

Judicial Commission of Inquiry into State Capture Report: Part IV

Vol. 3: 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. 3



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of
Inquiry into Allegations

of

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

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**THE CAPTURE OF ESKOM
TABLE OF CONTENTS**

INTRODUCTION.....	548
Public Protector’s State of Capture Report.....	549
Commission’s Terms of Reference relevant to allegations of corruption, state capture and other forms of wrongdoing at Eskom	553
Scope of evidence.....	555
The evidence of Mr Jabu Mabuza	555
THE APPOINTMENT OF THE 2014 ESKOM BOARD.....	561
Mr Romeo Kumalo	569
Mr Zola Tsotsi	574
Dr Ben Ngubane	574
Mr Zethembe Khoza.....	578
Mr Norman Baloyi	580
Ms Chwayita Mabude.....	581
Ms Nazia Carrim	582
Ms Venete Jarlene Klein	583
Ms Klein’s interactions with the Guptas	583
Ms D Viroshini Naidoo	584
Dr Pat Naidoo.....	585
Mr Mark Vivian Pamensky.....	585
Mr Geovanni Michele Leonardi.....	590
Ms Mariam Cassim.....	593
The composition of the committees of the 2014 Board.....	594
The evidence of Mr Zola Tsotsi	594
The Fundudzi Report on the composition of the 2014 Eskom Board.....	597
The “infoportal” address	603
The evidence of Minister Lynn Brown about the appointment of the 2014 Board of Directors of Eskom	608

THE SUSPENSION OF THE FOUR ESKOM EXECUTIVES	615
The postponement of the Eskom Board meeting of 26 February 2015	616
Ms Myeni's meeting with Mr Linnell on 6 March 2015	620
Ms Myeni calls Mr Zola Tsotsi to Durban meeting on 7 March 2015.....	622
The Durban meeting at President Zuma's official residence on 8 March 2015.....	623
What Mr Linnell did on 8 March 2015 after the Durban meeting	627
The Board meeting of 9 March 2015	628
The meetings involving Mr Salim Essa and Mr Koko at Melrose Arch on 10 March 2015	630
The meeting involving Ms Daniels, Mr Koko and Mr Essa	630
The meeting involving Mr Masango, Mr Koko and Mr Essa	633
Interaction between Ms Dlamini and Mr Koko on 10 March 2015	637
The events of the 11 th March 2015	642
The emails suggesting prior knowledge of suspension of executives on the part of Mr Zethembe Khoza	651
Evidence of Minister Lynn Brown	656
Ms Tsholofelo Molefe	662
Mr Marokane.....	666
Mr Koko.....	670
Mr Tsotsi's removal from the Board	675
Removal of Mr Baloyi.....	694
Mr Brian Molefe's and Mr Anoj Singh's secondments to Eskom and appointments as GCEO and CFO, respectively	697
The appointment of Mr Mosebenzi Zwane as Minister of Mineral Resources	709
The acquisition of the Optimum coal mine by Tegeta	716
Mr Brian Molefe assumes control and ends negotiations with OCM - The Guptas then emerged from cover	722
The Gupta's offer to purchase as pressure intensifies	734
Preferential treatment to Tegeta as it sought to fulfil the sale conditions	754

Mr Koko’s submission for a R1.68 billion pre-payment to Tegeta	755
Mr Anoj Singh involves Gupta associates to respond to Eskom Board queries....	764
The Guarantee by Mr Anoj Singh	765
Mr Anoj Singh involves Gupta associates in finalising a draft pre-purchase of coal agreement with the Tegeta and the terms of the R1.68 billion guarantee.....	766
Short-term Coal Supply Agreements with Tegeta.....	775
The R659 million Prepayment submission	776
The submission document	780
Tegeta’s offer letters	781
The Board Tender Committee’s “Special” meeting on 11 April 2016 at 21h00.....	785
How the minutes of this meeting were prepared	786
The Board Tender Committee meeting on 13 April 2016	791
Irregularities with the prepayment	792
The real purpose of the prepayment	793
Eskom’s treatment of OCM under Tegeta	800
Prevention of money laundering by Standard Bank	803
Evidence of Mr Sinton	803
The role of Mr Brian Molefe	805
The role of Mr Pamensky	810
The role of Ms Daniels	812
The role of Mr Koko.....	813
Mr Koko’s complaint against President Ramaphosa.....	819
President Ramaphosa’s response	824
The role of Mr Anoj Singh	830
The role of Mr Zwane	835
Implicated parties - Acquisition of OCH/OCM	840
Implicated parties - R1.68 billion submission and the guarantee	841
Implicated parties - R659 million prepayment.....	842

Implicated parties - Settlement of R2.17 billion and Temporary Reliefs	842
Relevant Terms of Reference	843
Applicable in general.....	843

THE CAPTURE OF ESKOM

INTRODUCTION

1223. This section of the Commission's Report relates to the Commission's investigation and inquiry into matters that fall within the Commission's terms of reference in so far as those matters relate to Eskom Holdings SOC Limited otherwise known simply as Eskom, a state-owned company that is very important to the economy of South Africa and in the lives of South Africans.

1224. Eskom is South Africa's main power utility. The utility is the largest producer of electricity in Africa, and was at some stage among the top utilities in the world in terms of generation capacity and sales, but has since slipped in both categories.

1225. Eskom uses a mix of nuclear, diesel, hydroelectric, pump storage and coal to meet South Africa's energy supply demand.

1226. South Africa produces an average of 224 million tons of marketable coal annually, making it the fifth largest coal producing country in the world. Twenty-five percent (25%) of our production is exported internationally, making South Africa the third largest coal exporting country in the world. The remainder of South Africa's coal production feeds the various local industries, with fifty-three percent (53%) used for electricity generation. Coal has traditionally dominated the energy supply sector in South Africa.

1227. The key role played by our coal reserves in the economy is illustrated by the fact that Eskom is the seventh largest electricity generator in the world. In December 2015

Eskom had thirteen coal-fired power stations and maintained thirty-three coal contracts serviced by at least twenty-eight suppliers.¹²¹⁰

Public Protector's State of Capture Report

1228. In her "State of Capture" Report the then Public Protector identified the following as the issues which needed to be investigated by this Commission:

"Alleged breach of the Executive Member Ethics Act, 1998

- (a) Whether President Zuma improperly and in violation of the Executive Ethics Code, allowed members of the Gupta family and his son, to be involved in the process of removal and appointment of the Minister of Finance in December 2015;
- (b) Whether President Zuma improperly and in violation of the Executive Ethics Code, allowed members of the Gupta family and his son, to engage or be involved in the process of removal and appointing of various members of the Cabinet;
- (c) Whether President Zuma improperly and in violation of the Executive Ethics Code, allowed members of the Gupta family and his son, to be involved in the process of appointing members of Boards of Directors of SOEs;
- (d) Whether President Zuma has enabled or turned a blind eye, in violation of the Executive Ethics Code, to alleged corrupt practices by the Gupta family and his son in relation to allegedly linking appointments to quid pro quo conditions;
- (e) Whether President Zuma and other Cabinet members improperly interfered in the relationship between banks and Gupta owned companies thus giving preferential treatment to such companies on a matter that should have been handled by independent regulatory bodies;
- (f) Whether President Zuma improperly and in violation of the Executive Ethics Code exposed himself to any situation involving the risk of conflict between his official duties and his private interest or used his position or information entrusted to him to enrich himself and or enabled businesses owned by the Gupta family and his son to be given preferential treatment in the award of state contracts, business financing and trading licences; and
- (g) Whether anyone was prejudiced by the conduct of President Zuma.

¹²¹⁰ Public Protector's "State of Capture" Report, paras 4.5-4.11.

Awarding of contracts by certain organs of state to entities linked to the Gupta family

- (a) Whether any state functionary in any organ of state or other person acted unlawfully, improperly or corruptly in connection with the appointment or removal of Ministers and Boards of Directors of SOEs;
- (b) Whether any state functionary in any organ of state or other person acted unlawfully, improperly or corruptly in connection with the award of state contracts or tenders to Gupta linked companies or persons;
- (c) Whether any state functionary in any organ of state or other person acted unlawfully, improperly or corruptly in connection with the extension of state provided business financing facilities to Gupta linked companies or persons;
- (d) Whether any state functionary in any organ of state or other person acted unlawfully, improperly or corruptly in connection with exchange of gifts in relation to Gupta linked companies or persons; and
- (e) Whether any person/entity was prejudiced due to the conduct of the said state functionary or organ of state.”

1229. In the same report then Public Protector had the following to say about allegations of corruption, state capture and other wrongdoing in relation to Eskom:

“Eskom is South Africa's main power utility. It uses a mix of nuclear, diesel, hydroelectric, pump storage and coal to meet South Africa's energy supply demand.

South Africa produces an average of 224 million tons of marketable coal annually, making it the fifth largest coal producing country in the world. Twenty-five percent (25%) of our production is exported internationally, making South Africa the third largest coal exporting country in the world. The remainder of South Africa's coal production feeds the various local industries, with fifty-three percent (53%) used for electricity generation. Coal has traditionally dominated the energy supply sector in South Africa. This domination is unlikely to change in the next decade, due to the relative lack of suitable alternatives to coal as an energy source.

The key role played by our coal reserves in the economy is illustrated by the fact that Eskom is the seventh largest electricity generator in the world. Eskom had thirteen coal-fired power stations and maintained thirty-three coal contracts serviced by at least twenty-eight suppliers in December 2015.”

1230. The Public Protector went on to say:

"I discuss below, the key allegations raised against Eskom in the media.

I noted an article in the **City Press** newspaper dated 12 June 2016 with the title "How Eskom bailed out the Guptas". The key points of the media article are:

Eskom has quietly awarded a contract worth more than R564 million to a coal mining company owned by the Gupta family and President Jacob Zuma's son Duduzane;

In March, the business rescue practitioners of Optimum Coal which was sold to Tegeta in April for R2.15 billion reported that the mine was projected to lose R100 million a month;

At the heart of the company's spectacular turnaround is the R564 million contract Eskom quietly awarded to Tegeta in April to supply Arnot power station with 1.2 million tons of coal over six months. With transport costs added, Eskom is paying just under R700 million - excellent, by Eskom standards;

Until recently, Optimum Coal, situated just south of Middelburg, Mpumalanga, was owned by mining giant Glencore. It was announced in December that Tegeta would buy it. It was later alleged that mining minister Mosebenzi Zwane travelled to Switzerland with the Guptas to help them seal the deal;

Tegeta's major shareholders include the Gupta family's Oakbay Investments (29%); Duduzane Zuma's Mabengela Investments (28,5%); Gupta associate Mr Essa's company, Elgasolve (21.5%); and two unknown investors in Dubai;

When Tegeta took over Optimum in January, it was losing more than R3 million a day because of a lossmaking contract to supply coal for the Hendrina power station. At the time, there was widespread speculation that Tegeta would use its political influence to secure more lucrative terms from Eskom;

Eskom, though, has repeatedly denied this, insisting there would be no special treatment for the Gupta company. 'There's an impression that we are doing special favours for them. This is not true,' Eskom spokesperson Khulu Phasiwe said on Thursday;

At R470 a ton, Tegeta's Arnot contract is one of Eskom's most expensive. In May last year, Public Enterprises Minister Lynne Brown told Parliament that Eskom paid an average price of R230,90 a ton for coal, and that the average price of Eskom's five most expensive contracts was a 'delivered price' of R428,84 a ton;

However, the price paid to Tegeta excludes transport costs. Eskom refused to reveal the transport costs, saying that these are 'commercially sensitive'. However, City Press has established that, with transport, Tegeta is paid roughly R580 a ton, pushing the total value of the six-month contract up to just under R700 million;

Tegeta only received this lucrative contract thanks to a nine-month delay in Eskom awarding a permanent supply contract to replace a 40-year-old Exxaro contract that expired at the end of 2015;

Eskom was supposed to award the contract in November, but this was initially delayed until March, and then delayed again until September this year;

When Tegeta started supplying Arnot in January, they were one of seven short-term suppliers;

In a rare public statement, the Guptas' Oakbay Investments insisted that they had only a small piece of the pie: 'We had a one-month contract in January, supplying less than 15%';

But by the end of March, the contract for Arnot had still not been awarded;

'Initially, the contract was supposed to be filled in March, but we couldn't do that because out of the five [short-listed bidders] none of them was able to give us the full 5 million tons a year,' said Phasiwe;

But the original request for the proposal document issued in August last year does not require a single supplier for the full 5 million tons; and Eskom says it approached the four remaining ad hoc suppliers at Arnot and offered them the opportunity to increase their supply;

