> *Id* p814.

<sup>1612</sup> Transcript 12 March 2019, p 11/20.

<sup>1613</sup> Transcript 12 March 2019, p 10/20.

<sup>1614</sup> BRAK *supra* file4 p816.

he signed the letter. He mentioned that letters would normally be drafted for him by Dr Nteta and that possibly he was trying to deal with things efficiently because he had many other matters to attend to, but would not have worried as the letter still stipulated that the terms were subject to an amendment being made to the contract.<sup>1615</sup> He made this concession:

“So I probably would have signed it to get it out the way so I can carry on with my business and I may not have applied my mind properly but I still feel comfortable that it is not a contract and it was an acknowledgement but yes it certainly does remove some of those protections that I would normally have applied specifically because we were dealing with these suppliers”.<sup>1616</sup>

2012. According to Mr Gert Opperman, it appears that, at the time of both the June letter, and even still by October 2015, the Brakfontein Colliery Extension was not yet being mined, nor had it been tested for coal suitability.<sup>1617</sup> He said that, had he been involved, he claims the suitability of the coal would have been a concern to him, because an immediately adjacent colliery, Kuyasa, had a high sulphur content. However, when Kuyasa supplied Majuba, it had the advantage of being able to use a particular rail service, whereas Brakfontein had to make more use of road delivery of the coal via trucks, and was more expensive.<sup>1618</sup> Mr Mashigo further confirmed that the coal quality of Brakfontein Colliery Extension was never tested.<sup>1619</sup>

2013. The Fundudzi Report has made the following findings, especially against Mr Johann Bester:<sup>1620</sup>

2013.1. Mr Johann Bester’s conduct was irregular because he allowed Tegeta to dictate the terms of the Brakfontein Coal Supply Agreement to their benefit and to

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<sup>1615</sup> Transcript 12 March 2019, pp 12-22.

<sup>1616</sup> *Id* p13/10.

<sup>1617</sup> Transcript 11 March 2019, p 32.

<sup>1618</sup> Transcript 11 March 2019, p 32-36.

<sup>1619</sup> Transcript 26 February 2019, p 89.

<sup>1620</sup> Transcript 12 March 2019, pp 23-28.

Eskom's detriment. Mr Johann Bester claims that he did his best to protect Eskom but with all the constant pressure "it may appear as if I went soft";<sup>1621</sup>

2013.2. Tegeta secured a ten-year coal supply agreement, whilst a five-year contract with an option for another five years would have been in Eskom's interest;

2013.3. Tegeta was allowed to proceed with the contract despite a critical condition precedent the non-satisfaction of which would have resulted in no agreement coming into effect. Tegeta received the benefit of no one following up on the condition precedent;

2013.4. Tegeta managed to dictate the terms of a further extension of the agreement in terms that were favourable to its bankers and less favourable to Eskom. Mr Johann Bester agreed with the above during his testimony before the Commission;<sup>1622</sup>

2013.5. Mr Johann Bester may have received gratification for changing the conditions of the coal supply agreements, which he denied by explaining that he would not have moved to resign if that was the case, as he would have been in a good position,<sup>1623</sup> and

2013.6. Mr Johann Bester is accused of breaching Section 34 of the PRECCA by not reporting the corruption that was evident to have occurred in relation to the contract. Mr Johann Bester responded that the contract was not in itself fraudulent or corrupt. He had no intention of doing anything corrupt, and there were processes in place that should have checked on specific conditions that needed to be taken into account. Mr Johann Bester claims that if everything

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<sup>1621</sup> Transcript 12 March 2019, p 24 line 1-7.

<sup>1622</sup> *Id*, p24 line 10 to p25 line 2.

<sup>1623</sup> *Id* p 25 line 3-9.

had been implemented in accordance with the terms of the contract, there would be no fraud. He attributes his signing of the letter drafted by Tegeta to his frustrations of working at Eskom under the new senior executives that had taken over, of wanting to move on as quickly and effectively as he could from the Brakfontein contract, and doing so without jeopardising his position because he felt that otherwise they would quickly replace him.<sup>1624</sup>

2014. Mr Johann Bester resigned on 20 July 2015, following a conversation with Mr Koko that, he says had left him uncomfortable. According to Mr Johann Bester, on his first day back from suspension, Mr Koko was making immediate inquiries about OCM as well as another project called "New Largo". Mr Johann Bester stated in his affidavit to the Commission that he felt Mr Koko was asking far too much detail for someone at his level of seniority, and told Mr Koko he was uncomfortable to continue meeting with him, and moreover that he would have his resignation by 12h00 that day, which he indeed tendered by 11h00.<sup>1625</sup>

### **Laboratory tests for quality compliance**

2015. As clearly apparent from above, Eskom was obligated to procure coal of specific quality suitable for its Majuba Power Station. Thus, Eskom continued to subject coal from the Brakfontein mine to constant inspection and sampling to ensure that it complied with Eskom's technical requirements. As it was entitled to do, Eskom procured services of various service providers to test and transport coal to its various power stations. Amongst the service providers appointed by Eskom to provide laboratory and coal transportation services was Sibonisiwe Coal Laboratory Services CC (Sibonisiwe);

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<sup>1624</sup> Transcript 12 March 2019, pp 28-30.

<sup>1625</sup> Mr Bester Affidavit Exhibit U4 file 3, p6/9-11 & p16/36-37.

SGS Services South Africa (Pty) Ltd (SGS) and South African Bureau of Standards (SABS).

2016. Between March and April 2015 SGS was the nominated laboratory which was responsible for the analysis of Brakfontein coal samples. From 24 May 2015 to 30 August 2015, Eskom appointed Sibonisiwe as a nominee laboratory for the analysis of Brakfontein coal. Sibonisiwe reported on its coal analysis results to Eskom for the period 23 July 2015 to 25 August 2015 and showed that the coal was non-compliant with Eskom's specifications.<sup>1626</sup>

### **Alleged Dispute by Tegeta**

2017. Dr van der Riet, a Coal Special Scientist working for Eskom's Research, Development and Testing Division (RT&D), was seconded to an acting managerial position in PED to assist them deal with coal supplies that were under-specification and partly responsible for load-shedding at Eskom's power stations.<sup>1627</sup> He was known as "Mr Coal" at Eskom, according to Mr Mashigo.<sup>1628</sup> Dr van der Riet passed away after he had submitted his affidavit to the Commission but before the evidence on Brakfontein was presented. Had he not passed away, he would certainly have given oral evidence before the Commission.

2018. During his secondment between 1 July 2015 and 31 August 2015, Dr van der Riet was informed by his Quality Assurance (QA) staff that coal qualities from Brakfontein, which had been fair up until July 2015, had deteriorated, whilst tonnages delivered had

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<sup>1626</sup> Fundudzi Report, BRAK *supra* p1210/6.16.5.18.

<sup>1627</sup> Transcript 26 February 2019 p 123 & Van der Riet, exhibit U4 file 4, p.447/6.

<sup>1628</sup> Transcript 26 February 2019, p 137.

increased substantially.<sup>1629</sup> Apparently, 50% of stockpiles had been rejected during this period.<sup>1630</sup>

2019. On 25 August 2015 Dr van der Riet was informed by Mr Mboweni that Brakfontein Colliery had laid a complaint that the laboratory monitoring Eskom's coal quality, viz. Sibonisiwe, had requested a bribe;<sup>1631</sup> it had been alleged that "a certain white woman", employed by an Eskom-nominated laboratory, had demanded a bribe from Brakfontein's representatives in order to change their coal analysis results.

2020. Apparently, this had been reported by one of Brakfontein's representatives, Mr Jacques Roux (Mr Roux), directly to Mr Koko,<sup>1632</sup> and Mr Koko is reported in the Fundudzi Report to have confirmed that much.<sup>1633</sup> Dr van der Riet was told that Mr Koko wanted the allegation to be investigated immediately and findings reported back to him.<sup>1634</sup> Mr Mashigo remarked that it was "very, very unusual" for such an issue to be escalated to this level, and would normally be handled by the contract manager and quality advisor at Eskom.<sup>1635</sup>

2021. In his affidavit to the Commission, Mr Masuku of Sibonisiwe, indicated that Sibonisiwe did not have an employee that fitted the description referred to above. The allegation of bribery was likely a ruse by Mr Koko and Tegeta, as it will become apparent below. It was a calculated manoeuvre on their part to get rid of Sibonisiwe and replace it with a third party that could provide positive test results from the coal being supplied from Brakfontein.

<sup>1629</sup> Dr van der Riet affidavit BRAK *supra* p 449.

<sup>1630</sup> Transcript 11 March 2019, p 41.

<sup>1631</sup> Dr van der Riet affidavit *supra* p 449 para 9.

<sup>1632</sup> Mr Masuku affidavit BRAK Exhibit U4 file 4 p691.3, annexure "HM1".

<sup>1633</sup> Fundudzi Report *supra* p 1214 para 6.16.6.9.

<sup>1634</sup> Dr van der Riet affidavit *supra* p 499 para 9.2.

<sup>1635</sup> Transcript 26 February 2019, p 130.

2022. Whilst Dr van der Riet and his team conducted their investigation, Mr Koko called Mr Masuku to his office for a meeting on 28 August 2015 and interrogated him regarding the testing results that his laboratory was producing on the Brakfontein coal. The full details of this meeting are captured in the relevant pages of the Fundudzi Report and attached to Mr Masuku's affidavit to the Commission as annexure "HM1".<sup>1636</sup> The details reveal much about Mr Koko's deep interest and involvement in the matter all in favour of advancing the interests of Tegeta.

2023. According to Mr Masuku, Mr Koko introduced himself to him and asked why Mr Masuku was fighting with the Gupta family, to which Mr Masuku stated he responded that he did not understand the question and that he did not even know who the Guptas were.<sup>1637</sup>

2024. Mr Koko then inquired whether Mr Masuku knew who the owners of the Brakfontein Colliery were, and when Mr Masuku said he did not know, Mr Koko informed him that the Colliery was owned by the Gupta family. Mr Koko then told Mr Masuku that he was fighting with the Gupta family by providing unfavourable coal analysis results on the Brakfontein coal, allegedly because Mr Masuku wanted to solicit a bribe from the Gupta family. Mr Masuku responded that he was not soliciting a bribe from anyone and reiterated that he did not know the Guptas.<sup>1638</sup> He also informed Mr Koko that he (Mr Masuku) had no knowledge of the coal quality specification parameters which were detailed in the contracts between Eskom and its coal suppliers.<sup>1639</sup>

2025. Further, Mr Masuku's evidence is that earlier in the meeting, Mr Koko made a phone call to Mr Roux regarding Brakfontein's sulphur quality parameter results for stockpile 26B and 27A, during which call a suggestion was made to resample Brakfontein's

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<sup>1636</sup> Mr Masuku affidavit *supra* p 691.3.

<sup>1637</sup> Mr Masuku affidavit *id* p 691.4.

<sup>1638</sup> Mr Masuku affidavit *id* p 691.4 to p 691.5.

<sup>1639</sup> *Id* p 691.5 para 6.16.6.19.

stockpiles which had failed the precertification process. It was also suggested that Sibonisiwe would be involved in the precertification, but this never happened.<sup>1640</sup>

2026. Mr Koko requested a break from the meeting, while they waited for the comparison of Sibonisiwe's coal analysis results with those of SGS's and reconvene at 3pm to discuss the results. When the meeting reconvened at the agreed time, Mr Koko made a phone call to one Mr Sam Phetla (Mr Phetla), who had been appointed together with Dr van der Riet, and requested him to bring the results to his office, which he did. The comparison was only in respect of the total sulphur parameter and showed that Sibonisiwe's total sulphur results were similar to those of SGS, a matter that seemed to make Mr Koko unhappy.<sup>1641</sup>

2027. In response to these allegations, Mr Koko has admitted the meeting, but denied that he made threats to Mr Masuku and said that present at the meeting was also Dr van der Riet and Ms Charlotte Ramavhona (Ms Ramavhona), where it was agreed that samples from the stockpiles at Brakfontein mine that had failed prior tests had to be taken under controlled circumstances for separate analysis at Eskom, Sibonisiwe and SABS laboratories.

2028. Dr van der Riet denied that he was present at the said meeting and informed that Sibonisiwe could not have done coal sampling, as they were not contracted to provide that service. Sibonisiwe was doing coal analysis for Eskom. Mr Masuku has also denied Mr Koko's evidence that Dr van der Riet and Ms Ramavhona were present at the meeting,<sup>1642</sup> and as already stated, also said that no samples were delivered to

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<sup>1640</sup> *Id* p 691.4 para 6.16.6.12.

<sup>1641</sup> *Id* p 691.5 para 6.16.6.20 to 6.16.6.22.

<sup>1642</sup> Fundudzi Report *supra* p 691.6 paras 6.16.6.24 & 6.16.6.26.

Sibonisiwe for testing. Mr Koko's version of the meeting must therefore be rejected as false.

### **Results of Dr van der Riet's investigation**

2029. According to Dr van der Riet, he and three of his colleagues concluded their investigation and reported their findings, which they personally relayed in a meeting at Megawatt Park, to Mr Koko and the then Head of Legal, Ms Daniels. The findings were that coal quality delivered from Brakfontein had been deteriorating. A plan was then devised to retest the samples at another laboratory run by SABS.<sup>1643</sup> This was done and test results from SABS were communicated by Dr van der Riet to Mr Koko on 28 August 2015.

2030. Whilst the Sibonisiwe laboratory had failed 15 out of 30 coal consignments in August 2015, the SABS laboratory results showed that 29 of the 30 samples should have been failed.<sup>1644</sup> Therefore, on either Laboratory's test results, Brakfontien coal was non-compliant.

2031. Dr van der Riet stated that in retort, Mr Koko instructed that Eskom's designated laboratory, Sibonisiwe, be replaced by SABS and RT&D, which instruction was complied with.

2032. Mr Koko also instructed Dr van der Riet and his colleagues, Ms Ramavhona and Mr James Mudau (Mr Mudau), to organise for a re-sample and analysis of the Brakfontein coal that had previously failed minimum specification requirements. An arrangement was made with the Brakfontein Colliery manager for this purpose to have

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<sup>1643</sup> Dr van der Riet affidavit *supra* p 450.

<sup>1644</sup> Dr van der Riet affidavit *supra* p 450 para 9.5. Transcript 11 March 2019, p 40.

the analysis done on 29 August 2015, with Dr van der Riet and Mr Mudau scheduled to personally witness the sampling and testing.<sup>1645</sup>

2033. Mr Koko has confirmed his instruction for SABS to conduct resampling of the Brakfontein coal and that he had made it clear to Dr van der Riet and Ms Ramavhona that the analytical process needed to be transparent and above board and had directed the two to “have ‘hold points’ and ‘witness points’ where all parties were present and instructed the team to have traceability so that the prepared coal sample would not be compromised”.<sup>1646</sup>

2034. However, Mr Koko would soon make an about turn and telephoned Dr van der Riet to inform him that they were not to be involved in witnessing the sampling. Dr van der Riet stated in his affidavit to the Commission that Mr Koko’s instruction was in contravention of Eskom’s CQMP which required the Employer (Eskom) to witness any sampling. When he advised Mr Koko of this, Mr Koko suggested that the sampling exercise should go ahead, but that another sampling would take place the next week in the presence of Eskom representatives and Mr Koko.<sup>1647</sup> Dr van der Riet states in his affidavit that he received a telephone call from Mr Koko on 29 August 2015, the same day when the resampling was scheduled to take place, informing him that Brakfontein had requested Eskom to cancel the scheduled visit.<sup>1648</sup>

2035. When confronted with these facts, Mr Koko said that he was not aware that Dr van der Riet and Ms Ramavhona were scheduled to visit Brakfontein mine on 29 August 2015 to witness the resampling process. Had he been aware of such a visit, he said, he would have supported it. He has apparently denied issuing Dr van der Riet, Ms Ramavhona and their team with an instruction not to visit Brakfontein mine for

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<sup>1645</sup> Dr van der Riet affidavit *id* p 450 para 9.7-9.9.

<sup>1646</sup> Fundudzi Report *supra* p 1224 para 6.19.4.

<sup>1647</sup> *Id* p 451 para 9.9.

<sup>1648</sup> Fundudzi Report *supra* p1224 para 6.20.1.

resampling purpose.<sup>1649</sup> Dr van der Riet maintained his version and there is no reason to suggest that he would have contrived such an elaborate story. Thus, Mr Koko's denials fall to be rejected.

2036. On the evening of 30 August 2015, a progress report with the resampled stockpile analysis results at that point, was sent to Mr Koko, with a preliminary finding that the coal was in fact fit for purpose. Dr van der Riet stated in his affidavit to the Commission that this should have been a cause for considerable concern, as no Eskom officials were present to witness the resampling. He could, therefore, not vouch for the validity of the results.<sup>1650</sup>

2037. On 31 August 2015 Dr van der Riet was asked by Mr Mboweni to prepare and handover an investigation file at a meeting scheduled for the morning of 01 September 2015. The file that was prepared included an affidavit and a CCTV footage from SABS Laboratory that alleged that the Brakfontein Colliery manager, Mr Roux, together with a relative, had forcefully gained entry to the laboratory on the morning of 30 August 2015 and confronted staff there who were working 'overtime' on the sample analysis. The colliery manager had attempted to exert undue influence on the laboratory staff to change their results to show that the coal was fit for purpose.<sup>1651</sup>

2038. Request had been made by the Commission to obtain the investigation file, including the CCTV footage referred to in Dr van der Riet's affidavit but to date the information had not been made available.

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<sup>1649</sup> *Id* p 1225 para 6.20.5.

<sup>1650</sup> *Id* p 451 para 9.10-9.11.

<sup>1651</sup> *Id* p 451 para 9.12 to p 452.

### **Mr Koko suspends coal supply from Brakfontein**

2039. On 31 August 2015 Eskom sent a letter suspending coal supply from Tegeta's Brakfontein mine, due to apparent "great concern" over stockpiles that had been coming from the mine between July 2015 and August 2015.<sup>1652</sup> Mr Gert Opperman was not involved with the letter; although he says he was aware of quality issues.<sup>1653</sup>

2040. The suspension letter was issued by Mr Koko, allegedly as a precautionary measure in order to enable Eskom to investigate the causes of inconsistencies in the coal quality management processes.<sup>1654</sup> Fundudzi has reported that Mr Koko also said that Eskom noted a significant increase in the number of out of specification coal stockpiles that came from the Brakfontein mine during July 2015 and August 2015. However, the suspension was a sham, as Mr Koko would lift it only five days later, on 5 September 2015, without any tests having been conducted on the Brakfontein coal between 31 August 2015 and 05 September 2015.<sup>1655</sup> Thus, the reason for the suspension was not fulfilled. In fact, it was Mr Koko himself who thwarted the investigation, by placing on suspension for no valid reason Eskom officials who were to conduct the investigation.<sup>1656</sup>

### **Mr Koko suspends Dr van der Riet and his team**

2041. On 1 September 2015, when Dr van der Riet arrived at Eskom to meet Mr Mboweni, in order to hand over the investigation file, he was served with a notice of intention to suspend, signed off by Mr Koko.<sup>1657</sup> Three other colleagues of his, viz. Ms Ramavhona, Mr Phetla and Ms Sipehelele Ngobeni, were also served with similar notices. It was

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<sup>1652</sup> Transcript 11 March 2019, p 36.

<sup>1653</sup> Transcript 11 March 2019, pp 37-38.

<sup>1654</sup> Fundudzi Report *supra* p 1238 para 6.27.

<sup>1655</sup> *Id* p 1240 para 6.27.20 – 6.27.24.

<sup>1656</sup> *Id* p 1244 para 6.29.1

<sup>1657</sup> Dr van der Riet affidavit *supra* p 452 para 9.14.

stated by Mr Koko that they “may have committed a serious misconduct by amongst others inconsistency in the management of the coal quality assurance process”, and that Eskom had decided to investigate the alleged misconduct.<sup>1658</sup> The letter came from Mr Koko and not from Mr Mboweni, despite Dr van der Riet and the three officials reporting directly to Mr Mboweni.

2042. It is worth noting that at this time Dr van der Riet and Ms Ramavhona were also in the process of conducting an investigation into the inconsistencies in the test results issued by Eskom’s contractual laboratories and those issued by a laboratory contracted by the Brakfontein mine.<sup>1659</sup> Dr van der Riet explained in his affidavit that from July 2015, when the tonnages from Brakfontein increased but the quality deteriorated, the Eskom geologist opined that the S4U coal accounted for this deterioration as it was considered to be too low to meet Eskom’s specifications. He further stated:

“The Eskom geologist’s hypothesis therefore had merit, as the mixing of 4-Lower with 4-Upper seams would correlate with the increased tonnages delivered. However, this hypothesis was never tested, as the Eskom geologist Mr James Mudau, the Eskom QA [Quality Assurance] manager Ms Charlotte Ramavhona, the Eskom Senior QA Mr Sam Phetla responsible for Brakfontein colliery, and myself were all suspended on 1 September 2015 prior to being able to initiate the investigation.”<sup>1660</sup>

2043. It is, therefore, reasonable to conclude that it was this investigation that Mr Koko, acting in concert with Tegeta, sought to circumvent. It is significant that Mr Koko’s unsigned letter of intention to suspend Mr Phetla, dated 31 August 2015, was emailed by Mr Koko to the email address infoportal1@zoho.com on 21 September 2015, without any message in the body of the email.<sup>1661</sup> Mr Koko’s engagement with this email address, used by to Mr Salim Essa, a close associate of the Gupta brothers, permeates all his

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<sup>1658</sup> Fundudzi Report *supra* p 1244 para 6.29 to p 1245.

<sup>1659</sup> Fundudzi Report *supra* p1245 para 6.29.8.

<sup>1660</sup> Dr van der Riet affidavit *supra* p449 para 8.

<sup>1661</sup> Exhibit U1, p512-513.

involvement in matters relating to transactions between Eskom and Tegeta. He facilitated the capture of Eskom by the Guptas and their associates.

2044. The reference in Dr van der Riet's affidavit to Mr Mudau as having been one of persons suspended is an error. The fourth person suspended was Ms Siphelile Ngobeni, who was also a geologist.<sup>1662</sup>

2045. The suspension of Dr van der Riet and his three colleagues was, in fact, effected on 8 September 2015, and thus ended the investigation.<sup>1663</sup>

### **Brakfontein coal supply continues**

2046. Following Mr Koko's lifting of the Brakfontein Coal Supply Agreement suspension, a further sample of the Brakfontein coal was taken and tested on 6 September 2015 at an Eskom laboratory, which differed markedly from that of the sample of 29 August 2015. Laboratory specialist, Dr Chris Van Alphen Chief Advisor Eskom Research, Testing and Development Division, subsequently advised that the two samples could not have come from the same mine, and further that the sample of 29 August 2015 did not in fact come from Brakfontein Colliery.<sup>1664</sup>

2047. During this time, on or about 7 September 2015, Mr Gert Opperman received an email from a representative of Tegeta, with results from an SABS test attached. Mr Gert Opperman testified that he then received a phone call from Mr Roux (who was at this stage COE of Tegeta),<sup>1665</sup> asking whether they could dispatch the stockpile to Majuba Power Station. According to Mr Gert Opperman, one of the quality parameters on the

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<sup>1662</sup> Transcript *supra* p 108 line 20 to p 109 line 23.

<sup>1663</sup> Dr van der Riet affidavit *supra* p 452 para 9.17.

<sup>1664</sup> Transcript 11 March 2019, p 41; Fundudzi Report *supra* file 5, p 1244.

<sup>1665</sup> Transcript *id* p 51 line 20.

stockpile did not meet the contractual specifications which meant that in terms of the contract the coal would be termed Reject Coal.<sup>1666</sup>

2048. Mr Gert Opperman testified that he responded to Mr Roux thus:

“As contract manager I do not have the authority to make a decision to dispatch this coal, I cannot do it and I immediately told him you cannot dispatch this coal, I cannot support it, you need to either declare a dispute or you need to reprocess the coal, you have got one of those two options.”

2049. Mr Gert Opperman further testified that Mr Roux was not pleased with this response and the call was “disconnected”.

2050. However, soon thereafter, Mr Gert Opperman indicated that he received a phone call from Mr Koko asking him to please engage with the Majuba Power Station to accept the coal. Mr Gert Opperman indicated that he was very surprised to have heard from Mr Koko,<sup>1667</sup> and this was not usual, and he considered it to be an instruction that Mr Koko was requiring him to perform outside the mandate of the contract. Mr Gert Opperman was not happy about approving that coal of the incorrect specification to be pushed through. He sought advice from his immediate manager, Mr Ncube, who agreed with Mr Gert Opperman that out of specification coal should not be accepted, but felt that they should do what Mr Koko had asked, as it was his instruction. Mr Gert Opperman then called the power station; he claims he did not pressure them but relayed Mr Koko’s instruction, and also gave them his opinion. The power station agreed to accept the coal.<sup>1668</sup>

2051. Mr Gert Opperman testified that he did not resist Mr Koko because he had a very threatening management style, and there was an “atmosphere” at Eskom where people

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<sup>1666</sup> *Id* p43/23 to p44.

<sup>1667</sup> *Id* p51/25.

<sup>1668</sup> Mr Opperman Transcript *supra* p44 line 15 to p45.

would get suspended or dismissed, and there was much discussion about this “in the corridors”.<sup>1669</sup>

### **Cancellation of arrangement to audit Brakfontein certification process**

2052. On 7 October 2015 Mr Ncube sent a letter to Mr Roux of Tegeta requesting their cooperation with an independent audit that Eskom was arranging of the coal precertification process at Brakfontein Colliery. This was as a result of both Mr Gert Opperman and Mr Ncube’s continued concerns over the quality of the coal being provided, but also it was a requirement from an audit report by one of the testing laboratories. Following this, Mr Gert Opperman proceeded to engage with various teams on site, but then Tegeta began making changes at Brakfontein, such as certain laboratory services being terminated.

2053. On 19 October 2016, Mr Ncube instructed Mr Gert Opperman to send a letter to Mr Roux cancelling the audit; Mr Gert Opperman claims Mr Ncube said he had been instructed to cancel it. Mr Gert Opperman claims that he did not feel he could resist because, “it was just such difficult circumstances you know being under this management of this Executive Team and what was happening at that moment in time. It was difficult”.<sup>1670</sup>

### **Eskom relocates the testing of Brakfontein coal to Kendal Power Station**

2054. From 22 October 2015, Eskom relocated the testing of coal quality from Brakfontein to Kendal Power Station Laboratory, after terminating their contract with SABS laboratories. This was on instruction from Mr Koko to the Head of Majuba Power Station, a Mr Christopher Nani.<sup>1671</sup> Kendal Power Station was not an accredited laboratory in

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<sup>1669</sup> *Id* p52 line 1-10.

<sup>1670</sup> *Id* p56-62.

<sup>1671</sup> See Mr Magwaza affidavit, Exhibit U4, p 482 para 4.5.6 & p 483 para 4.5.10.

accordance with the Coal Supply Agreement and did not comply with the ISO Standard.<sup>1672</sup>

2055. On enquiring with his General Manager, Mr Mazibuko, Mr Gert Opperman learnt that prior to this change, Mr Koko had the view to move the payment point for Coal Supply Agreements to power stations, so that the power station could analyse the coal and Eskom make payment based on the quality parameters reported by the power station. Although Mr Gert Opperman said he took comfort in the fact that Kendal Power Station laboratory was a laboratory internal to Eskom and would look after Eskom's interests, it was still in breach of the Coal Supply Agreement for it to do the testing of the Brakfontein coal.<sup>1673</sup> The Coal Supply Agreement required Eskom to appoint an independent laboratory that was independent and ISO accredited.<sup>1674</sup> Mr Mashigo, has confirmed this and that Eskom always used ISO-accredited laboratories; he said that this was the only case in his 26 years at Eskom that he had seen this happen.<sup>1675</sup>

2056. Mr Kwenzokuhle Magwaza, one of Eskom's senior managers at the time, also gave evidence of his encounter with Mr Koko on the issue above. It was on 21 October 2015, at around 07h30 while driving to work, when he received a call for the first time from Mr Koko summoning him to Mr Koko's office. Mr Magwaza said that when he came to Mr Koko's office, he was not offered a chair and Mr Koko berated him and expressed displeasure about "not just you [meaning Mr Magwaza], but people in PED, who are fighting other people's battles". Mr Magwaza testified that Mr Koko made a reference to where Dr van der Riet had been sitting in Mr Koko's office, telling Dr van der Riet

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<sup>1672</sup> Mr Opperman Transcript *supra* p64/20 to p65, & p72.

<sup>1673</sup> *Id* p65/4-24.

<sup>1674</sup> Mr Opperman Transcript *supra* p 65-68; Mashigo, Transcript *supra* p 109.

<sup>1675</sup> Mr Mashigo Transcript *supra* p 108.

exactly what Mr Koko was telling Mr Magwaza, prior to Mr Koko suspending Dr van der Riet.<sup>1676</sup>

2057. Mr Magwaza testified that he felt threatened as Mr Koko talked about why he had not yet suspended him (Mr Magwaza). He said that Mr Koko proceeded to give him instructions to use Kendal Power Station Laboratory to do further analyses of Brakfontein samples, which Mr Magwaza said was out of the norm as it was not accredited. He was also asked to remove Ms Viloshnee Moodley (Ms Moodley) from her acting role of Middle Manager: Quality Assurance, which Mr Magwaza did. Ms Moodley's sin was that she had suspended a service provider, Mpumamanzi, from the Brakfontein mine and replaced it with another. Mr Koko told Mr Magwaza that he wanted that decision reversed.<sup>1677</sup>

2058. Kendal Power Station Laboratory continued then to do the sampling from October 2015 until the end of the contract, and would only fail 3% of the Brakfontein stockpiles, compared to 23% by the accredited labs used before Kendal Power Station Laboratory took over.<sup>1678</sup>

2059. Based on the affidavit provided by Mr Sethowa<sup>1679</sup>, a Supervisor: Coal Chemical Services at Kendal Power Station, the Kendal Power Station laboratory had only obtained their SANAS 17025 accreditation during October 2017, long after they had started testing the Brakfontein coal.

2060. Another notable issue is that the CQMP, which is a standard schedule to Eskom Coal Supply Agreement's and sets out the requirements and process for coal testing, was only signed off during September 2015, months after the Coal Supply Agreement had

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<sup>1676</sup> Mr Magwaza affidavit, Exhibit U4 file 4, p 481 para 4.5.3 to p 482.

<sup>1677</sup> Mr Magwaza affidavit, p 482 para 4.5.6.

<sup>1678</sup> Exhibit U4, "04 Brakfontein Reconciliations", p 963.

<sup>1679</sup> Mr Sethowa affidavit.

been concluded and Tegeta had been delivering coal. Mr Magwaza also made the following points in his affidavit:

- 2060.1. during September 2015, Mr Mboweni had called him around 18h00 to come through to Mr Koko's office;
- 2060.2. Mr Mboweni was working with Dr Nteta on responding to questions raised by a journalist on the Brakfontein Coal Supply Agreement and had requested Mr Magwaza to provide assistance;
- 2060.3. Mr Koko then entered the room and requested to know why the CQMP had not yet been signed. Although Mr Mboweni attempted to intervene and inform Mr Koko that Mr Magwaza had recently assumed the role and would not have any knowledge thereof, Mr Koko interjected, stating "Chief, am I allowed to talk to you or ask you a question?", to which Mr Magwaza indicated that he did not know why the CQMP had not yet been signed; and
- 2060.4. Mr Magwaza signed off on the CQMP on 30 September 2015.

#### **Tegeta requests more non-compliant coal to be accepted**

2061. On a subsequent occasion, Mr Gert Opperman again received another phone call from Mr Roux (date not specified), regarding a stockpile that was out of specification. Mr Gert Opperman testified that this incident was similar to the one already referred to above, in September 2015, in that Mr Roux once again requested Mr Gert Opperman to organise that the stockpile be accepted by the Majuba Power Station, contending that "you did it the previous time so why not do it again?". Mr Gert Opperman again told him he did not have the power to authorise it and, thereafter, as before, he received

a phone call from Mr Koko requesting Mr Gert Opperman to engage the power station to accept it.

2062. Mr Gert Opperman engaged Mr Ncube, who again proposed that Mr Gert Opperman follow the instruction. Mr Gert Opperman then engaged the power station, but internal deliberations amongst the power station management did not result in their outright approval. Instead, there were a lot of engagements between the power station manager, Mr Makwaye, and more senior colleagues at Eskom headquarters (Mr Mashigo) before they would acquiesce.<sup>1680</sup>

2063. From Mr Gert Opperman's evidence, it seems that Mr Makwaye left the Majuba Power Station not too long after this.<sup>1681</sup>

#### **Mr Brian Molefe's awareness of the matter**

2064. In his evidence before Parliament to the suspension of Tegeta's contract to supply coal from Brakfontein mine on 31 August 2015 due to quality issues, Mr Brian Molefe said:

"The Guptas were very angry with us. They requested meetings, they phoned and there was a lot of exchange to the point where eventually we agreed with them that because they were disputing, they were saying that the people that are saying their coal is not of good quality have been paid by the opposition and people that don't like them. So we took the coal to the South African Bureau of Standards to get tested. During that period I did have contact with them and we spoke about that issue ..."<sup>1682</sup>

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<sup>1680</sup> Mr Opperman Transcript *supra* p69 line 10 to p70.

<sup>1681</sup> Mr Opperman, Transcript *id* p72 line 2-10.

<sup>1682</sup> Exhibit U38, Transcript, 21 November 2017, p306.

## **National Treasury declines Eskom's request to increase value of Brakfontein Coal Supply Agreement by R2.9 billion**

2065. Combustion tests of coal coming from Brakfontein Colliery Extension were conducted, which concluded that there were quality issues, and that more data and information would be required before procuring from the Brakfontein Extension to any power station.<sup>1683</sup> Yet, it was shortly after this that Eskom (in particular the Fuel Sourcing team) sought to extend the Brakfontein Coal Supply Agreement to include the Brakfontein Colliery Extension.

2066. On 8 August 2016, a submission was sent by Mr Ncube (to whom Mr Gert Opperman used to report in Coal Operations, before moving to the Fuel Sourcing Division), to the Board Tender Committee. The submission included a motivation for procuring 10.8 million tonnes from Brakfontein Colliery Extension - as opposed to other suppliers. The comparison of costs included showed that coal from Brakfontein by rail was in line with the price of other suppliers, while by road it was the highest price. However, the plan was for rail to be mostly used. Mr Gert Opperman, however, asserted that coal from Brakfontein would be a 50/50 split, and in the earlier stage more likely to be two thirds rail, one third road.<sup>1684</sup>

2067. A letter was sent on 19 August 2016 to National Treasury requesting permission to do so, as a National Treasury Circular issued in April 2016, required that any amendments of above 15% of the value of existing agreements required prior approval of the National Treasury. Eskom was seeking to increase the contract by R2.9 billion, which was 77% of the original contract value (of R3.79 billion). It is notable that in Eskom's letter, a

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<sup>1683</sup> Mr Opperman Transcript *supra* p74.

<sup>1684</sup> Mr Opperman Transcript *supra* p77-80.

claim was made that the coal reserve had been validated by Eskom and met the contract's quality and quantity requirements, which was not true.<sup>1685</sup>

2068. National Treasury rejected the request on the grounds that there was a question over the quality of the coal. Eskom responded that a new auto-mechanical sampling system had been installed and would be commissioned within three months. However, Mr Mashigo stated that this was only done much later, in January 2017.<sup>1686</sup>

2069. In November 2016 the coal from Brakfontein Extension was tested again, and Eskom's technical team concluded that it was not suitable for the Majuba, Tutuka or Matla Power Stations. It is notable that the technical report contains the phrase, "if Eskom is already contractually obliged to take this coal" and then continues to provide a warning on the risk that would need to be managed. However, it would have been irregular for Eskom to have contracted for coal before its technical department had confirmed its suitability, according to Mr Gert Opperman<sup>1687</sup>. Treasury never approved the extension of the contract.<sup>1688</sup>

### **Brakfontein mine fails to deliver and puts Eskom at risk**

2070. In terms of a letter from Eskom, dated 29 November 2017, addressed to Mr George van der Merwe, Chief Operating Officer of Optimum Coal Holdings, Brakfontein Colliery had undersupplied Eskom by around 265 000 tonnes of coal in the October 2016 to September 2017 period.<sup>1689</sup>

2071. According to Ms Singh, a management accountant employed at Eskom, for February 2018 to December 2018, a penalty amount of R531 million was calculated on the

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<sup>1685</sup> Mr Opperman Transcript *id* p 74-78.

<sup>1686</sup> Mr Mashigo Transcript *supra* p 157-158.

<sup>1687</sup> Mr Opperman Transcript *supra* p 80-81.

<sup>1688</sup> Mr Mashigo Transcript *supra* p 159.

<sup>1689</sup> Exhibit U4 file 4, p 836.

shortfall experienced, a period during which Tegeta was in business rescue.<sup>1690</sup> The sudden commencement of this business rescue did not give Eskom sufficient time to find an alternative supplier. Procurement processes only resulted in an alternative contract by October 2018.

2072. Majuba Power Station received out of specification coal from Brakfontein for a significant amount of time, as well as undersupply in terms of tonnes of coal delivered. This had the impact of lowering Majuba's coal stockpile to below ten days at one time, whereas it required 40 days' worth to maintain security of supply. Twenty-four of the 30 days that were missing was due to Tegeta's undersupply. This put power supply from the station at risk should there have been an interruption.<sup>1691</sup>

2073. Mr Johann Bester believed that the Brakfontein contract, although concluded under pressure, did not compromise Eskom. In his view, it was only when Mr Koko suspended those trying to implement the conditions of the contract that Eskom was compromised. He believed that "the system wasn't broken", but people such as Mr Koko compromised it, as well as Mr Mboweni who "appeared powerless to push back" and would try to avoid being accountable and responsible by refusing to sign things and delegating his authority either to people such as Mr Johann Bester to get contracts done or to the Board Tender Committee to sign off on.<sup>1692</sup> Mr Johann Bester himself had confessed to having been too soft to Tegeta's demands and/or to internal pressure.

#### **Amount paid by Eskom to Tegeta for supply to Majuba Power Station**

2074. The table below shows some of the money that Eskom paid to Tegeta for the supply of coal to the Majuba Power Station pursuant to the Brakfontein Coal Supply Agreement:

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<sup>1690</sup> Exhibit U4 file 4, p 691.9 & p 691.11.

<sup>1691</sup> Mr Mashigo, Transcript *supra* p165.

<sup>1692</sup> Mr Bester affidavit *supra* p10.

<b>Month</b>	<b>Tons</b>	<b>GJ</b>	<b>Payment (VAT Incl)</b>
Apr- 15	47 288.82	955 822.21	R15 013 465.97
May -15	77 605.72	1 586 421.32	R25 106 429.49
Jun- 15	78 674.04	1 583 238.11	R25 362 131.60
July-15	107 839.24	2 251 713.83	R35 325 955.88
Aug- 15	102 643.32	2 142 569.50	R33 205 563.78
Sept- 15	121 670.48	2 695 327.98	R42 551 067.07
Oct- 15	178 884.93	3 953 892.05	R61 703 068.81
Nov -15	179 713.15	3 772 327.69	R58 663 007.06
Dec -15	65 824.94	1 472 152.20	R46 040 272.71
Jan -16	137 988.56	3 038 764.90	R48 039 191.18
Feb -16	112 195.43	2 531 842.60	R38 488 667.57
Mar- 16	115 346.38	2 415 392.47	R36 881 351.25
Apr- 16	88 252.13	1 946 532.95	R32 148 533.86
May -16	148 885.72	3 110 314.91	R51 155 612.59
Jun- 16	77 429.74	1 596 639.44	R26 746 097.27
July 16	109 853.64	2 242 112.99	R37 265 363.83
Aug 16	68 432.84	1 413 553.82	R23 345 079.21
Sept -16	131 182.75	2 789 263.38	R45 743 899.10
Oct -16	91 877.87	1 920 927.61	R32 003 592.57
Nov- 16	83 223.16	1 730 266.65	R28 652 200.70
Dec- 16	93 559.86	1 901 951.19	R30 629 578.27
Jan -17	94 428.32	1 910 618.86	R31 113 826.61
Feb -17	93 452.71	1 855 668.24	R32 331 445.28
Mar -17	109 447.94	2 354 446.20	R37 490 726.96
Apr- 17	86 312.64	1 873 609.74	R31 565 969.28
May- 17	83 501.32	1 848 184.45	R32 850 719.43
Jun - 17	93 704.99	2 073 149.71	R36 567 032.90
Jul- 17	103 570.69	2 242 118.11	R38 882 165.91
Aug- 17	63 104.77	1 346 888.26	R23 893 025.52
Sep - 17	84 292.38	1 925 661.53	R32 530 039.33
Oct - 17	94 101.80	2 044 817.54	R35 774 100.74
Nov - 17	110 493.81	2 392 703.16	R43 031 040.61
Dec- 17	74 386.12	1 558 267.49	R26 837 375.70
Jan -18	124 496.08	2 634 112.85	R46 633 387.87
Feb- 18	64 605.50	1 448 409.84	R25 852 782.88
Mar 18	26 858.72	605 746.25	R10 598 827.96
	<b>3 525 130.51</b>	<b>75 165 430.03</b>	<b>R1 260 022 596.75</b>

### General conclusion and recommendations

2075. From the above, it is considered that the following parties are implicated in wrongdoing in regard to the Brakfontein Coal Supply Agreement:

- 2075.1. Mr Matshela Koko;
- 2075.2. Mr Vusi Mboweni;
- 2075.3. Dr Ayanda Nteta;
- 2075.4. Mr Ravindra Nath of Tegeta;
- 2075.5. Mr Jacques Roux of Tegeta; and
- 2075.6. Mr Tony Gupta of Tegeta.