'We had to get extra tonnages from the four that are remaining. If we did not get any extra tonnages, we would have had a shortfall of 2.1 million tons,' Phasiwe said;

Two companies were then given additional contracts: Umsimbithi for 540 000 tons, and Tegeta for 1.2 million tons;

Phasiwe said the delays in awarding the Arnot contract did not only benefit the Guptas;

'If we have other companies benefiting, then I don't think it's fair to single them out';

Umsimbithi spokesperson Shamiela Letsoalo would not confirm the price they were paid, but it is less than the amount paid to the Guptas;

'The terms of the contract are confidential. We can, however, confirm that the delivered contractual price is below the R450 a ton, as reported by Eskom previously' she said;

Under the existing Eskom contract that Tegeta inherited from Glencore, Tegeta must deliver 458 000 tons of coal a month to the Hendrina power station;

But City Press has established that Optimum does not produce enough coal to honour both contracts;

In what one mining industry financier describes as a sleight of hand, it appears that Eskom is allowing Tegeta to divert a significant portion of Optimum's coal from Hendrina power station, where Eskom pays them R174 a ton, to Arnot power station 50km away, where Eskom buys the same coal at R580 a ton;

Eskom confirmed that for the past three months, Tegeta delivered, on average, 315 000 tons of coal a month to Hendrina;

Four different coal industry analysts and miners City Press spoke to questioned why Eskom did not take possession of the full 458 000 tons of coal at R174 a ton, but allowed Tegeta to use them to increase its supply to Arnot;”

Commission’s Terms of Reference relevant to allegations of corruption, state capture and other forms of wrongdoing at Eskom

1231. Under its terms of reference (ToR) promulgated as a schedule to Proclamation 3 of 2018¹²¹¹, the Commission was directed to, amongst other things, inquire into, make findings, report on and make recommendations concerning the following, guided by the “State of Capture” Report, the Constitution, relevant legislation, policies, and guidelines, as well as the order of the North Gauteng High Court of 13 December 2017 under case number 91139/2016. The following terms of reference appear to be relevant to this aspect of the enquiry:

1232. (ToR 1.1) whether, and to what extent and by whom, attempts were made through any form of inducement or for any gain of whatsoever nature to influence members of the National Executive (including Deputy Ministers), office bearers and /or functionaries employed by or office bearers of any state institution or organ of state or directors; and of the boards of SOE's;

1233. (ToR 1.4) whether the President or any member of the present or previous members of his National Executive (including Deputy Ministers) or public official or employee of any SOEs breached or violated the Constitution or any relevant ethical code or legislation

¹²¹¹ Published in Government Gazette no. 41403 of 25 January 2018.

by facilitating the unlawful awarding of tenders by SOEs or any organ of state to benefit the Gupta family or any other family, individual or corporate entity doing business with government or any organ of state;

1234. (ToR 1.5) 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 1 of 1999, as amended (PFMA);

1235. (ToR 1.6) whether there were any irregularities, undue enrichment, corruption and undue influence in the awarding of contracts, mining licenses, government advertising in the New Age Newspaper and any other governmental services in the business dealings of the Gupta family with government departments and SOEs; and

1236. (ToR 1.9) the nature and extent of corruption, if any, in the awarding of contracts and tenders to companies, business entities or organizations by Government Departments, agencies and entities. Particularly, whether any member of the National Executive (including the President), public official, functionary of' any organ of state influenced the awarding of tenders to benefit themselves, their families or entities in which they held a personal interest.

1237. In investigating the allegations of state capture, corruption and other wrongdoing in Eskom, the Commission investigated the following:

1237.1. the appointment of the 2014 Eskom board members;

1237.2. the suspension of senior Eskom executives and the appointment of acting executives; and

1237.3. the appointment of Mr Mosebenzi Zwane as Minister of Mineral Resources.

- 1237.4. the sale of all shares held by Optimum Coal Holdings (OCH) and mining rights to Tegeta;
- 1237.5. Eskom's questionable coal contracts with and prepayment to Tegeta for coal supplied by Optimum Coal Mine (OCM);
- 1237.6. the irregularities relating to the supply of coal to Eskom from Tegeta's Brakfontein Colliery;
- 1237.7. an attempt by Eskom's CFO to enter into a fraudulent agreement in relation to the Huarong transaction; and
- 1237.8. the irregularities relating to the McKinsey, Trillian and Regiments contracts.

Scope of evidence

1238. The transactions and allegations that needed to be investigated by this Commission appear from the passages of the "State of Capture" Report to which reference has been made above, the terms of reference of the Commission and the evidence given by Mr Jabu Mabuza. Mr Jabu Mabuza was the Chairperson of the 2018 Board of Directors of Eskom. Unfortunately, he has passed on. The late Mr Jabu Mabuza was the first witness to give evidence before the Commission in respect of Eskom. It is therefore convenient to start with his evidence.

The evidence of Mr Jabu Mabuza

1239. Eskom is a major public entity in terms of Schedule 2 of the PFMA. The main business and objective of Eskom is to provide electricity and related services including its generation, transmission, distribution and retail sale.

1240. In terms of the Eskom Conversion Act No. 13 of 2001 (Eskom Conversion Act) and the Companies Act No. 71 of 2008 (Companies Act), Eskom is a public company. The sole shareholder of Eskom is the Government of the Republic of South Africa. Under Eskom's Memorandum of Incorporation, the Government as the sole shareholder, acting through the Minister of Public Enterprises, has the exclusive power to appoint directors of Eskom pursuant to the provisions of Section 66(4)(a)(i) of the Companies Act and Section 63(2) of the PFMA.

1241. Eskom is a major driver of the South African economy and its direct impact on the South African Gross Domestic Product as a result of its operational and capital expenditure is approximately 3%. Eskom is a key driver of the development of new industries in South Africa, both through its localisation programme and by providing electricity for the establishment of new businesses. It is also one of the largest employers, employing over 48 000 people directly, and one of the largest buyers of goods and services in the country.

1242. On 19 January 2018, a largely new board of Eskom was constituted. A number of challenges faced the 2018 Board. Many of these had been identified in the qualified audit presented in relation to Eskom for the year ended 31 March 2017 as having been due to incompleteness of the irregular expenditure information in terms of PFMA requirements; the many allegations of financial mismanagement and corruption against executives and senior management; and a myriad of other issues related to lapses in governance processes and other internal controls.

1243. These factors, amongst others, led to a deterioration of confidence in Eskom by financial markets which constrained access to funding. Eskom suffered a liquidity crunch, giving rise to serious concerns about its long-term financial viability and the going concern status. Eskom needed to raise loans of R20 billion in the period 1

February 2018 to 31 March 2018 after having had no access to funding since July 2017. Going concern status required Eskom to be both liquid and solvent to avoid the risk of triggering defaults on existing funding facilities.

1244. The 2018 Eskom Board was confronted with:

- 1244.1. a liquidity crisis with no access to funding;
- 1244.2. unsatisfactory sales revenue generated by Eskom;
- 1244.3. low investor confidence as evidenced by the credit rating downgrades;
- 1244.4. increasing municipal and Soweto debt;
- 1244.5. deteriorating earnings before interest, taxes, depreciation, and amortization margins;
- 1244.6. ballooning capital expenditure;
- 1244.7. high operating expenditure;
- 1244.8. high debt servicing costs;
- 1244.9. high costs of maintenance;
- 1244.10. a myriad of allegations of mismanagement and corruption against senior officials;
- 1244.11. breaches of the PFMA and lapses of governance systems and controls;
- 1244.12. delayed financial results on the back of going concern challenges; and

1244.13. low staff morale.

1245. Mr Jabu Mabuza was not able to give evidence from his personal knowledge of the transactions I shall list but identified them from documents and information under his control as the then chairman of Eskom.

1246. Much of the woes in which Eskom finds itself stem from corruption perpetrated by Eskom's own executives and managers in the field of procurement. In Mr Jabu Mabuza's graphic phrase, "I learnt that the name is corruption but the game is procurement".¹²¹²

1247. With this in mind, Eskom has committed itself to probity checks, which require the disclosure of potential conflicts of interest and evaluations of potential conflicts in relation to specific large value transactions by Eskom's assurance and forensic department as well as a wide ranging requirement of disclosure, operating in a wide range of situations, by executives and employees. Board members and employees may not be involved in bidding for Eskom tenders. Eskom employees are subject to lifestyle audits.

1248. In addition, numerous employees were subjected to disciplinary action where this was possible. In many instances, disciplinary action was frustrated by the employee resigning before or during the disciplinary process. Where it was considered appropriate, Eskom laid charges with the South African Police Service.

1249. A specific example of the way in which past procurement practice led to unacceptable results was the manner in which Eskom's procurement policy allowed for contracts which had been concluded for various products and services to be modified or expanded without adequate oversight and scrutiny. By 28 August 2018, 1 049 cases of

¹²¹² Transcript 22 February 2019 page 59.

allegedly improper modifications or expansions had been identified and reported to the 2018 Board. Most of these cases have been finalised. The overhaul of Eskom's procurement policy was under way when Mr Jabu Mabuza made his statement.

1250. Mr Jabu Mabuza identified the following transactions as warranting the attention of the Commission. These are:

- 1250.1. the contracts with New Age Media (Pty) Limited (TNA);
- 1250.2. Eskom's dealings with Tegeta from about 2013, Tegeta's acquisition of Optimum in 2015/2016 and Eskom's further dealings with companies in the Optimum group;
- 1250.3. the propriety of the dealings of Mr Matshela Koko, Mr Anoj Singh, Dr Ayanda Nteta, Mr Edwin Mabelane, Ms Suzanne Daniels, and Mr Brian Molefe, all erstwhile Eskom employees in relation to dealings between Eskom and Tegeta, Optimum and their associated companies;
- 1250.4. the contracts between Eskom and McKinsey and Company Africa (Pty) Ltd (McKinsey) and Trillian Management Consulting (Pty) Ltd (Trillian) and their associated companies;
- 1250.5. the propriety of the dealings of Mr Koko, Mr Anoj Singh, Mr Mabelane, Mr Prish Govender, Ms Daniels, Mr Sean Maritz, and Ms Bhana (Naidoo), all erstwhile Eskom employees in relation to McKinsey and Trillian;
- 1250.6. the contracts between Eskom and its subsidiary ERI (Eskom Rotek Industries SOC) and Impulse International (Pty) Ltd (Impulse);
- 1250.7. the appointment of accountants Nkonki Inc. as a subcontractor by KPMG;

- 1250.8. the contracts between Eskom and Huarong Energy Africa Ltd (HEA) relating to funding from Huarong Asset Management;
- 1250.9. the propriety of the dealings of the late Dr Baldwin (Ben) Ngubane (Dr Ngubane), a former chairman of the Eskom board, Minister Lynne Brown (Ms Lynn Brown), and Mr Maritz and Mr Anoj Singh, both erstwhile Eskom employees in relation to HEA; and
- 1250.10. the contract between Eskom and Dongfang for the Duvha unit 3 Recovery Project.

1251. Mr Mabuza concluded his statement 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 in Eskom 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.

1252. 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.

1253. This recovery program saw a greater number of irregularities surface and the 2018 Board came to understand that procurement processes and people are 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, needs to solve these deficiencies.

1254. This section of the Commission's Report also deals with the appointment of the 2014 Eskom board, suspensions of four Eskom executives and the subsequent exit of three of them with substantial packages, the role played by Eskom in the acquisition by Tegeta of the South African coal holdings of Glencore, with particular reference to the Optimum coal mine. This section of the Report also covers irregularities relating to contracts that Eskom entered into with the Brakfontein Colliery, McKinsey-Regiments-Trillian and Huarong.

THE APPOINTMENT OF THE 2014 ESKOM BOARD

1255. For reasons that should be apparent later in this part of the Report, it is convenient to deal with the composition of the 2014 Board of Directors of Eskom. Ms Lynn Brown was appointed as the Minister of Public Enterprises after the general elections of May 2015. She replaced Mr Malusi Gigaba who had been Minister of Public Enterprises from 1 November 2010. The evidence given by both Mr Gigaba and his estranged wife as at 2021, Ms Nomachule Gigaba (née Mngoma), was to the effect that, whereas Mr Gigaba had a lot of interactions with Mr Ajay Gupta for quite some time during his term as Minister of Public Enterprises, towards the end of his term - which ended in May 2014 - his relationship with Mr Ajay Gupta had cooled off. Ms Gigaba testified that during this time Mr Gigaba would sometimes - maybe often - avoid Mr Ajay Gupta's calls or not return them. Ms Gigaba testified that, according to Mr Gigaba, when Mr Ajay Gupta noticed this, he told Mr Gigaba that they (i.e. the Guptas) had put Mr Gigaba in the position which he occupied then, namely as Minister of Public Enterprises and they could take him out of that position and send him back to the Department of Home

Affairs. What that meant was that Mr Ajay Gupta claimed that the Guptas had made Mr Gigaba Minister of Public Enterprises or had had a hand in making him Minister of Public Enterprises and now that he was not doing what they expected or wanted him to do, they could have him removed from that position and he could be returned to the Ministry of Home Affairs where he had been prior to appointment as Minister of Public Enterprises.

1256. Although Mr Gigaba denied having told Ms Gigaba what Mr Ajay Gupta had allegedly said to him, as referred to above, I believe Ms Gigaba's version that Mr Gigaba told her that Mr Gupta had made that threat to him. This is because making that kind of threat is quite consistent with what I believe Mr Ajay Gupta could say when one has regard to part of what Mr Themba Maseko said Mr Ajay Gupta said to him both at the meeting that the two of them had in or around October 2010 and in a telephone conversation between the two of them around the end of November 2010. One of the things that Mr Ajay Gupta told Mr Themba Maseko was that President Zuma would do anything that they wanted him to do.

1257. It is also consistent with a statement that Mr Rajesh "Tony" Gupta made in the discussion with Mr Jonas in the meeting that Mr Jonas had with Mr Tony Gupta and Mr Duduzane Zuma and Mr Fana Hlongwane at the Gupta residence on 23 October 2015. One of the things that Mr Tony Gupta told Mr Jonas was that President Zuma would do anything that they (i.e. the Guptas) wanted him to do. Furthermore, the position is not only that Mr Ajay Gupta and Mr Tony Gupta said that President Zuma could do anything they wanted him to do, there is evidence led before the Commission which showed that President Zuma was prepared to remove even people from their positions who were very good in their jobs if the Guptas wanted those people removed or if the Guptas wanted people associated with them to be put in those positions.

1258. Some of those cases where President Zuma did this are the following:

- 1258.1. President Zuma's decision to remove Mr Themba Maseko from his position as Chief Executive Officer (CEO) of Government Communication and Information System (GCIS) because he was not co-operating with the Guptas.
- 1258.2. President Zuma's decision to appoint Mr Jimmy (later Mzwanele) Manyi (Mr Manyi) as Mr Themba Maseko's replacement at GCIS in February 2011.
- 1258.3. President Zuma's dismissal of Minister Nhlanhla Nene for refusing to work with the Guptas or for not being prepared to approve certain objectionable transactions or projects that President Zuma wanted him to approve.
- 1258.4. Indeed, after the May 2014 general elections not only was Mr Gigaba not returned to the Ministry of Public Enterprises, but he was in fact returned to the Ministry of Home Affairs, as Mr Ajay Gupta had allegedly threatened.
- 1258.5. In their newspaper, The New Age, the Guptas had announced in December 2010 that Mr Brian Molefe would be the next Group CEO of Transnet - way before the post was advertised. Indeed, President Zuma made sure that Mr Brian Molefe was appointed as Transnet's Group CEO even though he was not the candidate who had scored the highest points in the interviews.
- 1258.6. Mr Salim Essa knew and told Mr Hendrik Bester some time in 2014¹²¹³ that the next Group CEO of Eskom was going to be Mr Brian Molefe. Although he told Mr Hendrik Bester this, in that year Mr Molefe did not become the next Group CEO of Eskom. It was Mr Matona, who became the Group CEO but he was

¹²¹³ Transcript 20 October 2020, p 102.

removed from that position at the instance of the Guptas within five or six months of his appointment and was replaced by Mr Brian Molefe.

1258.7. As will be shown later in this Report, when the Guptas had devised a scheme for the removal of certain executives at Eskom so that they would have them replaced by executives of their choice, President Zuma helped implement that scheme.

1258.8. President Zuma had removed Minister Barbara Hogan as Minister of Public Enterprises to make way for a Minister of Public Enterprises who was linked to the Guptas, namely Mr Gigaba.

1258.9. President Zuma's decision to replace Mr Ngoako Ramatlhodi with Mr Mosebenzi Zwane as Minister of Mineral Resources was, on the probabilities, influenced by the Guptas; Mr Zwane had co-operated with the Guptas while serving as MEC in the Free State Provincial Government where his Departments (namely the Department of Agriculture and, later, the Department of Human Settlements) had performed very poorly and he was brought specially into the National Assembly so that President Zuma could appoint him as Minister of Mineral Resources; there can be no explanation why President Zuma overlooked so many able and competent ANC members of Parliament and brought Mr Zwane from outside of Parliament so that he could appoint him to the position of Minister of Mineral Resources. Mr Zwane had no previous experience of being a Member of Parliament, he had no prior exposure or experience in mining or mineral resources and had never been a Minister before. His record as an MEC in the Free State Provincial Government was dismal and there is no way that President Zuma would have chosen him because he thought he would do a better job as Minister of Mineral Resources

than Mr Ngoako Ramatlhodi or than any other ANC member of the National Assembly that he could have appointed.

1259. With all the above said, it seems probable that the Guptas had a hand in the removal of Mr Gigaba from the Ministry of Public Enterprises and in his re-appointment to the Ministry of Home Affairs in accordance with what Mrs Gigaba testified Mr Gigaba had told her Mr Ajay Gupta had threatened. The Guptas also probably had a hand in the appointment of Ms Brown as Minister of Public Enterprises in May 2014. A number of factors support this. Ms Brown testified that she and Mr Ajay Gupta knew each other before she was appointed as Minister of Public Enterprises and Mr Ajay Gupta had called her to congratulate her on her appointment as Minister of Public Enterprises. When Ms Brown was appointed to this position, it was her first appointment as a Minister. Prior to going to Parliament, Ms Brown had served as Premier of the Western Cape. This Commission has found in Vol I of Part II of its Report (dealing with Transnet) that Ms Brown was working with the Guptas.

1260. It is unlikely that, if the Guptas had had enough influence on President Zuma to have got him to appoint Mr Gigaba as Minister of Public Enterprises and had had enough influence to have got Mr Gigaba removed from that position and returned to Home Affairs, they would not have had enough influence on who replaced Mr Gigaba as Minister of Public Enterprises.

1261. The Commission obtained cell phone records relating to, among others, Mr Salim Essa and Minister Lynn Brown. These showed that from November 2014 to March 2015 there had been several cell phone calls that had been made between Mr Essa and Minister Lynn Brown. November 2014 was the month that preceded the month of the appointment of a new Board of Directors for Eskom. A finding was made in Part II of this Commission's Report partly on the basis of those cell phone records that Ms Lynn

Brown was working with the Guptas. It is not necessary to say more in this part of the Report.

1262. On 10 December 2014, Cabinet approved the appointments of the following Non-Executive Directors to the Eskom Board:¹²¹⁴

- “1. Mr Zola Andile Tsotsi (reappointment as Chairperson)
2. Ms Chwayita Mabude (reappointment)
3. Mr Norman Tinyiko Baloyi
4. Dr Pathmanathan Naidoo
5. Ms Venete Jarlene Klein
6. Ms Nazia Carrim
7. Mr Romeo Kumalo
8. Mr Mark Vivian Pamensky
9. Mr Zethembe Wilfred Khoza
10. Dr Baldwin Siphon Ngubane
11. Ms Devapushpam Viroshini Naidoo.”

1263. The following Board members were appointed on 25 May 2015:

1263.1. Mr Giovanni Michele Leonardi; and

1263.2. Ms Mariam Cassim.

1264. These two board members were appointed to replace Mr Zola Tsotsi and Mr Norman Baloyi, who both lost their places on the board in circumstances that will be dealt with below.

¹²¹⁴ Statement on Cabinet meeting of 10 December 2014_South African Government.

1265. The “State of Capture” Report stated that the Board of Eskom appointed in December 2014 consisted predominately of individuals with direct or indirect business or personal relations with Mr Duduzane Zuma, the Gupta family and their related associates, including Mr Salim Essa. Mr Duduzane Zuma is President Jacob Zuma’s son who was involved in business with the Gupta family at all relevant times.

1266. On 21 October 2014, Ms Orateng Motsoai, who at the time was the Chief Director: Legal and Governance at the Department of Public Enterprises (DPE), addressed a memorandum to Minister Lynn Brown recommending the appointment of the following persons as members of the Eskom Board of Directors:¹²¹⁵

- 1266.1. Dr Ben Ngubane;
- 1266.2. Ms Chwayita Mabude;
- 1266.3. Ms Venete Klein;
- 1266.4. Ms Nazia Carrim;
- 1266.5. Mr Romeo Kumalo;
- 1266.6. Mr Mark Pamensky;
- 1266.7. Mr Zethembe Khoza;
- 1266.8. Mr Tshediso Matona; and
- 1266.9. Ms Tsholofelo Molefe.

¹²¹⁵ Paragraphs 14.8.2.2. and 14.8.2.3 of Fundudzi’s report entitled “Forensic Investigation into various allegations at DPE” and dated July 2019.

1267. Mr Matona was the Group CEO at the time and Ms Tsholo Molefe was the Group Chief Financial Officer (Group CFO).

1268. Mr Simphiwe Makhathini, Deputy Director-General for Energy at the Department of Public Enterprises, raised concerns about the composition of the board. He wrote:¹²¹⁶

“I’m concerned about the skills of the proposed Board. It doesn’t address the challenges Eskom is facing. I would recommend that with the vacancies, we seriously look at strengthening those areas”.

1269. Minister Brown, nevertheless, appointed the persons referred to above as members of the Board of Directors of Eskom.

1270. Some of these newly appointed board members were serving for the first time on a board and/or an SOE board and indicated that they had become aware of the call for nominations either through a newspaper advertisement of the DPE or through a nomination from someone they knew.

1270.1. Ms Carrim (an attorney and wife to Mr Essa’s cousin), had no experience in serving on an SOE Board, nor any other boards prior to being appointed to the Eskom Board. In her rather scant affidavit to the Commission,¹²¹⁷ Ms Carrim stated that she responded to an advertisement published on the DPE’s website and submitted her application to DPE directly.

1270.2. Ms Devapushpum Viroshini Naidoo (Ms Viroshini Naidoo), also an attorney and wife to Mr Salim Essa’s business associate, Mr Kubentheran Moodley, had also never served on an SOE board prior to her appointment to the Eskom Board. She stated in her affidavit that she became aware of “the vacancy on the Board

¹²¹⁶ Paragraphs 14.8.2.4. of Fundudzi’s report entitled “Forensic Investigation into various allegations at DPE” and dated July 2019.

¹²¹⁷ Exhibit U34 para. 5.

through a publication in a newspaper” and “decided to apply to the Board by submitting her Curriculum Vitae (CV) to the Department of Public Enterprise”.¹²¹⁸

1270.3. Mr Zethembe Khoza also said that he had also never served on an SOE board before. He stated in his affidavit that he had received various nominations for appointment to various private and public company boards.¹²¹⁹ As regards Eskom, he could not remember who had nominated him to sit on the Eskom Board, but completed the form accepting the nomination and submitted it, together with his curriculum vitae, to the DPE.

Mr Romeo Kumalo

1270.4. Mr Kumalo¹²²⁰ was appointed to the Eskom Board on 11 December 2014. He resigned on 12 April 2016.

1270.5. According to Eskom’s Integrated Report,¹²²¹ as at 28 May 2015, Mr Kumalo (43), an Independent non-executive director:

“[was] the [then] CEO of Vodacom International, is an accomplished executive, with over 20 years’ experience in the information and communications technology industry. He is a commercial strategy expert, with a proven track record of building successful teams and turning around underperforming businesses”.

Mr Kumalo’s interactions with the Guptas

1270.6. In paragraph 5.79 of “the State of Capture” Report it is stated:

¹²¹⁸ Exhibit U29, p 22 para 12.

¹²¹⁹ Exhibit U30, p 22 para 7-8.

¹²²⁰ He is referred to as Mr Khumalo and Mr Kumalo.

¹²²¹ Eskom Integrated Report 31 March 2015 p 18.

“The following members of the Board as at 1 April 2016 have identified conflicts of interest...

Mr Romeo Khumalo (“Mr Khumalo”) resigned from the board of Eskom in April 2016. Mr Khumalo and Mr Essa were directors of Ujiri Technologies (Pty) Ltd (2011/010963/07). Mr Khumalo has since resigned from the Board of Eskom.”

1270.7. Mr Kumalo’s directorships have been independently confirmed by the Commission. He and Mr Essa were directors of the same entity, Ujiri Technologies (Pty) Ltd, albeit at different periods.¹²²²

1270.8. In relation to this, Mr Kumalo stated:¹²²³

“... that I once tried to venture into mining with Mr Essa, the company in question was actually dormant, Ujiri Mining never traded at all nor participated in any lucrative mining deals and the company has had no links whatsoever with the Gupta family”.