### **Relevant Terms of Reference**

2076. The facts above bear relevance to at least three of the terms of reference of the Commission, namely-

- 2076.1. Whether an employee of any SOEs breached or violated the Constitution or any legislation by facilitating the unlawful awarding of tenders by SOEs or any organ of state (ToR 1.4);
- 2076.2. The nature and extent of corruption, if any, in the awarding of contracts, tenders to companies, business entities or organizations by public entities listed under Schedule 2 of the Public Finance Management Act No. 1 of 1999 as amended (ToR 1.5); and
- 2076.3. Whether there were any irregularities, corruption and undue influence in the awarding of contracts in the business dealings of the Gupta family with SOEs (ToR 1.6).

2077. On the evidence before the Commission, it is concluded that:

- 2077.1. the Eskom officials listed above breached or violated legislation and Eskom policies by facilitating the unlawful awarding of the Brakfontein Coal Supply Agreement to Tegeta;
- 2077.2. those of the Eskom officials listed above who awarded the Brakfontein Coal Supply Agreement to a Gupta-owned entity, Tegeta, committed irregularities;
- 2077.3. the conduct of the Eskom officials listed above involved the abuse of their position and power and undue influence on subordinates in order to unduly benefit the Gupta family in the awarding of the Brakfontein Coal Supply Agreement to Tegeta;
- 2077.4. the conduct of the Eskom officials listed above potentially caused financial prejudice and loss to Eskom due to procuring some of the coal that they knew was non-compliant, thus potentially causing Eskom to incur losses from sub-optimal power generation and/or adverse impact on the Majuba Power Station generation infrastructure.

### **Legislative provisions breached**

2078. Eskom is a major public entity listed in Schedule 2 to the PFMA. Accordingly, it is bound by the provisions of the PFMA.

2079. Section 57 of the PFMA places certain obligations on officials of public entities. It states, inter alia, that an official of a public entity-

“Is responsible for the effective, efficient, economical and transparent use of financial and other resources within that official’s area of responsibility;

Must take effective and appropriate steps to prevent, within that official’s area of responsibility, any irregular expenditure and fruitless and wasteful expenditure and any under collection of revenue due;

Must comply with the provisions of this Act to the extent applicable to that official, and

Is responsible for the management, including the safe-guarding, of the assets and the management of the liabilities within that official's area of responsibility.”

2080. The implicated Eskom officials listed above have prima facie acted in breach of these provisions, in that they—

2080.1. failed to safeguard the financial interests of Eskom, and

2080.2. failed to take effective and appropriate steps to prevent irregular expenditure, and fruitless and wasteful expenditure.

### **Recommendations**

2081. It is recommended that National Prosecuting Authority (NPA) should consider criminal prosecution of Mr Koko, Mr Mboweni, Dr Nteta and Mr Roux for the contraventions of the legislation and policies of Eskom already referred to above.

2082. Further, it is recommended that the NPA should consider further investigation into determining whether the implicated parties have acted in breach of the following provisions of PRECCA:

2083. Section 3 and/or section 4: general offence of corruption or offences in respect of corrupt activities relating to public officers

“Any person or a public officer who, directly or indirectly-

accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person; or

gives or agrees or offers to give to any other person any gratification, whether for the benefit of that other person or for the benefit of another person,

in order to act, personally or by influencing another person so to act, in a manner-

- (i) that amounts to the-
    - (aa) illegal, dishonest, unauthorised, incomplete, or biased; or
    - (bb) misuse or selling of information or material acquired in the course of the, exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;
  - (ii) that amounts to-
    - (aa) the abuse of a position of authority;
    - (bb) a breach of trust; or
    - (cc) the violation of a legal duty or a set of rules,
  - (iii) designed to achieve an unjustified result; or
  - (iv) that amounts to any other unauthorised or improper inducement to do or not to do anything,
- is guilty of the offence of corruption.”

2084. Section 12(1), which reads:

- “(1) Any person who, directly or indirectly-
- accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of that other person or of another person; or
- gives or agrees or offers to give to any other person any gratification, whether for the benefit of that other person or for the benefit of another person-
- (i) in order to improperly influence, in any way-
    - (aa) the promotion, execution or procurement of any contract with a public body, private organisation, corporate body or any other organisation or institution; or
    - (bb) the fixing of the price, consideration or other moneys stipulated or otherwise provided for in any such contract; or
  - (ii) as a reward for acting as contemplated in paragraph (a),
- is guilty of the offence of corrupt activities relating to contracts.
- (2) Any person who, in order to obtain or retain a contract with a public body or as a term of such contract, directly or indirectly, gives or agrees or offers to give any gratification to any other person, whether for the benefit of that other person or for the benefit of another person-

(a) for the purpose of promoting, in any way, the election of a candidate or a category or party of candidates to the legislative authority; or

(b) with the intent to influence or affect, in any way, the result of an election conducted for the purpose of electing persons to serve as members of the legislative authority,

is guilty of an offence.”

2085. Section 21: attempt, conspiracy and inducing another person to commit offence; which reads:

“Any person who-

(a) attempts;

(b) conspires with any other person; or

(c) aids, abets, induces, incites, instigates, instructs, commands, counsels or procures another person

to commit an offence in terms of this Act, is guilty of an offence.”

## Huarong Energy Africa (Pty) Ltd

2086. In 2015, Eskom entered into an agreement with China Huarong Asset Management Co. Ltd (China Huarong). China Huarong is a majority state-owned financial asset management company domiciled in China. China Huarong approached Eskom with an unsolicited proposal to grant USD1.5 billion (approximately R25 billion) so that Eskom could build or refurbish power stations (capital projects).

2087. In 2015 Mr Rajeev Thomas, a representative of a firm called Tribus (Pty) Ltd (Tribus), approached Mr Andre Pillay, General Manager and the Head of Eskom Treasury, with an unsolicited proposal to provide Eskom with technical solutions to assist Eskom with its capital expansion program. In plain English, Mr Thomas was a money broker, who offered for a fee to put Eskom in touch with lenders who would agree to lend money to Eskom.

2088. After a couple of engagements, Mr Thomas approached Eskom on behalf of a consortium of Tribus and China Huarong Asset Management Co. Ltd (China Huarong). China Huarong operates in the field of asset management. China Huarong, too offered to provide capex solutions to Eskom, i.e. to lend Eskom money so that Eskom could build or refurbish power stations (capital projects).

2089. Negotiations progressed. A company was incorporated in South Africa for the specific purpose of doing this business with Eskom and was called Huarong Africa (Pty) Ltd (HEA). A group of officials within Eskom and a group in and around HEA tried to engineer a situation by which Eskom paid an enormous raising fee up front and then would have recourse only against HEA for payment of the loan. Fortunately for South Africa, this scheme was thwarted by an official in Eskom and officials in the National Treasury.

2090. The best option for Eskom when it received a proposal such as that submitted by Tribus is to issue a Request for Information (RFI) or Proposal (RFP) to test whether there were more advantageous options available to Eskom in the market. Eskom was looking for innovative funding that did not utilise government guarantees and should be greater than R15 billion. It was important that, in acquiring such innovative funding, Eskom did not trigger events of default in relation to its current debt which then stood at around R420 billion. Because Eskom is a state owned entity, equity or capital funding was not an option. Eskom was looking for reputable organisations with funding track records that could be implemented within a reasonably short term.

2091. At the time, Eskom had a funding plan. This included raising finance through domestic and international bonds, commercial paper loans and development finance institutions like the World Bank and the African Development Bank. Some multilateral institutions also provided funding, as did export credit agencies. In addition, there were structured products, which were innovative funding sources which were available in the market from time to time.

2092. Eskom received about twelve responses to its requests: from ABSA, Deloitte Capital, HEA, Wave, J P Morgan, Nedbank, Peu Capital Partners and Total Utilities Management Services, Regiments, Rand Merchant Bank, Standard Chartered, Superstars Group and Afriset Investments. HEA, as I have said, was incorporated for the specific purpose of doing this business with Eskom. As part of their responses, the several firms provided non-binding term sheets, which were the frameworks of the terms on which they were prepared to do business.

2093. The term sheet submitted by HEA offered to provide approximately USD1.5 billion (and for a facility fee of 1.6% of the program value, an annual fee of 0.8% of the funds made available and a cancellation fee of 2%).

2094. In December 2016, Mr Anoj Singh, to whom Mr Pillay reported and to whom he had in the normal course reported the responses to the requests, contacted Mr Pillay. He told Mr Pillay that Mr Thomas had asked that Eskom sign a non-binding term sheet as a demonstration to his partners that he had a good working relationship with Eskom. Mr Pillay was not comfortable that the term sheet be signed as it was not common for Eskom to sign such documents. Mr Pillay raised his concern with Mr Anoj Singh, who responded that it was just a term sheet.

2095. Mr Anoj Singh and Mr Thomas then proceeded to sign the term sheet on 20 and 21 December 2016 respectively. The document stated in terms that the contents did not bind the parties, except for clauses 17 and 18, which provided for confidentiality between the parties, no entitlement of the one to act as agent for the other and a declaration that the governing law was the law of South Africa.

2096. The usual authorisation process within Eskom was not followed and Eskom's legal department was not consulted.

2097. From 8 to 13 January 2017, Mr Anoj Singh, together with Mr Pillay, Mr Prish Govender and Mr Poobie Govender, met in Beijing, China with representatives of HEA, namely Mr Thomas, Mr Rex Madida and Mr Wim Terblanche. Following that meeting, Mr Anoj Singh asked for an Investment and Finance Committee submission to inform the board of the HEA proposal and approve a mandate to negotiate and conclude a financing agreement with HEA for loan transactions of R1.5 billion and R6 billion.

2098. During the meeting in China, Mr Pillay formed the impression that Mr Anoj Singh was rather disapproving of the proposed transaction. Later, Mr Pillay came to believe that this was a sham to allay Mr Pillay's concerns and that Mr Anoj Singh had his own agenda. During that meeting, Mr Pillay met Mr Madida who introduced himself as a

deployee of the African National Congress in KwaZulu Natal, deployed to Johannesburg.

2099. After the meeting, there was an exchange of correspondence between Mr Pillay and Mr Thomas. Mr Pillay wrote that the proposal was subject to Eskom's own internal analysis and that he would have to secure board approval for them to go forward on the proposal. The loan was offered at LIBOR rate (London Interbank Offered Rate) of about 3% plus 7,2%, i.e. about 10,2%.

2100. This was not simply a financing proposal, which fell within the jurisdiction of the board's Investment and Finance Committee. It was also linked to a capital program and therefore needed the approval of the Board Tender Committee. The Investment and Finance Committee resolved on 3 February 2017 that a team which included Mr Pillay could negotiate but not conclude the financing agreement with HEA.

2101. These contemplated transactions would have had to fall within the Eskom 5-year corporate plan, which was at that time still being developed. Eskom was assisted in the preparation of its corporate plan by teams from McKinsey and ostensibly Trillian. However, a board member, Mr Khoza, who chaired the Board Tender Committee, told Mr Pillay that, if the HEA proposal was brought before the Board Tender Committee, that body would approve the proposal.

2102. Mr Pillay became concerned that the HEA proposal was being considered outside of the Eskom Treasury. He raised this concern with Mr Anoj Singh who told Mr Pillay that he had been busy with other things and so had allocated the matter to Mr Prish Govender to deal with. He also gave as a reason for Eskom Treasury not being involved that Eskom Treasury already had a huge responsibility for raising funding for Eskom. Mr Pillay found this reason superficial.

2103. A few days before 14 March 2017, Mr Anoj Singh told Mr Pillay that he had been contacted by an HEA representative with the request that the term sheet be signed, in effect with the clause relating to its non-binding effect removed, but still subject to Eskom board approval and to be superseded by a formal Asset Loan Framework Agreement (ALFA). This was not a normal procedure in Eskom. Mr Pillay feared that if a binding term sheet were signed, the fees would be payable to HEA. Such term sheet was signed by Mr Anoj Singh on behalf of Eskom on 14 March 2017 and by Mr Chen Jianbao (Mr Jianbao) on a date not stated in the document. The signed term sheet left no doubt that it was designed to create binding obligations.

2104. The signed term sheet was not referred to the Eskom legal department and Mr Anoj Singh was made aware of the reservations of Mr Pillay regarding the document. Mr Anoj Singh's attitude was that the document was not binding.

2105. It is difficult to understand the belief allegedly held by Mr Anoj Singh that the term sheet was not binding because its first paragraph begins:

“The parties agree that this term sheet shall create legally binding obligations on each party and shall be in full force in effect upon its signature until such time as the asset loan agreement and the other related definitive agreements are concluded between the parties.”

2106. However, Mr Pillay, who is not a lawyer, considered it possible that certain other provisions in the signed term sheet led Mr Anoj Singh to believe that, despite the first paragraph, the document was, nevertheless, not binding. Mr Pillay also believed that Mr Anoj Singh would sign this latest term sheet regardless of what Mr Pillay might say.

2107. At that stage, Mr Pillay was relying on the help and advice furnished by a firm of lawyers called White & Case. White & Case advised in writing in an opinion dated 12 March 2017 that the latest term sheet contained several important terms which were onerous

and were expressed to be binding and should therefore not be signed in its then present form.

2108. Mr Pillay discussed the White & Case opinion with Mr Anoj Singh, who was in London with Mr Pillay and attended a meeting to discuss the concerns raised by White & Case in their opinion.

2109. At that stage, Mr Koko was the acting Group CEO of Eskom. According to Mr Pillay, Mr Koko's attitude was also that the latest term sheet was to be signed.

2110. Mr Pillay pointed out to Mr Anoj Singh that, according to Eskom Treasury, due process precluded Eskom from contracting on an RFI and required an RFP process. An RFP then went out to the market on 13 March 2017. The RFP process was, however, inconsistent with the process agreed in the latest term sheet. Nevertheless, HEA responded to the RFP.<sup>1693</sup>

2111. Mr Anoj Singh left Eskom in July 2017 and Mr Calib Cassim (Mr Cassim) was appointed acting CFO. Mr Pillay conveyed his concerns about the HEA transaction to Mr Cassim, who agreed with Mr Pillay.

2112. Certain approvals were made conditions of the latest term sheet. One of these conditions was South Africa Reserve Bank's (SARB) approval. The SARB gave its approval on 4 August 2017 on certain of its own conditions, including that no upfront payment of any fees be paid by Eskom.

2113. Much process had still to be undertaken within Eskom after SARB approval was given. In addition, the conditional nature of the SARB approval required that the promised

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<sup>1693</sup> Transcript 1 March 2019, pp 61-81.

funds be placed in Eskom's account before the final agreement, the ALFA, could be signed.

2114. On 14 August 2017 Mr Pillay received a copy of a memorandum of that date addressed by Ms Palacios, the Eskom Legal Corporate Specialist, to Ms Suzanne Daniels. The memorandum recommended against proceeding with the HEA project without favourable legal advice and queried why Eskom officials had signed the latest term sheet against legal advice and without following proper process.

2115. On 15 August 2017 Mr Pillay, as head of Eskom Treasury, submitted a memorandum to the Board Investment and Finance Committee seeking a mandate to conclude the financing arrangement with HEA.

2116. After considerable interactions at a technical level within Eskom, the Investment and Finance Committee resolved on 26 October 2017 to approve the HEA transaction subject to numerous conditions. At this stage, Mr Sean Maritz had been appointed acting Group CEO on 6 October 2017 in the place of Mr Johnny Dladla (Mr Dladla). On 20 October 2017, Mr Maritz, Mr Cassim and Mr Pillay met with HEA representatives. Mr Pillay indicated during the meeting that the signing of the ADFA with HEA would not be a solution given Eskom's liquidity constraints.

2117. The usual procedure following an RFP would have been for an independent valuation of the various proposals. This step was not taken. However, several of the proposals received were shortlisted for further consideration. One of these was the HEA proposal. While Eskom was considering these proposals, which were long term proposals, to operate largely over fifteen years, HEA suggested that Eskom enter into a short term transaction with HEA, to operate for between three to five years. This was considered to be urgent because of Eskom's liquidity problems and the RFI process was not followed.

2118. Eskom then made a proposal for short term financing to HEA. HEA responded that the proposal was not achievable because its implementation would require a government guarantee. Nevertheless, at its meeting on 27 October 2017, the Investment and Finance Committee resolved that Eskom Treasury negotiate a short term facility up to a maximum of R2 billion for six to twelve months with HEA. At the same time, the RFP process continued.

2119. A board meeting was held on 27 October 2017. Mr Maritz and Mr Khoza did not attend this meeting as they were away meeting with the Minister. The board resolved at this meeting to approve the HEA short term facility subject to certain conditions but no authority was given to proceed with the HEA long term facility.

2120. On his return, Mr Maritz demanded to know why the HEA long term facility was not to be signed. Mr Pillay sent Mr Maritz all relevant documents and explained that, as due process had not been followed, the contract for the long term facility could not be signed. Mr Maritz responded that he was, nevertheless, going to sign.

2121. Mr Maritz then proceeded to go against the board's decision or advice and signed the documents for the HEA long term facility. Nothing further was then done about the HEA short term facility. Although the RFP process continued, HEA continued to be treated preferentially by Eskom.

2122. The next day, an informal meeting took place, convened by the company secretary, and attended by Messrs Maritz, Khoza, Cassim, Sathiaseelan Gounden (Mr Gounden) the Chairman of Audit and Risk, Dingaane Simphiwe (Mr Simphiwe) the Chairman of the Investment and Finance Committee, and Mr Pillay.

2123. At this meeting, Mr Maritz stated that he had been to see the Minister (Ms Brown) and the Minister had said it was okay, he could sign. Mr Pillay responded, in effect, that the

Minister did not have the power to authorise Mr Maritz to sign. This was the province of the board. If the long term facility proceeded, it would amount to fruitless and wasteful expenditure.

2124. HEA then submitted an invoice dated 2 November 2017 to Eskom for the development fee amounting to USD21 888 000 (twenty-one million, eight hundred and eighty thousand Dollars), inclusive of VAT. Mr Pillay gave instructions that the invoice was not to be paid as the agreement underlying the invoice was not valid. Towards the end of December 2017, the HEA representatives submitted an updated ALFA to Mr Maritz for him to sign. Mr Maritz signed the updated ALFA. Shortly thereafter, HEA submitted an invoice for payment.

2125. Mr Pillay asked Mr Maritz why he was so anxious to get the HEA ALFA signed. Mr Maritz said that Mr Khoza was putting pressure on him. Mr Pillay heard Mr Khoza and Mr Madida of HEA discussing the transaction over the telephone in vernacular. On another occasion, Mr Khoza called Mr Pillay to his office to warn him that Mr Maritz did not like working with Mr Pillay and warned him (Mr Pillay) to be careful and that he was not cooperating with Mr Khoza and Mr Maritz.

2126. On another occasion, Mr Pillay was called to Mr Maritz's office. Mr Maritz told him that he had a whistleblower report that Mr Pillay had received a bribe for R5 million from some Russian company, which had built Mr Pillay a house in Plettenberg Bay. Mr Pillay did not see the alleged report and no such allegations were ever lodged with Eskom.

2127. When Mr Pillay became aware that Mr Maritz was going to sign the agreement with HEA, a few days before the contract was signed, he went without an appointment to the office of the Director-General (DG) of the National Treasury, Mr Dondo Mogajane (Mr Mogajane), waited in this official's office and, when the official had a few minutes to spare, reported the facts of the HEA transaction to him. Mr Pillay felt that he could not

safely report his concerns to the Eskom chair or any of the board members. They then followed a process by which Eskom formally applied for SARB approval to demonstrate that it was following process while privately the Eskom officials, including Mr Pillay, informed the National Treasury officials that permission should not be granted. On 4 August 2018, the SARB approval previously granted to Eskom was suspended.

2128. Eskom informed HEA that it would not pay its invoices and that it would litigate the matter if necessary. An investigation into the transaction by attorneys BGB was commissioned. During that process, Mr Maritz resigned on 1 March 2018.

2129. The fees provided for in the several contractual documents were never paid. This led to hostility between Mr Pillay and Mr Thomas.

2130. It seems clear on the evidence before the Commission that certain Eskom officials conspired with Mr Thomas and certain individuals outside Eskom to bind Eskom to a transaction pursuant to which Eskom would pay out a very substantial sum of USD21 888 000 (twenty-one million, eight hundred and eighty thousand Dollars) as a raising fee before any money had been raised and paid to Eskom. If the final agreement provides in this regard as the original term sheet does, the liability to actually pay the amount of the loan was imposed on HEA, a South African company incorporated for the specific purpose of doing business with Eskom. The strong probability is that HEA had no ability to advance billions of US dollars to Eskom. If that happened, Eskom had no recourse and, if it had paid the raising fee of USD 21 888 000 (twenty-one million, eight hundred and eighty thousand Dollars), it would have been unlikely to recover any part of that sum. All those Eskom officials who pressed for the raising fee to be paid are prima facie guilty of fraud because they sought to induce Eskom to act to its enormous financial prejudice, representing that this transaction was regular and in Eskom's interests, and well knowing that such representation was false.

2131. In the end, Eskom did not suffer the huge financial prejudice contemplated by those who promoted this scheme. Nevertheless, it is likely that expenses were incurred in preparation for the ultimate anticipated payout. That Eskom was saved from this financial disaster is due to the courageous actions of Mr Pillay in evading bureaucratic entanglement and reporting the facts of the scheme to the highest officer in the National Treasury, who then promptly took steps to protect the country's money.

2132. Although Eskom did not pay out the raising fee to HEA, I recommend that the prosecuting authority consider the facts of the case with a view to holding those responsible criminally liable.

2133. It is important not to get bogged down in detail in relation to this transaction. There was considerable evidence about bureaucracy, process and personal conflict within Eskom, and between Mr Pillay and Mr Thomas of HEA. However, the essence of the matter is that Eskom was seeking to raise money from outside its usual institutional sources in circumstances in which it would not need to provide a government guarantee to the lender.

2134. Loan procurement differs from most other types of procurement because the product offered by the lenders was identical: money almost invariably measured, whatever the source and whoever the supplier, in US dollars. What differed was the rate of interest, the fees paid to the middleman or broker and the terms on which the transaction was to be concluded, in particular how loan money was to be paid to Eskom, how it was to be repaid and what would happen if Eskom defaulted.

2135. Viewed from this perspective, it is extraordinary, even inexplicable, that Eskom could ever have considered approaching the HEA transaction on the basis that it offered a unique supply that could not be replicated by any other market participant. Absent a cogent reason for pursuing the HEA transaction with such unusual enthusiasm, it is

probable that for one reason or another, the officials in Eskom who supported this transaction in its original form wished to prefer HEA over any other potential lender in this class.

2136. The most obvious shortcoming in the HEA proposal related to the upfront fee structure.

The term sheets which formed the basis for the transaction are exceptionally vague about the source of the funds which are to constitute the product supplied. HEA itself was a company specially created for the HEA transaction. Its parent company is said to be China Huarong based in China, with assets under management in excess of R2 trillion.<sup>1694</sup> The proposal by HEA embodied in the signed term sheet is said to be part of the overarching master ALFA to be concluded between HEA (or its nominee) and Eskom as an asset refurbishment/creation program value initially of USD 1,5 billion. There is no specific commitment as to how much money is to be paid to Eskom, on what dates it will be paid and who is liable to Eskom to pay it. The lender is defined in clause 8 of the signed term sheet as HEA, or its designee (Lender).

2137. Against that background, the once off Facility fee of 1,6% of the amount of the program value, payable on the signature of the ALFA is commercially outrageous. This would commit Eskom to an upfront payment of 1,6% of USD1.5 billion, which equates to approximately USD24 million before a single cent had entered the coffers of Eskom.

2138. It is little wonder that the Eskom Treasurer, Mr Pillay, resisted this aspect of the transaction so strongly. It remains unexplained why the then CFO, Mr Anoj Singh, who signed the term sheet, and the acting Group CEO, Mr Maritz, who signed the ALFA, should have promoted the transaction so unreservedly.

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<sup>1694</sup> Exhibit U6 pp AFP-385.

2139. There does not appear to have been any justification for the signing of the term sheet.

Signing the term sheet was not in accordance with Eskom's usual practice and it is difficult to see what benefit there was in legally committing Eskom to its terms. It seems as if the purpose in signing the term sheet was to push Eskom closer to HEA and afford HEA preferential treatment over its competitors for Eskom's business.

2140. It does not appear to be in dispute that no board approval was provided for the conclusion of the HEA transaction. This alone rendered the signed contract with HEA invalid. Fortunately, the invoice submitted by HEA was never paid and the HEA transaction therefore caused Eskom no direct loss.

2141. Nevertheless, it would appear that there is at least a prima facie case of attempted theft or fraud against Mr Anoj Singh, who signed the term sheet, and Mr Maritz, who signed the contract documents on the strength of which the invoice for USD21 888 000 (twenty-one million, eight hundred and eighty-eight thousand Dollars) was submitted to Eskom. A similar case could be made against Mr Thomas of HEA.

### **General conclusion and recommendations: Huarong**

#### **Linking these conclusions to the terms of reference of the Commission: Huarong**

2142. The Commission's findings, report and recommendations on this topic are made pursuant to ToR 1.1, 1.4, 1.5 and 1.9. The attempt to commit Eskom to a contract with HEA providing for an upfront payment of a raising fee of some USD24 million before any money allegedly raised to lend to Eskom amounts to corruption as contemplated in the ToR identified.

**Recommendation**

2143. It is recommended that the law enforcement agencies undertake such further investigations as may be necessary with a view to a possible prosecution of Mr Anoj Singh and Mr Maritz in regard to their respective roles in the HEA transaction.

## **Eskom and McKinsey-Regiments-Trillian**

2144. The Regiments Capital and Trillian Management Consulting were implicated in allegations of corruption and state capture in a number of state entities and have been investigated by the Commission. Both were very small local companies doing advisory work largely of a financial and management consultancy nature where Mr Eric Wood (Mr Wood) featured prominently as a director, and who appeared to have a strong working relationship with Mr Salim Essa, referred to as a ‘rain-maker’, as he was said to secure contracts with government entities. Mr Wood led a division of Regiments that had been a partner of McKinsey and Company Africa (Pty) Ltd (McKinsey). As partners, that Division of Regiments and McKinsey had been getting work from certain state-owned entities. That Division or Unit of Regiments became Trillian Capital Partners (Pty) Ltd (which was the holding company of Trillian Management Consulting (Pty) Ltd) on 1 March 2016<sup>1695</sup> whose main shareholders was Mr Salim Essa.<sup>1696</sup>

## **McKinsey-Regiments relationship at Transnet**

2145. McKinsey and Regiments had a history of working together at Transnet since 2012, which predated that of the work they undertook together at Eskom from 2015. The evidence led before the Commission in respect of their roles at, and, relationships with Transnet is important for a proper understanding of what they did at Eskom from some time in 2015 onwards. McKinsey and Regiments also partnered to secure contracts at SAA through a corrupt relationship between Regiments and an SAA official.<sup>1697</sup> In total,

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<sup>1695</sup> EB14 (b), Court application by Regiments & Directors, p 679.37, para 52 and p 679.44 paras 73-74; Ms Bianca Goodson’s affidavit, p 432/19.1 & p 444/48.1; Ms Mosilo Mothepu’s affidavit, p571, paras 5 & 7.

<sup>1696</sup> EB14, See Ms Goodson’s affidavit, EB14, p431, para 18, that Mr Salim Essa had 60% shareholding in Trillian Capital Partners (Pty) Ltd, a holding company of Trillian Management Consulting (Pty) Ltd.

<sup>1697</sup> FoF9, Exhibit VV10, SCFOFA p79 para.79. See also Part 1 Volume 1 of this Commission’s Report.

McKinsey was paid just under R1.9 billion in connection with contracts shared with Regiments or Trillian at Eskom, Transnet and SAA.<sup>1698</sup>

2146. Note that from the point at which Regiments gets involved as McKinsey's Supply Development Partner (SDP) at Transnet, there is a succession of sole-source contracts awarded to the McKinsey-Regiments consortium starting from 2013 and continuing through 2014 and 2015. Moreover, from 2012 the fees at Transnet were growing exponentially: by 70% compared to the year before, further escalating under the first sole-source contract in 2013, doubling from 2013 to 2014, and by 2015 had increased again. McKinsey would land seven contracts by confinement at Transnet, with the same consortium, in the space of eighteen months.<sup>1699</sup>

2147. At Eskom, McKinsey's earnings would go on to dwarf anything they had earned at Transnet or previously at Eskom, at over R1 billion in under a year.<sup>1700</sup>

#### **Pressure for a contract for Regiments in 2014**

2148. In 2014, the year before Mr Anoj Singh and Mr Brian Molefe were seconded from Transnet to Eskom, Regiments tried with only limited success to get consulting work at Eskom. It appears that pressure was applied by Public Enterprises Minister, Mr Malusi Gigaba's advisor, Mr Thamsanqa Msomi (Mr Msomi), on Eskom's new Group CFO or FD, Ms Tsholo Molefe, who had been appointed into that position in January 2014. Mr Msomi complained to Ms Tsholo Molefe that there was insufficient transformation in the award of Eskom contracts, that he hoped she would improve the situation. Mr Msomi then arranged for Ms Tsholo Molefe to meet a supposed aggrieved supplier, which turned out to be Mr Salim Essa. However, it appears that he was not actually an

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<sup>1698</sup> Exhibit VV10, SCFOFA p 80 Table 33.

<sup>1699</sup> Transcript 10 December 2020, p 273.

<sup>1700</sup> Transcript 10 December 2020, page 150.

aggrieved party, but was attempting to use access to Ms Tsholo Molefe to create a relationship that would be useful to land contracts at Eskom. This strategy did not work with Ms Tsholo Molefe, who referred Mr Salim Essa on to the relevant tender processes and did not entertain Mr Msomi's further approaches either.

2149. However, a new situation appeared to be contrived where Mr Salim Essa would return at a very opportune moment to conveniently offer the services of Regiments Capital. According to Ms Molefe, a financial sustainability plan developed by her was deemed insufficiently robust by Eskom Chair Mr Zola Tsotsi, who said that Minister Brown demanded a more robust plan to be submitted within three months.<sup>1701</sup>

2150. In response, Mr Colin Matjila (Mr Matjila), then acting Group CEO, offered to assist and organised to meet with Ms Tsholo Molefe out of the office where he suggested that she make use of an external service provider. Pursuant to this suggestion, Mr Matjila introduced Mr Salim Essa to Ms Tsholo Molefe at a privately arranged meeting in Monte Casino, Fourways, and Mr Salim Essa offered the services of Regiments Capital.<sup>1702</sup> Following this, it appears that Mr Matjila pushed hard to get a contract signed off for Regiments Capital, whilst Ms Tsholo Molefe resisted taking up their services, not least due to the absence of a competitive tender process and that she felt that they were over-priced. Her resistance was also because the work Regiments Capital was offering to do was not the revised financial sustainability plan that Mr Tsotsi demanded, but was limited to outlining a few initiatives that could be taken to unlock cash in Eskom's balance sheet. This was work that Ms Tsholo Molefe felt Eskom had the capacity to do.<sup>1703</sup> Her evidence is also that Regiments Capital delayed in submitting its proposal, and what they ultimately submitted was not a proposal, but an agreement for Eskom to

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<sup>1701</sup> Exhibit U12, Ms Tsholo Molefe's Affidavit dated 22 July 2020, p7 para 7.

<sup>1702</sup> EB11, Ms Tsholo Molefe's Affidavit supra p8 paras 8-10.

<sup>1703</sup> Transcript 6 October 2020, pp 200-201 & 206.

simply sign. This is what she resisted, and would not succumb to Mr Matjila's pressure on her to sign the agreement, much to Mr Matjila's annoyance.<sup>1704</sup>

2151. The deadlock was only broken by the Board giving a mandate in writing to Ms Tsholo Molefe that Regiments Capital was permitted to test the viability of their proposed financial options for Eskom in a high-level desktop exercise, for which Regiments Capital was paid R1 million.

2152. As discussed above, Ms Tsholo Molefe would be suspended the next year, in March 2015, on spurious grounds, and then pushed to leave the organisation, which she ultimately did.

#### **Forces align in 2015 to bring Regiments and McKinsey a large contract**

2153. Regiments Capital and its off-shoot company, Trillian, would find it much easier to get work at Eskom from 2015, and on a far greater scale. As they did at Transnet, Regiments Capital partnered with McKinsey again on the same basis for contracts at Eskom, and were utilising the services of Mr Salim Essa as a "Business Development Partner", to land contracts in return for a large share of the fees earned. Ms Mosilo Mothepu, a former senior employee of Regiments, testified how the company had struggled to get government contracts when she first worked there during 2007 to 2010, but that, when she returned in May 2015, this had changed significantly with the assistance of both Mr Salim Essa and Mr Kuben Moodley. Ms Mothepu testified that, if ever someone at Regiments was having a problem, they would call Mr Salim Essa and "it would happen".<sup>1705</sup>

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<sup>1704</sup> EB11, Ms Tsholo Molefe's Affidavit supra p 9-10 paras.11-14.

<sup>1705</sup> Transcript 10 December 2020, p 51-52.

2154. It is significant that Mr Sinton of Standard Bank testified that in a meeting with Regiments' directors, Mr Niven Pillay and Mr Litha Nyhonhya, both confirmed that McKinsey had offered to partner with Regiments on an expected project at Eskom, on the same terms used in McKinsey's projects at Transnet, i.e. that Regiments would earn 30% of all revenue from the project, but that it would have to pay 30% of this on to Mr Salim Essa.<sup>1706</sup>

2155. In addition, Mr Brian Molefe and Mr Anoj Singh, the Group CEO and Group CFO at Transnet respectively, who had been key in securing the McKinsey and Regiments team contracts at Transnet, would move over to Eskom during the course of 2015 and occupy the same crucial positions, initially in acting capacities, before being appointed to these positions. The evidence on the suspensions of certain Eskom executives in 2015 shows how those executives were pushed out of Eskom by the Eskom Board that had many Board members who had connections with the Guptas or their associates vacated to make way for these new executives.

### **McKinsey, Regiments and Eskom discuss proposals – informally and secretly**

2156. McKinsey sent "unsolicited" proposals to Eskom during 2014 and early in 2015 in which it offered to continue working on the 'Top Engineers' programme that it had developed for Eskom, which involved training a cohort of Eskom engineers to provide an in-house consulting capacity rather than outsource the service. However, Eskom had not taken up this offer, despite several proposals by early 2015, with the reasons given as largely due to funding constraints.<sup>1707</sup>

2157. McKinsey and Regiments then jointly submitted a proposal to Eskom on 20 April 2015 titled "Building an Internal Consulting Unit for Eskom by driving savings and unlocking

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<sup>1706</sup> Exhibit U10, p.12-15. Cf: Transcript 12 March 2019, p 113.

<sup>1707</sup> EB14(c), Mr Edwin Mabelane's Affidavit, p701.58 paras 11.6 to 11.10.

cash". That they submitted their proposal on this date is interesting because that was the date on which Mr Brian Molefe started at Eskom on secondment from Transnet as Acting Group CEO. The work areas proposed included: creating an internal consulting unit based on the previous Top Engineering Programme; interventions to reduce expenditure on procurement; "balance sheet optimisation" to unlock cash for Eskom; and assisting with "unlocking funding sources" for Eskom to improve its financial position. The document proposed that these services be provided on an 'at risk' basis, where payment would be based on a percentage of the "savings" deemed to have been achieved for Eskom, and supposedly this would make the programme 'pay for itself' rather than require a budget from Eskom.<sup>1708</sup> Dr Alexander Weiss, the senior partner at McKinsey who served as 'Co-Lead of Eskom's Client Service Team at Eskom, stated that the suggestion of this approach came from Eskom.<sup>1709</sup> He stated:

"Around late 2014 or early 2015, Eskom approached McKinsey about training a third cohort of Top Engineers. While the program had been very successful, we understood that Eskom would not be able to fund another cohort. At Eskom's request, in late January 2015 my colleagues and I prepared a proposal in which McKinsey would train a third cohort of Top Engineers, and Eskom would only pay McKinsey for the training if Eskom realised savings from certain procurement projects on which McKinsey worked." (own emphasis)

2158. According to Mr Mabelane, the idea originated from Mr Koko who wanted to replicate McKinsey's alleged success in a previous program (namely, outage management) elsewhere within Eskom, their own newly created unit called Internal Engineering Consulting Unit.<sup>1710</sup> The training program was code named 'Top Engineers Programme'.<sup>1711</sup>

<sup>1708</sup> EB14 (d), Mr Phakamani Hadebe's Affidavit in the High Court, dated 29 March 2018, p1187 para 69.

<sup>1709</sup> EB14(c), Mr Edwin Mabelane's Affidavit, p 702.59 para.11.9 and Dr Weiss' Statement, p687 para 16-18.

<sup>1710</sup> Mr Mabelane's affidavit p 702.57/11.2 – p 702.58/11.3.

<sup>1711</sup> *Id* p702.58/11.5.

2159. However, Dr Weiss stated that Eskom did not move forward with the program at the time,<sup>1712</sup> until around May 2015 when, according to him, “McKinsey began to discuss the possibility of a larger ‘turnaround’ program with Mr Brian Molefe, Mr Anoj Singh and others at Eskom”.<sup>1713</sup> It is significant that May 2015 is way before Mr Anoj Singh’s secondment to Eskom, on 1 August 2015,<sup>1714</sup> and yet he was part of discussions with McKinsey and Mr Brian Molefe for work to be rendered at Eskom, whilst he was an employee of Transnet and not of Eskom.

2160. Dr Weiss said that McKinsey-

“[E]ventually agreed with Eskom to conduct this larger turnaround program in conjunction with the Top Engineers program, and to train a greater number of Top Engineers than previously discussed. Eskom requested that the entire program be funded on an impact or “at-risk” basis.”<sup>1715</sup> (own emphasis)

2161. Mr Mabelane confirmed that due to lack of funding as well as the restriction on using consultants which was adopted in line with National Treasury Note 2013/2014, the Top Engineers program stalled.<sup>1716</sup> In fact the top engineers were deployed to undertake certain functions that were executed without McKinsey’s involvement or support.<sup>1717</sup> They were deployed to support individual executives in their day-to-day functions, as well as support the CFO (then FD) on the Business Productivity Program (BPP).

2162. Mr Mabelane said:

“Various funding avenues were explored for almost eight (8) months UNTIL the proposal for the MASTER SERVICES AGREEMENT (“MSA”) was developed and supported by the newly appointed acting CE, Mr Molefe. At the time, I had taken custodianship of the program in my role as Acting Group Executive: Group

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<sup>1712</sup> Dr Weiss’ Statement, p 688/16.

<sup>1713</sup> *Id* p 688 para 17.

<sup>1714</sup> EB16 (a), Mr Singh’s affidavit on Tegeta, p 751/10.

<sup>1715</sup> Dr Weiss’ Statement supra p 688/17-18.

<sup>1716</sup> Mr Mabelane’s affidavit supra p 702.58 / 11.6-11.7.

<sup>1717</sup> *Id* p 702.59/11.7.

Technology & Commercial. The team from McKinsey introduced me to the various unsolicited proposals that have [sic] been shared with various stakeholders and in particular Mr Koko.”<sup>1718</sup>

2163. Mr Brian Molefe officially joined Eskom as Acting Group CEO on or about 20 April 2015, pursuant to an announcement made by Minister Brown on 17 April 2015. Mr Anoj Singh joined Eskom as Acting GCFO on 1 August 2015. Evidence shows that McKinsey and Regiments Capital held extensive consultations with Mr Anoj Singh in the months prior to Mr Anoj Singh’s commencement date at Eskom. Both McKinsey’s senior partner, Dr Weiss, and Mr Anoj Singh, describe these consultations as having been intended to help on-board Mr Anoj Singh and Mr Brian Molefe because of McKinsey’s supposed extensive insight into Eskom after years of working with Eskom. As Dr Weiss put it, this was “to help Mr Molefe and Mr Singh succeed in leading Eskom during this difficult time, my colleagues and I provided extensive insight and analysis ... I personally had not worked with Mr Molefe or Mr Singh before”.<sup>1719</sup> However, it is strange that outsiders should take it upon themselves to “on-board” anyone when, surely, this role should have been played by people within Eskom. That is those who dealt with the issues at hand, to which McKinsey would not be privy. It is very strange that, when you join a company, you should be given an insight into the workings of that company by an outsider to that company rather than by officials of the company you are joining. That Mr Brian Molefe and Mr Anoj Singh accepted this may be an indication that they were already listening to someone outside of Eskom on what they should in Eskom. That would happen when you are captured. This is more so because neither Mr Brian Molefe nor Mr Anoj Singh said that it was someone within Eskom who said that they should let McKinsey give them the analysis or induction that McKinsey appears to have given them.

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<sup>1718</sup> Mr Mabelane’s affidavit supra p 720.59 para 11.8

<sup>1719</sup> Dr Weiss’ Statement p687 para.13 and Transcript: 11 December 2020, p16 & 23.