1270.9. During the period 11 January 2013 to 15 February 2016, he was in communication with Mr Tony Gupta, fifty-eight times and Mr Essa, eighty times. In addition, there is evidence of at least four mobile communications between him and Mr Atul Gupta, between 3 November and 2 December 2015.¹²²⁴

1270.10. Mr Kumalo admitted the communications in relation to Mr Tony Gupta but maintained that communications between him and Mr Tony Gupta related to enquiries by the latter regarding placement of adverts by Vodacom on the Gupta media platforms and potential investment opportunities, both of which did not lead to any fruition. He said that no mention was made of Eskom or any other matter relating to Eskom during those communications. He denied ever

¹²²² Paragraphs 6 and 7 of Mr TM Nombembe’s affidavit in relation to Mr Kumalo dated 3 December 2021.

¹²²³ Paragraph 9.4 of Mr Kumalo’s affidavit dated 14 December 2021.

¹²²⁴ Paragraphs 8 to 12 of Mr TM Nombembe’s affidavit in relation to Mr Kumalo dated 3 December 2021.

speaking to Mr Atul Gupta. He said that he may have telephoned Mr Essa but does not recall having a meaningful discussion with him.¹²²⁵

1270.11. Mr Kumalo said that he was invited to attend the wedding between Ms Vega Gupta and Mr Aakash Jahaigarhia at Sun City in April/May 2013 and, although accommodation was arranged for him in the Cascades Hotel for three nights, he declined to attend the event.¹²²⁶

1270.12. He said that he was initially introduced to Mr Essa in 2003 by Mr Essa's sister, Ms Sarah Essa (Ms Essa). He said that at the time, Ms Essa was a producer with the SABC, producing a television program called Eastern Mosaic. Mr Kumalo said that at the time he was a General Manager at SABC and Mr Essa was still young and was not yet a business man.

1270.13. Mr Romeo Kumalo, (CEO of Vodacom Africa at the time), had never served on an SOE board prior to his appointment to the Eskom Board. Despite numerous attempts made by the Commission to get him to testify at the Commission, he seemed to do everything to avoid coming to testify before the Commission. He ultimately did not give oral evidence before the Commission. He submitted an affidavit, in which he explained that he was the CEO and a full-time employee of Vodacom at the time, running all of Vodacom business in Africa. He said that he was not allowed to sit on any other boards because Vodacom was a listed entity. He had to obtain approval from Vodacom to serve on the Eskom board. He said that he responded to an advertisement published by DPE in the Business Day newspaper, inviting qualified individuals to serve on the boards of SOEs.¹²²⁷ He said that he submitted his curriculum vitae through an email

¹²²⁵ Paragraph 18 of Mr Romeo Kumalo's affidavit dated 14 December 2021.

¹²²⁶ Paragraphs 17 of Mr TM Nombembe's affidavit dated 3 December 2021.

¹²²⁷ Exhibit U34, para 9-13.

and was nominated by one Mr Happy Ntshingila for appointment to the Eskom Board of Directors. He said that he did not know that he would be appointed to the Eskom Board.

1270.14. Mr Mark Pamensky, an admittedly close associate of the Guptas, did not claim to have served on an SOE board prior to his appointment to the Eskom Board. He also said that he was appointed to the Eskom board after applying in response to an advertisement he saw in the Sunday Times newspaper around 28 September 2014.¹²²⁸

1270.15. Ms Venete Klein stated in her affidavit that she had served on various boards, as executive and non-executive director.¹²²⁹ She said that she was nominated by Mr Lionel Ricardo Adendorf to serve on the Eskom Board. She stated that she signed the nomination form on 02 October 2014 and submitted it together with her curriculum vitae to the DPE. She explained that “the nomination was made in line with the prescripts as set out in the advertisement that appeared in the Business Times of Sunday, 28 September 2014”.

1270.16. Dr Pathmanathan Naidoo (Dr Pat Naidoo) did not mention serving on an SOE board prior to his appointment to the Eskom Board. He said that he became aware of an advertisement posted by the DPE in the Sunday Times newspaper calling for applications for non-executive director appointments at SOEs. He said that he responded by submitting his application, which he said was endorsed by the South African Institute of Electrical Engineers.¹²³⁰

¹²²⁸ Transcript 31 October 2019, p 6.

¹²²⁹ Exhibit U14, p 3, para 4-7.

¹²³⁰ Exhibit U36, p 30 para 4.

1271. The names of these persons were not on the database of the DPE for suitable persons to be considered for appointment on SOE boards. Minister Brown failed to consider persons on the DPE database and preferred instead to have an advertisement published calling for nominations.

1272. During her evidence before the Commission on 19 March 2021, Ms Brown seemed unsure about what course she had taken in this regard, but proffered an explanation that she “thought the advert was a good idea to add to the database” as, in her view, the database did not give the desired effect.¹²³¹ This is ironic given the concern raised by Mr Simphiwe Makhathini that the proposed persons essentially lacked the necessary skills to address the challenges faced by Eskom at the time.

1273. Minister Brown further explained that, in advertising the vacancies on the Board of Eskom, she did not seek to attract only a particular group of people, but to open up the process, which she said clearly had unintended consequences for her.¹²³² On the conspectus of all the evidence Ms Lynn Brown’s posture of innocence must be rejected. The evidence clearly shows that she was part of a scheme to capture Eskom. Her responses above are inconsistent with the contents of her affidavit that she signed on 9 August 2020¹²³³ In that affidavit she sought to create the impression that she followed a DPE process when appointing board members of SOEs and that her appointment of the December 2014 Eskom Board would have followed the same process and not deviated from it.¹²³⁴ In the Fundudzi report, reference was made to Ms Lynn Brown’s written response in which she said: “the administration of Boards was managed by the Legal and Governance Unit in DPE. They had procedures and manuals for the appointment of Boards. I inherited the procedure and simply adhered to it”. Based on

¹²³¹ Transcript 19 March 2021, p 68-69.

¹²³² Transcript 19 March p 73-74.

¹²³³ Exhibit U40, p 4 & p 18.

¹²³⁴ *Id* p7/26-28.

her responses referred to above, Ms Lynn Brown clearly did not follow that DPE procedure that she criticised as failing to yield the desired effect. Accordingly, she has given contradictory versions on what procedure or process was followed to get new members of the Board of Eskom.

Mr Zola Tsotsi

1274. Mr Zola Tsotsi was the Chairperson of the 2011 Eskom Board. On 10 December 2014 he was re-appointed as a member and Chairperson of the 2014 Board of Eskom.

1275. Mr Tsotsi described three occasions on which he was summoned by Mr Tony Gupta to the Gupta home, twice at Saxonwold and once at Constantia, where Mr Tony Gupta asked him to use his influence to get certain things done in Eskom. On one of those occasions Mr Tsotsi went to the Guptas' compound in Saxonwold and Mr Tony Gupta showed him transcripts of a chat group of Eskom board members talking about Eskom matters. Mr Tony Gupta said that he was showing Mr Tsotsi the transcripts to demonstrate to him that the Guptas had their sources of information.¹²³⁵¹²³⁶

1276. The interactions of Mr Tsotsi with the Guptas are covered in greater detail in the context of the suspensions of certain Eskom executives in which Mr Zola Tsotsi played an active role.

Dr Ben Ngubane

1277. Dr Baldwin Siphon "Ben" Ngubane was a board member of Eskom from 11 December 2014 until 12 June 2017 when he resigned as a member of the Eskom Board.

¹²³⁵ Transcript 9 September 2020 p 6.

¹²³⁶ Transcript 8 September 2020 p 94.

1278. According to Eskom's Integrated Report,¹²³⁷ as at 28 May 2015, Dr Ngubane (73) held the position of Acting Chairman and Independent non-executive director:

“Ben, former Minister of Arts, Culture, Science and Technology and also ambassador to Japan, has vast experience in the health sector, both local and international. He has served on the Boards of various child and community based organisations, as well as on the board of the South African Broadcasting Corporation. Ben was appointed as acting Chairman of the Board on 30 March 2015, until a permanent replacement is found”

Dr Ngubane's interactions with the Guptas

1279. In paragraph 5.74 of “the State of Capture” Report it is stated:

“The following members of the Board as at 1 April 2016 have identified conflicts of interest ...

Dr Baldwin Ngubane (“**Mr Ngubane**”) is a director of Gade Oil and Gas (Pty) Ltd (“**Gade Oil**”) (2013/083265/07). Mr Essa was a previous director of this entity.”

1280. Dr Ngubane's directorships have been independently confirmed by the Commission. These demonstrate a link between Dr Ngubane and Mr Salim Essa.

1281. Further, once at Eskom, Dr Ngubane seems to have kept his connection with Mr Salim Essa. Insofar as Mr Salim Essa is the person behind the email address infoportal1@zoho.com, referring to himself as “Business Man”. Dr Ngubane engaged in at least two email correspondence with “Business Man” as follows:

1281.1. The first email uncovered by the Commission came directly from “Business Man” to Dr Ngubane, on 28 September 2015, with the subject line “Fwd: For Chairpersons” and the message “Sir Documents as Discussed”. To this email was attached two documents. One was a draft resolution which the sender

¹²³⁷ Eskom Integrated Report 31 March 2015 p 18.

wanted the Eskom Board to adopt. It referred to an “Urgent Request to Approve the Suspension of Contract and/or Commercial Relationship with Mail & Guardian, City Press and Sunday Times on a Round Robin”. The other was an unsigned draft letter dated 28 September 2015 which had been prepared for issue by Eskom’s company secretary to Board members advising them of the reason for the resolution that was required so urgently.

1281.2. The draft documents made provision for Eskom and Denel to adopt the resolution, by reference to what was said to have been the same resolution adopted by the Transnet Board. When he testified before the Commission, Dr Ngubane recalled the draft resolution and confirmed, not only that it had been sent to Transnet, but also that he did take it to the Board, which adopted it and had it implemented. When Dr Ngubane was asked who had sent the emails, he said that he understood them to have been coming from the Director-General of the Department of Public Enterprises, Mr Richard Seleke. When it was pointed out to him that they could not have been coming from Mr Seleke as Director-General of the Department in September because Mr Richard Seleke only became Director-General of DPE in December 2015, Dr Ngubane could not explain who the sender was other than that the emails must have come from someone outside of Eskom. It was implied that he was saying that the letter or note must have come from someone outside of Eskom that he did not know. This answer by Dr Ngubane was absurd because, if true, it would mean that he received an email from someone outside of Eskom that he did not know who asked him or instructed him to take a certain resolution to the Board of Eskom and ask it to pass it and he did just that and that Board, too, passed that resolution as it was. Quite obviously, Dr Ngubane was being dishonest in his response. He knew exactly who the sender of the email was but he realised that, if he were to disclose that he knew the sender, that would show that he

was captured by the Guptas and their associates. He knew that the sender was Mr Salim Essa but was not prepared to admit that.

- 1281.3. The second email involving “Business Man”, Ms Daniels and Dr Ngubane, was exchanged over a period of two days, starting on Friday 10 June 2016, with the subject line “Draft position Statement forward payment to Tegeta”, with Ms Daniels using her private Gmail account. The first email on the trail is from Business Man to Ms Daniels on 10 June 2015 at 20:14 in which he wrote: “It’s too long. Needs to be half pager in total. Without too much detail. And highlight the rand savings as opposed to buying from exxaro please”.
- 1281.3.1. Ms Daniels responded at 21:36 (+0400), stating: “This is what came back from comms team. Going to read through it now. At home office now”.
- 1281.3.2. At 23:20 (+0400), presumably after going through the draft statement; Ms Daniels wrote to Business Man: “my first attempt at editing”.
- 1281.3.3. At 21:23, Business Man replied to Ms Daniels: “We must add the point that exxaro wanted 1300 for 2018 supply and the tons bought elsewhere has therefore saved Eskom xxx billions”.
- 1281.3.4. Ms Daniels responded the next day, on Saturday, 11 June 2016 at 13:54 (+0400) that: “let me know what you think. We don’t have exxaro volumes for 2016 as the contract ended in 2015”.
- 1281.3.5. At 12:32, Business Man replied to Ms Daniels, and copied Dr Ngubane, simply stating: “My version attached ... please advise”.
- 1281.3.6. At 1:11pm, Dr Ngubane replied to Business Man and stated: “*Much better agree*”.