2164. Regiments were present at these meetings allegedly to provide the “financial component” of these briefings. It is, however, arguable that Regiments’ relative lack of experience with Eskom would give them even less grounds to “on-board” anyone for their role at Eskom. Mr Anoj Singh testified that the meetings were really “McKinsey’s view of the world”, but at the same time that he thought it would be difficult to get an answer out of Eskom staff and that from McKinsey he would get a quick answer to understand why there was a problem and get to the root of the cause.<sup>1720</sup> This explanation does not make sense. That is that people within Eskom would not know what challenges Eskom was facing.

2165. The real reason for the meetings is important because if the explanation of the “on-boarding” does not hold water, then Ms Mothepu’s evidence would be correct that the real purpose was to discuss McKinsey and Regiments’ proposal on the Master Services Agreement (MSA) and possibly reach an understanding with Mr Anoj Singh ahead of any formal decision by Eskom. This conduct was irregular and impermissible. Regiments’ presence would then make more sense if it were there to present themselves as McKinsey’s intended Supplier Development & Localisation (SDL) partner at Eskom.

2166. As shown above, Dr Weiss admitted that from May 2015 discussions began with Mr Brian Molefe, Mr Anoj Singh and others about the possibility of doing a Turnaround Programme for Eskom, in addition to the Top Engineers Programme, which McKinsey eventually agreed to do.<sup>1721</sup> Mr Anoj Singh sought to deny this,<sup>1722</sup> but later conceded the meetings and that aspects of the MSA or Turnaround Programme formed part of discussions at those meetings. Former Regiments employee, Ms Mothepu, confirmed that these were consultations regarding a proposal by McKinsey and Regiments to offer

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<sup>1720</sup> Transcript 18 March 2021, p 29.

<sup>1721</sup> Eskom Bundle 14(c) p 688 para 17.

<sup>1722</sup> Transcript 18 March 2021, p 25.

services to Eskom, at which she was present, and which were held off-site, in a secretive fashion and code-named “Project Pandora”.<sup>1723</sup>

2167. Far from his downplayed version of events, it appears that Mr Anoj Singh was in fact giving extensive direction to McKinsey and Regiments to work on their proposal and also required them to do actual preparatory work for him. In a series of meetings in July 2015, Mr Anoj Singh apparently outlined the key challenges that they should focus on and find solutions to, then provided them with Eskom documents to study and had them draw up a proposal for what his priorities should be for his first hundred days in office.<sup>1724</sup> This is based on Ms Mothepu’s evidence.

### **Eskom disregards the requirement for National Treasury approval**

2168. A submission dated 13 May 2015 was prepared by Mr Mabelane, the Acting Group Executive of Technology and Commercial and Chief Procurement Officer, requesting that the Eskom Board authorise negotiations to take place for the appointment of McKinsey as a sole partner for the development of the new Internal Consulting Unit on a sole source or ‘at risk’ basis for consulting services aimed at achieving cost savings for Eskom under a Master Service Agreement.<sup>1725</sup> The memorandum made the following recommendation:<sup>1726</sup>

“It is recommended that the strategy for the development of Eskom’s Internal Consulting Unit be approved and that the Acting Group Executive: Technology & Commercial be authorised to put measures in place within Eskom’s governance and commercial processes to secure the services of McKinsey as a sole partner for the purpose of implementing the recommendation on the following parameters:

Mckinsey & Co be contracted in a manner that is self-funding and the project duration be limited to a maximum of three (3) years;

<sup>1723</sup> Exhibit U32, p 574, para 20-22; Emails for meetings (EB14), p811.447 - 811.451; Transcript 14 January 2021, pp146 and150.

<sup>1724</sup> Transcript 14 January 2021, pp 154-156.

<sup>1725</sup> Mr Mabelane’s affidavit supra 702.59/11.9 & Memorandum p 829.1.

<sup>1726</sup> EB14(c) p 829.5.

The BPP value package on optimisation of Eskom's external spend, currently located within Group Commercial, be used as base project to generate savings that will fund project set-up costs;

The development of packages relating to the unlocking of cash by optimising the balance sheet, the unlocking of funding sources through additional financing opportunities and claims management at Medupi, Kusile and Ingula, was approved. These projects to be included at Eskom's sole discretion on a case by case basis depending on value to Eskom.

Other projects would be added as they are identified and as the programme matures; and

That a Negotiating Team that would also serve as a Steering Committee for the development of the Eskom Internal Consulting Unit, be authorised under the Chairman of the Acting Group Executive: Technology and Commercial."

2169. Mr Brian Molefe approved the submission on 13 May 2015 and the Bid Tender Committee, a subcommittee of the Board approved it by round robin on or about 6 July 2015,<sup>1727</sup> as follows:

No	Committee Member	Date
1	Mr Zethembe Khoza (Chairperson)	1 July 2015
2	Ms Nazia Carrim	3 July 2015
3	Ms Chwayita Mabude	6 July 2015
4	Ms Viroshini Naidoo	6 July 2015

2170. The revised round robin document to be signed by Board Tender Committee members was dated 6 July 2015. It is unclear how Mr Khoza and Ms Carrim signed off for

<sup>1727</sup> EB14(c) p 829.14 to 829.18

approval on 1 and 3 July 2015 respectively on a document that was only submitted to the Board Tender Committee on 6 July 2015.

2171. Mr Prish Govender prepared a document dated 18 May 2015 which purported to provide justification for the use of a sole source provisions to procure McKinsey as the service provider for the contract. That document was approved by Mr Mabelane on the same day. The same document was reviewed and approved by Ms Susan Daniels on 26 May 2015.<sup>1728</sup> The grounds of justification were said to relate to McKinsey's unique intellectual property over the Top Engineers Programme, its unique insights into Eskom as a result of previous work and that an in-depth analysis showed that there was only one supplier, viz. McKinsey, in the market capable of delivering what Eskom required.<sup>1729</sup>

2172. However, the justification of the sole source basis was questionable, as there were numerous, large and experienced consulting firms in South Africa that could have competed for the 'turnaround' type of consulting work.<sup>1730</sup>

2173. If the motivation was that McKinsey was uniquely positioned to deliver because of their previous Top Engineers work for Eskom, then it would not make sense that any of it could be outsourced to another party, such as Regiments or Trillian, nor could this reasoning apply to all the other elements of the contract that had nothing to do with the Top Engineers programme. In any event, Mr Mabelane's memorandum had recommended that McKinsey be appointed as the sole service provider.

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<sup>1728</sup> EB14(c), p829.7 – 829.10 and for Ms Daniel's memorandum see EB14(c), p705.

<sup>1729</sup> EB14(c), p829.2, para 3 and p705-708: memorandum titled 'Approval of Strategy to Develop Current Top Engineers Programme'.

<sup>1730</sup> Transcript 14 January 2021, p 174 & 191.

2174. Ms Mothepu testified that Eskom had internal teams with the expertise and skills to perform the duties that were outsourced to Trillian, and also believed that Eskom was, instead charged exorbitant fees but did not get value for money.<sup>1731</sup>

2175. The grounds of justification for using an 'at-risk' approach to the contract remuneration was heavily disputed within Eskom, and was clearly unlawful:

2176. Mr Brian Molefe sought to justify the 'at-risk' approach on the basis that Eskom was carrying very high costs for external consultants, and that McKinsey would help to develop an internal consulting capacity within Eskom from which there would be huge savings realised, and from which McKinsey could be paid and thus would not require any upfront cash outlay.<sup>1732</sup> However, the risk-based approach was not permitted under Treasury Regulations. Furthermore, the amount of fees that could be charged was neither quantified nor capped, and such a system could easily be abused.

2177. National Treasury Instruction Note 1 of 2013/14 on Cost Containment Measures, which came into effect on 1 January 2014, essentially provided that consultants could only be appointed on a fixed fee basis and that any deviation from the requirement had to be applied for in writing to the Director-General of the National Treasury.<sup>1733</sup> National Treasury Instructions are issued pursuant to section 76(4) of the Public Finance Management Act (PFMA) and are applicable as part of the PFMA.<sup>1734</sup> Section 76(4) of the PFMA reads:

"(4) The National Treasury may make regulations or issue instructions applicable to all institutions to which this Act applies concerning—

(a) any matter that may be prescribed for all institutions in terms of this Act;

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<sup>1731</sup> EB14 (b), Ms Mothepu's Affidavit dated 30 November 2020, p588 para.104.

<sup>1732</sup> Exhibit 38, p 32/108.

<sup>1733</sup> EB14 (d), National Treasury Note 01 of 2013/2014, p877.296; para 4.2 (p877.297), para 5 (p877.300).

<sup>1734</sup> Section 1 of the PFMA defines the "Act" as including any regulations and instructions issued in terms of, *inter alia*, section 76.

- (b) financial management and internal control;
- (c) the determination of a framework for an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective;
- (d) audit committees, their appointment and their functioning;
- (e) internal audit components and their functioning;
- (f) the administration of this Act; and (g) any other matter that may facilitate the application of this Act.”

2178. In other words, they constitute statutory law and must be complied with, unless National Treasury approval for deviation has been secured, as envisaged in Section 79 of the PFMA.<sup>1735</sup> It is significant that the Treasury Instruction also stipulated that a request for a deviation could only be considered after the Presidency had been consulted and has consented to the deviation.<sup>1736</sup>

2179. Eskom was in no doubt that the Instruction Note needed to be complied with when incorporating the requirement in its own procurement policy in 2014. Eskom’s ‘Directive for the Implementation of the National Treasury Cost Containment Instruction and Government Gazette’, sets out how Eskom would comply with and implement the Cost Containment Measures of the 2013/2014 Note, with clause 2.2.2.3 setting out that the rates at which consultants were to be remunerated had to be not higher than those set out by a particular list of authorities.<sup>1737</sup> The Directive was dated 7 July 2014.<sup>1738</sup>

2180. Mr Koko clearly understood this legal requirement, having been part of signing off on an updated Eskom version of this policy in August 2015.<sup>1739</sup> Mr Koko authorised the relevant Eskom Position Paper, PP03 of 2015, by his signature on 21 August 2015.

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<sup>1735</sup> Section 79 reads: “The National Treasury may on good grounds approve a departure from a treasury regulation or instruction or any condition imposed in terms of this Act and must promptly inform the Auditor-General in writing when it does so”.

<sup>1736</sup> National Treasury Instruction Note supra p877.300, para 5.4.

<sup>1737</sup> EB18 (b), TEGETA p1022.

<sup>1738</sup> EB18 (b), p1019.

<sup>1739</sup> EB14(d), p877.304

This is some 10 days before 31 August 2015, when Mr Koko asked to be provided with feedback on progress with McKinsey,<sup>1740</sup> and well before the conclusion of negotiations with McKinsey on the MSA.<sup>1741</sup>

2180.1. It was also before feedback was provided to Mr Koko on 2 September 2015 which was to the effect that National Treasury approval for deviation was required.<sup>1742</sup>

2180.2. It was also before the meeting Mr Koko had in October 2015 with Mr Aziz Laher where he accused the latter of delaying his (Mr Koko) business by saying that a deviation application was required,<sup>1743</sup> and

2180.3. before the Acceptance Letter of 17 December 2015 issued to McKinsey for an appointment that was knowingly non-compliant with the National Treasury Instruction Note referred to above.<sup>1744</sup>

2181. Mr Ismail Mulla of Eskom Corporate Finance: Internal Consulting Unit explicitly called for work to be done firstly to establish the case for whether an internal consulting unit was needed, and then to determine the best strategy and partner by which this should be delivered. This was sent in a memorandum titled "Briefing Note" to Mr Mabelane, signed by Mr Mulla on 2 June 2015.<sup>1745</sup> More importantly in regard to the proposal for sole sourcing and risk-based appointment, Mr Mulla, in rejecting Mr Mabelane's proposal, stated:

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<sup>1740</sup> EB14(c), p811.168, Mr Koko's email to Mr Edwin Mabelane and Mr Prish Govender.

<sup>1741</sup> EB14(c), Dr Wiess' Statement dated 25 November 2020, p689 para 24.

<sup>1742</sup> EB14(c), Mr Prish Govender's email and feedback report to Mr Koko, p811.170 & p811.172 para 3.

<sup>1743</sup> EB14(c), Mr Aziz Laher's affidavit, p702.264 para 10.30.

<sup>1744</sup> EB14(c), Acceptance Letter signed by Mr Edwin Mabelane, p811.110 -811.111.

<sup>1745</sup> EB14 (d), Mr Phakamani Hadebe's Affidavit dated 29 March 2018, p1190/73.1.

“A sole source request for this scope of work cannot be justified, since McKinsey is not the sole provider of consulting services in the market and not the sole provider in the market of the scope of work set out in this request.

Consultants cannot be appointed for the development, as well as implementation of strategies, since this poses a conflict of interest and a risk that inappropriate strategies may be implemented. McKinsey can therefore not be used as consultants for implementation of projects where they have been appointed to develop the related strategies.

The National Treasury Directive does not allow SoE's to contract external consultants on a “success fee” basis. Fees quoted must be aligned to the National Treasury instruction effective 1 January 2014. Therefore, the success fee basis for external consultants cannot be entertained for approval.”

2182. The above was a response from Eskom's Internal Consulting Unit, from which was required to obtain approval for the appointment of a consultant on a sole source basis.<sup>1746</sup> Mr Mabelane had submitted a memorandum for such approval<sup>1747</sup> in which he motivated for the appointment of McKinsey on a sole source basis and at risk. With the response above, Eskom's Internal Consulting Unit rejected the request.

2183. In a letter dated 29 June 2015, the Acting Group CFO, Ms Nonkululeko (Veleti) Dlamini, approved the request for the development of the Top Engineers program into an Internal Consulting Unit, but subject to conditions which included setting aside budget for the project for three years and compliance with National Treasury Instruction in relation to consultant rates and “if alternative methodology such as incentive-based is used, need to verify that it is allowable within the rules of National Treasury”.<sup>1748</sup> The Eskom executives (driving the process) failed to comply with any of these conditions.

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<sup>1746</sup> Cf: Mr Mabelane's affidavit, EB14(c), p702.60/11.10, that: “The next hurdle was to obtain approval to implement the above on a ‘sole source’ basis. For this we required approval from Eskom's Internal Consulting Unit. The Eskom Internal Consulting Unit turned down the request to use McKinsey on a sole source basis”.

<sup>1747</sup> Firstly, a Memorandum Mr Mabelane signed on 18 May 2015 and secondly a Memorandum Mr Mabelane signed on 6 June 2015.

<sup>1748</sup> *Id* p1195/80.1 – copy of letter to be incorporated into the bundle.

2184. Mr Aziz Laher, the Group Compliance Manager and PFMA Corporate Specialist at Eskom, repeatedly raised the need to apply for a deviation from National Treasury in September 2015 with a number of Eskom officials including Mr Koko, Mr Prish Govender, Ms Maya Bhana (Ms Bhana), Mr Anoj Singh's office manager and Mr Charles Kalima .<sup>1749</sup>

2185. Mr Koko has stated clearly to the Commission that he was aware that a risk-based contract was not permitted by National Treasury regulations and that he was advising other colleagues not to make use of it.<sup>1750</sup> However, he tendered no evidence to show that this was the case at the time when Mr Aziz Laher advised of the need to apply for National Treasury approval for the deviation. In fact, evidence shows that he was opposed to Mr Aziz Laher's advice and questioned why Mr Aziz Laher was holding up his business with the view that a deviation application was required.<sup>1751</sup>

2186. Despite these internal warnings, negotiations by Eskom's top executives over McKinsey's proposal proceeded.

### **Eskom's executives involved in the MSA**

2187. It appears that, Mr Mabelane, Mr Govender, Mr Anoj Singh and Mr Brian Molefe represented Eskom in the negotiations. There is conflicting evidence as to whether or not Mr Koko was also involved. Ms Mothepu testified that he was, at least insofar as Regiments is concerned, as will be shown below. Dr Weiss said he was not, but that "McKinsey began discussing the proposed Top Engineers program with Mr Koko in his capacity as Group Executive for Technology and Commercial, and kept him apprised of this and related initiatives during his suspension with the expectation that he would

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<sup>1749</sup> EB14(c), Mr Aziz Laher's affidavit p702.258 to p702.260 (paras 10.1, 10.8-10.12; 10.15-10.17); p702.264 (para 10.30 to 10.31).

<sup>1750</sup> Mr Koko, Transcript: 29 March 2021, p.20.

<sup>1751</sup> EB14(c), Mr Aziz Laher's Affidavit, p702.264 para 10.30.

promptly return to his former position and be involved in executing these projects".<sup>1752</sup> Indeed, Mr Koko came back from his suspension to be part of the Steering Committee that was established to oversee the implementation of the MSA. The Board resolution of 6 July 2016 specifically gave him, as the Group Executive: Technology and Commercial, the mandate to lead the negotiations.

2188. Mr Koko, was on suspension from 12 March 2015 until 20 July 2015 and Mr Mabelane was acting in his place. Mr Mabelane stated that he handed over to Mr Koko on Mr Koko's return on 20 July 2015. Mr Mabelane stated that the negotiations only started after Mr Koko had returned from his suspension and after he (i.e. Mr Mabelane) had done a hand over to Mr Koko.<sup>1753</sup> Mr Koko denied that he was involved in the approval process or in the negotiations. He claimed that the negotiations were completed by the time he returned from suspension.<sup>1754</sup> He has sought to explain away any evidence suggesting his involvement, such as scheduled meetings, that he said he never attended, or where he said he did meet McKinsey or Regiments but over other matters, and having limited his role to merely getting feedback from Mr Mabelane and Mr Govender.<sup>1755</sup> Mr Koko has also relied on a statement of Dr Weiss as evidence of him (Mr Koko) not having been involved in the negotiations.<sup>1756</sup> <sup>1757</sup> In his affidavit dated 02 May 2021 Dr Weiss stated in this regard that Mr Koko was not part of the Eskom negotiating team and he had no recollection of Mr Koko participating in McKinsey's negotiations with Eskom regarding the Top Engineers Program. He also stated that-

2188.1. McKinsey developed the funding proposal for this program in consultation with Mr Koko,

<sup>1752</sup> Dr Weiss' supplementary statement dated 2 May 2021, p3/7.

<sup>1753</sup> EB14(c), Mr Edwin Mabelane's Affidavit, p702.60 para 12.3.

<sup>1754</sup> Transcript 29 March 2021, p 321 and EB14(c) p811 para.168.

<sup>1755</sup> Transcript 29 March 2021, p 277-279, 282, 288, 292-293.

<sup>1756</sup> Transcript 4 May 2021, p 118 and Dr Weiss' statement dated 2 May 2021, p3/8.

<sup>1757</sup> Mr Koko Transcript: 4 May 2021, p.118 and Dr Weiss' statement dated 2 May 2021, p3/8.

2188.2. McKinsey began discussing the proposed Top Engineers program with Mr Koko in his capacity as Group Executive for Technology and Commercial, and kept him apprised of this and related initiatives during his (Mr Koko's) suspension with the expectation that he would promptly return to his former position;

2188.3. McKinsey periodically gave updates on the status of the negotiations to senior Eskom executives, including Mr Brian Molefe, Mr Anoj Singh, Mr Koko and Mr Mabelane;

2188.4. Mr Koko would have received high-level briefings on developments for the workstreams falling under his purview;

2188.5. to the best of Dr Weiss' recollection and knowledge, annexures 2 and 6 to his affidavit may relate to meetings with Mr Koko where the Turnaround Program (also referred to as the Top Engineers program) could have been discussed. Annexure 2 is an email dated 29 July 2015 from Dr Weiss regarding "Workshop with Matshela Monday afternoon", and annexure 6 is another email from Dr Weiss dated 17 November 2015, with the subject line: "You should join tomorrow 7:30am a meeting with Matshela?". However, Dr Weiss still equivocates on his version.

2189. Although Dr Weiss equivocates on the latter part of his version, what is clear from his affidavit is that the development of the Top Engineers program (*aka* Turnaround Program) and its related funding were initiated and discussed with Mr Koko. Mr Koko received periodic updates and briefings on the negotiations and other related initiatives, as well as on developments for the workstreams falling under his purview.

2190. However, as already shown above, from the date of his return to Eskom on 20 July 2015, Mr Koko began sending emails with documents relating to these negotiations to infoportal1@zoho.com, an email address used by Mr Salim Essa. This included an email containing Eskom's negotiating position for the MSA,<sup>1758</sup> the Top Engineers programme and online vending, even stating in one email that: "we did not finish our discussion about these transactions".<sup>1759</sup> As already submitted, Mr Koko never addressed the account holder in the emails.<sup>1760</sup>

2191. According to Ms Daniels, Mr Koko had a certain document with him when he returned to work on 20 July 2015, which contained a list of certain entities or transactions. Ms Daniels testified that Mr Koko discussed this with her and told her that it was part of his instructions from "his principals".<sup>1761</sup> The list contained transactions that appeared to be areas of existing or potential contract work with Eskom with estimates of "revenue" for each transaction, and with handwritten notes on it which Mr Koko admitted were made by him.<sup>1762</sup> A picture of that document with certain handwritten notes appears on the next page:

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<sup>1758</sup> EB18 (b), p1032-1033, p1035-1047.

<sup>1759</sup> EB18 (b), p1056-1064. EB14 (d), Phakamani Hadebe's Affidavit supra, p1213 para.102.

<sup>1760</sup> Transcript 12 January 2021, p 192.

<sup>1761</sup> Transcript 16 March 2021, p 28.

<sup>1762</sup> EB8, p87.88, annexure "SMD4".

ESKOM-08-087.88

U18-SMD-083.88

SMD 4

		Revenue	
	Duvha 3	R 5 000 000 000,00	✓
	CPI Investigations ③	R 800 000 000,00	✓
	Mkinsey ③	R 10 000 000 000,00	✓
	Balance Plus	TBC	
	Funding Restructure	R 600 000 000,00	
	Maintenance Management	TBC	
	Security Guarding	R 2 500 000 000,00	✓
	Key Points Fencing and CCTV	R 2 100 000 000,00	✓
	OGGT Maintenance	R 700 000 000,00	✓
	Diesel to Gas Conversion	R 2 000 000 000,00	✓
	Project Libra Anglo	TBC	Give me a fixed price, I give you the partner
	Rotek HR Kelly Group	R 5 000 000 000,00	✓
	Load Management	R 1 000 000 000,00	✓
	IT Support Services	R 2 000 000 000,00	✓
	Fiber Lease Cash unlock	R 4 000 000 000,00	✓
	Online Vending Cash Unlock	R 35 000 000 000,00	✓
	Desktop Support MSA	R 2 500 000 000,00	✓
	Laptop and Hardware Supply Lease	R 1 500 000 000,00	✓
	Komatie Replacement 1000MW	R 15 000 000 000,00	✓
		<b>R 89 700 000 000,00</b>	

*Please follow this up*

*Part ①*

*outsourcing*

*Zestlor*

*we could buy windmills that want to be sold*

*Transact copy*

Stop paying T guys.

2192. Some of the notes on the list are worth mentioning, such as “give me a fixed price, I give you the partner”, which Mr Koko testified related to the New Largo mine that Anglo-American was building for the Kusile Power Station where he admitted he was stating who he thought should be subcontracted as a BEE partner”.<sup>1763</sup> This is contrary to Mr Koko’s evidence that at Eskom they never got involved in directing who should be a subcontractor.

2193. The other note is ‘Zestlor’, ostensibly Zestilor, an entity that belonged to Mr Salim Essa’s wife. When asked about Zestlor, Mr Koko could not recall why he had written this on

<sup>1763</sup> Transcript 4 May 2021, p 53-60.

the list. From Mr Holden's report it is apparent that Zestilor was one of the entities used by the Guptas to launder money.<sup>1764</sup>

2194. Mr Koko's version is that the list came from Ms Daniels who was passing it from the Board, but Ms Daniels denied this.<sup>1765</sup> Further, it is not clear why the Board would originate such a list at a detailed level or why Eskom would be interested in how much revenue could be earned by third parties on non-existent transactions.

2195. Ms Mothepu has described how Regiments (and later Trillian) would do their revenue projections, which involved calculating the fees that could be extracted from their clients. Amongst others, the list above mentions 'Duhva 3 – R5 billion', 'McKinsey – R10 billion', 'Funding Restructure – R600 million' and 'Online Vending Cash Unlock – R35 billion'.<sup>1766</sup> Ms Mothepu recalled interacting with Mr Koko over the Duhva and online vending items, which she testified were then added to the scope of the MSA proposal by Mr Koko and Mr Anoj Singh.<sup>1767</sup> Indeed, McKinsey and Regiments did get contract work for these items. Mr Koko denied that he was pursuing the matters on the list. In support of his denial he said that they did not fall within the scope of the division he headed.<sup>1768</sup> However, the presentation made at the first Steering Committee (SteerCo) meeting on 9 February 2016 shows that Mr Koko was responsible for, inter alia, 'Completion of the Duvha Insurance claim' and the 'Master Vending Agent'.<sup>1769</sup>

2196. When confronted with this presentation, Mr Koko's response was that it was an error for his name to be shown as aforesaid. However, there is no explanation why that error was never corrected. It is significant that the SteerCo presentation document was

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<sup>1764</sup> FoF9, Exhibit VV10, 'Shadow World Investigations Report', SCFOFA p184 para 245.

<sup>1765</sup> Transcript 16 March 2021, p 33.

<sup>1766</sup> See also Ms Bianca Goodson's affidavit supra p450 paras 52.9.

<sup>1767</sup> Transcript 14 January 2021, p 174 and 179.

<sup>1768</sup> Transcript 29 March 2021, pp 335-341.

<sup>1769</sup> EB16 (b), p1123.

provided by Mr Anoj Singh as part of his evidence to the Commission, and he did not point to any errors in the document.<sup>1770</sup>

2197. Ms Mothepu testified that Regiments and McKinsey were negotiating the MSA with Mr Anoj Singh, who she described as “the main contact person and through him brought McKinsey and Regiments from Transnet (SOC) to Eskom”, when she joined Regiments in June 2015, even though he was still at Transnet.<sup>1771</sup> Mr Anoj Singh denied this, and said that he could not have done so as he was at Transnet and that he was not the mandated authority to do the negotiations.<sup>1772</sup> However, as already shown above, Mr Anoj Singh admitted that he attended meetings with McKinsey and Regiments officials, back in May 2015, but said that the meetings were for his on-boarding at Eskom. It is not clear why Mr Anoj Singh thought that, if the meetings were for his own “on-boarding” it made any difference. The fact of the matter is that, while he was still at Transnet and had not as yet been seconded to Eskom, he was involving himself with McKinsey in respect of Eskom matters.

### **Mr Koko’s specific engagement with Regiments**

2198. A more detailed exposition of Mr Koko’s engagement in matters relating to the MSA is warranted.

2199. Ms Mothepu was one of Regiments’ representatives on the Steering Committee established by Eskom’s executives to oversee the implementation of the MSA.<sup>1773</sup> Ms Mothepu sent at least seven emails to Mr Koko on matters relating to the MSA. The emails were sent on 30 November 2015; 5 December 2015, 7 December 2015 at 8h09;

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<sup>1770</sup> Annexure AS5 (p1108) to Singh’s affidavit, Exhibit U37.3, EB16 (b) p1018/11.

<sup>1771</sup> EB14 (b), Ms Mothepu’s affidavit, p574/20-22.

<sup>1772</sup> EB16 (a), Mr Anoj Singh’s Affidavit dated 18 January 2021, p616/65.

<sup>1773</sup> EB14 (b) Ms Mothepu’s affidavit, p575/23 & p588.109.

7 December 2015 at 12h33; 7 December 2015 at 20h21; 12 January 2016; and 20 January 2016.<sup>1774</sup>

2200. The fee arrangement between McKinsey and Regiments under the MSA was envisaged to be 70% for McKinsey and 30% for Regiments.<sup>1775</sup> However, Regiments was supposed to lead its own financial transactions (with Eskom), called “Balance Sheet Optimisation and Cash Unlocking Initiatives”, for which it would earn 95% of the fees on this portion of the work, with McKinsey only earning 5% administration fee.<sup>1776</sup> This is exactly the type of work that Regiments had proposed to Ms Tsholofelo Molefe in 2014 when she was still the Financial Director of Eskom, following a meeting with Mr Salim Essa, arranged by Mr Colin Matjila, at Monte Casino, Fourways, Johannesburg. On that occasion, Regiments did not succeed to obtain a contract it had wanted from Eskom. This time around, in December 2015, when the Financial Director or Chief Financial Officer or Chief Financial Officer was Mr Anoj Singh it seems they did, in collaboration with the new management, of Mr Brian Molefe and Mr Anoj Singh, at Eskom.<sup>1777</sup>

2201. Significantly, the items of work for Regiments under ‘Balance Sheet Optimisation and Cash Unlocking Initiatives’ included:<sup>1778</sup>

	<b>Ms Mothepu’s Affidavit</b>	<b>Last Proposal emailed to Mr Koko<sup>1779</sup></b>
1	Insurance claims management for the Duvha Unit 3 Recovery Project	Insurance claims management for the Duvha Unit 3 Recovery Project

<sup>1774</sup> EB14 (c), p811.255 to 811.359.

<sup>1775</sup> EB14 (b), Ms Mothepu’s affidavit p573/16.

<sup>1776</sup> EB14 (b), Ms Mothepu’s affidavit p573/17.

<sup>1777</sup> EB14 (c), Dr Weiss’ statement p687/13 and Mr Yeboah-Amankwah’s affidavit, p702.185/5.2, and Dr Weiss’ statement p688/17.

<sup>1778</sup> EB14 (b), Mr Mothepu’s affidavit, p573/18.

<sup>1779</sup> EB14 (c), p811.331.

	<b>Ms Mothepu's Affidavit</b>	<b>Last Proposal emailed to Mr Koko<sup>1779</sup></b>
2	Rebuild – Duvha Unit 3 Recovery Project to recover the 600MW capacity loss	Rebuild – Duvha Unit 3 Recovery Project to recover the 600MW capacity loss
3	On-line vending	On-line vending
4	Optimisation of Fibre Optic Cable Capacity	Optimisation of Fibre Optic Cable Capacity
5	Insurance claims management in relation to the Hitachi settlement offer	Insurance claims management in relation to the Hitachi settlement offer
6	Escap capital structure optimisation	Escap capital structure optimisation
7	Overall insurance claims management	Overall insurance claims management
8	Arrangement and negotiation of long-term facilities	Arrangement and negotiation of long-term facilities
9	Arrangement and negotiation of working capital facilities	Arrangement and negotiation of working capital facilities
10	Sale of Eskom Finance Company business and mortgage book	Sale of Eskom Finance Company business and mortgage book
11	Hybrid Capital Issuance	Hybrid Capital Issuance

2202. As shown above, one of the emails from Mr Koko to “Business Man” on Saturday, 08 August 2015 at 22:20, related specifically to online vending, and attached a submission Document signed by Mr Koko himself as Group Executive: Technology & Commercial on 8 August 2015.<sup>1780</sup> In fact, the three emails that Mr Koko sent to “Business Man” on 20 July 2015, all related to the development of the Top Engineers Program and the appointment of McKinsey as a consultant.<sup>1781</sup> This could certainly not have been communications with Dr Ngubane, as Mr Koko's version on who “Business Man” was would suggest, who has in any event denied ever receiving such emails from Mr Koko.

<sup>1780</sup> EB18 (b) p1056.

<sup>1781</sup> EB18 (b) p1018 to 1035.

Mr Koko sent these emails to “Business Man” during the course of the MSA negotiations, which took place in July 2015 to November 2015.<sup>1782</sup> Given the findings I made earlier in this report that the infoportal email address was used by Mr Salim Essa – who called himself “Businessman” – it can be said that this means that Mr Koko was communicating with Mr Essa when he sent these emails. He was sending the emails to Mr Essa.

2203. According to Mr Koko’s feedback report of October 2015 to the Board Tender Committee on the outcome of negotiations with McKinsey, the negotiations commenced on 28 July 2015,<sup>1783</sup> eight days after Mr Koko’s return from suspension. At this stage it is important to note that the part of Mr Koko’s feedback report that said this – namely that the negotiations started on 28 July 2015 and went up to November 2015 contradicts Mr Koko’s evidence as recorded earlier that the negotiations for the MSA had been completed by 20<sup>th</sup> July 2015 when Mr Koko returned from his suspension. This relates to the dispute between Mr Koko and Mr Mabelane on whether Mr Koko took part in the negotiations after his return from his suspension. Mr Mabelane said Mr Koko was involved in the negotiations after his return whereas Mr Koko said he was not because those negotiations had been completed by the time he returned to work.

2204. Mr Koko, as a member of SteerCo, was the Eskom lead official especially responsible for the completion of the Duvha insurance claim and to advise on the appointment of the Master Vending Agent, an item relating to online vending. Mr Anoj Singh was the Eskom lead official in the Issuance of Hybrid Capital, Arrangement of long-term debt facilities, arrangements and negotiations of working capital facilities and the Sale of Eskom Finance Company, all items identified by Ms Mothepu as falling under

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<sup>1782</sup> EB14 (c), Dr Weiss’ statement, p689/22 & 24.

<sup>1783</sup> EB14 (c), p829.36, p829.37. The Feedback Report was signed by Mr Koko on 6 October 2015 and presented to the Board Tender Committee on 21 October 2015 [EB(c) p875.32: BTC Resolution].

Regiments' portion of the work.<sup>1784</sup> Ms Mothepu identified some of these items as initiatives that were added to the MSA original proposal by Mr Koko and Mr Anoj Singh, such as online vending, Duvha 3 insurance claim and rebuild and the Hitachi Insurance settlement.<sup>1785</sup> This is indeed apparent from her email below to Mr Koko, on 30 November 2015:<sup>1786</sup>

**“Subject:** Balance Sheet Optimization and Cash Unlocking Financial Initiative Streams

... I hope this email finds you well, and it was a pleasure meeting you last week. I had a chat with Eric Wood regarding additional financial initiatives that need to be included as part of our balance Sheet Optimization and Cash Unlocking Financial Initiative Stream; these include the sale and lease back on the optic fibre network, prepaid electricity vending, EFC disposal, Hitachi Claims, replacement of boilers and Duvha insurance claim. We are currently compiling a business case for these initiatives and require some information from you and your team.

We would like to set up time early this week with yourself and your team to source the information in order to complete the business cases by the end of the week.”

2205. Ms Mothepu also referred to annexures MM4 and MM5 (x3),<sup>1787</sup> in substantiation of her evidence. Her emails to Mr Koko were about Regiments' proposal on its portion of the MSA projects. The draft proposal was attached, identifying each project (those already listed above) to be undertaken by Regiments and describing the scope of work for each project, the approach and the project cost. The three emails on 7 December 2015, at 8:09, 12:33 and 20:21, show the evolution of the draft document; each attaching an updated draft of the proposal for Mr Koko's consideration, review and comment. In the third of these emails Mr Mabelane was included, and certain officials of Regiments were copied.<sup>1788</sup> The email reads:<sup>1789</sup>

<sup>1784</sup> EB16 (b) Presentation at SteerCo meeting of 9 February 2016, p1123.

<sup>1785</sup> EB14 (b) p575/27.

<sup>1786</sup> EB14 (b), Annexure MM1, p588.

<sup>1787</sup> EB14 (b), p588.5, p588.26, p588.50 & p588.75.

<sup>1788</sup> EB14 (b) p588.50 & EB14(c) p811.329.

<sup>1789</sup> EB14 (b) p588.75 & EB14(c) p811.329.

**From:** Mosilo Mothepu <mosilom@regiments.co.za>

**Sent:** Monday, 07 December 2015 20:21

**To:** Edwin Mabelane; Matshela Koko

**Cc:** Eric Wood; vikas\_sagar@mckinsey.com; Asanda Smith; Faheema Badat; Grant Joseph; Mahommed Bobat

**Subject:** Eskom Cash Unlocking Initiatives

**Attachments:** Eskom Cash Unlocking and Balance Sheet Optimisation Initiative\_07\_Dec\_2015\_V2.docx

Dear Matshela and Edwin,

Attached please find the revised cash unlocking initiatives for your review and comments. As per your request, we sat with your technical team who provided guidance and additional information to the document. We have incorporated their inputs and comments to the body of the document ...”

2206. As already submitted, Mr Koko sought to dispute these emails on the basis that the matters referred to in the emails did not fall under his division and would therefore not have discussed them with Ms Mothepu. He sought to contend that the email of 30 November 2015 was addressed not to him, but to his PA. However, his denials do not make sense. It is inconceivable that Ms Mothepu would have written as she did if she had not had any prior discussions with Mr Koko on matters referred in her emails. The email of 30 November 2015 has aspects of the message that can only relate to Mr Koko personally, and no one else: “Good day Matshela, I hope this email finds you well, and it was a pleasure meeting you last week. We would like to set up time early this week with yourself and your team to source the information”. He was the only addressee in the second and third emails, asking him to consider and review the updated proposal; all the time being addressed by his first name “Matshela”.

2207. Two further emails from Ms Mothepu in January 2016 also bear reference. The first of the two emails was addressed to Mr Koko personally, again in his first name “Matshela”,

and related to EFC (i.e. Sale of Eskom Finance Company), being one of the projects for Regiments under the MSA.<sup>1790</sup> The email read:

“... As discussed telephonically, I would appreciate it if you can assist in facilitating a meeting with Mike Beshy and his EFC team to understand the EFC business, for the ultimate sale from Eskom’s ownership.

We would also like to meet with Operations and Finance and other various heads of divisions within EFC.”

2208. It is only in this email that Ms Mothepu asked for Mr Koko’s assistance to facilitate a meeting with other Eskom officials, but she stated: “as discussed telephonically”. All the other emails were of direct interaction with Mr Koko.

2209. In the second email Ms Mothepu sought to confirm her availability for a meeting requested by Mr Koko. It reads:<sup>1791</sup>

**“Subject:** Meeting with Matshela

... As discussed, Matshela has requested a meeting with me on Friday afternoon. My team is available after 14:30.”

2210. All this goes to showing the level of Mr Koko’s involvement in the MSA contract. His membership on SteerCo only adds to that picture. He has sought to present himself as a “clean” person, that whatever he did at Eskom was above board. However, the evidence around the purported conclusion and termination of the MSA shows otherwise. The unjustified and irregular payments made to Trillian after approval by SteerCo all stand in stark contrast to his own portrayal of himself as an innocent man. Mr Koko colluded and collaborated with his colleagues and external parties, such as Mr Salim Essa and Mr Eric Wood, to siphon money out of Eskom to Mr Salim Essa and his entity, Trillian. His denial that he met with and had discussions with Ms Mothepu on the

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<sup>1790</sup> EB14(c) p 811.358.

<sup>1791</sup> EB14(c) p 811.359.

matters or issues referred to in Ms Mothepu's emails to him can only be true if the position is that Ms Mothepu fabricated all those things she said in those emails.

2211. I did not understand Mr Koko to suggest that Ms Mothepu fabricated those stories. If Mr Koko did suggest that, the suggestion had no foundation whatsoever and would fall to be rejected. Mr Koko did not suggest any reason why Ms Mothepu would have decided to lie about him in the way she would have to be taken to have lied about him if Mr Koko's version was accepted. There is also no possibility that Ms Mothepu could have been genuinely mistaken that Mr Koko was the person with whom she had the discussions to which she referred in her emails and the person with whom she had the meetings to which she referred in those emails. This is not a case where she may have met with or discussed with somebody she mistakenly thought was Mr Koko. The result is that it is Mr Koko who gave dishonest evidence when he denied having met with Ms Mothepu and discussed the matters she said they discussed.

### **McKinsey representatives**

2212. Dr Weiss and Mr Sagar led the negotiations on behalf of McKinsey. Dr Weiss said that the negotiations started in May 2015 and were largely completed by October 2015, with a final work stream regarding the Balance Sheet Optimisation still being negotiated by Regiments, led by Mr Eric Wood, into November 2015.<sup>1792</sup> I pause here to say Dr Weiss' evidence also contradicts Mr Koko's evidence that the negotiations were completed by 20 July 2015 when he returned from his suspension.

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<sup>1792</sup> EB14(c), Dr Weiss' Statement, p689/22-23.

## **Board Tender Committee approval for the conclusion of the Master Services Agreement**

2213. On 21 October 2015<sup>1793</sup> the Board Tender Committee approved a submission authorising the Eskom team to conclude the negotiations with the MSA. The submission to the Board Tender Committee was signed off by Mr Charles Kalima, Mr Govender and Mr Koko on 6 October 2015,<sup>1794</sup> and described as “Feedback on the negotiated outcome with McKinsey to develop the current Top Engineers programme into an internal Consulting Unit that can provide world class management consulting services capable of resolving emerging company-wide risks by unlocking cash, without prior tendering”.<sup>1795</sup>

2214. Permission for the sole source and at-risk based contracting approaches had still not been sought or obtained, although the submission stated that it could be required. Mr Koko stressed in his evidence that he knew that it was required and had insisted that the submission stress this point. At the meeting, Mr Neo Tsholanku, Head of Legal, apparently advised the Board Tender Committee that this was required.<sup>1796</sup>

2215. The submission stated that, if the contract value exceeded R1.2 billion, it would need to be reported to the Minister of Public Enterprises. This was never done.<sup>1797</sup> The MSA was described as having an “R0.0” costed budget. This reflected that it was supposed to be ‘self-funding’ from savings that were to be made, and never attempted to provide any valuation or place any cap on the payments that could be made under the contract, which was against National Treasury regulations.

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<sup>1793</sup> EB14(c), p875.32, BTC Resolution, extract from the minutes, signed by Ms Daniels on 8 November 2016, nearly a year later.

<sup>1794</sup> EB14(c), Feedback Report, p829.44.

<sup>1795</sup> EB14(c), Feedback Report, p829.36.

<sup>1796</sup> EB14(a), Exhibit U29, Ms Viroshini Naidoo’s Statement to the Portfolio Committee on Public Enterprises (undated) p266 Section d ‘McKinsey’.

<sup>1797</sup> EB14(d), Mr Phakamani Hadebe’s Affidavit supra p1193 para 78.4.

2216. Most extraordinarily, the submission sought approval for a R475 million down-payment to be made upfront to McKinsey, despite the lack of budget and the fact that the risk-based approach was supposed to mean that payment would only be made if Eskom realised actual savings. Further, this meant that Eskom would be making payment without having received any service yet from McKinsey.

2217. The Board Tender Committee resolved-

2217.1. To accept the feedback of the negotiations with McKinsey and Co to develop the current Top Engineers programme into an Internal Consulting Unit that provide world class management consulting services capable of resolving emerging company-wide risks, without prior tendering, for a period of 3 (three) years, with an option to terminate after a 12 (twelve) month period if no savings are realized.

2217.2. To ratify minor differences between negotiated outcomes and approved mandate parameters as contained in sub-clause 1.3.3 and 1.3.6”

2217.3. To note the following negotiated conditions:

2217.3.1. That the negotiated results for the Top Engineers Programme, Procurement (including inventory), Generations, Primary Energy and Claims Management value packages and the Supplier Development and Localisation (SD&L) proposal as contained in Appendix 4,5,6,7,8 and 9 be accepted; and

2217.3.2. That the contract will be based on the R0.00 and self-funding.

2218. This appears from an extract signed by Ms Daniels on 8 September 2016, nearly a year after the Board Tender Committee resolution, as a “True Extract” of the Board Tender Committee minutes.<sup>1798</sup>

2219. During the time of the Board Tender Committee resolution, it seems clear the lack of National Treasury approval was a sticking point that Eskom executives, such as Mr Koko, were not going to let get in their way. Mr Aziz Laher was taken to task by Mr Koko, in front of McKinsey representatives, for holding up the conclusion of the MSA on this point.<sup>1799</sup> Mr Koko and the McKinsey representatives then undertook to get their own legal opinion on the matter.<sup>1800</sup> Through Eskom’s Head of the Legal Affairs or Department, Mr Koko received both internal and external legal opinions that the approval was required, and McKinsey was advised that it was a ‘grey area’ and would be risky to proceed.<sup>1801</sup>

2220. Despite all these warnings over the irregularities and need for approvals, Mr Mabelane proceeded to issue an acceptance letter to McKinsey on 17 December 2015, emailed by Mr Prish Govender to Dr Weiss,<sup>1802</sup> and McKinsey accepted.<sup>1803</sup>

2221. The acceptance letter included a peculiar provision which read thus:<sup>1804</sup>

“It is a condition of the acceptance that Eskom considered opinion of the National Treasury Instruction will hold throughout the life of the contract. In an unlikely eventuality that the said opinion is conclusively altered the parties hereby agree to review the contract payment basis to reflect the revised opinion.”

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<sup>1798</sup> EB14(c) p875.21.

<sup>1799</sup> Mr Aziz Laher’s Affidavit, supra p702.264, para 10.30.

<sup>1800</sup> Mr Aziz Laher’s Affidavit, supra p702.264, paras 10.30.7, 10.30.8; p702.265, paras 10.32 & 10.34.

<sup>1801</sup> Mr Phakamani Hadebe’s Affidavit supra p1196 para.82 and p1197 para.83.1.

<sup>1802</sup> EB14 p811.110 & 811.111.

<sup>1803</sup> Dr Weiss’s Statement dated 25 November 2020 supra p7 para.25.

<sup>1804</sup> EB14(c), p811.357: “Acceptance Letter”.

2222. The wording of this so-called condition is not only unintelligible, but also intentionally misleading, because Eskom had received clear advice that National Treasury approval was required, and it is not clear who determined what the final “Eskom considered opinion” was, and, moreover, that in signing the acceptance letter McKinsey was prepared to accept the clause. It also indicates that no approval had, therefore, been obtained from the National Treasury, and as such then McKinsey would be aware of this.

2223. Mr Mabelane could not have inserted that condition (in a letter of December 2015) based on what the Eskom executives later refer to as confirmation from an official of the National Treasury that a deviation approval was not required, as the purported “confirmation” was only received by email on 4 February 2016.<sup>1805</sup> In any event, the email from Mr Solly Tshitangano of National Treasury, is not confirmation that a deviation approval was not required.

2224. With no contract and only an acceptance letter in place, McKinsey began working on the Turnaround Programme from January 2016. Regiments were not part of any formal arrangement, yet according to Ms Mothepu, Mr Anoj Singh told them that he would undertake to get the necessary approvals from National Treasury and that he wanted them to work whilst this took place.<sup>1806</sup> It appears that McKinsey and Regiments worked from around November or December 2015. Moreover, Mr Koko also appears to have informed them that Eskom had requested the National Treasury to approve their “confinement” appointment.<sup>1807</sup>

2225. No approval was ever sought nor obtained from the National Treasury for the MSA. On 4 February 2016 Eskom officials sent an email to Mr Tshitangano of the National

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<sup>1805</sup> EB14 (c), Email from Mr Solly Tshitangano; p811.112.

<sup>1806</sup> Transcript 14 January 2021, p 173 & pp 189-190.

<sup>1807</sup> Ms Mothepu’s Affidavit supra, p574 paras 20-21 and Transcript 14 January 2021, p 173.

Treasury asking for clarity on the National Treasury Practice Note Number SCM 3 of 2003.<sup>1808</sup> This note outlined, amongst other things, the different types of contracts used when hiring consultants depending on the circumstances.<sup>1809</sup> The email was sent by Mr Dave Gorrie, former Eskom Senior Manager: Contracts Management Office, in which he copied Mr Charles Kalima. The email read:

“... As we discussed, please confirm for us that Practice Note number SCM 3 of 2003 entitled Appointment of Consultants is currently valid and effective for public entities such as Eskom.

We understand that this Practice Note, and others, will be incorporated into a new set of regulations once the review process has been completed.”

2226. On the same day, Mr Tshitangano replied as follows:

“... Practice note 3 of 2003 is still applicable until replaced with new instructions after the promulgation of the new Treasury Regulations. The retainer/contingency fee principles are not clearly outlined in the practice note, if you intend applying them, you need to do some further work to ensure that you do not compromise the principles of section 217 of the Constitution and other legislation...”

2227. Mr Tshitangano’s reply email neither provided any particular clarity nor did it constitute an approval for a deviation from the 2014/2015 Instruction Note. Thus, the attempt by Eskom’s executives to rely on Mr Tshitangano’s February 2016 email, as confirmation that a National Treasury approval for deviation was not required, is misconceived, as the Practice Note of 2003 had long been superseded by the 2014/2015 Instruction Note and Eskom’s own adopted policies clearly reflected this.

2228. In his affidavit to the Commission, Mr Charles Kalima explained that the meeting at the National Treasury with Mr Tshitangano took place at the request of Mr Govender to enable Mr Charles Kalima and Mr Gorrie to go to the National Treasury and establish

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<sup>1808</sup> EB14 (c), National Treasury Practice Note Number SCM 3 of 2003, p359.

<sup>1809</sup> EB14 (c), the emails, p811.112.

whether or not “Practice Note Number SCM 3 of 2003: Appointment of Consultants”, was still valid and effective for public entities such as Eskom.<sup>1810</sup> Mr Gorrie, however, stated that, according to his recollection, the meeting was his idea, as he believed that Practice Note 3 of 2003 was still applicable.<sup>1811</sup> However, none of this makes sense, as these executives had been advised that a deviation approval was required, and Eskom had in August 2015 incorporated into its policy the 2013/2014 National Treasury Instruction requiring Treasury approval for a non-fee based contract.

2229. Yet, the minutes of a Steering Committee meeting chaired by Mr Anoj Singh on 9 February 2016 show that Mr Govender reported that “National Treasury approved confirmation of the Contract Methodology for the Risk Based Approach”.<sup>1812</sup> This was simply not true.

2230. Whilst the MSA was being finalised, a second contract (for the Corporate Plan) that was also mired in irregularities was concluded.

2231. With the negotiations for the MSA dragging on in 2015, Eskom sought to put a second, short-term contract in place with McKinsey “for urgent finance work”.<sup>1813</sup> This was also done via sole-sourcing, but this time for a fixed price that was not to exceed R98,977,024.08 (ninety eight million, nine hundred and seventy seven thousand and twenty four Rands and eight Cents) excluding VAT and expenses (travel and subsistence).<sup>1814</sup> To that end, McKinsey submitted a proposal to Eskom by email dated 3 September 2015 to Mr Prish Govender in respect of which Mr Koko was copied.<sup>1815</sup>

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<sup>1810</sup> EB14 (c), Mr Charles Kalima’s affidavit, p702.124/36.

<sup>1811</sup> EB14 (c), Mr Gorrie’s affidavit, p702.87/34.

<sup>1812</sup> EB14 (c), p875.36, Minutes of 9 February 2016 SteerCo meeting.

<sup>1813</sup> This contract is referred to variously as the ‘Design to Cost (DTC) Contract’, ‘The Professional Services Contract’, the ‘2015 contract’ and the ‘Corporate Plan’ contract.

<sup>1814</sup> EB14 (c) p812.

<sup>1815</sup> EB14 (c) p713.

The proposal document itself was dated 1 August 2015 and was addressed specifically to Mr Koko.<sup>1816</sup> Its introductory paragraph read:

“As discussed with you and Anoj over the past couple of days, please find enclosed our proposal how to support Eskom on the emerging work around financial and strategic topics that do not fit under the currently negotiated performance based MSA. This document outlines our understanding of the scope, a suggested approach and required professional fees. We are looking forward to discussing this proposal with you”<sup>1817</sup>

2232. The statement that these parties had discussions “over the past couple of days” goes to showing, once again, Mr Anoj Singh’s involvement in the affairs of Eskom even before his effective date of secondment to Eskom. He would have acted in concert with Mr Koko to set up the stage for Mr Salim Essa’s company, Trillian, to benefit unjustly at the expense of Eskom. The financial work for which McKinsey was to be appointed related ultimately to Eskom’s Corporate Plan, as apparent from Dr Weiss’ evidence. Dr Weiss said:

“The concept developed during Mr Singh’s onboarding was later developed in further detail and incorporated into the annual Corporate Plan that Eskom was required to submit to South Africa’s Department of Public Enterprises by March 2016.”<sup>1818</sup>

2233. In pursuance of McKinsey’s appointment for this work, the Eskom executives prepared a submission to the Board. The submission titled “Mandate to Negotiate – No Prior Tendering/Sole Source”, was prepared by Mr Koko and Mr Anoj Singh, addressed to the Chairman of the Board<sup>1819</sup> and signed by Mr Prish Govender, Mr Mandla Gobingca and Mr Charles Kalima on 8 September 2015.<sup>1820</sup> The submission asked for a mandate to negotiate and conclude a contract with McKinsey for professional strategic consulting

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<sup>1816</sup> EB14 (c) p714.

<sup>1817</sup> *Id.*

<sup>1818</sup> EB14 (c) p687/15.

<sup>1819</sup> EB14 (c) p714.

<sup>1820</sup> EB14 (c) p813.

services for ad-hoc support on urgent finance and strategy work, for a period of 8 months, to commence on 15 September 2015. It recommended that “Mr Koko: Group Executive Commercial & Technology, be authorised, with the power to delegate further, to take all the necessary steps to give effect to the above, including the signing of any agreements, consents other documentation necessary or related thereto”.

2234. The submission stated that the need for McKinsey’s appointment originated from Group Commercial and Technology, which was Mr Koko’s division, and that it arose as a result of interactions between the Acting Chief Financial Officer, i.e. Mr Anoj Singh, and the GE, Group Commercial and Technology, i.e. Mr Koko, with McKinsey on several key and financial concerns.<sup>1821</sup>

2235. Mr Koko sought to deny his involvement in financial aspects of the MSA when confronted with Ms Mothepu’s emails but here he is shown to have been directly involved in discussions on such matters with McKinsey. The proposal from McKinsey shows that these so-called “financial concerns” emerged from the MSA negotiations and could possibly not fit under the MSA. As a result, this “avenue” was contrived to facilitate a quick appointment for McKinsey, but to ultimately benefit Mr Salim Essa’s company, Trillian Capital. As already shown, the SteerCo presentation of 9 February 2016 also placed Mr Koko at some of the finance-related matters that were specifically assigned to Regiments Capital (and later Trillian Capital) in respect of the MSA.

2236. The motivation given for the sole-sourcing was “unforeseen events that make it extremely urgent to obtain certain assets, goods or services, which could not be obtained in time by means of an open or closed tender/enquiry”,<sup>1822</sup> and that only McKinsey would have the distinctive insights required of its business.<sup>1823</sup> No mention

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<sup>1821</sup> *Id*

<sup>1822</sup> EB14 (c) p814.

<sup>1823</sup> EB14 (c) p817.

was made of a Supplier Development of Localisation partner. Instead, the submission stated that McKinsey would maintain its BBBEE contribution level or improve it by the end of the contract and, also, improve on the Black ownership of the company for future business relationship with Eskom.<sup>1824</sup> The requirement for an SD&L partner was introduced for the first time in Mr Koko's Acceptance Letter to McKinsey dated 29 September 2015<sup>1825</sup> in which he stated that "subcontracting of 30% of the contract value to a black owned supplier will apply".<sup>1826</sup> It is this requirement that brought Regiments Capital into the picture, but ultimately benefited Mr Salim Essa's company, Trillian Capital, with a R30.6 million payment.

2237. It is no insignificant matter that Dr Wiess stated that he understood from his McKinsey colleagues that Mr Anoj Singh had spoken positively about engaging Regiments Capital at Eskom based on his experience with their work at Transnet.<sup>1827</sup> When confronted with this evidence, Mr Anoj Singh equivocated, clearly unable to maintain a consistent version, firstly denying that he had recommended Regiments Capital to McKinsey, but later conceding that he would have done so and that this was "a normal thing to happen".<sup>1828</sup>

2238. At a special meeting on 10 September 2015 the Board resolved:<sup>1829</sup>

"(1) the appointment of McKinsey and Company ("McKinsey") as the sole partner for the financial and strategic topics of: cash flow and profitability targets for FY16; updating the business cases for Medupi and Kusile; further developing and disseminating Eskom's new design to cost strategy; and adapting Eskom's governance model to ensure delivery of the new strategy is approved;

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<sup>1824</sup> EB14 (c) p819.

<sup>1825</sup> See also, Mr Yeboah-Amankwah's affidavit, p702.191/7.1 [EB14(c)]: "McKinsey was notified late in the contracting process, in Eskom's acceptance letter of 29 September 2015, that McKinsey would need to outsource 30% of the Corporate Plan contract to a SDP."

<sup>1826</sup> EB14 (c), p877.82.1

<sup>1827</sup> EB14 (c) p693/44.

<sup>1828</sup> Transcript 13 April 2021, p 78 (cf: p71-78).

<sup>1829</sup> EB14 (c) p834 & p838 item 7.2.

(2) McKinsey & Company should be contracted on a fixed-cost basis with a total contract value of R 101,733,124.80 for an effective duration of 8 months;

(3) the Group Executive: Technology and Commercial is hereby authorised, with the power to delegate further, to take all the necessary steps to give effect to the above, including the signing of any agreements, consents or other documentation necessary or related thereto;

(4) The Mandate to negotiate and conclude with a Strategic Partner on the financial and strategic topics of: cash flow and profitability targets for FY16; updating the business cases for Medupi and Kusile; further developing and disseminating Eskom's new design to cost strategy; and adapting Eskom's governance model to ensure delivery of the new strategy is hereby approved subject to the following:

(4.1) McKinsey & Company be contracted on a fixed-cost basis with a total contract value of R101,733, 124.80 for an effective duration of 8 months; and

(4.2) the Group Executive for Commercial and Technology is given the necessary authority to execute this contract in line with the Eskom delegation of authority.”

2239. It is also significant that in respect of this item the minutes specifically record, similarly to McKinsey’s proposal that was premised on discussions with Mr Koko and Mr Anoj Singh, that:

“The Strategy to appoint McKinsey as a strategic partner support to Eskom on the emerging work around financial and strategic topics that do not fit under the currently negotiated performance based MSA, and the Mandate to negotiate and conclude external Strategic Partner support to Eskom on the emerging work around financial and strategic topics that do not fit under the currently negotiated performance based MSA were tabled for approval, details of which were included in the meeting pack.”

2240. The following Board members were present at the meeting:

2240.1. Dr Ngubane (Acting Chairman);

2240.2. Ms Carrim;

2240.3. Ms Cassim;

2240.4. Mr Khoza;

2240.5. Mr Kumalo;

2240.6. Ms Klein;

2240.7. Mr Leonardi;

2240.8. Ms Mabude;

2240.9. Dr Pat Naidoo;

2240.10. Ms Vironshi Naidoo; and

2240.11. Mr Pamensky.

2241. The following officials were also present:

2241.1. Mr Brian Molefe – Acting Group CEO;

2241.2. Mr M Malesela Phukubje (Mr Phukubje) – Company Secretary; and

2241.3. Mr Anoj Singh – Acting Group CFO.

2242. Mr Koko, in his capacity as Group Executive: Technology & Commercial, joined the meeting when the item regarding McKinsey appointment came up for discussion and resolution by the Board.

2243. Mr Pamensky, an Eskom Board member who simultaneously worked for the Guptas, at ORE and Shiva Uranium companies, was conflicted in deliberating over matters involving Trillian Capital as he also had a business association with Trillian associated

companies, including with Trillian Financial Advisory (Pty) Ltd and Trillian Capital Partners (Pty) Ltd, which he disclosed to the High Court.<sup>1830</sup>

2244. The sole-sourcing aspect of the contract was questionable not least because:

2244.1. Eskom was required to run a competitive tender process or, otherwise, seek approval for a deviation from this requirement from the National Treasury, which was not done.

2245. Mr Koko explained in one of his affidavits that the urgency of the contract was created by the need for assistance on Eskom's 'Design to Cost' (DTC) strategy that was meant to cut costs in line with the latest tariff ruling by the National Energy Regulator of South Africa (NERSA) that set a cap on Eskom's allowable revenue-raising and expenditure. Mr Koko stated that the need was established in a Board meeting of 22 July 2015.<sup>1831</sup> However, it had been two years since NERSA's ruling on the tariff (February 2013)<sup>1832</sup> and there was in fact a wide-ranging cost-cutting initiative that had already been underway during this time<sup>1833</sup> and financial assistance from Government through a substantial equity injection had been obtained.<sup>1834</sup> This begs the question of why suddenly external expert help was required, and, even if so, why there was thought that there was not enough time for a competitive, open tender process to an external expert.

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<sup>1830</sup> EB17 (Exhibit U39), High Court of South Africa, Gauteng Division, Pretoria, Case No: 81998/18, p567 para 47.1-52.3. EB14 (b), Ms Goodson's affidavit supra p432/20.

<sup>1831</sup> Transcript 29 March 2021, p 64-64.

<sup>1832</sup> <https://www.gov.za/nersa-decision-eskom-mypd3-tariff-application>.

<sup>1833</sup> Eskom began a wide-ranging cost cutting initiative in 2013 in response to the NERSA tariff ruling called the 'Business Productivity Programme', which according to the Eskom 2014 Integrated Annual Report "focuses on the reduction of the cost base, increased productivity and revisions of the Eskom business model and strategy in order to close the revenue shortfall. Cash savings of between R50 billion and R60 billion are targeted over the MYPD 3 period" and had already identified R72.9bn of potential areas of savings by the time of publication of the report in 2014. (Eskom Integrated Annual Report 2014, p.153 and p.73).

<sup>1834</sup> [http://www.treasury.gov.za/comm\\_media/press/2014/2014091401%20-%20Electricity%20press%20statement.pdf](http://www.treasury.gov.za/comm_media/press/2014/2014091401%20-%20Electricity%20press%20statement.pdf); and the [https://www.eskom.co.za/IR2015/Documents/Eskom\\_advert\\_2015.pdf](https://www.eskom.co.za/IR2015/Documents/Eskom_advert_2015.pdf).

## Further irregularities with Corporate Plan Contract

2246. There were further legal difficulties with the contract:

2247. By reference, once again, to the documents regarding National Treasury approval above, the end-user was required to do a gap analysis before considering the appointment of a consultant.<sup>1835</sup> The National Treasury Instruction Note read:

“3.1 It is mandatory for accounting officers of departments and constitutional institutions and accounting authorities of public entities listed Schedules 2 and 3 of the PFMA to implement the cost containment measures referred to in paragraph 4 of this Treasury Instruction.”<sup>1836</sup>

#### 4. Cost Containment Measures

##### Engagement of consultants

4.1 Departments, constitutional institutions and public entities may only contract in [sic] consultants after a gap analysis has confirmed that the department, constitutional or public entity concerned does not have the requisite skills or resources in its full time employ to perform the assignment in question.”<sup>1837</sup>

2248. According to Mr Mulla’s Briefing Note from Eskom Internal Consulting, a gap analysis was not done.<sup>1838</sup>

2249. Ms Mothepu testified how Eskom’s own teams actually had the expertise and skills to perform the duties that Regiments and, later, Trillian were to perform on the financial aspects of the contract.<sup>1839</sup> Mr Safroadu “Saf” Yeboah-Amankwah (Mr Yeboah-Amankwah) also confirmed in his affidavit that Eskom had internal resources and personnel who were experienced in such matters.<sup>1840</sup> It was, therefore, unnecessary

<sup>1835</sup> EB14 (d) National Treasury Instruction 01 of 2013/2014, p877.296 & p877.297 para 4.1.

<sup>1836</sup> *Id* p877.297 para 3.1.

<sup>1837</sup> *Id* para 4.1.

<sup>1838</sup> Mr Mulla’s Briefing Note, Item 24 to Mr Phakamani Hadebe’s affidavit supra EB14 (d) p1190/73.1.

<sup>1839</sup> EB14 (b), Ms Mosilo Mothepu’s Affidavit supra p588 para.104.

<sup>1840</sup> EB14 (c), Mr Yeboah-Amankwah’s Affidavit, p702.185 para 5.2.

for Mr Anoj Singh and Mr Koko to have McKinsey and Regiments appointed to render services in relation to the Corporate Plan.

2250. Mr Koko signed the acceptance letter on Eskom's behalf on 29 September 2015<sup>1841</sup> but Mr Mabelane purported to sign the contract only on 4 May 2016 – well after services were purportedly rendered and payment made. In any event, Mr Mabelane failed to properly sign the contract where he was required to sign and only signed the Schedule of Deviations.<sup>1842</sup> As a result, the purported services were rendered without any valid contract in place.

2251. Eskom required McKinsey to have an SDL partner, but no partner was named in the contract.<sup>1843</sup> McKinsey chose to have Regiments work on aspects of this contract, presenting them as their SDL partner, but had no subcontracting agreement with Regiments over this.<sup>1844</sup>

2252. The extent of the work done was limited and provided questionable additional value to Eskom:

2252.1. Mr Anoj Singh tasked Mr Wood and his team with assisting the Eskom Treasury division on the Funding Plan which was essentially a chapter of the Corporate Plan. Regiments' contribution on the Funding Plan appears to have consisted of work done over a weekend by Ms Mothepu and a few colleagues, which Mr Anoj Singh apparently considered was not up to scratch<sup>1845</sup> and providing comments on a draft being worked on by the Head of Eskom Treasury, Mr Pillay, between late January 2016 and February 2016. Both Mr Pillay and Ms

<sup>1841</sup> EB14 (c), p877.82.1 – 877.82.3.

<sup>1842</sup> EB14 (c), p877.82.4 & p877.82.7 to p877.82.8.

<sup>1843</sup> EB14, See the submission documents: 'Mandate to Negotiate – No Prior Tendering/Sole Source' dated 7 September 2015, U33-MCK p130 and EB17, submission Document dated 10 September 2015, U39-MVP p169.

<sup>1844</sup> EB14 (c), Dr Weiss' Statement supra p693 para.42 and Mr Yeboah-Amankwah's affidavit supra p702.191 paras 7.1-7.5.

<sup>1845</sup> Transcript 14 January 2021, p 209 and 235.

Mothepe gave evidence that Regiments had done little of the work and added little value.

2253. The R30.6 million paid to Trillian was apparently not just for the Funding Plan work, but for the overall Corporate Plan work, and, according to Mr Anoj Singh, represented 30% of the just under R100 million contract.<sup>1846</sup> Moreover, it appears it was Regiments, not Trillian, that did the Corporate Plan work between October and December 2015, in addition to the Funding Plan specific work of January to February 2016.<sup>1847</sup>

2254. The Board had approved the request for a contract duration of eight months. However, the purported contract was concluded for a duration of six months, from 1 October 2015 to 31 March 2016.<sup>1848</sup> This period was still cut short, as the contract endured only until February 2016.<sup>1849</sup> Despite the shortened duration, McKinsey was remunerated as if the contract had run for the entire eight-month period. McKinsey was paid R78.6 million and Trillian (not Regiments) paid R30.6 million.

### **Trillian's R30.6 million invoice**

2255. Trillian Management Consultancy (Pty) Ltd (TMC), a subsidiary of Trillian, invoiced for the work on the Corporate Plan on 3 February 2016. They were paid for it despite the fact that TMC only had two employees at the time and neither of them had done billable work in respect of Eskom during this time (January to February 2016).<sup>1850</sup> Mr Wood himself only officially left Regiments by the end of February 2016 to join Trillian on 1 March 2016.<sup>1851</sup>

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<sup>1846</sup> EB16 (a), Mr Anoj Singh's Affidavit dated 18 January 2021, p608 paras.49-51.

<sup>1847</sup> Transcript 14 January 2021, p 209 & p235.

<sup>1848</sup> EB14 (c) p877.82.6 & p877.82.18.

<sup>1849</sup> EB14 (c) p702.187/5.7.

<sup>1850</sup> EB14 (b) Ms Goodson's affidavit, p444/48.1.

<sup>1851</sup> Ms Goodson's Affidavit supra p20 para.48.1.

2256. The invoice dated 31 January 2016<sup>1852</sup> was sent from Mr Tebogo Leballo of Trillian to Mr Anoj Singh directly by email dated 3 February 2016, to which was also attached a covering letter dated 29 January 2016. The email read:<sup>1853</sup>

“Please find attached an invoice from Trillian for the Eskom Corporate Plan deliverable. We have also attached a letter for your consideration.”

2257. The covering letter bears the signature of Ms Bianca Goodson, who testified that it was her electronic signature that was used, and she said that did not draft the letter. The letter read:<sup>1854</sup>

“Dear Sir

Re: Trillian Supplier Development Cash Flow Considerations

As the preferred Supplier Development partner to McKinsey on various projects including the Eskom turnaround program, Trillian Management Consulting (Pty) Ltd (“Trillian”) is committed to delivering the highest service levels in assisting to achieve our joint objectives of realising cost savings and introducing efficiencies for Eskom.

Obviously as a young and growing Supplier Development company we are determined to build a sustainable business resourced with high calibre people with the appropriate skills and experience in order to deliver on our mandates. In order to reach our objectives in terms of cash flow management and resourcing our CFO needs to be in constant and direct control of the company's funding position at all times.

In this regard we would appreciate Eskom considering the following to assist Trillian from a cash flow management perspective:

1) Trillian as a Supplier Development Company currently does not have the balance sheet available to furnish our share of the “down-payment guarantee” required on the Eskom/McKinsey mandate. We therefore propose that the requirement for Trillian to lodge such guarantee be waived. However, Trillian will remain committed to funding its portion of a liability to refund any down payment fees received in the (unlikely) event of non-delivery. Such refund would be on the same basis that Eskom would draw down on the corresponding portion of the McKinsey guarantee.

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<sup>1852</sup> EB14 (b) p459.147.

<sup>1853</sup> EB14 (b) p459.149.

<sup>1854</sup> EB14 (b) p459.151 to 459.152.

2) Trillian needs to be in a position to invoice Eskom directly simultaneously with McKinsey for all fees on contracts where McKinsey is appointed to lead and Trillian the Supplier Development partner. By requiring Trillian to invoice McKinsey only after McKinsey has invoiced Eskom, will result in significant cash flow pressure for Trillian since Trillian will be dependent on McKinsey's internal processes before receiving it's [sic] payment. A company of Trillian's early stage and developmental nature is reliant on cash flow to grow and any un-necessary delays in receiving payment for work done and resources committed will negatively impact the business's ability to operate effectively including the company's ability to hire appropriate resources as and when they are needed.

We have the support of McKinsey in this matter, and thus we request that Eskom allow for both Trillian and McKinsey to invoice separately for fees due and payable under any contract between Eskom and McKinsey where Trillian is the appointed Supplier Development partner.

In anticipation of your favourable response, please find attached a copy of our Trillian invoice for Trillian's pro rata share of the Corporate Plan deliverable.

Kind Regards

Ms Bianca Goodson

CEO: Trillian Management Consulting (Pty) Ltd"

2258. The truth is that Trillian was never appointed a Supplier Development Partner to McKinsey and never rendered any services under the Corporate Plan. Therefore, there could not be and there was not, any legal basis upon which Trillian could invoice Eskom or could require Eskom to pay it for any services. Eskom had no legal obligations towards Trillian with which it had no contract.

### **9 February 2016 letter from Mr Vikas Sagar – McKinsey**

2259. The matter was apparently complicated further by a letter written by McKinsey's Senior Partner, Mr Vikas Sagar (Mr Sagar), on 9 February 2016, to Mr Prish Govender of Eskom. The letter read:<sup>1855</sup>

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<sup>1855</sup> EB14 (c), p877.25.

“Authorisation to pay Subcontractor Directly

We refer to the Professional Services Contract for the provision of consulting services for 6 months entered into between Eskom SOC Ltd (Eskom) and McKinsey and Company Africa Proprietary Limited (“McKinsey”), dated 29 September 2015 (the Agreement). As you know, McKinsey has subcontracted a portion of the services to be performed under the Agreement to [Trillian Proprietary Limited] (Trillian).

Subject to: (i) the terms of the Agreement relating to any payments to be made by Eskom to us; and (ii) us issuing a written confirmation of our satisfaction with the relevant services to be performed by Trillian to McKinsey and; (iii) the correctness of the amount to be invoiced, we hereby agree for, and authorize, Trillian to invoice, and be paid directly by, Eskom for any services performed by it in pursuance of our obligations under the Agreement.”

2260. This letter has been denounced by McKinsey as containing inaccuracies and, therefore, misleading.<sup>1856</sup> McKinsey has especially rejected the statement that Trillian was its subcontractor on the Corporate Plan and tendered evidence that, after it had conducted some investigation, it emerged that the letter was prepared at the request of both Eskom and Trillian,<sup>1857</sup> and that it initiated a disciplinary action against Mr Sagar and dismissed him. He lodged an internal appeal against his dismissal, but resigned before the appeal could be dealt with.<sup>1858</sup>

2261. In any event, the said letter had laid down conditions that had to be met before payment could be made, such as McKinsey confirming in writing that it was satisfied with the relevant services performed by Trillian and satisfied that the amount of the invoice was correct before Eskom was to pay Trillian. On both Eskom and McKinsey’s versions, these conditions were never met.<sup>1859</sup>

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<sup>1856</sup> EB14 (c), Mr Yeboah-Amankwah’s affidavit p702.221/21.2 to p702.224/21.7.

<sup>1857</sup> *Id* p702.221/21.3 & p702.222/21.5.

<sup>1858</sup> Mr Jean-Christophe Mieszala, Transcript: 10 December 2020, pp.120-122.

<sup>1859</sup> EB14 (c), Mr Yeboah-Amankwah’s affidavit supra p702.221 para 21.1 to p702.224 para 21.6.

2262. Mr Anoj Singh sought to contend that Eskom had a policy allowing direct payment to sub-contractors in certain circumstances to ensure sub-contractors got paid their due.<sup>1860</sup> However, he never produced a copy of such policy, and he made reference to some “vendor payment practices” in his subsequent affidavit to the Commission.<sup>1861</sup>
2263. Ms Jainthree Sankar, Senior Manager in Contracts Management at Eskom, confirmed in an affidavit to the Commission that Eskom’s current (and previous versions of) procurement and supply chain management policies contained no clause for direct payment to sub-contractors.<sup>1862</sup> Ms Sankar further stated that she was not aware of any practice where payment could be made directly to subcontractors, as was done with Trillian.<sup>1863</sup>
2264. For his part, Mr Koko was adamant that no such policy as alleged by Mr Anoj Singh existed and that he had refused to approve the payment of the R30.6million invoice, because Trillian had no contract with Eskom, and that it was McKinsey which had to arrange payment to Trillian based on whatever relationship there was between them.<sup>1864</sup>
2265. Mr Anoj Singh, as the GCFO, received the invoice and forwarded it for payment, when he ought to have known that Trillian was not an SDL partner to McKinsey. Mr Anoj Singh also appears to have had no evidence of Trillian (as opposed to Regiments) doing work on the Funding or Corporate Plan; only observations of some interactions taking place between the Trillian Management Consultancy CEO, Ms Bianca Goodson, and Eskom executives, which were of a more general nature. In fact, Mr Anoj Singh appears to have been well aware that Regiments were working on the Corporate Plan in December 2015 but he has sought to argue that he thought Regiments were seconding

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<sup>1860</sup> Transcript 18 March 2021, p 64.

<sup>1861</sup> EB16 (b), Mr Singh’s Affidavit (Exhibit U37.3) p1023/28-29.

<sup>1862</sup> Ms Jainthree Sankar’s Affidavit, p.2 para.9.

<sup>1863</sup> Ms Jainthree Sankar’s Affidavit, p.3 para.11.

<sup>1864</sup> EB15, Exhibit 27, Mr Koko’s affidavit, p. U27-MMK-118 p.72-73.

staff to Trillian – although he admitted that he had no evidence at any point that this was in fact the case, or evidence that Regiments were sub-contracting their work to Trillian. Mr Anoj Singh ultimately stated that he never approved the Trillian invoice – that he merely sent it on for verification and payment by others – thus seeking to pass responsibility on to others. He testified before the Commission that:<sup>1865</sup>

“Indeed, Sir, I did receive the invoice and I sent it to the relevant people for processing. I did not give them any instruction to not comply with any policies.”

2266. It is inconceivable that Mr Anoj Singh would even forward the invoice for processing when he knew or ought to have known that Trillian was not a subcontractor to McKinsey and that it certainly did not have a contract with Eskom.

2267. A very telling comment relayed by Mr Pillay is that apparently Mr Wood once boasted to him that they could be given any work at Eskom, even sweeping floors, and Mr Anoj Singh would find a way to pay them.<sup>1866</sup>

2268. As already stated, Eskom had no contract with either Regiments or Trillian, and no confirmation of a contract between McKinsey and Regiments or Trillian. Thus, there were no legal grounds for making payments to either McKinsey or Trillian for the benefit of Trillian.

2269. On or about 14 April 2016 Trillian was paid R30.6 million<sup>1867</sup> under the guise that it was McKinsey’s BBEE partner, when in fact it was not, as McKinsey had officially rejected Trillian as an SDL partner, and Eskom and Trillian knew as from 30 March 2016 that this was the case.

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<sup>1865</sup> Transcript 18 March 2021, p 185/ line 4.

<sup>1866</sup> Mr Pillay, Exhibit U6, Affidavit and Annexure (Part 1), p.14.

<sup>1867</sup> See Ms Mosilo Mothepu’s Affidavit supra p581/54.

### Mr Prish Govender's evidence on direct payment to Trillian

2270. The evidence of Mr Govender regarding payment of the above invoice directly to Trillian also bears reference.

2271. Mr Govender stated that he received an email from Mr Mabelane on 19 February 2016 relating to payment of the R30.6 million invoice to Trillian. He explained to Mr Mabelane, *inter alia*, that he had not received confirmation from McKinsey of the work done, in line with the authorisation to pay.<sup>1868</sup> However, at the beginning of April 2016, Mr Mabelane made a follow up with him, after Mr Mabelane had had a discussion with Mr Koko and Mr Anoj Singh, to find out whether the invoice had been paid. Mr Govender said that it had not yet been paid as McKinsey had not given written approval. Mr Mabelane then said that he would approve the invoice "as per his discussions with Mr Koko and Mr Singh". Mr Koko and Mr Anoj Singh were working with the Guptas or with the associates of the Guptas. So, Mr Mabelane was effectively saying as per his discussions with two Gupta associates. Mr Govender stated that he also raised the issue of direct payment to a subcontractor without a contract and, in response, Mr Mabelane assured him that it was allowed and had been done in the past at Eskom. Mr Mabelane then asked him to support the invoice as the Project Manager, which he did.<sup>1869</sup>

2272. Mr Govender's evidence reveals a contradiction in Mr Koko's attitude regarding Eskom's direct payment to Trillian when Eskom had no contract with Trillian. What gives credence to Mr Govender's version is that, as a member of SteerCo,<sup>1870</sup> Mr Koko participated in and supported SteerCo's decisions to approve several payments under

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<sup>1868</sup> EB14 (d) Mr Govender's affidavit (Exhibit U45) *supra* p1348/52.

<sup>1869</sup> Mr Govender's affidavit *supra* p1349/54.

<sup>1870</sup> Cf: EB14 (c) SteerCo minutes 31 March 2016, p875.42, item 7; SteerCo minutes 15 July 2016, p875.62, para 10.

the MSA directly to Trillian, when he knew that Trillian had no contract with Eskom and no subcontract with McKinsey.

2273. Mr Govender stated that payments were approved by SteerCo before being finally approved by the Board Tender Committee.<sup>1871</sup> Oliver Wyman & Marsh (OWM) confirmed this in their report that SteerCo "has the authority to approve the triggering of payments, but investigation of these sources shows that there are several initiatives where the approved payment amount appears not to be correct, and where there seems to be a case to revise down the payment amount", and considered that the reduction could amount to R387.5 million.<sup>1872</sup>

2274. Therefore, Eskom officials who served on SteerCo would have approved payments to McKinsey and Trillian which, according to OWM, were incorrect and inflated, thus acting to the detriment of Eskom's interests and causing it to incur fruitless and wasteful expenditure.

### **The MSA contract and confirmation of SDL partner not in place as work begins**

2275. By January 2016, not only were the National Treasury and shareholder approvals for the MSA outstanding, but the contract for the MSA also appears not to have been in place, as according to Dr Weiss, he received the contract, for signature on behalf of McKinsey, only towards the end of September or early October 2016. The contract purported to show Mr Mabelane as having signed on behalf of Eskom on 7 January 2016 and Dr Weiss decided to backdate his signature to 11 January 2016.<sup>1873</sup> The long delay in receiving the contract and then the backdating of the signing is of enormous significance. Firstly, it meant that McKinsey began working with no contract in place,

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<sup>1871</sup> EB14 (d) Mr Govender's affidavit, p1342/20.25.

<sup>1872</sup> EB14 (c) p877.60, under para 4.

<sup>1873</sup> EB14 (c), SLA/MSA, p 877.1 to p877.24

and thus they and any partner working alongside them had no legal basis for doing the work. Secondly, Eskom was permitting and facilitating McKinsey and Trillian to begin working, under the pretext that Eskom required urgent assistance, whilst knowing that there was no contract in place and that huge resources were being deployed by McKinsey.

2276. Mr Anoj Singh and other Eskom executives have denied knowing that the contract with McKinsey was not yet in place. However, there are numerous references in both internal Eskom documents, SteerCo documents and correspondence between Mr Anoj Singh himself and McKinsey that indicate that this was indeed still an outstanding matter.<sup>1874</sup> This includes an internal memorandum sent by Mr Singh himself to Mr Brian Molefe in February 2016 indicating that the contract had not yet been concluded as certain issues had not yet been settled with McKinsey, such as for McKinsey to have an SDL partner officially in place.<sup>1875</sup> Indeed, Eskom's legal and governance processes would not allow the contract to be concluded until the "SD&L" annexure setting out the terms of McKinsey's relationship with its intended partner was provided.

2277. In a letter to Dr Weiss dated 19 February 2016, Mr Anoj Singh referred to the "proposed contract" and listed items that remained unresolved so that the signing of the 'proposed contract' could take place.<sup>1876</sup> The closing paragraph of his letter read as follows:

"Your urgent response, within 7 days, on the above issues will be appreciated. The signing of the proposed contract is contingent upon the receipt of satisfactory responses to the above requests."

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<sup>1874</sup> See Minutes of SteerCo meeting of 9 February 2016: [EB14(c) p875.33], Mr Anoj Singh's Memorandum to Mr Brian Molefe in February 2016: [(EB14 (d)), Mr Phakamani Hadebe's Affidavit supra p1206 para.93.4], Mr Singh's letter to McKinsey on 19 February 2016 [EB14 (d) p877.156] and Dr Weiss' response on 25 February 2016 (p877.158) and a letter from McKinsey to Eskom on 30 March 2016 [EB14(c), p.876].

<sup>1875</sup> EB14 (d), Mr Phakamani Hadebe's Affidavit supra p1206 para.93.4.

<sup>1876</sup> EB14 (d), p877.156-877.157.