1281.4. Thus, the email correspondence continued between the parties on 11 June 2016, this time utilizing the Eskom email account of Ms Daniels, instead of her private email account. From the Commissions' review of the correspondence obtained between the above-mentioned parties as well as other parties, the following emerged:

1281.4.1. Carte Blanche had raised queries with Oakbay on 08 June 2016 relating to the R659 million prepayment Eskom had made to Tegeta for coal supply to Eskom's' Arnot Power Station;

1281.4.2. the above request appears to have emanated from an interview that Mr Matshela Koko had had with Carte Blanche earlier in the month in which he was questioned about the R659 million prepayment to Tegeta;

1281.4.3. Mr Nazeem Howa (Mr Howa) shared the questions put to Oakbay by Carte Blanche with Ms Daniels on 09 June 2016 who in turn shared these queries with Mr Anoj Singh on 10 June 2016; and

1281.4.4. This led to Dr Ngubane and "Business Man" both providing Ms Daniels with inputs in drafting a statement, starting on 10 June 2016, which statement Dr Ngubane would later release to the media on 11 June 2016 in which he addressed Eskom's position that it had not offered Tegeta any form of favouritism and reiterated that it was not uncommon for Eskom to engage in prepayments for coal supply.

Mr Zethembe Khoza

1282. Mr Zethembe Khoza was a board member of Eskom from 11 December 2014 until 19 January 2018, when he resigned as a member of the Eskom Board.

1283. Mr Khulani Qoma, a former Eskom General Manager: Office of the Chairman, provided the Commission with an affidavit in which he had this to say that relates to Mr Khoza:

1283.1. During a meeting at Mr Khoza's Durban residence on 17 June 2017, Mr Khoza related to him that Minister Lynn Brown was captured and that she took instructions from the "G-brothers", which Mr Qoma understood to be the Gupta brothers he also said:

"... Mr Khoza went on to describe the new Board members, who were to be announced on 23 June 2017, as "abantwana besikole", loosely translated to mean "school children" and that they had been appointed by the G-brothers. I understood his reference to them as school children to mean that they were young and unfit for the job"

1283.2. Dr Ngubane had been stopped in his tracks when he sought to suspend Mr Koko. Dr Ngubane had called a Board meeting to discuss the allegations against Mr Koko with the Board, who were ready to suspend him, during which Mr Khoza claimed that he (Mr Khoza) snuck out of the meeting and alerted a Gupta brother of the impending suspension. Subsequent to this, Dr Ngubane received a telephone call from Minister Lynn Brown, who instructed him to cancel the suspension of Mr Koko, to which Dr Ngubane obliged; and

1283.3. During a subsequent meeting between Dr Ngubane, Ms Daniels and Mr Qoma, Dr Ngubane confirmed to them that he had received a call from Minister Lynn Brown the evening he met with the Board to discuss Mr Koko's suspension and that she had instructed him not to suspend Mr Koko.

1284. According to Eskom's Integrated Report,¹²³⁸ as at 28 May 2015, Mr Khoza (57), an Independent non-executive director:

“[was] the former head of Customer Services at Telkom, heads up his own investment company, specialising in consulting, civil construction work and building maintenance. He is experienced in infrastructure planning and commercialisation. Zethembe acted as Chief Executive from 12 March to 17 April 2015”

Mr Khoza's interactions with the Guptas

1285. During the period 28 March 2015 to 5 November 2016, he communicated six times with Mr Salim Essa and twice with Mr Tony Gupta.¹²³⁹

1286. Mr Khoza denied receiving or making any calls to Mr Salim Essa or Mr Tony Gupta but said that, even if sufficient evidence exists to substantiate the analysis of the cell phone records, because of the short duration of the calls it could not be inferred that he had any association or relationship with Messrs Essa and Tony Gupta¹²⁴⁰.

Mr Norman Baloyi

1287. Mr Norman Baloyi was on the Eskom Board from 11 December 2014 until 22 April 2015, when he was removed by Minister Lynn Brown.

1288. The Eskom Integrated Report for 2016 states:

“Mr Norman Baloyi was removed as director by the Minister of Public Enterprises on April 22, 2015 due to a breach of fiduciary duties in terms of section 76 of the Companies Act.”

¹²³⁸ Eskom Integrated Report 31 March 2015 p 18.

¹²³⁹ Paragraph 10 of Mr TM Nombembe's affidavit in respect of Mr Khoza dated 3 December 2021.

¹²⁴⁰ Paragraphs 27 and 28 of Mr Khoza's affidavit dated 22 December 2021.

1289. Mr Baloyi is not listed in the director's profiles for either the 2015 or 2016 reports.

1290. From the evidence before the Commission, in the meeting of the Board of Eskom on 11 March 2015, it seems that Mr Baloyi expressed opposition to the suspensions of the four executives. A month later he was removed from the board in very unusual circumstances.

Ms Chwayita Mabude

1291. Ms Chwayita Mabude was on the Eskom Board from June 2011 until 23 June 2017. She was one of two members of the 2011 Board who were re-appointed to continue in the 2014 Board.

1292. According to Eskom's Integrated Report,¹²⁴¹ as at 28 May 2015, Ms Mabude (45), an Independent non-executive director:

“[was] a practising accountant with a background in financial management. She has served on the Eskom Board since June 2011, and also serves on the board of the Airports Company South Africa”

1293. According to the Shadow World Investigations report¹²⁴²:

1293.1. Ms Mabude was the owner of Innova Management Solutions (Innova), an entity that appeared to have been managed by Mr Salim Essa and Mr Ashok Narayan; and

¹²⁴¹ Eskom Integrated Report 31 March 2015 p 18.

¹²⁴² The cashflows between her entity, Gateway and the Estina proceeds, as dealt with in the Shadow World Report.

1293.2. Monies received from the Free State Department of Agriculture were laundered onto Innova, which then laundered the monies through to Aerohaven and Gateway Limited, both Gupta entities.

Ms Nazia Carrim

1294. Ms Nazia Carrim was a board member of Eskom from 11 December 2014 until 1 July 2016. According to Eskom's Integrated Report,¹²⁴³ as at 28 May 2015, Ms Carrim (34), an Independent non-executive director:

“[was] an admitted attorney, conveyancer and notary, with a strong focus on business. She heads up her own legal practice and also serves as a Commissioner at the CCMA”

Ms Carrim's interactions with the Guptas

1295. In paragraph 5.78 of “the State of Capture” Report it is stated:

“The following members of the Board as at 1 April 2016 have identified conflicts of interest ...

Nazia Carrim (“Ms Carrim”) is the spouse of Muhammed Sikander Noor Hussain (“Mr Hussain”). Mr Hussain is a family member of Mr Essa. Ms Carrim has since resigned from the Board of Eskom.”

1296. During the period 24 May 2012 to 30 June 2017, she communicated six times with Mr Tony Gupta and twenty-two times with Mr Salim Essa.¹²⁴⁴

1297. Ms Carrim does not deny the communications in relation to Mr Salim Essa and offered possible reasons for those communications, which reasons range from Mr Essa conveying condolences to her on one occasion, and, on another, her congratulating Mr

¹²⁴³ Eskom Integrated Report 31 March 2015 p 18.

¹²⁴⁴ Paragraph 10 of Mr TM Nombembe's affidavit in respect of Ms Carrim dated 3 December 2021.

Essa on his birthday; and during 2014 she being invited by either Mr Essa and/or his wife to occasionally have dinner at Mr Essa's house, and on another occasion Mr Essa calling to obtain legal advice for Mr Duduzane Zuma.¹²⁴⁵ Ms Carrim has also confirmed that her husband is related to Mr Salim Essa.¹²⁴⁶

1298. Regarding the calls with Mr Tony Gupta, she stated that two of these related to legal advice sought by Mr Tony Gupta also in relation to personal matters pertaining to Mr D Zuma¹²⁴⁷

Ms Venete Jarlene Klein

1299. Ms Venete Klein was a member of the Eskom Board from December 2014 until 2017.

1300. According to Eskom's Integrated Report,¹²⁴⁸ as at 28 May 2015, Ms Klein (56), an Independent non-executive director:

“[was] a chartered director, and the Chairman of the Institute of Directors of Southern Africa. She heads up her own management consultancy firm. She has completed numerous senior executive programmes at top business schools both locally and internationally, and holds various directorships”

Ms Klein's interactions with the Guptas

1301. The Commission identified that a payment of R150 000.00 had been paid by Saamed Bullion (Pty) Ltd (Saamed), an entity identified by the Commission to have been used by the Guptas or entities associated with the Guptas or their entities as a money-laundering vehicle for funds derived from corruption, to Centuria 400 (Pty) Ltd (Centuria 400), an entity owned by Ms Klein.

¹²⁴⁵ Paragraphs 9.1 to 9.4 of Ms Carrim's affidavit dated 21 December 2021.

¹²⁴⁶ Paragraph 9.4.7 of Ms Carrim's affidavit dated 21 December 2021.

¹²⁴⁷ Paragraph 11.1 and 11.2 of Ms Carrim's affidavit dated 21 December 2021.

¹²⁴⁸ Eskom Integrated Report 31 March 2015 p 18.

1302. In her response to questions put to her by the Commission regarding the above payment, Ms Klein responded by way of a statement that Centuria 400 was an entity she used in running her consulting services and that her entity was approached by a Mr Riaz Abu regarding consulting work where her advice and expertise was required. She said that she had no knowledge of any links Saamed had with the Gupta's.

Ms D Viroshini Naidoo

1303. Ms Devapushpum Viroshini Naidoo was a board member from December 2014 until 2017.

1304. According to Eskom's Integrated Report,¹²⁴⁹ as at 28 May 2015, Ms Viroshini Naidoo (42), an Independent non-executive director:

“joins the Board as an admitted attorney with High Court right of appearance and over nine years' experience in private practice as well as corporate legal counsel roles with Telkom and Mpact Limited”

Ms Viroshini Naidoo's interactions with the Guptas

1305. In paragraph 5.77 of “the State of Capture” Report it was stated:

“The following members of the Board as at 1 April 2016 have identified conflicts of interest...

Ms Devapushpum Viroshini Naidoo (“Ms D Naidoo”) is the spouse of Mr Moodley, who is the director of Albatime...Albatime contributed to the purchase of OCH [Optimum Coal Holdings].”

1306. Further in paragraph 5.82 it was said:

“Ms D Naidoo, in her declaration made on 19 February 2016, lists her husband as Mr K Moodley who is a part-time advisor to the Minister of Mineral Resources and

¹²⁴⁹ Eskom Integrated Report 31 March 2015 p 18.

declares that this may be a conflict if she is in a forum at Eskom which seeks to influence the Government's mineral policy. Ms D Naidoo, lists herself as an employee of Albatime. This is as per her declaration made on 19 February 2016 and 31 May 2016”.

1307. It has been independently confirmed by the Commission that Ms Viroshini Naidoo is the spouse of Mr Kuben Moodley, a known Gupta associate and former advisor to Minister Zwane.

Dr Pat Naidoo

1308. Dr Pat Naidoo was a member of the Eskom Board from 11 December 2014 to 21 January 2018.

1309. According to Eskom's Integrated Report,¹²⁵⁰ as at 28 May 2015 Dr Pat Naidoo (55), an Independent non-executive director:

“is a registered professional engineer, a specialist consultant and an Adjunct Professor of Power Engineering at the Durban University of Technology. He has three decades of experience in the electricity industry, with both Eskom and the Southern African Power Pool. He serves on the Council of the South African Institute of Electrical Engineers and is a member of the executive committee of the Institute of Electrical and Electronics Engineers South Africa and Cigre SA”.

Mr Mark Vivian Pamensky

1310. Mr Pamensky was a member of the Eskom Board from 11 December 2014 until 25 November 2016.

¹²⁵⁰ Eskom Integrated Report 31 March 2015 p 18.

1311. According to Eskom's Integrated Report,¹²⁵¹ as at 28 May 2015, Mr Pamensky (42), an Independent non-executive director;

"[was] a chartered accountant with experience in effecting turnaround strategies. He serves as the Group Chief Operations Officer of Blue Label Telecoms Limited"

Mr Pamensky's interactions with the Guptas

1312. In paragraphs 5.75 and 5.76 of "the State of Capture Report" it is stated:

"The following members of the Board as at 1 April 2016 have identified conflicts of interest ...