2278. Dr Weiss responded by a letter dated 25 February 2016, also referring to the Top Consultants Programme as “our proposal to serve Eskom”, and continued to offer responses to Mr Anoj Singh’s “key issues” with a clear indication that the contract had not yet been concluded, much less with a BBBEE partner.<sup>1877</sup> He wrote:

“We have been informed by Mr. Eric Wood that Regiments Capital’s management advisory business is transitioning ownership to Trillian Capital Partners. Our diligence process for partnering and sub-contracting include, amongst others, that we are fully apprised of the composition of our partners including with respect to:

Shareholding of holding companies

Ultimate beneficial shareholders

Related parties and group companies (e.g., significant lenders)

Executive management team and other “key man” dependencies for both the company and group companies

This is to provide assurance that, amongst other considerations, neither Eskom nor McKinsey have exposure to politically exposed persons.

In this case of supplier development relationships in South Africa, we are additionally required to ensure that the partners/subcontractors meet three additional criteria:

Majority Black ownership

Majority Black management and staff or a clear and committed plan to deliver this outcome

Capability and capacity to execute work and deliver benefits that are commensurate with the share of fees earned

We can confirm that we will not be able to commence a relationship with Trillian, or any other partner/sub-contractor until these criteria have been met and approved by our global risk and legal teams;

We have requested the above information from Trillian and have been assured that this will be made available to us before 1 March, 2016. We have also expressed our concern to Mr. Wood about the article [regarding Mr Bobat] and he has assured us that he will issue a satisfactory response by the above date; and

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<sup>1877</sup> EB14 (c), p877.158-877.163.

Based on this, **our relationship with Trillian remains under review by our committees**. We will discuss with you how our discussions develop and the conclusions we reach, and will seek your input to our discussions.”

2279. The letter further continues:

“We would like to take the opportunity to highlight that Regiments will not be our BBEE partner but potentially, and subject to completion of further review, Trillian.”

2280. McKinsey ultimately informed Eskom, by letter dated 30 March 2016, that it would not partner with Trillian. This letter also made it plain that the MSA had not been concluded yet as at that date,<sup>1878</sup> referring to it still as “the draft of the Services Level Agreement between Eskom and McKinsey”.

2281. The letter of 30 March 2016 set out the reasons for the decision as follows:

“We refer to your letter to us dated February 19, 2016 and our response thereto dated February 25, 2016. This letter serves as an update on further developments since our last letter to you on February 25, 2016. In particular, you may recall, that we confirmed to you that we will not be in a position to commence a relationship with Trillian, or any other partner/sub-contractor until the criteria below have been met and approved by our global risk and legal teams:

[criteria in the email of 25 February 2016 above is then repeated]

We have requested the above, and other additional relevant information, from Trillian on separate occasions including via letters to them dated 25 February 2016 and 10 March 2016. We have, to date, not received any formal response to each of the letters despite the respective deadlines of 25 February 2016 and 11 March 2016.

We have also had separate discussions with Mr Eric Wood on a number of occasions. During these meetings, Mr Wood orally provided partial information concerning Trillian’s potential shareholders and directors but expressed that the information was neither complete nor final. The information received served as input into McKinsey’s risk management process and review of the proposed contracting arrangement which has been ongoing.

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<sup>1878</sup> EB14 (c), p876 to 877.

All information received to date concerning our requests to Trillian, as set forth above, was presented and evaluated during a periodic McKinsey global risk committee meeting. The committee came to the following conclusions

McKinsey does not know enough about Trillian, its ownership and governance to be comfortable going ahead on a programme of this scale

Trillian's speed and clarity of response to McKinsey's questions has not been satisfactory

McKinsey is uncomfortable about Trillian's transparency on conflict issues

McKinsey has material concerns around reputational risk to the Firm given the above.

As a result, McKinsey's interactions with Trillian have now been terminated with confirmation having been sent to Trillian.

We acknowledge that the draft of the Services Level Agreement between Eskom and McKinsey entails the requirement of outsourcing a percentage of the total consulting fee to a Supplier Development partner. We are fully committed to giving effect to this obligation despite the termination. In light of the previously envisaged sub-contracting relationship with Trillian which, under the current conditions, will not be possible, we would appreciate an opportunity to develop options with Eskom to ensure that we meet our supplier development obligations"<sup>1879</sup>

2282. McKinsey indeed did not have an SDL partner in place, as a significant change was taking place at their intended partner, Regiments. Dr Wood and his team, who constituted the consultancy arm of Regiments, were moving over to a new company, Trillian, majority owned by Mr Salim Essa, and where Dr Wood would be part-owner and a director. So, it appears that, whilst Dr Wood and others only officially joined Trillian on 1 March 2016, McKinsey was eager to continue working with the same team, and appear themselves to be confused over at what stage they were officially working with Trillian as opposed to Regiments.

2283. Eskom, particularly Mr Anoj Singh, appears to have supported the switch to working with Trillian. What was most important, however, was that McKinsey's corporate

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<sup>1879</sup> EB14 (c) p876 to p877.

governance would not allow a contract to be forged with Trillian before a due diligence was performed on the company, and, when this was done, unfortunately Trillian failed, as Mr Salim Essa's ownership was identified (which had previously been concealed by Trillian) and he was flagged as a Politically Exposed Person (PEP). Further, as apparent from Dr Weiss' letter above, Trillian repeatedly failed to provide the required information, including confirmation of the company's BBBEE status, despite McKinsey's numerous requests.<sup>1880</sup>

2284. It was the end of March 2016 when McKinsey officially informed Eskom of their rejection of Trillian as an SDL partner. According to Ms Mothepu, Mr Anoj Singh was apparently very upset about this and begged McKinsey to reconsider, but Mr Anoj Singh denied this.<sup>1881</sup> However, that this was not going to be acceptable to Mr Anoj Singh and other top executives at Eskom appears obvious.

2285. The Transnet evidence shows how Mr Anoj Singh and Dr Wood (under Regiments) continuously contrived to work closely together under a series of irregular contracts. In fact, Mr Yeboah-Amankwah of McKinsey stated that, when McKinsey was looking for a BEE partner to work with at Transnet, after their first choice was not possible, Mr Anoj Singh had suggested Regiments.<sup>1882</sup> Indeed, Mr Anoj Singh appears to have played a key role in negotiating for a McKinsey-Regiments contract at Eskom even when he was still at Transnet.

2286. Mr Anoj Singh was already working with Dr Woods' team (as Regiments Capital) during 2015, under a second small fixed-price contract (in regard to the Corporate Plan) that was put in place with McKinsey, presenting themselves as McKinsey's SDL partner.

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<sup>1880</sup> EB14 (c), Dr Weiss's statement supra p695 paras 52 to 57 and Mr Yeboah-Amankwah's affidavit supra p702.214 paras 20.4 to 20.16.

<sup>1881</sup> Transcript 13 April 2021, p 68.

<sup>1882</sup> EB14 (c), Mr Yeboah-Amankwah's affidavit supra p702.210 para.19.1. See also Dr Weiss' Statement supra p693 para 44.

2287. The modus operandi of Regiments Capital and thereafter, Trillian companies, across many SOEs was that Mr Salim Essa was essentially the ‘rainmaker’ who would secure a contract with an SOE or a state entity for a major contracting party in return for Regiments Capital /Trillian being sub-contracted as their BEE partner. Mr Salim Essa wielded influence over certain top executives at the SOEs and in return he received a large share of Regiments Capital/Trillian’s earnings.

2288. Indeed, emails show that Mr Salim Essa was sent important insider information from Mr Koko in 2015 on the MSA and other related matters at Eskom, and Mr Koko in return was receiving certain instructions from Mr Salim Essa. Most crucially, there is email evidence of Mr Salim Essa needing a fee arrangement to be settled with McKinsey, through Mr Sagar, before he could set up a particular meeting for McKinsey at Eskom with “Brian” – presumed to be Mr Brian Molefe, in November 2015. He wrote:

“We are still waiting for the financial spreadsheet re the proposed “aggregate” 50/50 fee split and timelines. As mentioned last week Salim needs this in advance of setting up a meeting for you and Alex with Brian.”<sup>1883</sup>

2289. It is significant that this was at a critical point after there had been negotiations for several months over the MSA but still no conclusion. This shows that (1) Mr Sagar knew that Mr Salim Essa was behind Trillian, (2) Mr Salim Essa was involved in arranging meetings for Mr Sagar and Dr Weiss to meet Mr Brian Molefe, and (3) Mr Sagar was dealing directly with Mr Salim Essa in relation to the proposed appointment of McKinsey and Trillian at Eskom, (4) Mr Salim Essa had some influence over Mr Brian Molefe and Mr Sagar and was trying to exploit that influence in relation to McKinsey’s position at Eskom, and (5) this was a favour being offered on condition of a favourable fee split for Trillian.<sup>1884</sup>

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<sup>1883</sup> Exhibit VV9 p393. Transcript 10 December 2020, pp 171-173.

<sup>1884</sup> Transcript 10 December 2020, p 171-173

2290. Trillian staff continued to work at Eskom even after Eskom had been informed of the decision. This is arguably an intentional act by Eskom who was still allowing the staff access to their power stations and had not revoked their access cards.<sup>1885</sup>

### **Purported termination of the MSA**

2291. On 7 June 2016, on the day of the 3<sup>rd</sup> SteerCo meeting, which took place after Eskom had been informed of McKinsey's decision not to partner with Trillian, the Eskom executives convened a closed session meeting, chaired by Mr Anoj Singh. According to the minutes of the closed meeting, the closed session was convened at Mr Anoj Singh's request apparently to raise concerns about the sole source method which they themselves had used to appoint McKinsey to the MSA. An extract from the minutes reads:<sup>1886</sup>

"CFO requested this to be a closed meeting to discuss alignment to the first steering committee meeting. ...

A programme like this with a huge contract is a risk to be given to a Sole Source. National Treasury is not happy with the Sole Source Contract.

Prish to address Board Tender Committee to reconsider the sole source mandate. The business requirement is terminate the sole source contract, allow Tops the benefits and explore alternative ways to deal with this programme.

McKinsey and Trillian to be informed and follow the governance process pro-actively. Panel Contract to be utilized for each work package instead of a Sole Source Contract."<sup>1887</sup>

2292. The reason given for the termination was a complete farce, as Mr Koko and Mr Anoj Singh proceeded in September 2015 to compile a motivation for sole sourcing, despite Eskom Internal Consulting Unit's advice, back in June 2015, that a sole source for the scope of work proposed for McKinsey was unjustified, as McKinsey was not the sole

<sup>1885</sup> Transcript 11 December 2020, p 39.

<sup>1886</sup> EB14(c) p875.50.

<sup>1887</sup> *Id* item 7 of the Minutes.

provider of consulting services in the market. Therefore, this could not have been the real reason for the termination of the MSA. It is reasonable to conclude that the termination was underpinned by these executives' disappointment by McKinsey's decision not to subcontract their friend's (Mr Salim Essa's) company, Trillian; and set about to devise another means of channelling money to Trillian.

2293. Pursuant to the aforesaid decision by Mr Anoj Singh and his SteerCo team to terminate the MSA, a submission to the Board Tender Committee was prepared, bearing the date 9 June 2016, but signed by both Mr Govender and Mr Mabelane on 6 June 2016.<sup>1888</sup> The submission asked for a Board Tender Committee resolution to grant:

- “(1) Approval to cancel McKinsey risk based process
- (2) Allow all costs to be negotiated and finalised, to be approved by the relevant tender committee
- (3) Approval for the activities to be re-directed to existing contracts where appropriate, with the incorporation of similar SDL objectives and the option of contracting on a risk based approach”<sup>1889</sup>

2294. The submission proffered the following as reasons for the proposed termination:<sup>1890</sup>

“Bearing in mind that the McKinsey risk based process was conducted via a sole source, albeit permissible within the approved procurement procedure, such contracts attract a higher level of scrutiny ...

Furthermore, National Treasury has requested key information regarding contracts with McKinsey

With this in mind, it may be prudent to terminate the contract finalisation process for the McKinsey risk based contract

It is management's view that McKinsey will have to be compensated for work carried out to date. Such costs will need to be negotiated and finalised with McKinsey

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<sup>1888</sup> EB14(c) p829.19.

<sup>1889</sup> EB14 (c) p829.19.

<sup>1890</sup> EB14 (c) p829.20.

It is recommended that the approval for costs be presented to the appropriate tender committee for approval of payment

Activities to be redirected to other existing contracts where appropriate, with the incorporation of similar SDL objectives and the option of contracting on a risk based approach.”<sup>1891</sup>

2295. Due to the premature termination of the contract concluded to run for three years,<sup>1892</sup> payments to McKinsey (and Trillian) could not have been based on realised savings, as was envisaged by the concept risk-based appointment, and such payments would have no legal justification, as the MSA had, much to the knowledge of Eskom’s executives, not been concluded. In fact, the MSA was never concluded, as it was “terminated” before McKinsey could sign off on it. Therefore, in recommending compensation to McKinsey, the executives were acting in blatant violation of Eskom’s interests and would make it incur fruitless and wasteful expenditure in breach of the provisions of the PFMA.

2296. The submission was presented to the Board Tender Committee at its meeting of 21 June 2016.<sup>1893</sup> Only an extract of the minutes has been obtained, signed by Ms Daniels on 8 November 2016, recording the Board Tender Committee’s resolution for termination of the MSA on exactly the same terms proposed in the submission.<sup>1894</sup>

2297. However, Mr Mabelane addressed a letter of termination to Dr Weiss of McKinsey on 16 June 2016, some five days before the Board Tender Committee meeting above, advising as follows:<sup>1895</sup>

“TERMINATION OF TOP CONSULTING GROUP MSA

This letter serves to officially notify McKinsey & Co of a Board Decision taken on 09 June 2016 to terminate the McKinsey Risk Based Contract.

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<sup>1891</sup> *Id.*

<sup>1892</sup> EB14 (c), MSA clause 4, p726.

<sup>1893</sup> EB14 (c) p875.1.

<sup>1894</sup> EB14 (c), p875.1, Extract from Minutes of Board Tender Committee meeting held on 21 June 2016.

<sup>1895</sup> EB14 (c) p877.26.

You are requested to engage with Mr Prish Govender to discuss the pertinent issues to give effect to the Board Resolution.

In conclusion Eskom will embark on a transparent procurement process to reallocate the activities under the risk based contract. McKinsey & Company is welcome to participate in this process.”

2298. There was no Board decision on 9 June 2016 terminating the MSA. Mr Mabelane said that the reference to this date stemmed from his understanding from Mr Anoj Singh and Mr Govender that the Board had given the green light to have the contract cancelled.<sup>1896</sup> But this cannot be true, as from the evidence, it is apparent that all these executives acted in such close collaboration with one another that Mr Mabelane would or ought to have known that there was no Board decision at the time when he issued the termination letter.

2299. Four days later, Mr Mabelane addressed another letter to McKinsey, dated 20 June 2016, in which he, once again, advised McKinsey that “based on the Board decision to cancel the contract, Eskom would reimburse McKinsey for the costs up to and until 8 August 2016”.<sup>1897</sup> This was also prior to the Board Tender Committee meeting on 21 June 2016, without any guarantee, objectively speaking, that the Board Tender Committee would approve the termination.

2300. Therefore, at the time of Mr Mabelane’s two letters to McKinsey, the purported decisions to terminate the MSA and to compensate McKinsey were made, not by Eskom’s Board or Board Tender Committee, but by the Eskom executives who served on SteerCo. Thus, what was being communicated to McKinsey was not Eskom’s decisions, but those of executives who were purporting to bind Eskom to a financial obligation without any authority for them to do so. This was their conduct, despite knowing that the MSA had not been signed, but even if a contract had been signed and concluded, that its

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<sup>1896</sup> EB14 (c) Mr Mabelane’s affidavit, p702.64/12.7.

<sup>1897</sup> EB14 (d), Mr Prish Govender’s affidavit (Exhibit U45), p1341/20.19 and Annexure EN10 p1407.

conclusion would have lacked National Treasury approval for a risk-based appointment, thus making the contract a nullity from inception. As Mr Koko conceded, it was wrong to seek to conclude the MSA, because of lack of National Treasury approval for the deviation, and that by January/February 2016, the writing was on the wall that National Treasury approval was required and was not obtained.

2301. On 21 June 2016 Dr Weiss responded to Mr Mabelane by noting the decision of termination, but rejecting the offer to reimburse McKinsey on a cost basis only.<sup>1898</sup> McKinsey adopted this attitude despite knowing that it had not signed the MSA; which only happened in early October 2016, when Dr Weiss received a copy from Mr Mabelane and backdated it to 11 January 2016.<sup>1899</sup> Dr Weiss said that at that stage he did not even expect any further payment from Eskom,<sup>1900</sup> and yet he went along and McKinsey issued an invoice which Eskom paid on 22 February 2017, as shown later below.

2302. It is significant that in his affidavit Dr Weiss stated that by early June 2016 McKinsey and Eskom had not decided on any alternative SDL partner, and in fact never did, until Eskom's purported termination of the MSA.<sup>1901</sup> It is unlikely that Eskom would have signed the MSA at that stage; which, in any event, would still not have come into operation if only signed by one party.

### **General conclusion on McKinsey and Eskom “contract”**

2303. Thus, the evidence heard by the Commission reveals that, despite McKinsey and Eskom officials working for two months on a new contracting approach to the SDL partnering, in terms of which McKinsey would pay a range of alternative BEE

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<sup>1898</sup> EB14 (d) Mr Govender's affidavit (Exhibit U45), p1341/20.19 and Annexure EN11 p1408.

<sup>1899</sup> EB14(c) Dr Weiss' statement, p 690/29-30.

<sup>1900</sup> *Id* p690 /29.

<sup>1901</sup> EB14(c) Dr Weiss' statement, p697/59 & p700/74.

contractors, Eskom executives on SteerCo decided to “terminate” the contract, by letter dated 16 June 2016, signed by Mr Mabelane, even before they could obtain a Board Tender Committee approval for termination on 21 June 2016. This negates the urgency and importance of the case that had been argued for sole-sourcing McKinsey to assist Eskom, and the significant investment of time by numerous Eskom officials, including the top executives, to negotiate over the proposal.

2304. The official reasons given to the Board Tender Committee very opaquely referenced concerns about the “mechanics” of the Turnaround programme that McKinsey had not addressed, and there was reference to a concern that National Treasury was starting to review Eskom’s contracts with McKinsey. Indeed, according to Mr Anoj Singh, the National Treasury scrutiny was triggered by an audit finding over the use of sole-sourcing and the lack of a quantifiable value to the contract with McKinsey, which could trigger a finding of ‘irregular expenditure’, and appears to have made Eskom executives nervous.<sup>1902</sup>

### **Trillian and Regiments’ work on the MSA/Turnaround Programme**

2305. There were to be four work streams that constituted the MSA/Turnaround Programme:

2305.1. “Primary Energy”,

2305.2. “Generation”,

2305.3. “Procurement”, and

2305.4. “Claims”.

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<sup>1902</sup> Mr Anoj Singh, Transcript: 13 April 2021, p.51-57.

2306. What actually took place with regards to Trillian and Regiments' involvement was the following:

- 2306.1. On the "Procurement" work stream, Trillian made use of Cutting-Edge Commerce (Pty) Ltd (Cutting Edge), a subsidiary of the Gupta's Sahara group of companies, which had seven employees working at Eskom, and apparently presented themselves as Trillian employees.<sup>1903</sup>
- 2306.2. On the "Generation" work stream, Trillian brought in E-Gateway, a company that consisted of a few individuals brought in from abroad (UAE Emirates and India) that worked on the 'generation work stream'.<sup>1904</sup> This was peculiar, not least because Trillian was posing as the SDL partner to McKinsey, but clearly this team had no BBBEE credentials.
- 2306.3. On the Majuba site, there was one E-Gateway individual deployed as a technical expert, who lasted less than a month before being asked to leave, as he was unable to add much value. Another individual claimed by Trillian as working on site was never seen by the senior site manager; and a third apparently did little more than arrange some meetings. For all this, Trillian charged R100 million.<sup>1905</sup> Moreover, it is not clear why these E-Gateway personnel were even on site, where Eskom had said they already had sufficiently qualified and experienced engineers and technical personnel on site.
- 2306.4. Dr Weiss stated that "although Trillian was a new company and still establishing itself as of late 2015 and into early 2016, [he] understood it to be a real company

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<sup>1903</sup> EB14 (b), Ms Goodson's Affidavit supra p446 paras 49-51.

<sup>1904</sup> Exhibit U31, p 66-083.

<sup>1905</sup> EB14 (b), High Court in Gauteng: Judgement relating to McKinsey and Trillian, p619-620 para.48.1.

that did real work, as its predecessor company had reportedly done” and “(h)owever, because they were still building their company, they would need to initially rely on subcontractors to secure sufficient staffing”.<sup>1906</sup> Indeed, Ms Goodson confirmed that Trillian did not have the capacity to do the work and made use of sub-contractors on the Turnaround Programme (MSA).

2307. Trillian did not participate in the remaining two work streams, “Primary Energy” and “Claims”.

2308. However, Regiments did work on the “Claims” work stream, and there is particular mention of the online vending initiative and insurance claims. However, according to Ms Mothepu, Eskom already had sufficient in-house expertise to manage these, and Eskom officials were already working on all these initiatives, some of which were near completion, whilst Regiments were not necessarily knowledgeable in these areas and apparently had to be briefed and guided by Eskom officials.<sup>1907</sup>

2309. The only area where Trillian appears to have had expertise was in financial transactions, such as loan negotiations. However, here again, Eskom’s large Treasury division was capable of doing the work itself.<sup>1908</sup>

### **Eskom provides unlawful settlement payments to McKinsey and Trillian**

2310. Eskom then set about compensating not just McKinsey, but also Trillian, for the time spent on the Turnaround Programme, as well as compensation for the early cancellation. Between August 2016 and February 2017, Eskom made payments totalling just under R1.6 billion to McKinsey and Trillian for a purported MSA contract

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<sup>1906</sup> EB14 (c), Dr Weiss’ statement supra p694 para 47.

<sup>1907</sup> Transcript 14 January 2021, p 191 & p194-197 and EB14 (b), Mr Mothepu’s affidavit supra p 584/79 & p 588/104.

<sup>1908</sup> *Id.*

that was backdated after termination. The various payments are shown in the table below:

<b>Date</b>	<b>Supplier Name</b>	<b>Amount (Excl. VAT)</b>	<b>Amount (Inc. VAT)</b>
12-Aug-16	Trillian Management Consulting	R99 353 100.00	R113 262 534.00
12-Aug-16	Trillian Management Consulting	R107 200 000.00	R122 208 000.00
15-Aug-16	McKinsey & Co	R596 951 648.25	R680 524 879.00
20-Dec-16	Trillian Management Consulting	R134 123 548.47	R152 760 000.00
22-Feb-17	Trillian Management Consulting	R154 677 525.69	R176 332 379.29
22-Feb-17	McKinsey & Co	R305 322 474.32	R348 067 620.72
<b>Total</b>		<b>R1 397 504 748.25</b>	<b>R1 593 155 413.01</b>

2311. The R1.1 billion that McKinsey received between the MSA settlement and 2015 contract payments was nearly ten times what it had earned from Eskom in previous years.<sup>1909</sup>

2312. Regiments were not paid for the work they had done under the Corporate Plan. Payment went to Trillian. All the payments to Trillian were approved and effected despite the fact that:

2312.1. Eskom had not had a contractual relationship with Trillian;

2312.2. McKinsey had, with Eskom's knowledge, terminated any consideration of Trillian becoming its subcontractor or BBBEE partner under the MSA; and

<sup>1909</sup> EB14 (d), Mr Phakamani Hadebe's Affidavit supra p1166 para.13.

2312.3. Eskom policies and procedures did not provide for direct payment to subcontractors.

2313. The payments to Trillian was unconscionable and constituted corruption of the highest order. The officials at Eskom who pushed for payments to be made to Trillian knowing that Eskom had no contract with Trillian and McKinsey had not appointed Trillian as its SDL should hang their heads in shame and need to face the full wrath of the law. Those included Mr Koko, Mr Anoj Singh, Mr Mabelane and Mr Govender.

### **August 2016 payments to McKinsey and Trillian**

2314. A first series of payments were made in August 2016, pursuant to a Board Tender Committee resolution of 8 August 2016,<sup>1910</sup> which was based on a submission document signed by Mr Govender, Mr Mabelane and Mr Anoj Singh on 5 August 2016.<sup>1911</sup> Two payments of R113.2 million and R122.2 million were made to Trillian on 12 August 2016 and a payment of R680.5 million made to McKinsey on 15 August 2016.

2315. The submission to the Board Tender Committee required a resolution as follows:<sup>1912</sup>

“Resolution Required

The BTC to note the following:

To date the initiatives under the Top Consultants Programme MSA have achieved more than R18.6 billion of annualized impact for Eskom.

Applying the Termination and Settlement clauses within the MSA, Eskom may need to pay up to R2.84 billion (inclusive of payment to the BBBEE partner) for the value achieved to date.

The BTC approves the following:

An already negotiated lower settlement value of R1.8 billion (inclusive of payment to the BBBEE partner)

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<sup>1910</sup> EB14 (c) p875.2.

<sup>1911</sup> EB14 (c) p829.25-829.35

<sup>1912</sup> *Id.*

The R1.8bn settlement negotiated will consist of an initial cash payment of R800m to cover the utilisation of the consultant's resources to date.

The current consultants have made an offer to reinvest the risk premium (R1bn) from the settlement to cater for the following:

(5.1) A transition period of six months whilst Eskom transfers outstanding work beyond 6 months and any other new initiatives to another contracting mechanism. During this period Eskom would reimburse the consultant on a rates basis. It is proposed that the new contracting mechanism should cater for a risk based approach on the same T&Cs negotiated with the current consultants as far as possible. Where not possible a standard rates based approach would be adopted.

(5.2) Any further work based on new saving initiatives or any other activities that Eskom may require from a management consultancy and financial advisory perspective that the consultant has been awarded through the appropriate procurement process.

If total risk premium is not paid to the consultant through 2.5 [(5)] above, the balance will be redeemable by the consultant after a three-year period.

The Group Chief Executive, Group Chief Financial Officer and Group Executive Generation and Technology are authorised to negotiate more favourable terms and conditions to the settlement process”.

2316. The executives did not provide any breakdown on how any of the alleged amounts were arrived at. The MSA entitled McKinsey to a 10.55 % fee in respect of “Recurring Realised Impact Amounts” and 10.8% in respect of a “Once Off Realised Impact Amount”.<sup>1913</sup> The alleged potential liability of R2.84 billion, equates to about 15.27% of the alleged R18.6 billion said to have been achieved.

2317. Thus, this amount of R2.84 billion, said to have been inclusive of payment to the BBBEE partner, was simply made up to instil fear and mislead the Board Tender Committee. The MSA was a nullity from inception and McKinsey had no BBBEE partner entitled to any payment from Eskom. The Board Tender Committee does not seem to have cared

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<sup>1913</sup> EB14 (c) MSA clause 7.3, p731.

about these realities, not even enquired about who the undisclosed BBBEE partner was. Its resolution simply reproduced the wording of the submission:<sup>1914</sup>

“The Board Tender Committee approved

(1) An already negotiated lower settlement value of R1.8 billion (inclusive of payment to the BBBEE partner)

(2) The R1.8bn settlement negotiated will consist of a n initial cash payment of R800m to cover the utilisation of the consultant's resources to date.

(3) The current consultants have made an offer to reinvest the risk premium (R1bn) from the settlement to cater for the following:

(3.1) A transition period of six months whilst Eskom transfers outstanding work beyond 6 months and any other new initiatives to another contracting mechanism. During this period Eskom would reimburse the consultant on a rates basis. It is proposed that the new contracting mechanism should cater for a risk based approach on the same T&Cs negotiated with the current consultants as far as ...”

2318. The resolution was signed by Ms Daniels on 8 November 2016, as a “certified true extract”.<sup>1915</sup> The alleged reinvestment does not make sense and has not been explained.

### **December 2016 and February 2017 payments**

2319. Further payments were made in December 2016 and February 2017, as per the table above. These payments were made in the face of both internal and external advice to Eskom that this would be potentially unlawful and that there had been little value added by Trillian.

2320. OWM, the international consultants who had been hired by Eskom in November 2016 to do a technical review of the MSA, gave an assessment of the claimed value and payments due on the work done on the MSA by the time of the termination, and advised

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<sup>1914</sup> EB14 (c) p875.2.

<sup>1915</sup> EB14 (c) p875.2.

against any payments to McKinsey and Trillian pending a legal review of the MSA and contracting process of the overall programme.<sup>1916</sup> OWM were particularly critical of the 'gain share' calculation of the work performed by Trillian at Majuba Power Station.<sup>1917</sup>

2321. OWM issued a draft report on 9 December 2016,<sup>1918</sup> followed by a final report on 15 December 2016,<sup>1919</sup> recommending in both reports a legal review before any further payment was made to McKinsey and its BBBEE partner, which, as already shown above, McKinsey did not have. The draft report also stated as one of the open issues to be investigated before finalising the range of payments, viz. "clarification on the legal viability of the MSA regarding the structure of payment triggers and payment terms based on any cancellation of the contract".<sup>1920</sup>

2322. However, on 13 December 2016, prior to OWM's final report, the Board Tender Committee met and approved a further payment of R134 million (excluding VAT) to Trillian. At this meeting, Mr Khoza (Board Tender Committee Chairperson) and Ms Daniels falsely informed the Board Tender Committee that Cliff Dekker Hofmeyr (CDH) had done a legal review and concluded that Eskom should seek settlement with McKinsey. Eskom made payment of R152.7 million (including VAT) to Trillian on 20 December 2016, notwithstanding that OWM's final report, issued on 15 December 2016, stated the following:<sup>1921</sup>

"However, there are a number of potential issues that Eskom will want to consider with respect to this work:

Despite the agreement of Eskom and McKinsey in April that the BBBEE partner would invoice Eskom directly, there is no contract in place between Eskom and the BBBEE partner

<sup>1916</sup> EB14 (c), OWM Report dated 15 December 2016, p877.55.

<sup>1917</sup> EB14 (c), OWM Draft Report dated 9 December 2016 (p877.27) and OWM Final Report dated 15 December 2016 (p 877.55).

<sup>1918</sup> *Id* OWM Draft Report, p887.30, p877.32 & p 877.34.

<sup>1919</sup> OWM Final Report dated 15 December 2016, p 877.55.

<sup>1920</sup> OWM Draft Report supra, p877.34 under para 5.

<sup>1921</sup> OWM Final Report supra p877.82.

Moreover, there is no contract in place between McKinsey and the BBBEE partner, so there is not a contractual basis for the amounts to be charged for the work

The McKinsey memorandum of 23rd November 2015 that sets out the plan for the work package says that the fee structure would be entirely based on a success fee; the BBBEE partner has billed on a time and rates basis for the work done up to July 2016 on the understanding that this is the correct basis given the early termination of the contract

It is out of the scope of this review to provide legal advice on these issues. Eskom will need to address them through the separate legal review of the MSA that is underway”

2323. The invoice from Trillian was authorised for payment by Messrs Govender and Mabelane, who both signed off on it on 14 December 2016 approving the invoice.<sup>1922</sup>

2324. Ms Daniels was especially responsible for inserting in a submission to the Board Tender Committee a statement that:

“Cliffe Dekker Hofmeyr was retained to conduct the review and the conclusion is that Eskom needs to enter into a Termination Agreement with the parties to bring the matter to finality. This will absolve Eskom from any further liability once the Termination Agreement is in place.”<sup>1923</sup>

2325. As already stated, this statement was false and misleading, and Ms Daniels has admitted that much in her evidence before the Commission.

2326. On 8 February 2017 the Board Tender Committee approved another payment of R460 million to both McKinsey and Trillian in full and final settlement of all claims in terms of the MSA. This approval was also made without Eskom having received a legal review on the MSA.

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<sup>1922</sup> EB14 (d), Mr Govender’s affidavit, p1343/20.26.

<sup>1923</sup> Cf: EB14 (d), Mr R Moodley’s affidavit p942/94-96.

2327. CDH had, in fact, not yet finalised its legal review, and only submitted its memorandum on 17 February 2017, in which it raised certain concerns regarding the conclusion of the MSA.<sup>1924</sup> It would appear that CDH was not aware that the contract had also been back-dated, after it had been “terminated”, as CDH had apparently been given a limited set of documents and information to scrutinise at the time.<sup>1925</sup>

2328. In any event, Mr Rishaban Moodley of CDH explains that the memorandum of 17 February 2017 was only a preliminary step, as it highlighted various risk elements and requested additional documentation, as well as sought further clarification from Eskom on certain issues, including whether the suspensive conditions contained in the MSA had in fact been fulfilled by 31 January 2016.<sup>1926</sup> It was only on 28 February 2017 that CDH provided Eskom with a final legal review memorandum, sent to Mr Govender,<sup>1927</sup> in which CDH advised, *inter alia*, that the suspensive conditions on the SLA/MSA appear not to have been fulfilled by the due date and that this caused the material provisions of the SLA/MSA to lapse.<sup>1928</sup> Thus, even on this score, there was no agreement for Eskom to terminate, as material provisions never came into effect.

2329. It is necessary to refer to certain events prior to CDH’s preliminary legal review on 17 February 2017.

2330. On or about 12 February 2017 Ms Daniels asked CDH to draft for Eskom a settlement letter with McKinsey. CDH provided a draft letter on 15 February 2017 by email to Ms Daniels and Mr Govender.<sup>1929</sup> On 17 February 2017 Mr Mabelane signed the letter as a settlement agreement between Eskom and McKinsey.<sup>1930</sup> McKinsey countersigned

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<sup>1924</sup> EB14 (d), Mr Rishaban Moodley’s affidavit p945/106-107.

<sup>1925</sup> Transcript 16 March 2021, p 61.

<sup>1926</sup> EB14(c), p725, clause 3 of the SLA ‘Conditions Precedent’. See also clause 22 which required compliance with PFMA provisions before any performance in terms of the SLA/MSA or execution thereof (p740).

<sup>1927</sup> EB14(c), p811.416.

<sup>1928</sup> EB14 (d), Mr Rishaban Moodley’s affidavit p946/109-112.

<sup>1929</sup> EB14 (d) p945/104-105.

<sup>1930</sup> EB14(c) p702.66/12.13. Need copy of the letter.

on the same day.<sup>1931</sup> Also on the same day, McKinsey issued an invoice to Eskom, addressed to Mr Govender, for a final settlement amount due of R348 067 620,72 (three hundred and forty eight million, sixty seven thousand, six hundred and twenty Rands and seventy two Cents).<sup>1932</sup> Trillian, on the other hand, had already issued its invoice of R176 332 379,29 (one hundred and seventy six million, three hundred and thirty two thousand, three hundred and seventy nine Rands and twenty nine cents) to Eskom two days earlier, on 15 February 2017, even before the purported settlement agreement could be signed.<sup>1933</sup> The invoice was addressed to Mr Mabelane. These invoices were approved for payment by both Mr Govender and Mr Mabelane and payment made to McKinsey and Trillian on 22 February 2017.<sup>1934</sup>

2331. Therefore, when the final legal review from CDH was received on 28 February 2017, the water under bridge had already dried up. The collusion and corruption on the part of Eskom executives, with external third parties (of Trillian and McKinsey), was blatant.

2332. The executives involved in negotiating the McKinsey MSA would have been aware that the contracting process was never finalised, yet continued to support a process of “terminating” the contract and then facilitating payments to both McKinsey and Trillian. It appears that at the very least this involved Mr Brian Molefe (present at Board meetings and part of Board approvals), Mr Anoj Singh (signing off on the payments and part of Board decisions), Eskom executives who were members of SteerCo and approved payments under the MSA, Mr Govender (preparing submissions to the Board, giving approval for payments and facilitating the settlement letter), and Mr Mabelane (signing off on submissions to the Board, approving payments and also sending letters to McKinsey regarding payment).

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<sup>1931</sup> EB14 (d) Mr Rishaban Moodley's affidavit, p947/112.

<sup>1932</sup> EB14 (d) p877.95-877.98.

<sup>1933</sup> EB14 (d) p877.94 – Trillian's Invoice.

<sup>1934</sup> EB14 (d) p1343/20.26.

## **General conclusions and recommendations: Eskom and McKinsey-Regiments-Trillian**

### Implicated parties

#### *MSA*

2333. The focus will primarily be on the Eskom executives who carried a large responsibility for the MSA.

2334. Messrs Anoj Singh, Brian Molefe and Koko were all central to the origin and furtherance of a scheme at Eskom, designed to exploit Eskom and benefit Mr Salim Essa's company, Trillian. The so-called "onboarding" meetings McKinsey and Regiments had with Mr Anoj Singh and Mr Brian Molefe, from May 2015, just shortly after Mr Brian Molefe's arrival at Eskom but not long before Mr Anoj Singh was seconded to Eskom, presented key moments at which the scheme was conceived and hatched, based on the McKinsey/Regiments model of operation at Transnet with which both Mr Anoj Singh and Mr Brian Molefe were very much familiar. Therefore, the allegation that Mr Anoj Singh (and perhaps Mr Brian Molefe) would have introduced Regiments at Eskom is not at all far-fetched. In fact, on the evidence, it is palpably reasonable to conclude that he did.

2335. To that end, Mr Brian Molefe and Mr Anoj Singh pursued "negotiations" with McKinsey and Trillian through secret, off-site meetings to agree to work on a range of issues together before any formal contracting processes even began. This would eventually result in them and other Eskom officials, e.g. Messrs Kalima, Govender, Mabelane and Koko, taking part in signing off on submissions to obtain Board approvals for the contracting process which they knew was irregular and unlawful.

2336. Correspondence from McKinsey on the proposal to render financial work at Eskom places Mr Koko in the picture of negotiations of both the MSA and the 2015 contract in relation to the Corporate Plan. The evidence of Mr Mabelane is to the effect that the idea to employ McKinsey to develop an Internal Engineering Consulting Unit was the brainchild of Mr Koko.<sup>1935</sup> From McKinsey's proposal on the finance work, it is apparent that both Mr Koko and Mr Anoj Singh would have commenced discussions and negotiations with McKinsey on both the MSA and the Corporate Plan even before April 2015. As the proposed work activities could allegedly not all fit under the MSA, these executives contrived another means, i.e. the Corporate Plan, to facilitate a quick appointment of McKinsey, on a sole source basis, with a last minute requirement to subcontract 30% of the contract value to a Black owned supplier.<sup>1936</sup>

2337. It is no surprise that the submission to the Board Tender Committee was prepared by both Mr Koko and Mr Anoj Singh,<sup>1937</sup> as parties to the negotiations, and Mr Koko signed off on the Acceptance Letter to McKinsey. It soon transpired that the Black-owned supplier was Regiments, which Mr Anoj Singh had spoken positively about and recommended to McKinsey. Mr Salim Essa was, according to Ms Mothepu's evidence, a business development partner to Regiments.<sup>1938</sup> He secured government contracts for Regiments and, indeed, tried to do so in 2014 at Eskom, but fell short. The R30.6 million payment by Eskom in respect of the Corporate Plan followed Mr Salim Essa to Trillian. There was no justification for this payment, nor for the "believe" that Regiments or Trillian was a BBBEE partner to McKinsey. This was corruption, plain and simple.

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<sup>1935</sup> EB14 (c) Mr Mabelane's affidavit p702.58/11.3: "As the program unfolded (outage performance improvement program), the value of McKinsey's involvement on the ground was realised and the then Divisional Executive: Group Technology, Mr Koko sought to replicate this success and make it sustainable. The idea of having an Internal Engineering Consulting Unit was born".

<sup>1936</sup> EB14 (c) Mr Koko's Acceptance Letter to McKinsey dated 29 September 2015, p877.82.1.

<sup>1937</sup> EB14 (c) submission titled "Mandate to Negotiate [and conclude with McKinsey] – No Prior Tendering / Sole Source", page 812.

<sup>1938</sup> Ms Mothepu transcript: 14 January 2021, p217/line24 - p218: "I said that Mr Salim Essa and Mr Kuben Moodley were Regiments' business development partners. So, they are the ones who essentially sourced these contracts with – from the state-owned companies under the umbrella of the Department of Public Enterprise". Cf: Ms Mothepu transcript: 10 December 2022, page 51/line 5.

2338. Mr Mabelane and Mr Govender were complicit in the scheme, as they both approved Trillian's R30.6 million invoice for payment directly to Trillian. Mr Govender was also one of the three Eskom officials who signed off on Mr Koko and Mr Anoj Singh's submission to the Board Tender Committee.
2339. Mr Govender participated in formulating flawed justifications for the sole sourcing of the MSA, with Mr Mabelane and Ms Daniels supporting this.
2340. Messrs Koko, Singh and Molefe were present at Eskom board meetings where the potential irregularities of the sole-sourced "at-risk" contract and the need for National Treasury approvals was discussed, yet Board approval to proceed with contracting process was requested and obtained nonetheless.
2341. Mr Koko provided confidential information on Eskom's negotiation position on the MSA to "Business Man" (alias Mr Salim Essa) and took instructions from external parties on additional items to be included under the scope of the MSA, so that the extent of contracting work would be expanded.
2342. Mr Koko put pressure on Eskom managers not to hold up the finalisation of the MSA despite lack of Treasury approval.
2343. Messrs Koko and Singh engaged McKinsey and Trillian to begin working before the contracting process was complete.
2344. Messrs Singh, Koko and Mabelane, were all complicit in the false statement of Mr Govender that Treasury had approved Eskom's risk-based appointment of McKinsey.
2345. Mr Mabelane signed off on an acceptance letter for McKinsey without having obtained approval for the deviation. Mr Koko and Mr Anoj Singh were complicit in this conduct.

2346. Mr Mabelane and Mr Anoj Singh concealed the fact that the contract was not signed in January 2016, and was only signed and back-dated much later, after its purported termination.
2347. Messrs Singh, Mabelane and Govender, when the hiring of Trillian as McKinsey's BBEE partner did not materialise, were part of the "cancellation" of McKinsey's "contract".
2348. Mr Anoj Singh, Mabelane and Govender are responsible for allowing payment of invoices that should not have been paid; the payments were unlawful due to the flawed contracting process, and involved excessive overpayment to Trillian and McKinsey.
2349. Mr Khoza and Ms Daniels lied to the Board Tender Committee at its meeting on 13 December 2016, that a legal review had been obtained advising Eskom to agree to a settlement with McKinsey, when no such review had been received. The conclusion is inescapable that both Mr Khoza and Ms Daniels would either have been part of or, at least, aware of the scheme above perpetrated against Eskom by Messrs Koko, Anoj Singh, Mabelane, Govender and Brian Molefe.
2350. Consequently, the purported conclusion of the MSA and subsequent termination thereof were all a sham, in which Messrs Koko, Anoj Singh, Mabelane, Govender and Brian Molefe were the primary role-players. The submission, titled "Feedback Report", prepared and presented by Eskom executives (Messrs Kalima, Govender and Koko),<sup>1939</sup> for the conclusion of the MSA was all premised on false and misleading information; the result of a carefully orchestrated and well thought through plan. These executives purported to conclude the MSA, following a process they knew was irregular, and terminated it on spurious grounds even before it could be concluded and before

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<sup>1939</sup> EB14 (c) Feedback Report, p829.36 to p829.64.

the Board Tender Committee could approve a decision to terminate it. They offered payment to McKinsey and its “BBBEE partner”, Trillian, prior to a Board Tender Committee decision on the matter, whilst knowing that McKinsey did not have a BBBEE partner, and that Trillian was not McKinsey’s BBBEE partner. The MSA (like the 2015 contract) was a charade designed to siphon money out of Eskom to third parties, particularly Trillian. Eskom’s money was expended on a contract that never existed. The expenditure was blatantly wasteful and the irregularities pertaining thereto gross.

### **Corporate Plan**

2351. Similarly, in regard to the Corporate Plan, the Eskom executives committed gross irregularities and breaches of the law.

2352. Mr Koko and Mr Anoj Singh championed negotiations with McKinsey, even before Mr Anoj Singh was seconded to Eskom, and ultimately prepared a submission to the Board motivating for an appointment of McKinsey under the guise that there was ‘urgent finance and strategy work’ to be done and only McKinsey had the “know-how” to render the service, when according to Eskom’s Internal Consulting Unit, this was not the case.

2353. Mr Koko and Mr Anoj Singh pursued a sole-sourcing contract without obtaining permission from National Treasury for a deviation and where there was no justifiable case for the work to be done under the contract.

2354. Mr Mabelane and Mr Govender acquiesced in the conduct of Mr Koko and Mr Anoj Singh in pursuit of McKinsey’s appointment and were thus complicit in the furtherance of a scheme calculated to exploit Eskom financially.

2355. Mr Koko signed the Acceptance Letter with McKinsey for the contract, and Mr Mabelane purported to sign the contract well after its end date and, in any event, failed to append his signature on the right place, such that the contract never came into effect.

2356. Mr Anoj Singh engaged Regiments to conduct work for Eskom when Eskom had no contract with Regiments.

2357. Mr Anoj Singh, as the Group CFO, allowed payment of the R30.6 million invoice directly to Trillian that was unwarranted, as Trillian did not conduct work for Eskom and did not have a contract with Eskom or McKinsey.

### **Further considerations**

2358. Another disturbing factor is the apparently fraudulent nature of the invoice sent by Trillian to justify their R595 million share of the settlement. According to Ms Mothepu, the calculations involved grossly inflated time that Trillian employees spent at Eskom, such as allocating 180 days to her, which was not physically possible as she was only with Trillian Financial Advisory for four months and did not even spend all of her working hours on Eskom.<sup>1940</sup>

2359. In total, R14.7 billion of Eskom's contracts are calculated to have been afflicted by State Capture according to the Flow of Funds' investigation and, of this, McKinsey's MSA and Corporate Plan contracts account for R1.1 billion,<sup>1941</sup> and related payments to Trillian account for R595.2 million from these two contracts.<sup>1942</sup>

2360. All of the above-mentioned individuals colluded together to ensure that at least two large contracts were irregularly awarded to McKinsey and their development supplier, which

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<sup>1940</sup> EB14 (b), Ms Mothepu's Affidavit supra p586 para 97.

<sup>1941</sup> Exhibit VV10, 'Shadow World Investigations Report', SCFOFA p154 to 155.

<sup>1942</sup> Exhibit VV10, 'Shadow World Investigations Report', SCFOFA p154.

was intended at first to be Regiments and then Trillian. Substantive payments were made unlawfully and irregularly to these parties, who benefitted unduly at the expense of Eskom.

### **Exposure of irregularities**

2361. Despite these events and other allegations of corruption becoming public knowledge, the 2014 Eskom Board and senior executives repeatedly denied wrongdoing and even actively intervened or stopped Eskom from taking the necessary legal steps to have these contracts and their associated payments set aside by the Courts. The corporate governance failures inherent in these events triggered, amongst other things, a qualified audit report, a backlash from Eskom's creditors, severe liquidity problems that threatened Eskom's ability to generate electricity to South Africa and downgrades of Eskom's credit rating.<sup>1943</sup>

2362. Things only changed when a new leadership took over at Eskom from 2018: this included a new Board appointed in January 2018, with Mr Jabu Mabuza appointed as Chair, and an acting Group CEO, Mr Hadebe. As with Transnet, the afore-mentioned contracts were found to be highly irregular and suspicious in many respects, and became the subject of investigations and legal proceedings to have them set aside and monies recovered. To that end, in March 2018, Eskom went to court to have the two contracts and resultant payments of around R1.6 billion to McKinsey and Trillian set aside. The High Court in Gauteng ruled that both the MSA and the 2015 contract had not been legally concluded, and that there was no legal basis for the payments to McKinsey and Trillian, which had to be returned.<sup>1944</sup> McKinsey had already decided to repay the monies – around R1 billion, whilst Trillian would refuse, with the matter

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<sup>1943</sup> EB14 (d), Mr Phakamani Hadebe's Affidavit supra p1167 para 16.

<sup>1944</sup> EB14 (b), High Court Judgment, p589-640: *Eskom Holdings SOC Limited v Trillian Capital Partners (Pty) Ltd - 2019 JDR 1256 (GP)*.

becoming entangled in further court proceedings. Eskom subsequently obtained an order, on 9 March 2020, for the final winding up of Trillian.

### **Relevant Terms of Reference**

2363. As already shown above, the conduct of the Eskom executives contravened the National Treasury Instruction 1 of 2013/2014, incorporated into Eskom's own Procurement Policy, which provides that it is mandatory for accounting officers and accounting authorities of public entities listed Schedules 2 of the PFMA to implement the cost containment measures referred to in paragraph 4 of the Treasury Instruction.

2364. Paragraph 4 of the National Treasury Instruction provides, inter alia, that public entities may only contract with consultants after a gap analysis has confirmed that the public entity concerned does not have the requisite skills or resources in its full time employ to perform the assignment in question. The failure by Eskom executives to comply with these provisions constituted breach of legislation and was, therefore, unlawful.

2365. The 2014 Eskom Board failed to exercise their fiduciary duties and prevent financial prejudice to Eskom, as required in Sections 50 and 51 of the PFMA. They instead, allowed irregular procurement in breach of both the law and Eskom policies, and allowed irregular, fruitless and wasteful expenditure in the face of legal instruments that enjoined them to act otherwise. The Board members acted unlawfully and committed financial misconduct, as envisaged in Section 83 of the PFMA. Mr Brian Molefe and Mr Anoj Singh were ex officio members of the Board and therefore equally responsible for the Board's various breaches of its fiduciary duties.

2366. Eskom officials also acted in breach of the PFMA which, in section 57, required them to-

“(a) ensure that the system of financial management and internal control established for that public entity is carried out within the area of responsibility of that official;

(b) be responsible for the effective, efficient, economical and transparent use of financial and other resources within that official's area of responsibility;

(c) take effective and appropriate steps to prevent, within that official's area of responsibility, any irregular expenditure and fruitless and wasteful expenditure and any under collection of revenue due;

(d) ....

(e) be responsible for the management, including the safeguarding, of the assets and the management of the liabilities within that official's area of responsibility.”

2367. The Eskom executives used their positions of authority and power within Eskom to benefit Trillian; a corrupt activity under Prevention and Combating of Corrupt Activities Act No. 12 of 2004 (PRECCA). Mr Brian Molefe, Mr Anoj Singh and Mr Koko all benefited from the Guptas and/or Mr Salim Essa in various forms, with Messrs Singh and Molefe already covered in Part II of the Commission's Report. This too may constitute the criminal offence of corruption under PRECCA. The conduct of Eskom officials therefore implicates several provisions of the Commission's terms of references, namely ToR 1, ToR 4, ToR 5 and possibly ToR 6 (corrupt and irregular awarding of contracts to benefit the Gupta family or their associates) and ToR 9 (corruption to benefit the officials involved).

2368. The conduct implicates ToR 1, in that some form of inducement or gain was offered to and received primarily by the three main executives at Eskom (Mr Brian Molefe, Mr Anoj Singh and Mr Koko (from Eskom perspective as regards Messrs Koko and Singh and as dealt with in other reports as regards Mr Brian Molefe) which would have served to influence them to act in the manner above. ToR 4, regarding breach of the Constitution and legislation through the facilitation of unlawful awarding of contracts to McKinsey, is also implicated by the appointment of McKinsey on a sole source basis and at risk, in breach of Section 217 of the Constitution, the National Treasury Instruction and

Eskom's Policy on Cost Containment Measures. Also relevant are the provisions of ToR 5, ToR 6 and ToR 9 regarding corruption in the awarding of contracts by public entities either to benefit the Gupta family and their associates and/or to benefit Eskom individual officials involved in the transactions. Rampant corruption is evident in the awarding of contracts and approval of payments to McKinsey and its BBBEE partner, Trillian, in circumstances described in this report.

2369. In the result it is recommended that the law enforcement agencies should conduct such further investigation as may be necessary with a view to the possible criminal prosecution of the implicated parties by the National Prosecuting Authority for their part in facilitating the fraud, corruption and financial misconduct against Eskom and the State.

#### **Public Protector Report - Linking these conclusions to the "State of Capture" Report**

2370. The McKinsey, Trillian and Regiments contracts were not specifically mentioned in the "State of Capture" Report.

## ANALYSIS OF MR KOKO'S 6<sup>TH</sup> AFFIDAVIT

### Preliminary

2371. Mr Koko's 6th affidavit is dated 27 July 2021 and was submitted, at my direction, after Mr Koko had presented his oral evidence before the Commission. As correctly captured in paragraph 22 of Mr Koko's 6th affidavit, the purpose thereof was:

2371.1. to provide written responses to matters that the evidence leader may have wanted to raise with Mr Koko during his oral evidence, but could not do so due to time constraints;

2371.2. to deal with issues in reply by way of an affidavit, and

2371.3. to provide, through his counsel, written submissions to the Commission regarding Mr Koko's evidence.

2372. In paragraph 22 of his affidavit, Mr Koko explained that his 6th affidavit served only the first two of the three purposes above.

2373. The affidavit runs up to 173 pages, excluding the annexures<sup>1945</sup>. Due to the enormity of the affidavit, the methodology ultimately adopted in this analysis was to approach Mr Koko's averments on a theme basis, by commenting on related paragraphs collectively, as opposed to *ad seriatim*. However, the issues regarding the suspension of the Eskom executives are not addressed as a specific theme in this analysis.

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<sup>1945</sup> Mr Koko's 6th affidavit dated 27 July 2021.

### **Cell phone records and connection with Mr Salim Essa and the Gupta brothers**

2374. At some stage I directed that the Commission's investigators take necessary steps to see whether they could not obtain cellphone records that could possibly reflect communications between certain people including Mr Koko and the Guptas. Records were obtained which reflected that there were certain calls between Mr Koko and the Gupta brothers and some of their associates. By way of an affidavit deposed to by the Head of the Commission's Investigation Team, Mr Terence Nombembe, these cellphone records were brought to Mr Koko's attention and he was afforded an opportunity to depose to an affidavit and comment thereon. Cellphone records affecting other people were also brought to their attention and they were given an opportunity to comment on them; some of them gave acceptable or understandable explanations, others did not have an answer or they had answers which did not assist them.

2375. Mr Koko responded to this evidence in paragraphs 25 to 33 and 118 to 138 of his 6th affidavit; he responded in paragraphs 292 to 308 regarding his family's trip to Dubai.

2376. Mr Koko denied that he had any contact, connection or dealings with Mr Salim Essa, especially in 2015. He denied ever meeting the Gupta brothers or making or receiving any telephone calls from them. He said that, despite the investigators' endeavours to show otherwise, there was no cell phone record linking him to Mr Salim Essa or the Gupta brothers.

2377. The cellphone records reflecting communication between Mr Koko and Mr Salim Essa reveal that Mr Koko's denials on the point must be rejected as false.

- 2377.1. Two cell phone calls made by Mr Koko to Mr Salim Essa on 30 March 2015 for a total duration of 65 seconds;
- 2377.1.1. three cell phone calls made by Mr Koko to Mr Atul Gupta and/or Mr Moegsien Williams between 6 November 2015 and 9 December 2015 for a total duration of 211 seconds;
- 2377.1.2. one a cell phone call from Mr Koko to Mr Rajesh “Tony” Gupta on 27 November 2015 for a duration of 14 seconds;
- 2377.1.3. three cell phone calls from Mr Koko to Mr Salim Essa between 16 December 2015 and 23 December 2015 for a total duration of 224 seconds; **[this coincides with Mr Koko and his family’s trip in December 2015 to Indonesia, then to Dubai]**
- 2377.1.4. two cell phone calls between Mr Koko and Mr Ravindra Nath between 7 April 2016 and 11 April 2016 for a total duration of 25 seconds (This coincides with the period of the R659 million prepayment);
- 2377.1.5. three cell phone calls between Mr Koko and Mr Salim Essa between 23 April 2016 and 28 April 2016 for a total duration of 682 seconds; that was just over 10 minutes – though not in one conversation;
- 2377.1.6. one cell phone call received by Mr Koko from Mr Nazeem Howa and/or Mr Atul Gupta on 10 May 2016 with a total duration of 39 seconds;
- 2377.1.7. three cell phone calls between Mr Koko and Mr Salim Essa between 12 May 2016 and 16 May 2016 with a total duration of 266 seconds that is just over four minutes, albeit not in one conversation; and

2377.1.8. two cell phone calls received by Mr Koko from Mr Howa and/or Mr Atul Gupta between 16 June 2016 and 23 June 2016 with a total duration of 89 seconds.

2378. Further, there is additional evidence on the basis of which it is reasonable to conclude that Mr Koko had contact and dealings with Mr Salim Essa during 2015 and that he indeed facilitated the Guptas and Mr Salim Essa's cause at Eskom:

2378.1. the finding already made above that on 10 March 2015 Mr Koko was with Mr Essa at Melrose Arch when they met with Mr Masango and Ms Daniels separately dealing with who would act in the positions of the executives who were to be suspended.

2378.2. multiple emails from Mr Koko to infoportal1@zoho.com on 20 July 2015, the day of his return from suspension (EB18 p 1032). This email address was used by Mr Salim Essa.<sup>1946</sup> Ms Daniels has, before this Commission, ultimately testified that she suspected that the email address belonged to Mr Salim Essa. It is probable that she would have known that it in fact belonged to Mr Salim Essa. The information that Mr Koko shared with "Business Man" at the said email address was relevant to the Master Services Agreement that Eskom officials were, with Mr Koko's knowledge, busy negotiating with McKinsey and Regiments at the time;

2378.3. an email from "Business Man", infoportal1@zoho.com, to Mr Koko on 10 December 2015 regarding the terms of the would be R1.68 billion guarantee

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<sup>1946</sup> Also refer to exhibits to the DPE Fundudzi report where Ms Kim Davids exchanges communication with "Business Man", stating "*Dear Saleem*" Exhibit U18, p 1032.

that Eskom was to issue in favour of the Gupta-owned entity, Tegeta,<sup>1947</sup> this was an email from Mr Salim Essa to Mr Koko;

2378.4. Mr Koko's trip, with his wife and son, from Indonesia to Dubai, United Arab Emirates and from Dubai to Johannesburg, South Africa, arranged by Mr Salim Essa through Travel Excellence, including applications for their visas,<sup>1948</sup> it was also paid for by Mr Salim Essa;

2378.5. Mr Koko's role in the submission of 8 December 2015, recommending an urgent prepayment of R1.68 billion to Tegeta based on spurious grounds. He facilitated the scheme with a DMR official, Mr Joel Raphela, with whom he conferred on the contents of the letter that was to be addressed to the Director-General of Department of Mineral Resources, Dr Ramontja.<sup>1949</sup> The contents of the letter conveniently failed to correctly reflect the facts regarding Eskom and OCM at the time, and were therefore misleading. The correct facts were that OCM had just confirmed to Eskom, by communication directly with Mr Koko, that Glencore had decided to provide funding to OCM, take it out of business rescue and honour the Coal Supply Agreement with Eskom to the end of the contract in December 2018;

2378.6. an email from Mr Ravindra Nath, Tegeta CEO, on 9 December 2015, to Mr Koko, in which Mr Tony Gupta was copied, attaching a letter said to be "*the request letter as per our meeting*". In other words, Mr Ravindra Nath and/or Mr Tony Gupta would have had a meeting with Mr Koko where the letter was

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<sup>1947</sup> Exhibit U18, p 957.

<sup>1948</sup> Exhibit U34, p 1085.

<sup>1949</sup> Exhibit U34, p 414.

discussed prior to it being emailed to Mr Koko. The letter is quite revealing; it reads:<sup>1950</sup>

“Att: Mr Matshela Koko

Dear Sir

PRE-PAYMENT FOR SUPPLY OF COAL BY OPTIMUM COAL MINE

We are thankful to you meeting with us in the captioned matter. As discussed in the meeting we want to once again reiterate our commitment for continuous supply of agreed quantity of coal to Eskom.

In this connection we humbly request you to kindly send us a written confirmation regarding the payment for supply of coal amounting to R1,680,000,000 (Rand one billion six hundred and eighty million) detailing the agreed terms and conditions.

Please find below the details of our Attorneys i.e. Van Der Merwe & Associates:

....

Yours sincerely

R Nath”

2378.6.1. the letter speaks for itself, Mr Koko would have met at least with one of the Gupta brothers, despite his denials. Mr Koko’s response is that he met with Mr Nath when he (Mr Koko) was at a coffee shop at Megawatt Park (Mr Koko’s 6th affidavit, paragraph 454). It is inconceivable that such an extraordinary matter, involving such a huge sum of money, would be discussed at a coffee shop, via an accidental meeting, without any formalities;

2378.6.2. it is significant that this is at the time when Tegeta had no contract with OCM for the amount of coal it promised to supply to Eskom pursuant to the R1.68 billion pre-payment; it did not own the Optimum mine and had no money to pay for the acquisition of OCH/OCM, as indicated by the

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<sup>1950</sup> Exhibit U34, p 1534.

need for the R1.68 billion guarantee and the R659 million prepayment;  
and

2378.6.3. the prepayment and proposed contract with Tegeta were also unnecessary and unjustified as OCM had just confirmed to Mr Koko, through Mr Clinton Ephron, that it would honour the Coal Supply Agreement to its expiry date, end December 2018, at the then contract price for coal.<sup>1951</sup>

2379. Further on the “infoportal1” email address, to which Mr Koko sent multiple emails in 2015, three of those emails he sent on the day of his return from suspension (i.e. 20 July 2015), containing the following documents:

2379.1. First document: Eskom’s Internal Consulting Directive:<sup>1952</sup>

2379.1.1. In sharing this Directive and in his capacity as the Group Executive: Commercial and Technology, Mr Koko would have been aware of the fact that Internal Consulting approval was required prior to the appointment of any consultants at Eskom. Despite having been aware of this, he continued to request the Board to appoint McKinsey on a fixed fee contract (Corporate Plan) while knowing that Internal Consulting Unit approval had not been obtained, nor was Internal Consulting Unit consulted.

2379.2. Second document: Approval Conditions agreed to between the Acting CFO and Acting GE: C&T on 26 June 2015:<sup>1953</sup>

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<sup>1951</sup> Exhibit U34, p 349.111.

<sup>1952</sup> Exhibit U34, p 1015 - 1028.

<sup>1953</sup> Exhibit U34, p 1029 – 1030.

2379.2.1. One of the requirements in the said document was the requirement for compliance with National Treasury requirements. However, Mr Koko continued to support the Feedback Report and submission to the Board Tender Committee, for the conclusion of the MSA with McKinsey, whilst knowing that National Treasury approval had not been obtained for a risk-based contract.

2379.3. Third document: Eskom EXCO's round robin resolution on the Top Engineers Program in March 2014.<sup>1954</sup> Top Engineers Program was the subject matter of the MSA contract.

2380. Mr Koko would have been sharing these documents with Mr Salim Essa.

2381. Therefore, Mr Koko's denials that no state capture took place at Eskom, involving the Guptas and their associates, fall to be rejected as devoid of any truth. His denial that he was not a facilitator for Mr Salim Essa, the Guptas and their associates falls to be rejected as there is ample evidence to the contrary before the Commission.<sup>1955</sup>

2382. Further, Mr Koko's meetings with Mr Salim Essa at Melrose Arch, and not at Eskom, in order, on his version, to discuss Trillian payments and MSA deliverables, betrays his assertion of innocence and fly in the face of his aforesaid denials.

2383. Mr Koko claims to have met Mr Salim Essa for the first time in February 2016, yet the evidence referred to above shows the contrary, especially his cell phone records presenting evidence of calls between him and Mr Salim Essa dating back to 30 March 2015.<sup>1956</sup>

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<sup>1954</sup> Exhibit U34, p 1032-1033.

<sup>1955</sup> Mr Koko's 6th affidavit, paras 31 & 32.

<sup>1956</sup> Mr Koko's 6th affidavit, para 118.

2384. In his attempted justification for meeting with Trillian, Mr Koko claims that Eskom did meet with third parties, including suppliers. However, he failed to explain the basis of the meeting, especially given his concession that Trillian did not have a contractual relationship with Eskom. Mr Koko would have attended this meeting with Trillian (Mr Salim Essa) allegedly after Mr Koko had a meeting with Ms Goodson on 10 February 2015, where he had advised her that Trillian did not have a contract with Eskom.

2385. Mr Koko's attendance at Trillian's offices is also odd for the reason that his evidence at the Parliamentary Portfolio Committee was that the contract involved did not fall under his Department/Division. Therefore, he had no reason to attend this meeting with Mr Salim Essa at Trillian's offices, much less to discuss Trillian payments with Mr Salim Essa, as admittedly the contract did not fall under his department and Trillian was not a service provider to Eskom.<sup>1957</sup> The following exchange took place at the Parliamentary Eskom Inquiry between Mr M Dlamini and Mr Koko apposite:

**Mr Dlamini:** Do you know Salim Essa's offices?

**Mr Koko:** I do.

**Mr Dlamini:** In Melrose. You have been to his office?

**Mr Koko:** I have visited him yes. I have been to his office.

**Mr Dlamini:** What were you doing in his offices?

**Mr Koko:** We discussed the Trillian payments.

**Mr Dlamini:** What position were you holding at that time, when you went to their offices to discuss Trillian?

**Mr Koko:** I was group Chief Executive for Generation.

**Mr Dlamini:** And that contract was under your department?

**Mr Koko:** No, it wasn't.

**Mr Dlamini:** So, how did you leave your office at Eskom and go to Melrose to meet Salim Essa about a contract that is not yours?

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<sup>1957</sup> Exhibit U27, p 1108-1109.

**Mr Koko:** We had a workshop with McKinsey and Trillian at Megawatt and we met the CEO of McKinsey that day and through the CEO of McKinsey, we met him and the reason that I met him was because I'm interested in all the BEE partners of the big suppliers. They raised the issue of payment. And I said no."<sup>1958</sup>

2386. It is significant that in his affidavit to the Commission, Mr Koko did not mention that the meeting included the CEO of McKinsey. Mr Vikas Sagar was not McKinsey's CEO. He was only a director.<sup>1959</sup>

2387. Mr Koko states that the meeting with Mr Salim Essa related to the deliverables under Eskom's MSA with McKinsey. In paragraph 35 of his affidavit, he is clear that he was against the conclusion of a risk-based contract with McKinsey without having obtained a National Treasury approval. However, despite knowing that a National Treasury approval had not been obtained, and thus the ensuing contract was unlawful, he attended this meeting to talk about MSA deliverables, including the earlier meeting allegedly on 10 February 2016. Further, despite his knowledge of lack of Treasury approval, he was a member of SteerCo and attended some of its meetings relating to the MSA.<sup>1960</sup>

2388. Mr Koko conveniently omits to disclose who called the meeting of June 2016 with Mr Salim Essa. This is significant, because his attendance at this meeting to discuss MSA deliverables could be indicative of Mr Koko's intricate involvement in the MSA or of him being a facilitator for Mr Salim Essa. His involvement to this extent, not holding meetings at Eskom but at Trillian's offices, raises serious questions, especially as he admittedly engaged in discussions about MSA deliverables when he knew that McKinsey had made a decision not to partner with Trillian, and Trillian had no contract with either Eskom or McKinsey.

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<sup>1958</sup> Exhibit U27, p 1108-1109.

<sup>1959</sup> EB14: p877.25, the letter from Mr Vikas Sagar dated 9 February 2016.

<sup>1960</sup> EB14: p875.33.

2389. McKinsey had formally informed Eskom on 30 March 2016 that it would not partner with Trillian,<sup>1961</sup> a fact of which Mr Koko admits to having been aware.<sup>1962</sup> However, notwithstanding this fact Mr Koko continued to attend SteerCo meetings of 31 March 2016 and 15 July 2016, which meetings were also attended by Trillian. His actions are therefore not in line with the stance he sought to have the Commission believe that he had adopted in regard to McKinsey's risk-based appointment.

2390. Mr Koko sought to create the impression of ignorance on his part through questions referred to in paragraph 127 of his affidavit. However, he has not explained why he failed make those inquiries at the time, when he chose to meet with Mr Salim Essa at Trillian's offices in Melrose Arch to discuss MSA deliverables.

#### **Further on the Dubai trip**

2391. With a view to establishing whether Mr Koko was rewarded for his actions on behalf of the Gupta capture scheme, evidence was led of travel by Mr Koko and his family during the period December 2015 to January 2016 when Mr Koko and his whole family travelled overseas, first to Bali in Indonesia and then at least some of the family went to Dubai in the United Arab Emirates (UAE) before returning to South Africa. However, the documentation produced is equivocal. It seems as if Mr Salim Essa was at pains to create a paper trail linking Mr Koko's travel financially to Sahara, a Gupta business.

2392. The question ultimately is not whether Mr Koko and his family travelled, as Mr Koko admitted they did during the period in question. The question is whether the Guptas and Mr Salim Essa paid for Mr Koko and his family to travel.

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<sup>1961</sup> EB14: p876.

<sup>1962</sup> Mr Koko's 6th Affidavit, par 127.

2393. Mr Koko produced evidence, which was not disputed, that he or his family paid for the travel. The evidence in this regard was contained in an email dated 3 March 2021 from Ms Vanessa De Stefano of Thompsons Holidays t/a The Travel House (Thompsons Holidays) to Ms Khomotso Koko in which she recorded having received two payments from FNB from someone on behalf of Mr or Mrs Koko for R113 000 on 17 November (2015) and R270 800 on 25 November (2015).<sup>1963</sup>

2394. Mr Koko said he paid for his own accommodation in relation to accommodation at the Oberoi Hotel in Dubai and that documents to the contrary that were put to him did not reflect the true position. The assertion of Mr Koko that he had paid for his own accommodation was not disputed.

2395. It does seem an extraordinary coincidence that Mr Koko was able to take his whole family overseas just after he had been so helpful to the Guptas. The air tickets alone cost over R300 000.

2396. According to Thompsons Holidays<sup>1964</sup>, the travel agency Mr Koko used, their travel arrangements for Mr Koko did not include the Dubai, UAE leg and therefore Thompsons Holidays was not paid for it by Mr Koko. The fact that Mr Koko travelled on the Dubai, UAE leg which he did not arrange with his travel agent nor pay for through Thompsons Holidays, and claim ignorance regarding its arrangement, is preposterous. This, considered against the evidence of Travel Excellence, which is to the effect that Mr Salim Essa paid for Mr Koko's Dubai, UAE leg, is the more plausible explanation of how this leg was likely funded. Also noteworthy is that the leg that Mr Koko paid for himself, which amounted to R385 755.94, R383 800.00 thereof was paid in cash. One wonders

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<sup>1963</sup> Transcript: Mr M Koko day 396 page 240; Eskom-15-1554.

<sup>1964</sup> Affidavit of Ms de Stefano to the Commission, dated 23 July 2021.

where Mr Koko, got the cash which he used to pay for the trip. But he was not examined on this questions.

### **Mr Koko's Travel arrangements<sup>1965</sup>**

2397. Ms Daniels has denied making any travel arrangements for Mr Koko and/or his family and also denied Mr Koko's evidence that he had asked her to make such arrangements. Mr Koko's evidence is in any event odd and raises the question why he would not have asked his own PA, but someone not reporting to him, to arrange his private travel.

2398. It is further strange that after the Dubai trip was seemingly abandoned before Mr Koko and his family left South Africa, it got resuscitated in Indonesia and visas were arranged on such urgent basis, all just for shopping. However, there is an apparent inconsistency in this in that Mr Koko stated that by the time they left South Africa no arrangements had been made for the Dubai trip. Therefore, it is inconceivable that he would, before leaving, given Ms Daniels R5000.00 for the Dubai visas. His Thompsons travel itinerary also did not make any provision for Dubai travel.

2399. Thompsons Holidays, the travel agency used by Mr Koko, has submitted an affidavit deposed to by its General Manager: Reservations, Ms Vanessa de Stefano (Ms de Stefana). In that affidavit she states<sup>1966</sup>:

"On 11 November 2015, Thompsons received a request from travel agent Ms Terry Gunter ("Ms Gunter") of XL Sandown Travel to quote for a party of 7 (seven) passengers, including flights, to travel to Bali, departing from Johannesburg on 23 December 2015 for 10 (ten) nights. This was duly quoted ... and the quoted price of R335 782.37 (VAT inclusive) included [7 passengers].

On 12 November 2015, we received an email request to convert the quote to a booking. The booking was duly made.

<sup>1965</sup> Mr Koko's 6th affidavit dated 27 July 2021, paras 295 to 308.

<sup>1966</sup> Ms de Stefano of Thompsons' affidavit, paras 4, 5, 6 & 16

On 14 December 2015, we received an email from Ms Gunter asking for costs to amend three of the Koko family to change their departure date to 18 December 2015 for Dubai, stay in Dubai in a 4\* hotel until 23 December 2015 where they would then fly from Doha to Bali. We were asked to quote only, but not book anything. Our consultant investigated the cost to amend tickets. The options regarding flight changes were sent to Ms Gunter. We did not hear back from her to amend. Our booking therefore remained unchanged in accordance with the attached itinerary (VS10)".

2400. Insofar as Mr Koko seeks to involve Ms Daniels in this arrangement, both Travel Excellence and Thompsons have denied any contact or dealings with Ms Daniels and Ms Daniels has also denied any part in assisting with Mr Koko's travel arrangements. Ms Sameera Sooliman (Ms Sooliman) of Travel Excellence confirmed during her evidence before the Commission that she did not know Ms Daniels nor Mr Koko.<sup>1967</sup> Ms Sooliman testified that it was Mr Salim Essa who engaged them for Mr Koko's travel to Dubai and back to Johannesburg.

2401. Further, Ms de Stefano of Thompsons' affidavit shows that Mr Koko had a travel agent, one Ms Gunter, already assisting him and his family with the concerned travel arrangements, including the request for a quotation to change plans by incorporating a trip to Dubai, which they never pursued. Mr Koko did not disclose this fact to the Commission during his evidence, nor in any of his affidavits to the Commission. Clearly, he had a travel agent, which was not Ms Daniels, already assisting him. Therefore, he did not need Ms Daniels. In the result, Ms Daniels' denial of any involvement in Mr Koko's travel arrangement is more plausible than Mr Koko's contrary versions. Mr Koko's version must therefore be rejected as implausible, if not blatantly false. His trip from Indonesia to Dubai would have been arranged by him in direct engagement with Mr Salim Essa.

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<sup>1967</sup> Transcript 18 May 2021, p 79, line 20; p88 & p106, line 15.

2402. Further, in paragraphs 17 and 18 of Ms de Stefano of Thompsons' affidavit, the deponent states:

"On 24 December 2015 we received a notification via our airline booking system (Amadeus) that Ms Mokgadi Koko was a no-show for the flight from Johannesburg to Doha on 23 December 2015 and therefore her entire flight booking had been cancelled. We notified agent Ms Gunter. All other passengers departed from South Africa.

On 4 January 2016 we received notification via our airline booking system (Amadeus) that Mr Matshela Koko was a no-show for his flight from Bali to Doha and therefore his Doha to Johannesburg flight had also been cancelled. We again notified Ms Gunter. I do not recall receiving any other airlines message regarding the rest of the group. We also advised Ms Gunter that both tickets were non-refundable."

2403. This last statement that the tickets were not refundable, makes mockery of Mr Koko's evidence that he had assumed that there was surplus money paid to Thompsons and such money was used to cover his and his family's trip to Dubai.<sup>1968</sup> Nothing could be further from the truth.

2404. Ms de Stefano of Thompsons concludes her affidavit in paragraph 20 by stating that-

"Thompsons Holidays did not book any flights, hotels, transfers or visas for Dubai for the Koko Party. All invoices as well as payment received was only for booked services from South Africa to Bali, and back to South Africa."

2405. Thompsons essentially denies making any travel arrangements for Mr Koko to travel to Dubai, and any involvement in his visa applications.

2405.1. It is apposite to refer to the exchange I had with Mr Koko on this issue, as it exposes the fallacies in Mr Koko's version:<sup>1969</sup>

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<sup>1968</sup> Mr Koko's 6<sup>th</sup> affidavit dated 27 July 2021, para 308.

<sup>1969</sup> Transcript, 17 May 2021 pp 307-308.

**“CHAIRPERSON:** Of course on your version, Mr Koko, if your version is true, let us proceed on that basis, then the scenario which would emerge is that people connected with Mr Salim Essa or Salim Essa and Sahara Computers, Mr Chawla, they are all busy together with travel agents they use, namely Travel Excellence, they are all busy wanting to make bookings for your travelling and accommodation and even wanting to pay for these in circumstances where you have nothing to do with them. Of course you say Ms Daniels is the one who is putting them to all of this without my knowledge. You agree, that is the picture that emerges.

**MR KOKO:** I agree but there is one step further.

**CHAIRPERSON:** Ja.

**MR KOKO:** I have made submissions to you that all material times I know who paid for my travels.

**CHAIRPERSON:** Ja, no, no, that ...[intervenes]

**MR KOKO:** So at no material times – there is no ambiguity.

**CHAIRPERSON:** Ja, no, no, no ...[intervenes]

**MR KOKO:** I have given you documentary proof.

**CHAIRPERSON:** I understand that.

**MR KOKO:** About the payments. But I agree with you.

**CHAIRPERSON:** Ja, ja. So on your version it is Ms Daniels who just does not want you to use your own money as far as she is concerned for this travelling and accommodation. She wants these people to make bookings for you and to pay for you in circumstances where, from your point of view, they do not know you, they have nothing to do with you, but she is busy wanting them to incur all of these expenses and they probably do not even ask why must we pay for Mr Koko, Ms Daniels? Why? We do not know him, we have nothing to do with him, why must we pay for him? You understand that that is the scenario that emerges?

**MR KOKO:** Yes, yes and I need to comment on that.”

2405.2. When given the opportunity to comment, Mr Koko diverted completely from the point. Firstly, by seeking to cast aspersions on the Commission’s legal team and investigators saying that they failed to make certain documents available to me as the Chairperson.<sup>1970</sup> He was referring, in particular, to a ruling in a

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<sup>1970</sup> Mr Koko’s transcript, p308/20.

disciplinary hearing of Ms Daniels, a copy of which he later accepted had been provided to me. After I had pointed out that I had read the ruling before Ms Daniels came to testify,<sup>1971</sup> it quickly became apparent that Mr Koko was simply lying about the legal team and the investigators. The ruling was already in the bundle before Ms Daniels came to testify.<sup>1972</sup>

2405.3. Secondly, Mr Koko made reference to the said ruling in a concerted effort to divert attention from his own conduct and dealings with Mr Salim Essa and the Gupta associates, seeking to attack Ms Daniels' character.<sup>1973</sup>

2405.4. However, I took him back to the issue as follows:<sup>1974</sup>

**“CHAIRPERSON:** .... Now I go back to a question I raised earlier on. At that time during that year the two of you were still close based on what you testified. Now I am trying to understand what her motive would have been to say look, I know Mr Koko uses Thompsons for travelling arrangements but – and he will pay them, for himself, but I am going to ask Mr Salim Essa to speak to the travel agents he uses to say can they make bookings for him and then maybe she asked him to talk to Mr Chawla to arrange the accommodation. So, I go back to the question of what is the motive because the one thing she must think about is that if you wanted her to talk to Thompsons to make bookings for you and she had gone now to other people you will not be happy with that. Why is she...?”

**MR KOKO:** Yes. So, Chair, remember, this is a trip that I paid fully for.

**CHAIRPERSON:** Yes, yes.

**MR KOKO:** And the only thing that was a problem was a visa which my experience with her was that those type of arrangements she will easily dispose of, easily, quickly, that is the only reason I went to her. My proposition is that it was easier for her to deal with these friends to sort out my problem.

**CHAIRPERSON:** Ja.

**MR KOKO:** And that is why when I asked her post facto, she said it was convenience.”

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<sup>1971</sup> *Id*, p309/10.

<sup>1972</sup> Cf: EB8(a), p700 to 747.

<sup>1973</sup> *Id*, p309/1-20.

<sup>1974</sup> *Id*, p310/15 to p311/15.

2405.5. Mr Koko's evidence that he paid for the Dubai trip himself is not true. He also never produced any documentation to prove this. His version that he requested Ms Daniels to sort out his visa problem, has been denied by Ms Daniels. It is also inconsistent with documentary evidence from Travel Excellence which shows that it was Mr Salim Essa who requested Travel Excellence to obtain visas for Mr Koko and his family. Mr Koko's underlined statement above that it was his proposition for "Ms Daniels" to "deal with these friends" falls to be rejected.

2405.6. Mr Koko's evidence that he paid for the hotel accommodation himself is also untenable, as the invoice he produced for this assertion is not evidence of payment. There is evidence to show that the Oberoi hotel was requesting payment for Mr Koko's hotel accommodation from Mr Ashu Chawla of Sahara Computers. It is inconceivable that the hotel would have made that pursuit if it had already received payment from Mr Koko. Even more questionable is for the hotel to seek payment for Mr Koko's hotel accommodation from someone or entity with which Mr Koko claims to have had no dealings in regard to this transaction.

2406. The evidence and emails produced by the travel agents from Travel Excellence clearly show the involvement of Mr Salim Essa and the Gupta associates in Mr Koko's personal affairs, and the close connection he would have had with them. This connection was so strong that Mr Salim Essa would go out of his way to make travel arrangements for Mr Koko and his family, and Sahara Computers would attend to his hotel accommodation. Mr Salim Essa engaged Travel Excellence in regard to Mr Koko's flight tickets, visas, his ticket upgrade from economy to business class and that the costs be charged to Mr Salim Essa's account. Mr Koko has not proffered any cogent explanation why Mr Salim

Essa would be involved in his travel arrangements without his knowledge, nor why copies of his and his family's IDs and visas were provided to Mr Salim Essa.

2407. If Mr Koko truly understood the "infoportal1" email address to belong to Dr Ngubane, he would surely have been surprised why his visas were sent by Dr Ngubane.

2408. Apart from the fact that the production of two different invoices leaves one in doubt of the genuineness of such invoices, these are, as already submitted above, just invoices and not proof of payment by Mr Koko for his hotel accommodation. Mr Koko should be able to produce proof of payment, even if he paid in cash. He has not done so. It is highly unlikely that an invoice given to him at the hotel, upon payment, would not show the issuing entity, which was the case in this instance.

2409. Evidence before the Commission shows email correspondence between Mr Ashu Chawla of Sahara Computers and the Oberoi Hotel, where the Hotel enquired about payment for Mr Koko and his family's accommodation and Mr Chawla confirmed that Sahara Computers would pay. Similarly, a hotel booking confirmation for Mr Koko was sent to Mr Chawla, who forwarded it to Mr Salim Essa.<sup>1975</sup>

2410. It is strange that Mr Koko would need to verify payment of his travel with Mr Salim Essa, as he did by email from his attorney to Mr Salim Essa's attorneys, when he was adamant that he had paid for the trip himself, until shown evidence to the contrary presented by Travel Excellence, including Mr Koko's own evidence (of payment to and itinerary with Thompsons); an itinerary that does not include the trip to Dubai. This confirms that Mr Koko did not pay for the trip himself, otherwise there would be no need for such verification with Mr Salim Essa, as Mr Koko would have proof of his own payment. Mr Salim Essa's purported verification is in any event hearsay evidence. Mr

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<sup>1975</sup> EB15 p1476.