Mr Mark Pamensky ("**Mr Pamensky**") is/was a director of the following entities:

Name of Entity	Registration Number	Comment/ Observation
ORE (Mentioned above)	2009/021537/06	Mr Atul Gupta owns 64% of this entity
Shiva Uranium (Pty) Ltd (" Shiva Uranium ")	1921/006955/07	- ORE has a 74% shareholding in Shiva Uranium. - Tegeta has a 19.6% shareholding in Shiva Uranium.
Yellow Star Trading 1099 (Pty) Ltd	2000/020259/07	Mr Essa was a director of this entity.
B I T Information Technology (Pty) Ltd	2003/022444/07	- Mr Pamensky was a previous director. - Kubentheran Moodley ("Mr Moodley") is also a director of this entity and is the spouse of ESKOM board member Ms Viroshini Naidoo. - Mr Moodley is a special advisor to the Minister of Mineral Resources and is the sole director of Albatime (Pty) Ltd (2009/0211474/07) ("Albatime"). ALBATIME is one of the entities which contributed to the purchase price of OCH.

¹²⁵¹ Eskom Integrated Report 31 March 2015 p 18.

Public records confirm that Mr Pamensky has direct business interests in ORE and Shiva Uranium for which he received economic benefit. Mr Pamensky is also a member of Eskom's Board. By virtue of officio function and role in Eskom he would have or could have access to privilege or sensitive information regarding OCH and various Eskom Contracts. Such information coupled with a personal economic interest would give Tegeta an unfair advantage over other interested buyers. It would be very important to understand the role of this individual in this transaction in light of a high degree of irregularities that appear to have occurred in Eskom."

1313. Mr Pamensky's directorships have been independently confirmed by the Commission¹²⁵². He shared a common directorship with Mr Salim Essa in Yellow Star Trading 1099 (Pty) Ltd briefly during 2005.

1314. During his concurrent directorships of ORE and Eskom, ORE owned Tegeta Exploration and Resources (Pty) Ltd (Tegeta), which acquired Optimum Coal Holdings (OCH) from Glencore.

1315. During the period 31 January 2008 to 21 June 2017, he communicated.¹²⁵³

1315.1. 1 169 times with Mr Salim Essa;

1315.2. 106 times with Mr Atul Gupta;

1315.3. twice with Mr D Zuma; and

1315.4. 43 times with Mr Rajesh Gupta.

1316. The #Guptaleaks HDD H revealed that there was email correspondence from¹²⁵⁴:

¹²⁵² Paragraph of Mr TM Nombembe's affidavit in relation to Mr Pamensky dated 3 December 2021.

¹²⁵³ Paragraphs 7 to 11 of Mr TM Nombembe's affidavit in relation to Mr Pamensky dated 3 December 2021.

¹²⁵⁴ Paragraph 12 of Mr TM Nombembe's affidavit in relation to Mr Pamensky dated 3 December 2021.

- 1316.1. Mr Atul Gupta to Mr Pamensky on 31 July 2015;
- 1316.2. Mr Pamensky to Mr Atul Gupta on 05 September 2015 regarding IDC;
- 1316.3. Mr Pamensky to Mr Atul Gupta *et al* on 18 September 2015, regarding Eskom's new coal procurement methods and purchase of a coal mine;
- 1316.4. Mr Pamensky to Mr Atul Gupta on 17 November 2015, regarding Mr Pamensky's role at Eskom and ORE's potential acquisition of Tegeta and the perceived conflict of Mr Pamensky;
- 1316.5. Mr Pamensky to Mr Atul Gupta on 22 November 2015;
- 1316.6. Mr Pamensky to Mr Atul Gupta on 10 December 2015, in which the former congratulated the latter on the acquisition of Optimum Group of Companies;
- 1316.7. Mr Pamensky to Mr Atul Gupta and others on 01 January 2016, regarding new year wishes and thanking his welcoming into the family and the group;
- 1316.8. Mr Pamensky to Mr Atul Gupta on 16 January 2016; and
- 1316.9. Mr Pamensky to Mr Atul Gupta on 04 February 2016, expressing his support to Mr Atul Gupta in the face of articles about the family and offering a strategy in this regard to Mr Atul Gupta.
1317. Ms Pamensky responded as follows to the above¹²⁵⁵.

¹²⁵⁵ Mr Pamensky's affidavit dated 13 December 2021.

- 1317.1. he admitted his relationship and association with Mr Salim Essa, which he said commenced in 2003;
- 1317.2. though he attended the Gupta wedding in Sun City on 02 May 2013 as a Blue Label Telecoms representative, he had not met the Guptas before then, until he was invited to Saxonwold by Mr Rajesh Gupta in June 2014;
- 1317.3. he later became a non-executive director of ORE at the request of Mr Atul Gupta;
- 1317.4. the calls between him and Mr Salim Essa would have related to their association and friendship;
- 1317.5. the calls between him and the Guptas would have been confined to his role at ORE and “possibly mooted business prospects that however never materialized”, he disputed, however, that the calls with Mr Atul Gupta stated as far back as November 2012;
- 1317.6. Mr Duduzane Zuma was a director of Shiva Uranium (Pty) Ltd (Shiva Uranium), which owned ORE and Mr Pamensky would have “had limited interactions with him, in that capacity”;
- 1317.7. he admitted to having “had associations with each of the people identified in Mr Nombembe’s affidavit”; and
- 1317.8. He admits to the email correspondence above and refers to affidavits to which he previously deposed and his evidence led at the Commission in this regard.

Mr Geovanni Michele Leonardi

1318. Mr Leonardi, a Swiss national, was appointed to the Eskom board on 25 May 2015. He resigned on 19 January 2018.

1319. In Fundudzi's report entitled "Forensic Investigation into various allegations at DPE" and dated July 2019, the following is stated in relation to the appointment of Mr Leonardi to the 2014 Eskom Board¹²⁵⁶:

"We determined that on 16 April 2015, [Ms] Davids forwarded an email titled "CV for DPE database" from Kim.Davids@dpe.gov.za to anckimwc@gmail.com. Attached to the email was Giovanni Leonardi's CV."

We further determined that on the same day i.e. 16 April 2015, [Ms] Davids sent an email to infoportal1@zoho.com stating 'Fyi below....send me please a answer for Mam to revert to this below.

Much appreciated.

Kind regards

Kim Davids"

1320. Ms Kim Valeries Davids (Ms Kim Davids),¹²⁵⁷ is a former personal assistant to Minister Lynn Brown.

1321. In addition to the above, the Fundudzi report stated that:¹²⁵⁸

1321.1. the response from infoportal1@zoho.com to Ms Kim Davids' email was: "Will do. Please give me till noon". To this Ms Kim Davids responded by email and said "Ok. Thanks very much. Kim Davids".

¹²⁵⁶ Sections 14.8 and 14.9, page 75 to 85.

¹²⁵⁷ She is frequently referred to as "Kim Davids" and even signs emails as such. However, in her sworn statement to the Commission dated 9 November 2020 she states her full names as "Kim Valeries David".

¹²⁵⁸ Sections 14.8 and 14.9, page 75 to 85.

1321.2. on 11 May 2015 Ms Kim Davids sent an email to Messrs Botha and Ruthnam and copied Ms Annelize van Wyk (Special Advisor to Minister Lynn Brown) and Ms Mokholo, with subject matter of the email being “3 x Boards – SA Express – Denel – Eskom”. In the email, Ms Kim Davids indicated that as discussed with Minister Lynn Brown and her direction, the following was the Eskom board nominations for the Cabinet memorandum:

1321.2.1. Ms Cassim; and

1321.2.2. Mr Giovanni.

1321.3. The “Leonardi” that was recommended to the Eskom board as per email dated 11 May 2015 was Mr Giovanni, who’s CV Ms Kim Davids had enquired about from infoportal1@zoho.com on 16 April 2015.

1321.3.1. There is no evidence that Mr Giovanni was subjected to a shortlisting, screening and vetting process as required by the DPE processes for the selection of members of Boards of state-owned entities.

1321.3.2. Mr Giovanni’s CV and appointment letter reflect his address as being in Bodio, Switzerland.

1321.3.3. It is evident that Mr Giovanni’s CV was sent to Ms Kim Davids in connection with his possible appointment to the Eskom board.

1321.3.4. Given what this Commission has uncovered about Ms Lynn Brown and her interactions with the Guptas and their associates, there is no doubt that Ms Brown knew about Ms David’s interaction with Mr Salim Essa via the “infoportal” email address.

- 1321.3.5. In her response to questions relating to Mr Giovanni's appointment on the Eskom board, Minister Lynn Brown indicated that "Like other names, Giovanni Leonardo's name came to me as part of a list in the normal course of the process. I had some doubts, but after looking at the CV, I thought international electrical expertise would be valuable".
- 1321.3.6. Minister Brown further indicated that Mr Giovanni was appointed in line with the Department's procedures and manuals for the appointment of Boards. However, there is no evidence that Mr Giovanni was subjected to a shortlisting, screening and vetting process as required by the Department.
- 1321.3.7. Mr Giovanni's appointment as an Eskom board member therefore did not follow the Department's procedures as indicated by Minister Lynn Brown.
- 1321.3.8. The communication between Ms Kim Davids and infoportal1@zoho.com regarding Mr Giovanni's CV is another indication of the collaboration that was taking place between Mr Salim Essa and Minister Lynn Brown in regard to board appointments at SOEs; Ms Kim Davids was Minister Brown's Personal Assistant.

1322. Fundudzi concluded¹²⁵⁹ that:

- 1322.1. Inforportal1@zoho.com and Ms Kim Davids worked closely together to facilitate the appointment of Giovanni to the Eskom board.

¹²⁵⁹ Sections 14.8 and 14.9, page 75 to 85. Paragraph numbers omitted.

- 1322.2. a possibility exists that Mr Giovanni was recommended and placed at Eskom to pursue certain agendas and mandates that would benefit entities linked to the Guptas.
- 1322.3. Mr Giovanni was not subjected to a transparent recruitment process which included nominations, shortlisting, security screening, vetting and interviews.

Ms Mariam Cassim

1323. Ms Cassim was appointed to the Board on 25 May 2015 and she resigned in 2017.

Ms Cassim's interactions with the Guptas

1324. Ms Cassim was not called to give evidence before the Commission. However, there is considerable evidence of telephone calls between Ms Cassim and Messrs Ajay Gupta and Tony Gupta during the period 13 March 2015 to 19 December 2015. In all, there were ten such conversations, eight of which were initiated by Ms Cassim. Three of these conversations lasted more than 200 seconds each.

1325. Ms Cassim has admitted the calls. Her explanation is that she was networking with these persons by means of brief calls asking them how they were doing and congratulating them on developments in their business and so on, merely in order to stay in contact.

1326. This explanation is implausible. On 13 March 2015, just two days after the four executives had been suspended, Ms Cassim had two conversations with Mr Ajay Gupta, at 15h05 and 15h45, for 60 and 30 seconds respectively. On 28 November 2015, which was at a time when Tegeta was arranging to use Eskom money to pay for Tegeta's purchase of Glencore's coal interests, Ms Cassim called Mr Tony Gupta twice

without connecting. Then Mr Tony Gupta called Ms Cassim back and they spoke for 254 seconds. On 30 November 2015 Ms Cassim called Mr Ajay Gupta and then Mr Tony Gupta. She spoke to them, respectively, 233 and 263 seconds. On 19 December 2015 Mr Ajay Gupta called Ms Cassim and they spoke for 27 seconds.

1327. Thereafter, there were no calls at all between Ms Cassim and the Guptas. So much for networking.

1328. Once one rejects Ms Cassim's explanation for her calls to the Guptas, there is strong correlation between Ms Cassim's contact with the Guptas and the timing of transactions that were initiated to benefit the Guptas.

The composition of the committees of the 2014 Board

The evidence of Mr Zola Tsotsi

1329. As already stated above, in May 2014 Ms Lynne Brown was appointed as the Minister of Public Enterprises. A new Board of Directors was appointed in December 2014. Mr Zola Tsotsi had been appointed as Chairperson of the Eskom Board that served from 2011 to 2014. When the next Board was appointed in December 2014, Mr Tsotsi was re-appointed as the Chairperson of the Board. Ms Chwayita Mabude was the only other member of the 2011-2014 Board reappointed to the 2014 Eskom Board.

1330. Mr Zola Tsotsi as the Chairman of the 2014 Eskom Board was responsible for the composition of the committees of the Board and was busy with it in December 2014 when he engaged Minister Lynne Brown, as she was responsible for the statutory committees, namely, Audit & Risk and the Social & Ethics.