Salim Essa has rejected the Commission's repeated request for him to submit an affidavit and testify before the Commission.

2411. On Mr Koko's hearsay evidence, the R100 000 that Travel Excellence indicated was paid to it by Mr Salim Essa for Mr Koko's travel to Dubai and back to Johannesburg, was not for that purpose, but for Mr Salim Essa's own travel arrangements. However, Mr Koko has not explained how Travel Excellence was compensated for his travel bookings and visas and who or what was the source of the payment.

2412. In her evidence, Ms Sooliman said that there were two sets of bookings, one for Mr Salim Essa and family and another for Mr Koko's travel. Ms Sooliman testified that-

2412.1. Mr Salim Essa's travel amounted to R118 000.00, but this was not settled at once. Payment was made in part payments;<sup>1976</sup> that Mr Salim Essa's travel was not R100 000.00. The R100 000 related to Mr Koko's travel. Mr Salim Essa was not in the country at the time, and used a friend to settle Mr Salim Essa's account.

2412.2. Travel Excellence is a small entity and it would not have incurred the costs for Mr Koko's travel without receiving the money fairly shortly after payment was made.

2412.3. Mr Koko's travel was charged to Mr Essa's account. One would expect Mr Essa to have raised issue with this at the time if this would have meant that he was paying for the travelling costs of someone he did not even know..

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<sup>1976</sup> Ms Sooliman's transcript for testimony on 18 May 2021; pages 106 – 112.

**Mr Koko's examples that he was not a facilitator for the Guptas and Mr Salim Essa**

2413. Mr Koko cited what he said were five (5) examples that showed that he was not a facilitator for the Guptas and Mr Salim Essa.<sup>1977</sup> However, his evidence in this regard distorts the true facts. In any event the finding made earlier in this report that he was with Mr Essa at Melrose Arch on 10 March 2015 and that the two of them met with Mr Masango and Ms Daniels has conclusively shown that Mr Koko was working with the Guptas or their associates to facilitate the capture of Eskom by the Guptas.

2414. There's no evidence that Mr Tsotsi engaged with Mr Koko in regard to the Brakfontein contract or the alleged issue of failing to prioritise Black suppliers, in order to necessitate a reaction from Mr Koko to either sign or not sign a contract with Tegeta.<sup>1978</sup> It is evident from Mr Johann Bester's affidavit that Mr Koko was not present at the meeting where Mr Tsotsi is said to have acted in this manner.<sup>1979</sup> There is also no evidence to show that Mr Tsotsi's alleged conduct was carried out with Tegeta in mind. Therefore, Mr Koko's self-praise does not make sense.

2415. Contrary to his assertions of self-righteousness, evidence before the Commission shows that, acting on Tegeta's request, Mr Koko lifted the suspension of the Tegeta Brakfontein contract, which had been suspended for supplying Eskom with substandard coal. Mr Koko also breached the terms of the contract by sending the coal from Tegeta-owned Brakfontein Mine to Kendall Power Station during late 2015, which was not a SANAS accredited laboratory, nor were they an independent laboratory, which was a requirement of the Coal Quality Management Procedure, a standard procedure

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<sup>1977</sup> Mr Koko's 6<sup>th</sup> affidavit dated 27 July 2021, paras 33 to 38, 120.

<sup>1978</sup> Mr Koko's 6<sup>th</sup> affidavit dated 27 July 2021, para 34.

<sup>1979</sup> EB18: p28-29.

attached to all Eskom coal contracts, including the Brakfontein Coal Supply Agreement.<sup>1980</sup>

2416. Section 3.3 notices were issued to Mr Koko in respect of the evidence of Mr Johann Bester and Dr van der Riet, affording him an opportunity to respond, but he elected not to respond to their evidence.

2417. Mr Koko stated that he was “clear and unambiguous” with Dr Ngubane that the MSA could not be concluded on a risk basis, unless Eskom had obtained a National Treasury approval.<sup>1981</sup> However, this statement cannot be true. Mr Koko has conceded that [infoportal1@zoho.com](mailto:infoportal1@zoho.com) was not Dr Ngubane’s email address. Given the finding made earlier that Mr Koko and Mr Salim Essa met with Ms Daniels and Mr Abraham Masango on 10 March 2015 to tell them about the planned suspensions of the Eskom Executives and to talk about people who would act in the positions of those executives, it is clear that Mr Koko was part of the scheme to push out certain Eskom Executives so that Gupta associates would be appointed to certain strategic positions at Eskom. When Mr Koko said that he made it clear to Dr Ngubane that the MSA could not be concluded without the approval of National Treasury it can simply not be true. Dr Ngubane denied receipt of such emails or that Mr Koko had discussions with him in regard to such emails. In his affidavit to the Commission dated 27 March 2021, Dr Ngubane responded to Mr Koko’s averments as follows (paragraph 3):

“I deny that I ever provided the email address [infoportal1@zoho.com](mailto:infoportal1@zoho.com) to Ms Suzanne Daniels to provide it to Mr Koko as my private email address and for Mr Koko and I to correspond thereon and/or to exchange Eskom related documentation and information. In any event I wish to make it clear that the said email address is not mine.

I further deny that I ever utilised the said email address as my personal email address. Nor did I ever receive a query from Mr Koko to confirm whether that

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<sup>1980</sup> This is dealt with in more detail in the Brakfontein section of this report.

<sup>1981</sup> Mr Koko’s 6<sup>th</sup> affidavit dated 27 July 2021, para 35.

address was my personal email address. And in the same vein I have never stated to Koko that the email address was mine.”

2418. In any event, Mr Koko has not produced any evidence or email to show that he ever took the matter up with Dr Ngubane as alleged or at all. Besides, at the time Mr Koko said that Ms Daniels informed him the “Business Man” email address was that of Dr Ngubane and that Mr Koko would use same to communicate with Dr Ngubane, Mr Koko was a General Executive, reporting to the Group CEO. Mr Koko failed to explain why he would have needed to communicate with the Eskom Board chairman when his direct report was the Group CEO.

2419. Further, Mr Koko failed to explain why he would have raised such matter with the Chairperson of the Board, when it was the Board Tender Committee (of which Dr Ngubane was not a member) that made a decision on the McKinsey contract. The Chairman of the Board Tender Committee at the time was Mr Zethembe Khoza.

2420. Mr Koko’s evidence that his stance was reflected in the submission that served before the Board Tender Committee on 21 October 2015,<sup>1982</sup> is not true. There is no such reflection of his alleged stance in the Feedback Report (or submission, as he calls it) to the Board Tender Committee,<sup>1983</sup> nor was it reflected in the minutes of the Board Tender Committee meeting held on 21 October 2015.<sup>1984</sup>

2421. The relevant paragraph in the submission that served before the Board Tender Committee on 21 October 2015 reads: “Possible application for a deviation from the National Treasury Cost Savings Instruction Note 1 prescripts may be required”.<sup>1985</sup> This can hardly be referred to as a stance, much less of Mr Koko or of any Eskom official.

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<sup>1982</sup> EB14: p829.49.

<sup>1983</sup> EB14: p829.36.

<sup>1984</sup> EB14: p875.32.

<sup>1985</sup> EB14: p829.61.

2422. If Mr Koko had, indeed, adopted the alleged stance, he should have refused to serve on the Steering Committee appointed to facilitate the execution of the MSA and approved payment triggers in amounts that Oliver Wyman & Marsh found to have been excessive.<sup>1986</sup>

2423. Further, the evidence of Mr Aziz Laher, which Mr Koko could not deny during his evidence, refuted Mr Koko's contrary evidence above.<sup>1987</sup>

2424. Mr Koko focused on a risk-based element of McKinsey's appointment, and conveniently remained silent on the fact that McKinsey was also appointed on a sole source basis, which was also irregular and unjustified.<sup>1988</sup> A competitive tender process should have been followed.

2425. Whilst Mr Koko testified that he intervened to stop the implementation of the Board resolution to stop engaging with certain media houses<sup>1989</sup>, his version is not only inconsistent, but also unsubstantiated and even false.

2426. It is significant that the Board pack, put together by the then Company Secretary (Mr Malesela Phukubje) and emailed to Board members, included an unsigned letter from Mr Koko to Mr Brian Molefe in which Mr Koko criticised the media houses and appealed to Mr Brian Molefe to allow Eskom to consider terminating engagement with the media houses, which is what the Board ultimately resolved by round robin.

2427. It is therefore inconceivable that Mr Koko would have acted contrary to the Board resolution, which he ostensibly supported (and was adopted on the intervention of Minister Brown).

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<sup>1986</sup> OWM Report: Exhibit U33, p 222 & Exhibit U33, p 255, para 4.

<sup>1987</sup> Exhibit U33, p 020.264, para 10.30 Mr Aziz Laher's affidavit.

<sup>1988</sup> Internal Consulting Memo.

<sup>1989</sup> Mr Koko's 6th affidavit dated 27 July 2021, para 36.

2428. Mr Koko never mentioned in his evidence that he received the Board's letter from Ms Daniels. His evidence is that he was asked by Mr Brian Molefe to implement the Board resolution. In his affidavit to the Commission dated 15 September 2021, Mr Brian Molefe said that he had no recollection of this matter.

2429. As for Mr Koko's evidence that he took the matter up with Dr Ngubane via the "infoportal1" email address, this is once again baseless, for the above reasons. In any event, Mr Koko has not produced a copy of the email he said he transmitted to the "infoportal1" email address.

2430. Mr Koko stated that he took up with Dr Ngubane, via the "infoportal1" email address, allegations that some Board members wanted to cancel the online vending tender and award it to Blue Label as the Master vendor. From his version, he did this even before the submission recommending the bidders was tabled at the Board Tender Committee meeting discussing the online vending strategy.<sup>1990</sup>

2431. Once again, the statement that Mr Koko took the matter up with Dr Ngubane through the "infoportal1" email address cannot be true because that was not Dr Ngubane's email address and Mr Koko knew that. On the totality of the evidence heard by the Commission he knew that that email address was used by Mr Essa.

2432. Further, Mr Koko failed to explain why he would have raised the matter with the Chairman of the Board, when the decision was to be made by the Board Tender Committee, whose Chairperson was Mr Khoza.

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<sup>1990</sup> Mr Koko's 6th affidavit dated 27 July 2021, para 37.

2433. Whilst Mr Koko maintained that he did not approve the direct payment to Trillian, he failed to explain why such a request would have come to him in the first place, instead of going to the CFO.

2434. In any event, Mr Koko's self-praise on this issue is very much eroded by his involvement in SteerCo that triggered payments that would ultimately be made directly to Trillian (an entity in which Mr Salim Essa was the majority shareholder) under the MSA when Trillian had no contract with Eskom nor with McKinsey.

2435. In respect of Trillian's specific invoice of R30.6 million, the issue was not only the absence of contract with Eskom, but also that Trillian had no contract even with McKinsey and it had not rendered any services under the Corporate Plan/Funding Plan "agreement". Therefore, there was no basis for Mr Koko to say that Trillian should sort out payment of the invoice with McKinsey.

2436. In any event, in his affidavit Mr Prish Govender stated the following on this issue (paragraphs 52-54):

"On 19 February 2016, Mr Kalima and I received an email from Mr Mabelane, that he received from Ms Bhana, relating to the payment of the Trillian invoice. I explained to Mr Mabelane that firstly the invoice related to contract 4600059002 Mckinsey Fixed Fee contract and not the MSA, and that secondly I did not receive confirmation from McKinsey of the work done, in line with the authorisation to pay.

On 18 March 2016, I received an email from Lorenz Jungling from McKinsey, with the attached Trillian invoice, saying he will review the invoice the next day.

At the beginning April 2016, Mr Mabelane after discussions with Mr Koko and Mr Singh, followed up with me as to whether the invoice for Trillian had been paid. I explained to him that McKinsey had still not given written approval, and hence I could not forward the invoice for payment. Mr Mabelane advised that he would approve the invoice as per his discussions with Mr Koko and Mr Singh. I also raised the issues of direct payment to a subcontractor without a contract, after which, Mr Mabelane assured me that it was allowed and had been done in the past at Eskom. He asked me to support the invoice as the Project Manager. Mr Mabelane also

asked me to send a letter (PG4) to Mr Muvenda Khomola (Eskom Vendor Management) in line with 4.10 above, for the registration of Trillian as a vendor. The payment of the invoice was then processed by the procurement team.”<sup>1991</sup>

2437. In his recent supplementary affidavit to the Commission (par 3.8.14), Mr Mabelane claims to have no recollection of the said conversation with Mr Govender. However, he did not and could not deny that he did approve Trillian’s invoice for payment. Mr Koko has not addressed this issue in his affidavit. Through his attorneys, he was provided with a copy of Mr Govender’s affidavit and given prior notice of his appearance before the Commission.

2438. Therefore, contrary to what he communicated to Ms Goodson, Mr Koko seems to have acted differently in the company of his colleagues.

### **The “infoportal1” email address**

2439. The position regarding the “infoportal1” email address has already been addressed above.

2440. It is significant that Mr Koko has failed to explain the person behind the email that he received on 10 December 2015 providing him with the terms of the R1.68 billion guarantee that Eskom would issue, on the same day, in favour of Tegeta.<sup>1992</sup> One would have expected him to reply to that email, if he believed that it came from Ms Daniels or Dr Ngubane with whom he said he communicated via that email address. Instead, he forwarded the email to Ms Daniels which she used to instruct to CDH to draft a pre-purchase of coal agreement between Eskom and Tegeta.<sup>1993</sup> Suspension letters and IT expert evidence

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<sup>1991</sup> Exhibit U43, p 1348-1349.

<sup>1992</sup> Mr Koko’s 6th affidavit dated 27 July 2021, para 447-451.

<sup>1993</sup> Dealt with in the main report under Tegeta.

2441. The Commission's investigation into the pre-suspension letters that were not utilised in the suspension of the Eskom executives, but were produced by Mr Zethembe Khoza on the basis that they showed a connection between Ms Daniels and Mr Salim Essa, did not involve Mr Koko. Mr Koko repeatedly referred to these letters as conclusive evidence that Ms Daniels had a connection with Mr Salim Essa and that the two had a hand in drafting the said pre-suspension letters, as the metadata reflected them respectively as the author and last modifier.<sup>1994</sup>

2442. However, amongst his demands to the Commission for certain matters to be investigated, Mr Koko also requested that his computer hard drive image or computer backup data be considered for any trace of the said pre-suspension letters. The exercise was performed by two IT experts in the service of the Commission, namely Professor Cecil Petrus Louwrens and Mr Lance Poon, who both submitted affidavits and testified before the Commission. Mr Poon's expert evidence is especially relevant to Mr Koko's demand.

2443. In his affidavit,<sup>1995</sup> Mr Poon details the forensic analysis that he conducted in regard to the matter. He had been tasked to analyse computer data that were forensically acquired from Eskom pertaining to Ms Daniels, Mr Koko and Mr Khoza. He was provided with copies of the four pre-suspension letters and asked to establish whether the letters were present in the computer backup data of the three individuals and, if possible, ascertain the source of the documents.

2444. His forensic analysis yielded the following findings:

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<sup>1994</sup> Mr Koko's 6th affidavit dated 27 July 2021, paras 82 to 108.

<sup>1995</sup> Exhibit U44 p 1.

- 2444.1. Two emails, with attachments, were found in the email data of both Ms Daniels and Mr Koko.
- 2444.2. The two emails were exchanged between Ms Daniels and Mr Koko on 25 and 26 February 2015 with the subject title "Sekhasimbe documents". Ms Daniels' email of 26 February 2015 appears to have been a follow up to her first email to Mr Koko of 25 February 2015.
- 2444.3. Ms Daniels had attached, to both emails, an MS Word document with a file name "20150225 Invitation to Pre-Suspension Meeting execution copy.docx". The document was a draft letter addressed to "Malesela Sekhasimbe, General Manager Commodity Sourcing", at Eskom, and dated 25 February 2015. The subject of the letter is "INVITATION TO A PRE-SUSPENSION MEETING", and Mr Koko is reflected as the issuer of the letter.
- 2444.4. The metadata associated with the two letters showed Ms Daniels as both the original and last author of the documents. Ms Daniels has confirmed that she did draft these documents for Mr Koko in connection with Mr Sekhasimbe.
- 2444.5. Two MS Word documents were found in Mr Koko's backup data, the first being the draft letter for Mr Sekhasimbe's pre-suspension meeting that Ms Daniels had emailed to Mr Koko on 26 February 2015, with some amendments. The metadata still reflected Ms Daniels as the original author, but this time the last author was reflected as Mr Koko.
- 2444.6. The second document was also an MS Word document with the same file name as the documents Ms Daniels had emailed to Mr Koko, viz. "20150225 Invitation to Pre Suspension Meeting execution copy.docx". However, this document was not addressed to Mr Sekhasimbe, but to Mr Koko himself. The metadata

reflected Mr Koko as the last author of the document and “Last Modified Datetime” as 10 March 2015 at 15h14 (SAST).

2444.7. The aforesaid (second) document also contains, save for a few grammatical differences, allegations against the recipient that are identical to those in Mr Koko’s pre-suspension letter produced by Mr Zethembe Khoza.

2444.8. The aforesaid document was apparently drafted utilising the draft that Ms Daniels had emailed to Mr Koko on 25 February 2015. In other words, the document of 25 February 2015 was evidently used as a template for the letter of 10 March 2015 and some of its content still remained in the latter document, such as the date for Mr Sekhasimbe’s pre-suspension meeting “Monday, 2 March 2015 at 11h00” and the recipient, to sign acknowledging receipt, still reflected as “Malesela Sekhasimbe”, yet the letter was addressed to Mr Koko.

2445. In the result, Mr Poon concluded:

*“Given that the letter (dated 10 March 2015) was found within Mr Koko’s own backup data and the Last Author reflected as Matshela Koko, one can also not exclude the possibility that the letter, which appeared to be addressed to Mr Koko was modified by Mr Koko himself or at least on his computer [at Melrose Arch whilst meeting with Salim Essa], and was subsequently used in the final drafting of the letter of Annexure LP3 [produced by Khoza].” (own emphasis)*

2446. Mr Koko said that the existence of the said document in his backup data came as a total surprise to him and he could not offer an explanation for this finding. He said that the document could have found its way to his computer at any time, on or after 10 March 2015, and be saved there without his knowledge, either inadvertently or mischievously. Mr Koko offered no contrary evidence to the expert’s findings. He sought to avoid the truth by vague speculations that have no merit whatsoever.

2447. In paragraphs 96 to 98 of his 6th affidavit, Mr Koko sought to level some criticism at the experts' affidavits, saying that there were discrepancies or anomalies in the metadata. The experts have responded to his criticism and rejected it.<sup>1996</sup> For instance, Mr Koko said that there was a two-hour discrepancy between the time stamp of the electronic document referred to in Mr Poon's affidavit and the metadata of the same document referred to in Professor Louwrens' affidavit. The datetime stamp on the document attached to Mr Poon's affidavit is expressed as 10 March 2015 15h14 SAST (South African Standard Time), which he explains that when converted to UTC (Coordinated Universal Time) may be expressed as UTC +02:00. The document attached to Prof Louwrens' affidavit shows the datetime as 10 March 2015 13h14, expressed in UTC 00:00, which is 2 hours behind the SAST time value. Therefore, the time is the same, only expressed in two different time zones. The alleged discrepancy is not a discrepancy at all.

2448. Mr Koko stated that reference was not made in Prof Louwrens' affidavit to the fields "Last Modified Datetime" or "Last Author". However, Mr Poon and Prof Louwrens say this is incorrect, as the fields are in fact referred to in Prof Louwrens' affidavit, expressed as "Modify Date" and "Last Modified By", which are the same fields respectively as those aforesaid. These experts say that the utilisation of different analysis tools account for the reference to the metadata fields in different wording or description.

2449. Mr Koko further stated that neither of the IT investigators addressed the anomaly that the "Create Date" and the "Modify Date" reflected the same date and time. According to him, this rendered as untrue the suggestion that one of the "Sekhasimbe documents" was copied and saved and then modified on Mr Koko's computer. Mr Koko's complaint is that because the modified and creation datetime are identical, the document could not have been copied, saved and then modified at the same time, because that

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<sup>1996</sup> Affidavits of Mr Poon and Prof Louwrens.

sequence of events would result in the creation and modified datetimes being different, i.e. one after the other (modified after creation).

2450. In response to this, Mr Poon explained that it was possible that the template file (e.g. the Sekhasimbe letter) was opened, edited and then saved as a new file. This would result in a new file bearing the same creation and modified dates.

### **Glencore's failure to do a due diligence**

2451. Mr Koko dismissed as nonsense Glencore's submission that, when it acquired OCH/OCM, it only had publicly available information regarding the Coal Supply Agreement<sup>1997</sup>. Mr Ephron addressed this issue during his evidence before the Commission on 10 June 2021, as well as in his second supplementary affidavit.<sup>1998</sup>

2452. In his affidavit, Mr Ephron stated:<sup>1999</sup>

"...The opportunity to acquire OCH arose in H1 2011. Prior to the consortium's acquisition, OCH had been listed on the Johannesburg Stock Exchange in March 2010. There was therefore a reasonable amount of recent publicly available information regarding OCH and OCM. The consortium was concerned that if it approached the OCH Board to request the Board to conduct a due diligence, that would have compelled OCH as a listed company to publish a cautionary announcement to the market which may have resulted in an increase in the share price of OCH. The consortium also understood that it was competing with various other potential purchasers to acquire control of OCH and therefore took the strategic decision to rely on publicly available information and effect its acquisition through a series of transactions with OCH shareholders on the stock exchange without the involvement of OCH.

Accordingly, while the consortium did comprehensively consider the then publicly available information, the consortium was not able to undertake a comprehensive due diligence exercise on all aspects of OCH's business as it did not have access to information from OCH and OCM. In particular, Glencore only had publicly

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<sup>1997</sup> Mr Koko's 6th affidavit dated 27 July 2021, paras 195 to 198.

<sup>1998</sup> Exhibit U34, p 1261.

<sup>1999</sup> Exhibit U34, p 1262, para 6-7.

available information regarding the CSA and, accordingly, it only knew the duration, volume to be supplied and price per tonne provided by the CSA. Glencore did not, for example, know how any price-adjustment mechanisms in the CSA worked. It was only after the consortium acquired control of OCH that it became aware of the various hardship provisions which were included in the CSA ...”

## **Glencore & OCM/OCH: Alleged preferential treatment, cooperation agreement, hardship, penalties and Tegeta**

### Cooperation Agreement

2453. Mr Koko made wide ranging allegations that are not necessarily relevant to an investigation into state capture.<sup>2000</sup>

2454. He stated, amongst others, that Ms Maharaj had no authority to conclude the Cooperation Agreement between Eskom and OCM, entered into in May 2014. The Eskom Procurement and Supply Chain Management Procedure<sup>2001</sup>, however, indicates otherwise and, in any event, the Cooperation Agreement was only to allow for negotiations for the conclusion of the Fourth Addendum to the Coal Supply Agreement. Any revision or change to the terms of the Coal Supply Agreement was subject to Board approval (clause 5.12 of the Cooperation Agreement). The Cooperation Agreement, which proposed certain changes to the Coal Supply Agreement ultimately served before the Board on 23 April 2015 for consideration and approval, but the Board referred it to the newly seconded Acting Group CEO, Mr Brian Molefe, who subsequently decided to terminate the Cooperation Agreement.

2455. Clause 2.5.4 of the Eskom Procurement and Supply Management Procedure<sup>2002</sup> provided:

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<sup>2000</sup> Mr Koko's 6th affidavit dated 27 July 2021, paras 211 to 233.

<sup>2001</sup> Exhibit U27, p 602.

<sup>2002</sup> Exhibit U27, p 602.

“2.5.4 Divisional Executive: Primary Energy

The executive delegated by the Eskom Board and appointed to lead and manage the procurement of all primary energy within Eskom. For the purposes of this Procedure, any reference to the Divisional Executive: Primary Energy is specific to all primary energy related procurement and/or disposals. The Divisional Executive: Primary Energy may, at his/her discretion, nominate any other general or senior managers to fulfil any of the roles and responsibilities set out herein on his/her behalf.”

2456. Ms Maharaj submitted an affidavit dated 22 September 2021, to the Commission in which she, *inter alia*, referred to the various positions she held at Eskom. In April 2011, she was appointed as the Divisional Executive of PED, a position she occupied until 31 March 2015, when she resigned from Eskom. Therefore, in her capacity as such, she had the requisite authority to sign the Cooperation Agreement on behalf of Eskom. In any event, as already stated above, the Cooperation Agreement and any changes to be made to the Coal Supply Agreement were subject to Board approval.

2457. Ms Maharaj has disputed Mr Koko’s evidence that she did not have the authority to sign the Cooperation Agreement on behalf of Eskom, as well as his evidence that the Cooperation Agreement changed the terms and conditions of the Hendrina Coal Supply Agreement.<sup>2003</sup> It is correct that Mr Koko’s allegations are not true.

2458. Mr Koko said that Eskom board had agreed to meet OCM’s request for a coal price of R285/ton that had been made before he (Mr Koko) approached the Board Tender Committee on 12 August 2014. However, this is not true, as there is no evidence of such a proposal by OCM, nor was there any approval by the Board Tender Committee of a price of R285/ton. The Board Tender Committee did not resolve that any set price

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<sup>2003</sup> Mr Maharaj’s Affidavit: paras 11 & 12.

be negotiated. In terms of the minutes of the Board Tender Committee meeting of 12 August 2014,<sup>2004</sup> the Board Tender Committee resolved as follows:

- “1. Primary Energy Division (“PED”) is mandated to negotiate with Optimum Coal Mine (“OCM”) to ensure security of supply for the life of Hendrina Power Station (“Hendrina”);
2. Approval is granted for PED to issue an open tender market enquiry to secure coal supply to Hendrina for the period post 2018 taking into consideration the following: (not relevant for present purposes)
3. The Divisional Executive, PED is authorised herewith, with the power to delegate further, to take all the necessary steps to give effect to the above, including the signing of any agreements, consents or other documentation necessary or related therewith.”

2459. As is apparent from page 1 of the minutes, Mr Koko was also present at the meeting as Acting GE: Technology & Commercial; he should therefore not misrepresent the Board Tender Committee resolution.

2460. The Board Tender Committee resolution was for Eskom PED to negotiate with OCM to secure coal supply to Hendrina Power Station, and, to that end and in order to ascertain the financial viability of the mine, experts were engaged, namely Nedbank and Basis Point, to conduct a financial assessment of the mine.

2461. Mr Koko stated that the Board of OCH/OCM placed the companies in business rescue because they wanted to cancel the Coal Supply Agreement. However, he omitted to mention that external experts, Nedbank and Basis Point, who were appointed by Eskom to verify the production costs of OCM, confirmed that OCM was selling at a loss and

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<sup>2004</sup> Exhibit U34, p 355, 368-369.

required an adjustment to a higher price.<sup>2005</sup> On this point, Mr Johann Bester said the following in his affidavit, responding to Mr Brian Molefe on a related point:<sup>2006</sup>

“OCM’s concerns, which Mr Molefe refers to as “threats”, had been subjected to an assessment and analysis by independent corporate finance advisors, namely Nedbank Capital and Basis Points, and Mr Molefe is aware of this fact, as it was recorded in the PED’s submission to Excops, to the Board Tender Committee and to the Board. I refer the Commission to annexure “SA2”, p10, wherein the following was reported:

‘PED engaged the services of Independent Corporate Finance advisor (Nedbank Capital and Basis Points) to conduct the financial due diligence on Optimum’s costs mentioned above. The price offer for the coal that meets Hendrina’s higher CV specification is P442/ton until 2018, which Optimum has indicated does not include a margin and this has been verified by the independent financial advisers. The price post 2018 is 475/ton which excludes a margin of 20%”.

The conclusion from the Independent Corporate Finance advisors was that, based on mining and beneficiation costs for the coal quality specification and ash requirements at Hendrina, the price of P442/ton offered by Optimum for a CV of 23.5MJ/kg Dry basis is cost reflective and they are in agreement with how the costs have been allocated to produce the coal for Eskom. In comparison, PED’s approved mandate was to negotiate a real base of P296.30/ton (August 2014 money values) for a CV of 22.8MJ/kg on a Dry basis’.”

2462. It is apposite to also refer to what Mr Johann Bester said in the same supplementary affidavit responding, once again, to Mr Brian Molefe on a related point:

“Although Mr Molefe alleges that the “hardship” experienced by Glencore/Optimum was because of their own negligence, neither Glencore management team nor the Optimum mine management can be blamed for the low international coal prices experienced through 2014 and 2015. Had the mine still been owned by BHP-Billiton or Optimum Coal holdings the low export prices would have made it uneconomical even for them to export coal. No amount of due diligence can accurately forecast international commodity prices.”<sup>2007</sup>

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<sup>2005</sup> Mr Bester’s Supplementary Affidavit: EB18 p1479/45 & Mr Moodley’s Affidavit: EB14 Exhibit U35, p936-939, for another expert assessment done in November 2015, collectively by CDH, Meridian Economics and SRK Consulting.

<sup>2006</sup> Exhibit U34, p 1476 para 45.

<sup>2007</sup> Exhibit U34, p 1461, para 10.

2463. Further, Mr Johann Bester said:

“The point is that irrespective of who owned the mine, Optimum mine would still have experienced hardship with the low coal prices being experienced. Coal prices in 2020 were in the low US\$ 50’s per tonne. But now at the start of 2021 prices are back up to US\$90 per tonne. South32’s SAEC lost money in 2020. No amount of due diligence on the mine can protect from the international coal price fluctuations.”<sup>2008</sup>

2464. Insofar as Mr Koko said that OCM had made a proposal for a coal price of R285/ton,

Mr Johann Bester, in his last affidavit to the Commission, responded as follows:

“No! No! No! If there was a firm offer on the table for R285 per tonne at the lower quality then the team would have asked the Board for a mandate “TO CONCLUDE”. Instead, the team asked for a “Mandate to NEGOTIATE but NOT CONCLUDE”. The team further asked for a mandate to issue an open market enquiry. Why? Because we were also tasked to secure coal for the life of the power station, i.e. for the “period post 2018.” Is it possible Mr Koko still does not understand the Board submission or is he trying to mislead?”<sup>2009</sup>

2465. Mr Koko stated that Glencore was “apparently not interested to pursue the remedies provided for in the OCM CSA”. The negotiations OCM pursued with Eskom were permissible and required in terms of Coal Supply Agreement.<sup>2010</sup> Clause 27.5 of the Coal Supply Agreement provided that: “the parties shall in the utmost good faith use their best endeavours to agree mutually acceptable amendments to this agreement in order to resolve the problems resulting from the relevant circumstances”. In this regard Mr Ephron stated in his statement to the Commission:

“Following the acquisition by Glencore of its interest in OCH, differences continued to arise between OCM and Eskom, particularly in relation to sizing and quality of the coal supplied to Hendrina (although Eskom continued to accept and use the coal). In April 2013, OCM issued a notice requesting renegotiation of the sizing provisions

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<sup>2008</sup> Exhibit U34, p 1466, para 25.

<sup>2009</sup> Page 19 para 45 of Mr Bester’s affidavit in response to Mr Koko’s averments, dated 24 August 2021.

<sup>2010</sup> CSA clause 27.5; CME Exhibit U5, p73.

in accordance with a provision in the CSA which specifically provided for such renegotiation”.<sup>2011</sup>

2466. Mr Ephron went further to explain that in OCM’s view the circumstances triggered the Hardship clause in the CSA, which entitled OCM to a revision of the purchase price for the coal.<sup>2012</sup> However, Eskom disputed OCM’s declaration of hardship and the dispute was referred to arbitration. Following OCM’s referral of the hardship dispute to arbitration, a Cooperation Agreement was concluded to, *inter alia*, suspend the arbitration, but Mr Brian Molefe subsequently terminated the Cooperation Agreement and the negotiations process.

### **Glencore’s Decision to Fund OCM**

2467. Much has been said about Glencore’s failure to do due diligence upon acquisition of OCH, about the hardship dispute and the arbitration, about the Cooperation Agreement and its termination, about the coal price negotiations and failure to reach agreement, but all these were superseded by Glencore’s decision to fund OCM, take it out of business rescue and honour the Hendrina Coal Supply Agreement as it was. The signs of that decision were already evident on 3 September 2015 when Mr Brian Molefe and Mr Koko agreed to an interim coal supply arrangement with the BRPs. Glencore’s final decision to honour the Coal Supply Agreement to its expiry date, 31 December 2018, was communicated to Mr Koko on 1 December 2015, with Mr Marsden concluding in his affidavit: “OCM had effectively then conceded on everything Eskom had wanted”.<sup>2013</sup>

2468. Mr Koko’s averments are incorrect and calculated to mislead.<sup>2014</sup> His allegation that Eskom received a letter from Werksmans on 1 December 2015 which stated facts contrary to the undertaking provided by the BRP’s earlier that day, is false, and Mr Koko

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<sup>2011</sup> Exhibit U34 p 349.91 para 15.

<sup>2012</sup> Exhibit U34, para 349.92 para 18.

<sup>2013</sup> Exhibit U34, p 349.130 para 38 to p349.131 para 41.

<sup>2014</sup> Mr Koko’s 6<sup>th</sup> affidavit dated 27 July 2021, para 368.

would know this based on his written submissions to the Parliamentary Portfolio Committee.<sup>2015</sup>

2469. The letter from Werksmans dated 1 December 2015 preceded the communication (made on the same day to Mr Koko), of Glencore's decision to fund OCM and honour the CSA to the end of December 2018. Werksmans' letter applied to the extension of the interim coal supply agreements between Eskom and OCM and confirmed another extension until 31 January 2016.<sup>2016</sup> The communication that followed thereafter conveyed an even better position that, on Mr Koko's admission, brought a major relief to him. This is apparent from Mr Koko's written submissions to the PPC, where he had this to say on this point:<sup>2017</sup>

“On 1 December 2015 I received a letter from Werksmans Attorneys, acting on behalf of the business rescue practitioners. It stated that coal supplies to Hendrina were confirmed until 31 January 2016. Mr Piers Marsden shortly afterwards came to see me, either on the 1<sup>st</sup> or the 2<sup>nd</sup> December. He was accompanied by a representative from Glencore, but I am not now sure whether it was Mr Ephron, or Mr Shaun Blankfield (who had attended the 24 November meeting as Glencore's representative). They informed me that Glencore had decided to take the Optimum companies out of business rescue and to honour the Hendrina Coal Supply Agreement in its terms, i.e. until 2018. That was a major relief to me.”

2470. The turn of events spearheaded by Mr Zwane in Switzerland, for the sale of OCH/OCM to Tegeta, somewhat redefined the position going forward. Nonetheless, OCM continued to supply coal to Eskom.

2471. Mr Koko alleged that the funding of OCM's operations from 1 January 2016 to September 2016 was provided by Tegeta in terms of the Post-Commencement Finance (PCF) agreement.<sup>2018</sup> It is unclear how Mr Koko, an Eskom executive, would have been

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<sup>2015</sup> Exhibit U27, p 1012, para 81.

<sup>2016</sup> Exhibit U27, p 203 annexure “MMK16”.

<sup>2017</sup> Exhibit U27, p 1012, para 81.

<sup>2018</sup> Mr Koko's 6th affidavit dated 27 July 2021 para 360.

privity to such contractual arrangements between Tegeta and OCM. In any event, his allegation is not entirely correct as Mr Marsden explained that it was primarily the revenue derived from selling coal to Tegeta, which coal was diverted from Hendrina to Arnot, that allowed OCM to trade in the normal course. Mr Marsden said:

“34.5 During this time (during or about January 2016), the BRPs were advised by Gert Opperman (Eskom’s Coal Unit Supply Manager for the Hendrina Power Station) that Eskom did not require the minimum contracted amount of coal in terms of the CSA. This resulted in excess coal being available for sale.

34.6 As a result of Eskom’s reduced need for coal, OCM had more coal than the minimum required for Eskom’s purposes.

34.7 When there was surplus coal during this time, the surplus would either be exported by OCM (through Glencore) or purchased by Tegeta. In the latter case, Tegeta’s PCF funding obligation to OCM would be reduced.

34.9 Tegeta entered into various coal supply agreements with OCM. These agreements were signed in January 2016 and February 2016, before the closing of the Sale Agreement in April 2016. In other words, Tegeta was not yet the owner of the mine at the time when these agreements were signed.

34.10 In terms of these agreements, OCM sold (and delivered) coal from the Hendrina Power Station to the Arnot Power Station (“Arnot”) on behalf of Tegeta in January 2016 and in the period from February 2016 to April 2016.

34.15 Insofar as the Further Coal Supply Agreement [unsigned] is concerned, the terms provided for the supply of coal from OCM to Tegeta over the period May 2016 to October 2016. ... As with the other coal supply agreements, the contract provided for the delivery of the coal to Arnot.

34.16 These supply agreements allowed OCM to trade in the ordinary course without the need to request additional PCF from Tegeta. OCM was therefore primarily funded until August 2016 (when it was discharged from BR) from the coal purchases by Tegeta (and Eskom).” <sup>2019</sup>

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<sup>2019</sup> Exhibit U34, p 349.159 – 349.162.

2472. Given that Tegeta did not at this stage own the mine, its short-term agreements with Eskom for coal supply to Arnot would have been in breach of the Eskom 2008 Mandate which required that coal be purchased directly from mine owners and not traders.<sup>2020</sup>

2473. Mr Koko made a statement in paragraph 390 of his 6<sup>th</sup> affidavit which nearly acknowledged that Eskom concluded short-term contracts for the Arnot Power Station with Tegeta in order to benefit Tegeta in discharging its PCF obligations to OCM. He is unashamedly making this concession, yet at the same time seeking to vehemently deny that there was state capture at Eskom. Mr Koko and his colleagues financially assisted a Gupta entity that did not own the mine, in circumstances where nothing stopped Eskom from purchasing coal directly from OCM, as it did for the Hendrina Power Station.

2474. It is not true that Eskom obtained coal from Tegeta cheaper than it would have from OCM. In fact, Tegeta charged Eskom more than Eskom had paid for the coal from OCM. Mr Anoj Singh conceded that much at the PPC, that it only made business sense for Tegeta to put a mark-up.<sup>2021</sup> Mr Koko's pretentious speculations and inferences make no sense, and only serve to betray his posture of innocence.

2475. Mr Koko's statement that the R1.68 billion prepayment would only arise when the BRPs had disappeared from the scene and OCM had come out of business rescue,<sup>2022</sup> makes no sense, given that the request to the Eskom Board was for this prepayment to be made on an urgent basis. Mr Koko's statement, however, reveals that the motivation presented to the Board for this prepayment was never the real reason for the request. The real reason was to financially assist Tegeta in acquiring OCH. Once again, this is

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<sup>2020</sup> Exhibit U34 p 942.193 to 942.198 paragraph 4.10: A submission dated 27 July 2008 requesting a Mandate, for the period October 2008 to March 2018, to conclude coal supply contracts on a short to medium term basis with mine owners. EB18, p945.221: Extract from Minutes Board Tender Committee meeting of 11 September 2008, approving the requested Mandate to Negotiate and Conclude Contracts on a medium term basis.

<sup>2021</sup> Exhibit U34, p 787 refer to the short-term agreements between OCM & Tegeta, and Tegeta & Eskom.

<sup>2022</sup> Mr Koko's 6th affidavit dated 27 July 2021, para 397.

the closest Mr Koko has come to admitting that the prepayment was not for the purpose which was presented to the Board.

## Penalties

2476. Regarding the penalties, extensive evidence was led by reference to CDH's affidavit, in which it was apparent that Eskom was uncertain about the methodology for the calculation of penalties and what the correct amount was.<sup>2023</sup> On Mr Koko's own admission, he compromised the alleged claim of over R2.1 billion, by directing that the claim be settled at around R500 million. This is when Tegeta was responsible for the penalties claim.<sup>2024</sup> On this, Ms Daniels stated the following in her affidavit on the "transactions":

"In and during December 2016, Mr. Koko was appointed Acting Group Chief Executive of Eskom, after Brian Molefe's resignation. Mr Koko took a particular interest in the matter and I was requested to brief him on a weekly basis on progress in the matter. It was he who began the discussion towards settlement of the matter rather than proceeding with the arbitration. At this early stage, he was already mentioning that it would be acceptable if Eskom settled at the amount of around R500 million."<sup>2025</sup>

2477. Whereas the claim was being pursued against OCM, it was Mr Koko and Mr Anoj Singh who motivated for the settlement of the claim at R577 million, thus causing Eskom to lose the very amount that Mr Koko had said was duly owed to Eskom. Therefore, Mr Koko has no basis on which to point a finger at other officials. Of course, the evidence heard by the Commission has revealed that both Mr Anoj Singh and Mr Koko were working with the Guptas or with Gupta associates to the detriment of Eskom.

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<sup>2023</sup> Exhibit 35, p 21, para 45 to p 33.

<sup>2024</sup> Ms Daniels' affidavit on transactions, EB18(a): p264/93.

<sup>2025</sup> *Id* and p265/97 (same affidavit).

### **The document with a list of contacts<sup>2026</sup>**

2478. This has been sufficiently addressed in the evidence analysis report on Tegeta transactions.

### **McKinsey MSA contract, conclusion, termination & payments**

2479. Most of Mr Koko's evidence regarding the McKinsey/Regiments/Trillian transactions<sup>2027</sup> has already been addressed above.

2480. Mr Koko stated that he only attended two SteerCo meetings, on 9 February 2016 and 31 March 2016. This does not make his position any better, as SteerCo members were all responsible for decisions that were financially prejudicial to Eskom's position. His statement in this regard, is in any event not true, as he also attended another SteerCo meeting on 15 July 2016.<sup>2028</sup>

2481. The aforesaid SteerCo meeting is significant in that it also discussed the termination and settlement process of the purported MSA contract with McKinsey.<sup>2029</sup> Insofar as Mr Koko sought to deny that he was part of the termination process,<sup>2030</sup> this evidence negates his denial.

2482. In regard to the Mosilo Mothepu's emails, the matter is adequately addressed in the evidence analysis report. A few comments should suffice.

2483. Mr Koko refers to the subject matter of the emails as being totally out of his field as the Group Executive Generation and Technology.<sup>2031</sup> However, the presentation at the very

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<sup>2026</sup> Mr Koko's 6th affidavit dated 27 July 2021, paras 234 to 244.

<sup>2027</sup> Mr Koko's 6th affidavit dated 27 July 2021, paras 245 – 291.

<sup>2028</sup> Exhibit U33, p 193.33, p193.42 & p 193.61.

<sup>2029</sup> Exhibit U33, p 193.61.

<sup>2030</sup> Mr Koko's 6th affidavit dated 27 July 2021, para 267.

<sup>2031</sup> Mr Koko's 6th affidavit dated 27 July 2021, para 261.

first SteerCo meeting on 9 February 2016, listed Mr Koko as the Eskom lead on Work Package Initiatives within Finance, namely Master Vending Agent and Completion of Duvha Insurance claim.<sup>2032</sup> If this was an error, as Mr Koko sought to suggest, he failed to offer any explanation why that error was never corrected.

2484. Both these items are mentioned in Ms Mothepu's emails to Mr Koko.<sup>2033</sup>

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<sup>2032</sup> Exhibit U37, p 1074.

<sup>2033</sup> Exhibit U33, p 129.255 – 129.355.

## KEY FINDINGS AND RECOMMENDATIONS

### The recovery program of the 2018 Board

2485. The late Mr Jabu Mabuza, who was the Chairman of the 2018 Eskom Board, concluded his evidence with the observation that there had previously been within Eskom a culture of corrupt practices, mismanagement and malfeasance that had been inculcated within Eskom by certain individuals over a period of time. The issues of impropriety within Eskom seemingly extended beyond the matters which are under investigation by the Commission. This was clearly a pervasive culture and was sanctioned from within the board, the executive and senior management.

2486. The 2018 Board concluded that it had to strike a balance between dealing with the past irregularities which it found at Eskom and building a capable, strong organization able to carry out its public mandate. The recovery program from the qualified audit for the year ended 31 March 2017 was a key part of Eskom's efforts to rectify past irregularities.

2487. This recovery program saw a greater number of irregularities surface and the 2018 Board came to understand that procurement processes and people were at the centre of the challenges; internal controls had not been effective; the system and practices were not set up for proper accountability and consequence management; some of Eskom's policies were too vague and lent themselves to loopholes that could be abused; and there had been lapses in governance because the roles of the shareholder, the board and the executive often overlapped and flouted best corporate governance practices. Any process of renewal and ridding the organization of impropriety, whether state capture related or not, needed to adequately address these deficiencies.

2488. The Eskom Board is encouraged to continue with its efforts to strike a balance between dealing with the past Eskom irregularities which it found at Eskom and building a capable, strong organization able to carry out its public mandate to take its rightful place in the international family of similar organisations as it once did in the past.

2489. The Board must regularly report on the effectiveness of the recovery program to the Executive Authority and Parliament.

2490. In addition to its reporting on the effectiveness of the recovery program and other reporting responsibilities that are required by the Companies Act and the PFMA, the Eskom Board must particularly conduct (at least annually) an in depth and objective review and evaluation of the adequate application of the King IV principles at Eskom.

2491. The outcome of such objective evaluation of the effective application of the King IV principles at Eskom must be reported to the Executive Authority and Parliament, and published in the Eskom Integrated Report and website, for public information.

2492. The Eskom Board must re-evaluate the effectiveness of the Eskom Anti-Corruption Strategy including consequence management for non-compliance, unethical and poor performance. The Board must formalise and institutionalise the standard operating procedures relating to the implementation of the Anti-Corruption Strategy and it must take effective and appropriate disciplinary steps against anyone who:

2492.1. contravenes or fails to comply with a provision of any laws;

2492.2. commits an act which undermines the financial management and internal control of the public entity; and

2492.3. makes or permits an irregular expenditure or a fruitless and wasteful expenditure.

## **The appointment of the 2014 Eskom Board**

2493. The evidence proves a scheme by the Guptas to capture Eskom, install the Guptas' selected officials in strategic positions within Eskom as members of the board, the committees of the board and the executives and then divert Eskom's assets to the Guptas' financial advantage. Central to the Guptas' scheme of state capture was President Zuma who the Guptas must have identified at a very early stage as somebody whose character was such that they could use him against the people of South Africa, his own country and his own government to advance their own business interests and President Zuma readily opened the doors for the Guptas to go into the SOEs and help themselves to the money and assets of the people of South Africa. Mr Zuma did this by appointing Mr Brian Molefe as Group CEO of Transnet after he had discussed the matter with them. That has to be so because, if that were not the case how would one explain the fact that in December 2010, long before the vacant position of Group CEO of Transnet could be advertised, the Guptas already announced their knowledge in their newspaper that Mr Brian Molefe was going to be the next Group CEO of Transnet and Mr Molefe became the Group CEO of Transnet two or three months thereafter despite the fact that another candidate – more qualified than Mr Molefe – had scored higher points in the interview than Mr Molefe. If the position is not that the Guptas were making the decisions or that President Zuma was discussing the appointments of key personnel with the Guptas long before the need to make the appointments arose, how could one explain the fact that in 2014 already “Mr Salim Essa knew that Mr Brian Molefe would be the next Group CEO of Eskom and, indeed, in April 2015 President Zuma or his Minister or Cabinet approved Mr Brian Molefe's secondment to Eskom as well as his subsequent appointment as Group CEO? If the position is not that the Guptas were making decisions which were supposed to be made by President Zuma or his Ministers, how would one explain the fact that Mr Tony Gupta told Mr Mcebisi Jonas on 23 October 2015 at the Gupta residence that Minister Nene was going to be fired because he was

not working with the Guptas and six weeks later on 9 December 2015 Minister Nene was, indeed, fired in circumstances where the reasons that President Zuma gave made no sense whatsoever and all three people he wanted to appoint as Minister of Finance at different times, namely Mr Des Van Rooyen, Mr Brian Molefe and Mr Gigaba, had one thing in common. That is that, they were all Gupta associates?

2494. If the position is not that the Guptas were making decisions that were supposed to be made by people in Government or if the position is not that President Zuma was consulting the Guptas before making decisions that he or his Ministers were supposed to make, how would one explain the fact that in respect of a scheme that was quite clearly devised by the Guptas and their associates to initially have certain Eskom executives suspended and, ultimately, certain of those executives removed from Eskom so as to facilitate the appointment of Gupta associates into positions of strategic importance, President Zuma was involved in that scheme in that he brought in Ms Dudu Myeni and discussed the matter with her and he attended what appears to have been a secret meeting at his official residence where the scheme or plan was discussed?

2495. It is clear that from quite early in his first term President Zuma would do anything that the Guptas wanted him to do for them.

2496. How does one explain how President Zuma abruptly removed Mr Themba Maseko from the position of CEO of GCIS in February 2011 when Mr Maseko had served Government as well as he had and after Mr Ajay Gupta had told Mr Maseko late in November 2010 or early in December 2010 that he would report Mr Maseko to his seniors and they would sort him out and replace him with someone else and indeed Mr Maseko was replaced by Mr Mzwanele Manyi, a Gupta associate?

2497. It is also quite clear that during President Zuma's term of office certain decisions which were supposed to be made within Government were made outside of Government and not with his party, the ANC, but with the Guptas.

2498. This scheme frequently entailed communication between Minister Brown and her personal assistant, Ms Kim Davids, and the "[Business Man](#)" email address. A finding has been made in this Report that the "[Business Man](#)" email address was used by Mr Salim Essa.

2499. In addition, a conclusion can be drawn that there was a relationship and communication between the Gupta network and a number of Eskom board members.

### Recommendations

2500. The way members of Boards of state owned companies are appointed cannot remain as it has been during all the years which have been covered by the investigation of the Commission. The same applies to the appointment of Chief Executive Officers and Chief Financial Officers of these companies. The evidence heard by the Commission has revealed quite clearly that part of the reason why some of the state owned companies have performed as badly as they have and why some rely on Government bail outs year in year out is the calibre of some of the people who are appointed as members of the Boards of these companies or who are their Chief Executive Officers and Chief Financial Officers. Recommendations will be made in Part V of this Commission's Report with regard to changes that must be made in the appointment of such people.

### **The suspension of senior executives and appointment of acting executives**

2501. The evidence of Ms Daniels, Ms Dlamini and Mr Masango as a whole proves two things conclusively: firstly, that there was a scheme to remove from Eskom certain executives who occupied strategic positions who the Gupta family believed would not co-operate with them in their plan to capture Eskom and steal tax payers' money and to replace them with officials who would co-operate with them. Secondly, that Mr Koko was an integral component of the Gupta family's strategy to capture Eskom. Former President Zuma and Ms Myeni were witting participants in the scheme to oust the relevant Eskom executives and thus witting participants in the Gupta family's larger scheme to capture Eskom.

2502. On the evidence, this was not the only time that Mr Salim Essa knew in advance what personnel changes were to be made in the Eskom executive. There is the evidence of Mr Henk Bester, who testified that in 2014 Mr Salim Essa told him that Mr Brian Molefe was going to become the Eskom CEO. According to Mr Johann Bester, Mr Salim Essa's motive in disclosing this to Mr Johann Bester was that he wished to demonstrate to Mr Johann Bester the reach and extent of the Gupta family's power or influence in state affairs.

2503. Following a board meeting on 11 March 2015, at which Ms Brown addressed the board, processes within Eskom were then put into operation by which first then three, then the four officials, were notified that the board had decided to suspend them but would hear them on the question why they should not be suspended. These proceedings were conducted with extraordinary haste. By close of business on 11 March 2015, the processes by which the four executives were suspended had been completed.

2504. It is plain that Mr Koko's suspension was a ruse. That is why on the 10<sup>th</sup> March 2015 he was busy with Mr Salim Essa at Melrose Arch seeking to identify Eskom officials

who could act in the positions that would become temporarily vacant the following day when the executives including Mr Koko would be suspended. The Guptas and their associates must have identified Mr Koko much earlier as someone who could work with them to advance their capture of Eskom and, therefore, their business interests. They knew that, after the suspension, he would be allowed back at Eskom and they could rely on him. As it turned out, on the first day he was back at work, namely, on 20 July 2015, he came with a list of entities that he told Ms Daniels he got from his “principals” and he wasted no time in sending emails to Mr Salim Essa at the infoportal address discussed elsewhere in this report. In the rest of 2015 and beyond Mr Koko continued to act in the interests of the Guptas and their associates in a number of instances rather than in the interests of Eskom.

2505. The suspension of executives was a key component of the scheme from the outset. The only proper conclusion is that the proposed inquiry was intended to act as cover for the suspension of the four executives. The primary purpose of the scheme was to install Mr Brian Molefe in Eskom as its CEO and Mr Anoj Singh as the Financial Director because those who devised and implemented the scheme believed that Mr Brian Molefe and Mr Singh would favour the Gupta family and channel resources of Eskom towards the Gupta family.

2506. The members of the Eskom Board took part in the decision to suspend the executives because some must have known that it was part of the Gupta scheme and were happy to advance the agenda of the Guptas and others may have simply done so to do the bidding of President Zuma and Ms Brown and not because they regarded the suspensions as in the interest of Eskom. Those board members, with the exception of Mr Baloyi, therefore breached their fiduciary duties to Eskom.

## Recommendations

2507. In terms of section 50 (1)(a) of the Public Finance Management Act, the 2014 Board of Eskom was under an obligation to—

“exercise the duty of utmost care to ensure reasonable protection of the assets and records of the public entity”

2508. Section 50(1)(b) of the PFMA placed an obligation on the members of the 2014 Board to—

“act with fidelity, integrity and in the best interests of the public entity in managing the financial affairs of the public entity”

2509. Section 50 (1)(d) obliged the 2014 Board to—

“seek, within the sphere of influence of that accounting authority, to prevent any prejudice to the financial interests of the state”.

2510. Section 50(2) of the PFMA placed an obligation on the members of the 2014 Board not to—

“(b) use the position or privileges of, or, confidential information obtained as an accounting of an accounting authority, for personal gain or to improperly benefit another person.”

2511. Section 51(1)(b) of the PFMA enjoined the 2014 Board to—

“take effective and appropriate steps to-

- (i) ....
- (ii) prevent irregular expenditure, fruitless and wasteful expenditure not complying with the operational policies of the public entity.

2512. Section 86(2) makes it a criminal offence for an accounting authority – which was the 2014 Board in his case – to wilfully or in a grossly negligent way to fail to comply with a provision of section 50 or 51.

2513. Section 86(2) of the PFMA reads:

“(2) An accounting authority is guilty of an offence and liable on conviction to a fine, or to imprisonment for a period not exceeding five years, if that accounting authority wilfully or in a grossly negligent way fails to comply with a provision of section 50, 51 or 55.”

2514. There are many decisions that were made by the 2014 Board of directors of Eskom which were in breach of their duty in terms of section 50(1) and (2) as well as section 51 of the PFMA including their decision to suspend the executives who were suspended and their decision to push three of those executives out of Eskom and to pay them the millions of rands that they decided should be paid out to them. The amounts paid out to the three executives were in the region of R18 million. It is recommended that the National Prosecuting Authority should consider the evidence that has already been collected by the Commission and the transcript of the evidence led in the Commission and allow such further investigations as may be necessary to be conducted with a view to the criminal prosecution of all the people still alive who were members of the 2014 Board who made or supported the decisions made by that Board in breach of section 50(1)(a) including the decisions referred to above.

2515. It is recommended that, in so far as this has not been done, serious consideration be given to instituting legal proceedings against all members of the 2014 Eskom Board, except Mr Baloyi, to recover all the financial losses that were suffered by Eskom as a result of decisions taken by the 2014 Board against the interests of Eskom.

### **The appointment of Mr Mosebenzi Zwane as Minister of Mineral Resources**

2516. On the evidence, it is clear that Adv. Ramatlhodi was moved from the portfolio of Minerals to that of Public Service Administration because he refused to co-operate with the Guptas and in regard to matters affecting the Guptas.

2517. Viewed in its proper context, it is plain that he was removed from the position of Minister of Public Service & Administration because he did not support Mr Manyi's appointment as Director-General of the Department of Mineral Resources and would not agree to table a memorandum to Cabinet on the appointment of Mr Manyi.

2518. It is quite clear on the evidence that Mr Mosebenzi Zwane was appointed Minister of Mineral Resources because the Guptas wanted him to be appointed to that position or because of his connection with the Guptas.

2519. This is reinforced by the identities of the two persons whom Mr Zwane appointed as his advisors after he was appointed as Minister. The two persons were Mr Kuben Moodley and Mr Malcolm Mabaso, both of whom were proved to have business links with the Guptas.

### **The acquisition of Optimum Coal Mine (OCM) by Tegeta**

2520. The characterisation of the payment as a pre-payment for coal supplies was a sham. This is confirmed by the findings of a cash flow analysis which shows that the R659 million was paid towards the acquisition price of OCH by Tegeta, as was the R1.68 billion guarantee which was used to prove to OCH bankers that Tegeta was good for the acquisition price. The context in which these were made, their timing and the urgency with which they were processed, all demonstrate that the R659 million payment and the R1.68 billion guarantee were not made with the purpose of furthering the

interests of Eskom. These were made with the single purpose of ensuring that the Guptas' deal in terms of which they acquired the Glencore coal interests did not fall through for want of finance on the part of the Guptas.

2521. I cannot accept that the payment and the guarantee were for coal to be delivered. Once it is accepted that Messrs Molefe, Koko and Singh were Gupta agents, prepared when they were called to do so to do the Guptas' bidding, then the possibility that any of them did not know that the money was required to complete the purchase of shares transaction is small. Some private explanation to all of them was required to explain why the payments were so urgent. There is no suggestion that any of them was misled as to the true purpose for which the money was needed.

2522. I, therefore, conclude that there are reasonable grounds to believe that Mr Anoj Singh may be guilty of the theft of this money from Eskom by false pretences or fraud, in that he led Eskom, through the officials who processed the payments, to believe that the payments were in the nature of pre-payments for coal, when in truth and fact they were needed to enable the Guptas to complete and save the share transaction. However, whether he is criminally guilty will be determined by a Court of competent jurisdiction. It is recommended that the National Prosecuting Authority should consider all the evidence before the Commission and have such further investigations conducted as may be necessary with a view to instituting criminal charges against Mr Anoj Singh in this regard. It is also recommended that the NPA should consider possible criminal prosecution of the members of the 2014 Board of Directors who supported the decision to pay this money on the grounds of breach of their obligations imposed on that Board by sections 50 and 51 of the PFMA.

2523. There are reasonable grounds to believe that all those Eskom officials who were party to or facilitated the acquisition by bringing pressure to bear on Glencore to dispose of

its coal interests to the Guptas and were party to or facilitated payment of this very large sum of R659 million and the R1.68 billion guarantee may be guilty of theft and ought to face criminal charges.

### Recommendations

2524. Money laundering transactions which Mr Sinton brought to the open session on day 64 by way of an envelope which he said contained matters about which he did not want to testify in public which he described in simple terms as being efforts to disguise the origins of the proceeds of crime need to be pursued further by the Law Enforcement Agencies for further investigation and prosecution.

2525. All those Eskom officials who were party to or facilitated the acquisition by bringing pressure to bear on Glencore to dispose of its coal interests to the Guptas and were party to or facilitated payment of this very large sum of R659 million and the R1.68 billion guarantee are prima facie guilty of theft and ought to face criminal charges for such corruption related conduct.

2526. The recommendation for criminal charges is particularly applicable to Mr Anoj Singh and Mr Koko, who by false pretences led Eskom, through the officials who processed the R659 million payment, to believe that the R659 million payment was in the nature of pre-payment for coal, as was the R1.68 billion pre-payment, later converted into a guarantee, when in truth and fact they knew that the prepayment and the guarantee were needed to enable the Guptas to complete and save the sale of share transaction.

### **The irregular supply of coal to Eskom from Tegeta's Brakfontein Colliery**

2527. From the above, it is considered that the following parties are implicated in wrongdoing in regard to the Brakfontein Coal Supply Agreement:

- 2527.1. Mr Matshela Koko;
- 2527.2. Mr Vusi Mboweni;
- 2527.3. Dr Ayanda Nteta;
- 2527.4. Mr Ravindra Nath of Tegeta;
- 2527.5. Mr Jacques Roux of Tegeta; and
- 2527.6. Mr Tony Gupta of Tegeta.

2528. Prima facie the evidence before the Commission, it may be concluded that the Eskom officials listed above:

- 2528.1. breached or violated legislation and Eskom policies by facilitating the unlawful awarding of the Brakfontein Coal Supply Agreement to Tegeta;
- 2528.2. their conduct in awarding the Brakfontein Coal Supply Agreement to a Gupta-owned entity, Tegeta, was vitiated by irregularities, corruption and undue influence; and
- 2528.3. their conduct involved abuse of position of power and undue influence on subordinates in order to unduly benefit the Gupta family in the retention of the Brakfontein Coal Supply Agreement with Tegeta; and their conduct potentially caused financial prejudice and loss to Eskom due to procuring some of the coal that they knew was non-compliant, thus potentially causing Eskom to incur losses from sub-optimal power generation and/or adverse impact on the Majuba Power Station generation infrastructure.

### Legislative provisions breached

2529. Eskom is a major public entity listed in Schedule 2 to the PFMA, thus it is bound by the provisions of the PFMA.

2530. Section 57 of the PFMA places certain obligations on officials of public entities.

2531. The implicated Eskom officials listed above have prima facie acted in breach of section 57 of the PFMA in that they appear to have-

2531.1. failed to safeguard the financial interests of Eskom, and

2531.2. failed to take effective and appropriate steps to prevent irregular expenditure, and fruitless and wasteful expenditure.

### Recommendations

2532. It is recommended that the National Prosecuting Authority should consider the criminal prosecution of Mr Koko, Mr Mboweni, Dr Nteta and Mr Roux for the possible contraventions of the PFMA and policies of Eskom already referred to above.

2533. Further, it is recommended that the law enforcement agencies should consider further investigation into determining whether the implicated parties have acted in breach of the provisions of PRECCA (sections 3 and/or section 4, section 12(1), sections 21).

### **The Huarong transaction**

2534. The attempt to commit Eskom to a contract with HEA providing for an upfront payment of a raising fee of some USD24 million before any money allegedly raised to lend to Eskom amounts to corruption as contemplated in the ToR identified.

2535. It is little wonder that the Eskom Treasurer, Mr Pillay, resisted this aspect of the transaction so strongly. It remains unexplained why the then CFO, Mr Anoj Singh, who signed the term sheet, and the acting Group CEO, Mr Maritz, who signed the ALFA, should have promoted the transaction so unreservedly.

2536. There does not appear to have been any justification for the signing of the term sheet. Signing the term sheet was not in accordance with Eskom's usual practice and it is difficult to see what benefit there was in legally committing Eskom to its terms. It seems as if the purpose in signing the term sheet was to push Eskom closer to HEA and afford HEA preferential treatment over its competitors for Eskom's business.

2537. It does not appear to be in dispute that no board approval was provided for the conclusion of the HEA transaction. This alone rendered the signed contract with HEA invalid. Fortunately, the invoice submitted by HEA was never paid and the HEA transaction therefore caused Eskom no direct loss.

2538. Nevertheless, it would appear that there is at least a prima facie case of attempted theft or fraud against Mr Anoj Singh, who signed the term sheet, and Mr Maritz, who signed the contract documents on the strength of which the invoice for USD21 888 000 (twenty-one million, eight hundred and eighty-eight thousand Dollars) was submitted to Eskom. It is possible that a similar case could be made against Mr Thomas of HEA.

### Recommendations

2539. It is recommended that National Prosecuting Authority consider criminal prosecution of at least a prima facie case of attempted theft or fraud against Mr Anoj Singh, who signed the term sheet, and Mr Maritz, who signed the contract documents on the strength of which the invoice for USD21 888 000 (twenty-one million, eight hundred and eighty-eight thousand Dollars) was submitted to Eskom.

2540. The NPA should consider a similar case to be made against Mr Thomas of HEA.

## **The McKinsey, Trillian and Regiments contracts**

### **McKinsey and Eskom “contract”**

2541. The evidence above shows that, despite McKinsey and Eskom officials working for two months on a new contracting approach to the SDL partnering, in terms of which McKinsey would pay a range of alternative BEE contractors, Eskom executives on SteerCo decided to “terminate” the contract, by letter dated 16 June 2016, signed by Mr Mabelane, even before they could obtain a Board Tender Committee approval for termination on 21 June 2016. This negates the urgency and importance of the case that had been argued for sole-sourcing McKinsey to assist Eskom, and the significant investment of time by numerous Eskom officials, including the top executives, to negotiate over the proposal.

2542. The official reasons given to the Board Tender Committee very opaquely referenced concerns about the “mechanics” of the Turnaround programme that McKinsey had not addressed, and there was reference to a concern that National Treasury was starting to review Eskom’s contracts with McKinsey. Indeed, according to Mr Anoj Singh, the National Treasury scrutiny was triggered by an audit finding over the use of sole-sourcing and the lack of a quantifiable value to the contract with McKinsey, which could trigger a finding of ‘irregular expenditure’, and appears to have made Eskom executives nervous.

### **Trillian and Regiments’ work on the MSA/Turnaround Programme**

2543. There were to be four work streams that constituted the MSA/Turnaround Programme:

2543.1. “Primary Energy”,

- 2543.2. “Generation”,
- 2543.3. “Procurement”, and
- 2543.4. “Claims”.

2544. What actually took place with regards to Trillian and Regiments’ involvement was the following:

- 2544.1. On the “Procurement” work stream, Trillian made use of Cutting-Edge Commerce (Pty) Ltd, a subsidiary of the Gupta’s Sahara group of companies, which had seven employees working at Eskom, and apparently presented themselves as Trillian employees.
- 2544.2. On the “Generation” work stream, Trillian brought in E-Gateway, a company that consisted of a few individuals brought in from abroad (UAE Emirates and India) that worked on the ‘generation work stream’.
- 2544.3. On the Majuba site, there was one E-Gateway individual deployed as a technical expert, who lasted less than a month before being asked to leave, as it was said that he was unable to add much value. Another individual claimed by Trillian as working on site was never seen by the senior site manager; and a third apparently did little more than arrange some meetings. For all this, Trillian charged R100 million. Moreover, it is not clear why these E-Gateway personnel were even on site, where Eskom had said they already had sufficiently qualified and experienced engineers and technical personnel on site.
- 2544.4. Indeed, Ms Goodson confirmed that Trillian did not have the capacity to do the work and made use of sub-contractors on the Turnaround Programme (MSA).

2545. Trillian did not participate in the remaining two work streams, “Primary Energy” and “Claims”. Nonetheless, Regiments did work on the “Claims” work stream, and there is particular mention of the online vending initiative and insurance claims. However, according to Ms Mothepu, Eskom already had sufficient in-house expertise to manage these, and Eskom officials were already working on all these initiatives, some of which were near completion, whilst Regiments were not necessarily knowledgeable in these areas and apparently had to be briefed and guided by Eskom officials.

2546. The only area where Trillian appears to have had expertise was in financial transactions, such as loan negotiations. However, here again, Eskom’s large Treasury division was capable of doing the work itself.

Eskom provides settlement payments to McKinsey and Trillian that are unlawful

2547. Eskom then set about compensating not just McKinsey, but also Trillian, for the time spent on the Turnaround Programme, as well as compensation for the early cancellation. Between August 2016 and February 2017, Eskom made total payments of just under R1.6 billion to McKinsey and Trillian for a purported MSA contract that was backdated after “termination”.

2548. The R1.1 billion that McKinsey received between the MSA settlement and 2015 contract payments was nearly ten times what it had earned from Eskom in previous years.

2549. Regiments were not paid for the work they had done under the Corporate Plan. Payment went to Trillian. All the payments to Trillian were approved and effected despite the fact that:

2549.1. Eskom did not have a contractual relationship with Trillian;

- 2549.2. McKinsey had, with Eskom's knowledge, terminated any consideration of Trillian becoming its subcontractor or BBBEE partner under the MSA; and
- 2549.3. Eskom policies and procedures did not provide for direct payment to subcontractors.

#### Eskom and McKinsey-Regiments - Trillian

##### *MSA*

2550. Messrs Singh, Molefe and Koko were all central to the origin and furtherance of a scheme at Eskom, designed to exploit Eskom and benefit Mr Salim Essa's company, Trillian. The so-called "onboarding" meetings McKinsey and Regiments had with Messrs Singh and Molefe, from May 2015, just shortly after Mr Brian Molefe's arrival at Eskom but not long before Mr Anoj Singh could be seconded to Eskom, presented key moments at which the scheme was conceived and hatched, based on the McKinsey/Regiments model of operation at Transnet with which both Mr Anoj Singh and Mr Brian Molefe were very much familiar. Therefore, the allegation that Mr Anoj Singh (and perhaps Mr Brian Molefe) would have introduced Regiments at Eskom is not at all far-fetched. In fact, on the evidence, it is palpably reasonable to conclude that he did.

2551. To that end, Mr Brian Molefe and Mr Anoj Singh pursued "negotiations" with McKinsey and Trillian through secret, off-site meetings to agree to work on a range of issues together before any formal contracting processes even began. This would eventually result in them and other Eskom officials, e.g. Messrs Kalima, Govender, Mabelane and Koko, taking part in signing off on submissions to obtain Board approvals for the contracting process which they knew was irregular and unlawful.

2552. Correspondence from McKinsey on the proposal to render financial work at Eskom places Mr Koko in the picture of negotiations of both the MSA and the 2015 contract in relation to the Corporate Plan. The evidence of Mr Mabelane is to the effect that the idea to employ McKinsey to develop an Internal Engineering Consulting Unit was the brainchild of Mr Koko. From McKinsey's proposal on the finance work, it is apparent that both Mr Koko and Mr Anoj Singh would have commenced discussions and negotiations with McKinsey on both the MSA and the Corporate Plan even before April 2015. As the proposed work activities could allegedly not all fit under the MSA, these executives contrived another means, i.e. the Corporate Plan, to facilitate a quick appointment of McKinsey, on a sole source basis, with a last minute requirement, but arguably key to the scheme, to subcontract 30% of the contract value to a Black owned supplier.

2553. It is no surprise that the submission to the Board Tender Committee was prepared by both Mr Koko and Mr Anoj Singh, as parties to the negotiations, and Mr Koko signed off on the Acceptance Letter to McKinsey. It soon transpired that the Black-owned supplier was Regiments, which Mr Anoj Singh had spoken positively about and recommended to McKinsey. Mr Salim Essa was, according to Ms Mothepu's evidence, a business development partner to Regiments. He secured government contracts for Regiments, and indeed tried to do so in 2014 at Eskom, but fell short. The R30.6 million payment by Eskom in respect of the Corporate Plan followed Mr Salim Essa to Trillian. There was no justification for this payment, nor for the "believe" that Regiments or Trillian was a BBBEE partner to McKinsey. This was corruption, plain and simple.

2554. Mr Mabelane and Mr Govender were complicit in the scheme, as they both approved Trillian's R30.6 million invoice for payment directly to Trillian. Mr Govender was also one of the three Eskom officials who signed off on Mr Koko and Mr Anoj Singh's submission to the Board Tender Committee.

2555. Mr Govender participated in formulating flawed justifications for the sole sourcing of the MSA, with Mr Mabelane and Ms Daniels supporting this.
2556. Messrs Koko, Singh and Molefe were present at Eskom board meetings where the potential irregularities of the sole-sourced “at-risk” contract and the need for National Treasury approvals was discussed, yet Board approval to proceed with contracting process was requested and obtained nonetheless.
2557. Mr Koko provided confidential information on Eskom’s negotiation position on the MSA to “Business Man” (alias Mr Salim Essa) and took instructions from external parties on additional items to be included under the scope of the MSA, so that the extent of contracting work would be expanded.
2558. Mr Koko put pressure on Eskom managers not to hold up the finalisation of the MSA despite lack of Treasury approval.
2559. Messrs Koko and Singh engaged McKinsey and Trillian to begin working before the contracting process was complete.
2560. Messrs Singh, Koko and Mabelane, were all complicit in the false statement of Mr Govender that National Treasury had approved Eskom’s risk-based appointment of McKinsey.
2561. Mr Mabelane signed off on an acceptance letter for McKinsey without having obtained approval for deviation, however, Mr Koko and Mr Anoj Singh were complicit in his conduct
2562. Messrs Mabelane and Singh concealed the fact that the contract was not signed in January 2016, and was only signed and back-dated much later, after its purported termination.

2563. Messrs Singh, Mabelane and Govender, when the hiring of Trillian as McKinsey's BBBEE partner did not materialise, were part of cancelling McKinsey's contract.
2564. Messrs Singh and Molefe are responsible for allowing payment of invoices that should not have been paid; which payments were unlawful due to the flawed contracting process, and involved excessive overpayment to Trillian and McKinsey.
2565. Mr Khoza and Ms Daniels lied to the Board Tender Committee at its meeting on 13 December 2016, that a legal review had been obtained advising Eskom to agree to a settlement with McKinsey, when no such review had been received. The conclusion is inescapable that both Mr Khoza and Ms Daniels would either have been part of, or, at least, aware of the scheme above perpetrated against Eskom by Messrs Koko, Singh, Mabelane, Govender and Molefe.
2566. Consequently, the purported conclusion of the MSA and subsequent termination thereof were all a sham, in which Messrs Koko, Singh, Mabelane, Govender and Molefe were the primary role-players. The submission, titled "Feedback Report", prepared and presented by Eskom executives (Messrs Kalima, Govender and Koko), for the conclusion of the MSA was all premised on false and misleading information; the result of a carefully orchestrated and well thought through plan. These executives purported to conclude the MSA, following a process they knew was irregular, and terminated it on spurious grounds even before it could be concluded and before the Board Tender Committee could approve a decision to terminate it. They offered payment to McKinsey and its "BBBEE partner", Trillian, prior to a Board Tender Committee decision on the matter, whilst knowing that McKinsey did not have a BBBEE partner, and that Trillian was not McKinsey's BBBEE partner. The MSA (like the 2015 contact) was a charade designed to siphon money out of Eskom to third parties, particularly Trillian. Eskom's

money was expended on a contract that never existed. The expenditure was blatantly wasteful and the irregularities pertaining thereto gross.

### Corporate Plan

2567. Similarly, in regard to the Corporate Plan, the Eskom executives committed gross irregularities and breach of the law.

2568. Messrs Koko and Singh championed negotiations with McKinsey, even before Mr Anoj Singh was seconded to Eskom, and ultimately prepared a submission to the Board motivating for an appointment of McKinsey under the guise that there was 'urgent finance and strategy work' to be done and only McKinsey had the "know-how" to render the service, when according to Eskom's Internal Consulting Unit, this was not the case.

2569. Messrs Koko and Singh pursued a sole-sourcing contract without obtaining permission from National Treasury for a deviation and where there appeared to be no justifiable case for the work to be done under the contract.

2570. Messrs Mabelane and Govender acquiesced in the conduct of Messrs Koko and Singh in the pursuit of McKinsey's appointment and were thus complicit in the furtherance of a scheme calculated to exploit Eskom financially.

2571. Mr Koko signed the Acceptance Letter with McKinsey for the contract, and Mr Mabelane purported to sign the contract well after its end date and, in any event, failed to append his signature on the right place, such that the contract never came into effect.

2572. Mr Anoj Singh engaged Regiments to conduct work for Eskom when Eskom had no contract with Regiments.

2573. Mr Anoj Singh, as the Eskom Group Chief Financial Officer, allowed payment of the R30.6 million invoice directly to Trillian that was unwarranted, as Trillian did not conduct work for Eskom and did not have a contract with Eskom or McKinsey.

#### Further considerations

2574. Another disturbing factor is the fraudulent nature of the invoice sent by Trillian to justify their R595 million share of the settlement. According to Ms Mothepu, the calculations involved grossly inflated time that Trillian employees spent at Eskom, such as allocating 180 days to her, which was not physically possible as she was only with Trillian Financial Advisory for four months and did not even spend all of her working hours on Eskom.

2575. In total, R14.7 billion of Eskom's contracts are calculated to have been afflicted by State Capture according to the Flow of Funds' investigation and, of this, McKinsey's MSA and Corporate Plan contracts account for R1.1 billion, and related payments to Trillian account for R595.2 million from these two contracts.

2576. All of the above-mentioned individuals colluded together to ensure that at least two large contracts were irregularly awarded to McKinsey and their development supplier, which was intended at first to be Regiments and then Trillian. Substantive payments were made unlawfully and irregularly to these parties, who benefitted unduly at the expense of Eskom.

#### Exposure of irregularities

2577. Despite these events and other allegations of corruption becoming public knowledge, the 2014 Eskom Board and senior executives repeatedly denied wrongdoing and even actively intervened or stopped Eskom from taking the necessary legal steps to have

these contracts reviewed and set aside by a Court and to recover associated payments. The corporate governance failures inherent in these events triggered, amongst other things, a qualified audit report, a backlash from Eskom's creditors, severe liquidity problems that threatened Eskom's ability to generate electricity to South Africa and downgrades of Eskom's credit rating.

2578. Things only changed when a new leadership took over at Eskom from 2018. This included a new Board appointed in January 2018, with Mr Jabu Mabuza appointed as Chair, and an Acting Group CEO, Mr Hadebe. As with Transnet, the afore-mentioned contracts were found to be highly irregular and suspicious in many respects, and became the subject of investigations and legal proceedings to have them set aside by a court of law and monies recovered. To that end, in March 2018 Eskom went to court to have the two contracts and resultant payments of around R1.6 billion to McKinsey and Trillian set aside. The High Court in Gauteng concluded that both the MSA and the 2015 contract had not been validly concluded, and that there was no legal basis for the payments to McKinsey and Trillian, which had to be returned. McKinsey had already decided to repay the monies – around R1 billion, whilst Trillian refused, with the matter becoming entangled in further court proceedings. Eskom subsequently obtained an order, on 9 March 2020, for the final winding up of Trillian.

2579. As already shown above, the conduct of the Eskom executives contravened the National Treasury Instruction 1 of 2013/2014, adopted into Eskom's own Procurement Policy, which provided that it was mandatory for accounting officers and accounting authorities of public entities listed Schedules 2 of the PFMA to implement the cost containment measures referred to in paragraph 4 of the Treasury Instruction.

2580. Paragraph 4 of the National Treasury Instruction provided, inter alia, that public entities could only contract consultants after a gap analysis had confirmed that the public entity

concerned did not have the requisite skills or resources in its full time employ to perform the assignment in question. The failure by Eskom executives to comply with these provisions constituted a breach of the law and was therefore unlawful.

2581. The 2014 Eskom Board failed to exercise their fiduciary duties and prevent financial prejudice to Eskom, as required in Sections 50 and 51 of the PFMA. They instead, allowed irregular procurement in breach of both the law and Eskom policies, and allowed irregular, fruitless and wasteful expenditure in the face of legal instruments that enjoined them to act otherwise. The Board members acted unlawfully and committed financial misconduct, as envisaged in section 83 of the PFMA. Mr Brian Molefe and Mr Anoj Singh were ex officio members of the Board and therefore equally responsible for the Board's various breaches of its fiduciary duties.

2582. Eskom officials also acted in breach of the PFMA which, in Section 57, required them to:

- “(a) ensure that the system of financial management and internal control established for that public entity is carried out within the area of responsibility of that official;
- (b) be responsible for the effective, efficient, economical and transparent use of financial and other resources within that official's area of responsibility;
- (c) take effective and appropriate steps to prevent, within that official's area of responsibility, any irregular expenditure and fruitless and wasteful expenditure and any under collection of revenue due;
- (d) ....
- (e) be responsible for the management, including the safeguarding, of the assets and the management of the liabilities within that official's area of responsibility.”

### Recommendations

2583. The Eskom executives used their positions of authority and power within Eskom to benefit Trillian; a corrupt activity under Prevention and Combating of Corrupt Activities

Act No. 12 of 2004. Messrs Molefe, Singh and Koko all benefited from the Guptas and/or Mr Salim Essa in various forms, with Messrs Koko and Singh from an Eskom perspective and Mr Brian Molefe as already covered in other reports. This may have constituted the criminal offence of corruption. The conduct of Eskom officials, therefore, implicated several provisions of the Commission's terms of references, namely ToR 1, ToR 4, ToR 5 and possibly ToR 6 (corrupt and irregular awarding of contracts to benefit the Gupta family or their associates) and ToR 9 (corruption to benefit the officials involved).

2584. The conduct implicates ToR 1, in that some form of inducement or gain was offered to and received primarily by the three main executives at Eskom (Mr Brian Molefe, Mr Anoj Singh and Mr Koko, from Eskom perspective as regards Messrs Koko and Singh and as dealt with in other reports as regards Mr Brian Molefe) which would have served to influence them to act in the manner referred to above. ToR 4, regarding breach of the Constitution and legislation through the facilitation of unlawful awarding of contracts to McKinsey, is also implicated by the appointment of McKinsey on a sole source basis and at risk, in breach of section 217 of the Constitution, the National Treasury Instruction and Eskom's Policy on Cost Containment Measures. Also relevant are the provisions of ToR 5, ToR 6 and ToR 9 regarding corruption in the awarding of contracts by public entities either to benefit the Gupta family and their associates and/or to benefit Eskom individual officials involved in the transactions. Rampant corruption is evident in the awarding of contracts and approval of payments to McKinsey and its BBBEE partner, Trillian, in circumstances described in this report.

2585. It is recommended that the law enforcement agencies should conduct such investigations as may be necessary with a view to the possible prosecution by the National Prosecuting Authority of the former Eskom officials referred to above who are implicated in the facilitation of unlawful contracts, corruption and financial misconduct

and breaches of the PFMA. It is also recommended that legal steps be taken by Eskom to recover from members of the 2014 Board and the former Eskom officials referred to above all losses that Eskom suffered as a result of their unlawful conduct.

2586. Criminal prosecution should be extended to the 2014 Eskom Board failed to exercise their fiduciary duties and prevent financial prejudice to Eskom, as required in Sections 50 and 51 of the PFMA. They instead, allowed irregular procurement in breach of both the law and Eskom policies, and allowed irregular, fruitless and wasteful expenditure in the face of legal instruments that enjoined them to act otherwise. The Board members acted unlawfully and committed financial misconduct, as envisaged in section 83 of the PFMA. Messrs Molefe and Singh were ex officio members of the Board and therefore equally responsible for the Board's various breaches of its fiduciary duties.