1331. Mr Tsotsi testified before the Commission that in December 2014 - after the appointment of the 2014 Board of Eskom, he received an email from Mr Salim Essa,

whom he knew, which contained Mr Salim Essa's composition of various committees of the Board. In other words, this email had names of which members of the Board should be members of the various committees of the Board. That list had the following compositions of committees:

Subcommittee	Members
Audit & Risk Committee (R&G)	Chwayita Mabude (Chair) Viroshni Naidoo Nadia Carrim Romeo Khumalo Norman Baloyi
Tender & Procurement (BTC)	Ben Ngubane (Chair) Mark Pamensky Zathembe Xhosa Nazia Carrim Chwayita Mabude
Investment & Finance Committee (IFC)	Mark Pamensky (Chair) Viroshni Naidoo Pat Naidoo Zathembe Xhosa
People & Governance (P&G)	Nazia Carrim (Chair) Ben Ngubane Zola Tsotsi Romeo Khumalo Venette Klein
Social Ethics & Sustainability	Venette Klein (Chair) Pat Naidoo Viroshni Naidoo Norman Baloyio

1332. Notable on Mr Salim Essa's list is the fact that the names of a number of Board members were wrongly spelt. Here are the wrong and correct spellings of the relevant names:

Mr Essa's list	Correct spelling
Nad <u>ia</u> Carrim	Naz <u>ia</u> Carrim
Norman Baloy <u>io</u>	Norman Baloy <u>i</u>
Zathembe <u>X</u> hosa	Zethembe <u>K</u> hoza

1333. Mr Tsotsi testified that Mr Salim Essa asked him to send that list to Minister Brown as his proposal of who should serve in the different committees. In his initial evidence Mr Tsotsi testified that he ignored Mr Essa's list. However, when shown, during his subsequent testimony before the Commission, the spelling errors on some of the names that could not have been made by a person familiar with the names, Mr Tsotsi suddenly changed his version and said that he did send Mr Essa's list to Minister Brown. Asked whether he sent it to Minister Brown as his list or as Mr Essa's list, he conceded that he did not inform Minister Brown of anything that would have suggested to her that the list was not his list. This means that Mr Tsotsi actually did what Mr Essa had asked him to do, namely, to send Mr Essa's list to Minister Brown as if it was Mr Tsotsi's list. Mr Tsotsi testified that later he sent a revised list of his own to Minister Brown.

1334. Minister Brown was provided with Mr Tsotsi's affidavit of 13 February 2020 and was requested to offer her own version in respect of Mr Tsotsi's evidence that she was colluding with the Guptas' and Mr Essa in the appointment of the Board committees. In that affidavit Mr Tsotsi dealt with among others an occasion when Minister Brown had called him to her residence and when Mr Tsotsi arrived at her residence he found her with Mr Tony Gupta and Mr Essa. Mr Tsotsi also testified that on that occasion Minister Brown instructed him in front of Mr Gupta and Mr Essa to implement the composition of committees of the Board that she had sent to him. Minister Brown vehemently denied any association with Mr Essa and the Guptas and categorically stated that Mr Essa and Mr Tony Gupta were never at her residence either individually or together, but she did not deny that she had a meeting with Mr Tsotsi.¹²⁶⁰

1335. Minister Lynn Brown maintained this version when she gave evidence before the Commission. She elaborated that her official residence had a security register or control point that would have information of all guests and persons attending her

¹²⁶⁰ Exhibit U17, p 445 para 58.

residence.¹²⁶¹ However, interestingly, Minister Lynn Brown did not provide any evidence of these registers or control access which could have contradicted Mr Tsotsi's evidence about having found Mr Salim Essa and Mr Tony Gupta at Minister Lynn Brown's residence. Instead she stated that Mr Zola Tsotsi should provide the date as to when he attended at her residence and then the information could be retrieved.

1336. Mr Tsotsi testified that he had met Mr Essa in mid2014 when he was introduced to him by Mr Tony Gupta.¹²⁶²

1337. Mr Tsotsi seems to me to have been a weak person who did not stand up for proper governance when he ought to have done so. After realising the interference of Mr Essa and Minister Brown with regard to the allocation of the 2014 Eskom Board members to Committees of the Board, he not only acquiesced in it but actually facilitated the implementation of Mr Essa's interference in the affairs of the Eskom Board.

1338. It is important to also refer to the fact that the cell phone records obtained by the Commission reveal that there were discussions between Mr Essa and Mr Tsotsi in November/December 2014 and between Mr Salim Essa and Minister Brown from November 2014 to March 2015.

The Fundudzi Report on the composition of the 2014 Eskom Board

1339. In the Fundudzi report titled "Forensic Investigation into various allegations at DPE" and dated July 2019, the following is stated in relation to the appointment of the 2014 Eskom Board and the composition of the various Eskom board committees:¹²⁶³

¹²⁶¹ Transcript 11 March 2021 p 158 of 331 lines 1 – 21.

¹²⁶² Transcript 9 September 2020, p.25.

¹²⁶³ Sections 14.8 and 14.9, page 75 to 85 of the report entitled "Forensic Investigation into various allegations at DPE" paragraph numbers omitted.

“During our review of the DPE emails, we determined that *infoportal1@zoho.com* played a role in the composition of various Eskom board sub-committees.

We determined that on 6 March 2015, *infoportal1@zoho.com* sent an email titled ‘Eskom Committee’ to [Ms] Davids on email address styled *anckimwc@gmail.com* proposing various Eskom sub-committees.

The following committees were proposed in the said email from *infoportal1@zoho.com* to [Ms] Davids:

- i. Audit & Risk
 1. New Lady CA (Chair);
 2. Viroshni Naidoo;
 3. Nazia Carrim;
 4. Romeo Khumalo; and
 5. Norman Baloyi.
- ii. Tender & Procurement
 1. Ben Ngubane (Chair);
 2. Zethembe Xhosa [sic];
 3. Nazia Carrim; and
 4. Chwayita Mabude.
- iii. IFC
 1. Mark Pamensky (Chair);
 2. Pat Naidoo;
 3. Zethembe Khoza;
 4. Venette Klein; and
 5. Zola Tsotsi.
- iv. People & Governance
 1. Chwayita Mabude (Chair);
 2. Ben Ngubane;
 3. Romeo Khumalo; and
 4. Venette Klein.
- v. Social & Ethics
 1. Venete Klein (Chair);

2. Pat Naidoo;
 3. Viroshni Naidoo;
 4. Norman Baloyi; and
 5. Zola Tsotsi.
- vi. Emergency Task Team and New Build¹²⁶⁴
1. Zethembe Xhosa [sic] (Chair);
 2. Ben Ngubane;
 3. New Lady CA;
 4. Viroshni Naidoo; and
 5. Nazia Carrim.
- vii. During our consultation with [Ms] Mokholo, she indicated that DPE would only be responsible **for** appointing the statutory committees which include the following:
1. Audit and Risk Committee;
 2. Social and Ethics Committee; and
 3. Remuneration committees.
- viii. Based on the review of the *infoportal1@zoho.com* email, *infoportal1@zoho.com* recommended names for two statutory committees namely the Audit and Risk committee and the Social and Ethics committee.
- ix. The above *infoportal1@zoho.com* email is an indication that the formation of Eskom board committees was facilitated by [Ms] Davids and external individuals not in the employ of Eskom and DPE.”

1340. Ms Cassim and Mr Leonardi were only appointed to the Board on 25 May 2015. As a result of these appointments, the composition of the Board committees would be revised. Below is a comparison of the individuals recommended by *infoportal1@zoho.com* and those appointed to the various Eskom committees according to Eskom’s Integrated Report¹²⁶⁵ as at 28 May 2015:

¹²⁶⁴ According to the draft resolution, the Build Programme Review and the Eskom Emergency Task Team Committee had been merged into one committee.

¹²⁶⁵ Eskom Integrated Report 31 March 2015 p 18.

1340.1. Audit and Risk Committee (ARC):

Infoportal**Eskom subcommittee
members**

Ms Mabude (Chairperson)

New Lady CA (Chair)

Mr Baloyi

Mr Khumalo

Mr Kumalo [sic]

Ms Carrim

Ms Carrim

Ms Naidoo

Ms Naidoo

1340.2. Investment and Finance Committee (IFC):

Infoportal**Eskom subcommittee
members**

Mr Pamensky (Chair)

Mr Pamensky (Chair)

Dr Pat Naidoo

Mr Khoza

Mr Khoza

Mr Tsotsi

Ms Klein

Ms Klein

Ms Mabude

Mr Kumalo [sic]

1340.3. People and Governance Committee:

Infoportal**Eskom subcommittee
members**

Ms Mabude (Chair)

Ms Mabude

Dr Ngubane

Dr Ngubane

Mr Khumalo

Infoportal**Eskom subcommittee
members**

Ms Klein

Ms Klein (Chair)

Mr Khoza

1340.4. Board Recovery and Build Programme Committee:

Infoportal**Eskom subcommittee
members**

Dr Pat Naidoo

Dr Ngubane

Dr Ngubane (Chair)

Mr "Xhosa" [sic] (Chair)

Ms Carrim

Ms Carrim

Ms Klein

Ms Naidoo

Ms Naidoo

New Lady CA

1340.5. Social, Ethics and Sustainability Committee:

Infoportal**Eskom subcommittee
members**

Ms Klein (Chair)

Ms Klein (Chair)

Dr Pat Naidoo

Dr Pat Naidoo

Ms Naidoo

Ms Naidoo

Mr Baloyi

Mr Tsotsi

Dr Ngubane

1340.6. Board Tender Committee:

Infoportal**Eskom sub-committee
members**

Dr Ngubane (Chair)

Mr Xhosa [sic]

Mr Khoza

Ms Carrim

Ms Carrim (Chair)

Ms Mabude

Ms Mabude

Dr Pat Naidoo

1341. In the same Fundudzi report the following is stated in relation to the Eskom board sub-committees and the link to the “infoportal” email address:¹²⁶⁶

1341.1. Based on their review of the Eskom draft resolution and the infoportal1@zoho.com email dated 6 March 2015, the Fundudzi report determined that at least 3 members recommended by infoportal1@zoho.com were appointed to various committees as reflected in the draft resolution.

1341.2. The individuals proposed on the Eskom committees by infoportal1@zoho.com were communicated to the Eskom board for implementation.

1341.3. Dr Ngubane was recommended by infoportal1@zoho.com to be the Chairperson of the Board Tender Committee. This means that he was recommended by Mr Salim Essa. According to a memorandum dated 9 April 2015 from Ms Motsoai to Minister Lynn Brown, Dr Ngubane was removed from the Board Tender Committee by virtue of his appointment as the interim Chairperson of the Eskom board.

1341.4. That memorandum to Minister Lynn Brown further indicated that Messrs Pamensky, Khumalo and Dr Pat Naidoo had a conflict of interest in terms of

¹²⁶⁶ Sections 14.8 and 14.9, page 75 to 85 of the report entitled “Forensic Investigation into various allegations at DPE” paragraph numbers omitted.

which they had current/potential/related business interest in companies that held contracts or had been awarded contracts by Eskom.

The “infoportal” address

1342. In the light of the fact that the email address infoportal@zoho.com was used on many occasions to communicate with either Ms Kim Davids and with Ms Daniels, Ms Koko and Dr Ngubane in regard to important aspects of this Commission’s investigation, it is necessary to establish the identity of the person or persons who were using this email to send or receive emails. The “Business Man” email address Infoportal1@zoho.com is an email address that was used to exchange confidential information in relation to various State Capture related activities at SOEs.

1343. The operator of the “Business Man” address took steps to conceal his/her identity. Thus, emails sent from the address were not signed, and when they forwarded email chains, those chains were generally edited to remove evidence of the identity of the party to whom they had been sent prior to being forwarded on from “Business Man”.

1344. Nevertheless, the operator of the “Business Man” address occasionally failed to remove all evidence of his/her identity in the trailing emails that s/he forwarded from the address, and some of the parties addressing emails to “Business Man” were sometimes less careful than the operator of the address when it came to leaving evidence of the addressee to whom they were writing.

1345. There are several cases where emails addressed to Mr Salim Essa were forwarded from the “Business Man” address. Examples include:

1345.1. The email sent from “Business Man” to Mr Matshela Moses Koko at his matshela2010@yahoo.com address on 3 January 2016 attaching pdf files of UAE visas for Mr Koko, his wife and his son¹²⁶⁷. That email read as follows:

“----- Original message -----
 From: Business Man <infoportal1@zoho.com>
 Date: 2016/01/03 7:58 PM (GMT+08:00)
 To: matshela2010 <matshela2010@yahoo.com>
 Subject: Fwd: FW: 1 VISA FOR TRAVEL
 ===== Forwarded Message =====
 3 x Koko Family visa.
 Thanks
 Warmest Regards
 SAAJIDA MAYET
 Your Personal Travel Agent”

1345.2. The email chain it forwarded shows that the visas for Mr Koko, his wife, and his son were forwarded to Mr Essa by “Saajida Mayet” of the travel agency, Travel Excellence. Lower down the email chain is an email of 22 December 2015 sent at 12h17 from Sameera Sooliman of Travel Excellence to Mr Essa and copied to Saajida Mayet, informing Mr Essa that one of his visas was out of date. That email read:

“From: Sameera [mailto:sameera@travelexcellence.co.za]
 Sent: Tuesday, December 22, 2015 12:25 PM
 To: Salim Essa <salimessa@gmail.com>
 Cc: Halima Allana <halima@travelexcellence.co.za>; 'Saajida'
 <saajida@travelexcellence.co.za>
 Subject: FW: 1 VISA FOR TRAVEL

¹²⁶⁷ Annexure “A” to the infoportal address memorandum dated 8 February 2022.

Your one visa is out

THANKING YOU AT ALL TIMES

SAMEERA SOOLIMAN

YOUR PERSONAL TRAVEL ADVISOR”

- 1345.3. Lower down the same email chain is an email sent on 22 December 2015 at 11h22 attaching the visa of “Moses Koko” (i.e. Matshela Moses Koko).
- 1345.4. The United Arab Emirates (UAE) visa for Mr Koko attached to the email sent from “Business Man” to Koko at his matshela2010@yahoo.com address on 3 January 2016 reflects that the visa was issued on 22 December 2015¹²⁶⁸.
- 1345.5. On 23 May 2016 “Business Man” forwarded to Ms Kim Davids, a copy of the Denel presentation to the Portfolio Committee on Public Enterprises on 4 May 2016, defending Denel’s relationships with VR Laser and Denel Asia. The email chain shows that the copy of the presentation had been sent by Ms Marietjie Strydom on behalf of Mr Zwelakhe Ntshepe to Mr Salim Essa at his salimessa@gmail.com address earlier on the same day before being forwarded from salimessa@gmail.com to the Business Man address and sent on to Ms Kim Davids¹²⁶⁹.
- 1345.6. Ms Kim Davids repeatedly used “Saleem” on her emails addressed to “Business Man” at the infoportal1@zoho.com address. For example:

¹²⁶⁸ Annexure “B” to the infoportal address memorandum dated 8 February 2022.

¹²⁶⁹ Annexure “C” to the infoportal address memorandum dated 8 February 2022.

- 1345.6.1. An email sent by Ms Davids on 27 February 2015 to which “Business Man” replied on 6 March 2015 with his proposals for the Eskom Board Committees¹²⁷⁰.
- 1345.6.2. An email addressed by Ms Davids to “Business Man” on 16 July 2015 forwarding a cv for consideration for the Alexkor Board¹²⁷¹
- 1345.7. When Mr Vikas Sagar of McKinsey was told by Mr Clive Angel of Trillian (in an email of 16 November 2016 sent to Mr Vikas Sagar and copied to Mr Essa at his salimessa@gmail.com address) that he had to forward a spreadsheet to Mr Essa before a meeting would be set up for McKinsey at Eskom, Mr Vikas Sagar sent the required spreadsheet in an email of 18 November 2015 addressed to “Business Man” and copied to Mr Clive Angel¹²⁷².
- 1345.8. On 7 December 2015 “Business Man” forwarded to Mr Ashu Chawla of Sahara Computers a blank Tequesta letterhead¹²⁷³. The letterhead provided for Tegeta documents to be signed by Mr Essa¹²⁷⁴.
- 1345.9. Quite apart from the evidence pointing specifically to Mr Essa, there can be no doubt that “Business Man” was a close associate of the Gupta family and its companies. There are numerous emails addressed to multiple addressees, including “Business Man” and Gupta family members or operatives, or forwarded from “Business Man” to Gupta family members or operatives. By way of example:

¹²⁷⁰ Annexure “D” to the infoportal address memorandum dated 8 February 2022.

¹²⁷¹ Annexure “E” to the infoportal address memorandum dated 8 February 2022.

¹²⁷² Annexures “F” and “G” to the infoportal address memorandum dated 8 February 2022.

¹²⁷³ Annexure “H” to the infoportal address memorandum dated 8 February 2022.

¹²⁷⁴ Annexure “I” to the infoportal address memorandum dated 8 February 2022.

- 1345.9.1. the email forwarded from “Business Man” to Mr Chawla on 22 March 2015, attaching calculations of the kickbacks paid to JJ Trading and CG Trading by China North Rail and China South Rail in respect of the Transnet locomotive contract kickbacks¹²⁷⁵;
- 1345.9.2. the email sent from Mr Pieter van der Merwe to Messrs Tony Gupta, Kamal Singhala, Santosh Choubey and Business Man on 16 February 2016 attaching a media statement in relation to the formation of Denel Asia and the reply from Mr Santosh Choubey sent to Messrs Pieter van der Merwe, Tony Gupta, Kamal Singhala and Business Man on the same day with the final media statement¹²⁷⁶;
- 1345.9.3. the email sent from “Business Man” to Mr Chawla on 7 August 2015 attaching a copy of a letter from the OCM business rescue practitioners to Eskom¹²⁷⁷;
- 1345.9.4. the email forwarded from “Business Man” to Mr Chawla of Sahara on 22 March 2015 on 5 November 2015 to wdrsa1@gmail.com, an email address used by Mr Tony Gupta, and then forwarded on the same day from wdrsa1@gmail.com to Mr Ashu Chawla, attaching a copy of a privileged legal opinion on the Optimum business rescue furnished to Eskom by its counsel and leaked to “Business Man” by Mr Koko on 4 November 2015¹²⁷⁸.

¹²⁷⁵ Annexure “J” to the infoportal address memorandum dated 8 February 2022.

¹²⁷⁶ Annexures “K” and “L” to the infoportal address memorandum dated 8 February 2022.

¹²⁷⁷ Annexure “M” to the infoportal address memorandum dated 8 February 2022.

¹²⁷⁸ Annexure “N” to the infoportal address memorandum dated 8 February 2022.

1346. On the basis of the above the Commission finds that the email address infoportal1@zoho.com belonged to or was used by Mr Salim Essa. Accordingly, anyone who sent emails to it or received emails from it was communicating with Mr Salim Essa.

The evidence of Minister Lynn Brown about the appointment of the 2014 Board of Directors of Eskom

1347. A striking feature of Ms Brown's evidence was her tendency to claim inability to remember pertinent facts and to pass the decision-making buck to officials in the DPE or to the Eskom board. Her attempt to pretend that she left decision making to officials with regard to the appointment of members of Boards falls to be rejected.

1348. On the question of the composition of the 2014 Eskom board, Ms Brown's version is that the board members were shortlisted by a process in the DPE which included advertising for candidates and vetting those who applied. However, it is apparent that Ms Lynn Brown stuffed the Denel Board and the Eskom Board with many Gupta associates.

1349. As already shown above, Mr Tsotsi testified that Ms Brown called him to a meeting at one of her official residences; that he found her there with Mr Essa and Mr Tony Gupta; and that in their presence she informed Mr Tsotsi that the members of the Eskom board committees were to be as she had prescribed. This would have been early in 2015.

1350. Ms Brown denied the meeting. She pointed out that all three of these persons would have had to sign in with her security. She said that, unless, she was given a date of the alleged meeting, she could not verify the evidence through the records of her security staff.

1351. The decisive factor in the evaluation of whether Ms Brown was a conscious agent of state capture is the analysis of her cell phone records which the Commission obtained.

1352. By a directive dated 19 July 2021 under Regulation 10(6) of the Regulations of the Commission, Ms Brown was called upon to respond to a schedule containing evidence of telephone records which showed that there had probably been, firstly, a telephone conversation between Ms Brown and either Mr Howa or Mr Atul Gupta and, secondly, several telephone conversations between Ms Brown and Mr Essa. The cell phone records revealed, among other things, that there had been numerous calls between Mr Essa and Minister Brown from November 2014 to 19 March 2015.

1353. Ms Brown did not deny the evidence regarding the telephone conversation between her and Mr Atul Gupta in March 2015 which is dealt in greater detail below. However, the evidence of telephone conversations between Ms Brown and the user of the cell phone belonging to Mr Essa, and, therefore, probably between Ms Brown and Mr Essa, is however of a different calibre. The evidence of Ms Brown before the Commission was unequivocal: she had said that she did not know Mr Essa and had never spoken to him. Nonetheless, the records show that she had a total of eight telephone conversations with the user of Mr Essa's cell phone, and therefore, Mr Essa, which in duration totalled 1 398 seconds, i.e. more than 23 minutes. Each of these calls was probably initiated by Mr Essa. In addition, Mr Essa probably tried to initiate twelve additional calls with her but was unsuccessful and those calls are recorded as having lasted zero seconds. The cell phone conversations between Ms Brown and Mr Essa are recorded as having taken place during the period 24 November 2014 to 19 March 2015,¹²⁷⁹ after which no more attempts were made from Mr Essa's cell phone to contact Ms Brown.

¹²⁷⁹ Six days after the suspension of the four Eskom executives.

1354. Ms Brown responded in an affidavit signed by her on 30 July 2021 to this evidence of calls between her cell phone and Mr Essa's cell phone she said:

“... I do not know Mr Essa as I have indicated ...

... I have racked my brain trying to recall and place these calls. I cannot deny the empirical evidence of the calls i simply cannot recall these calls, much less, the content of the conversations, if any.

Let me explain it this way: before I received this Rule 10.6 Notice, it never occurred to me that a number believed to be used by Mr Essa ever called me. Even when reading about him in the media, this never crossed my mind.

I am afraid I cannot take this much further and assist the Commission.”¹²⁸⁰

1355. In her response to the Regulation 10(6) directive, Ms Brown did not dispute that she had the conversations with Mr Essa. In my view, there is no innocent explanation of the fact that Ms Brown had cell phone conversations with Mr Essa while she was Minister of Public Enterprises on eight occasions during the period that the Guptas were putting into effect their scheme to capture Eskom. That scheme required that a board which would not resist the Guptas' capture of Eskom be put in place and that officials who might resist the Gupta capture be removed. That was the period during which the cell phone conversations between Ms Brown and Mr Essa took place. Four long such conversations, 407, 189, 289 and 279 seconds respectively, took place on 24 November 2014 (two conversations within less than half an hour), 29 November 2014 and 1 December 2014, when the appointments to the new board were being made. For example, Mr Pamensky was appointed to the Eskom board with effect from 11 December 2014 and there is no reason to believe that the timing of Mr Pamensky's appointment was any different to those of the other new board members. The other members of the Eskom Board were also appointed on or about 10 December 2014.

¹²⁸⁰ Paragraph numbers omitted.

1356. I reject Ms Brown's evidence that she cannot remember anything about the conversations. I find that she has told a deliberate untruth in this regard. Why would she lie about her cell phone conversations with Mr Essa? The only possible explanation is that Ms Brown was a witting participant in the Guptas' schemes to capture Denel and Eskom and she sought to conceal this by pretending that she did not know Mr Essa and had not spoken to him when she had spoken to him several times and during a period that was of strategic importance to the Gupta's scheme to capture Eskom. The fact of the matter is that Ms Brown has been found out. She was working with the Guptas and their associates to facilitate the capture of Denel and Eskom.

1357. In the case of Denel, Ms Brown participated in state capture by using the powers of her office to install persons as members of the Denel board of directors who she believed, would facilitate or at least not oppose the Guptas' state capture schemes. She appointed Mr Mantsha as the Chairperson of the Denel Board. In Part II of this Commission's Report this Commission found that Mr Mantsha was working with the Guptas.

1358. In the case of Eskom, Ms Lynn Brown participated in state capture by using the powers of her office to help remove from Eskom executives that were seen as unlikely to co-operate with the Guptas, to install persons as members of the Eskom board of directors who would facilitate or at least not oppose the Guptas' state capture scheme and appointed Eskom executives who would co-operate with the Guptas. Also, at Denel Ms Brown helped the Guptas and their associates to remove the three executives who were removed so that executives who would co-operate with the Guptas would be appointed. She facilitated this by not doing anything even when Mr Saloojee wrote to her and told her what was happening and she did nothing about it and yet, when the Guptas wanted to have certain Eskom executives suspended, she got involved in operational matters to help them.

1359. The evidence proves a scheme by the Guptas to capture Eskom, install the Guptas' selected candidates in positions of strategic importance within Eskom as members of the board, the committees of the board and executives at Eskom so as to then be able to divert Eskom's financial resources to themselves, their entities and their associates.
1360. This scheme frequently entailed communication between the Minister and her personal assistant and the "Business Man" email address. I have already found that the "Business Man" email address was an email address used by Mr Essa.
1361. Ms Brown approved the irregular appointment of Mr Siyabonga Gama as Group CEO of Transnet without any competitive process in circumstances where there was no justification for not following a competitive process. Ms Brown was the one who also approved the secondment of Mr Brian Molefe and Mr Anoj Singh from Transnet to Eskom. She was also the one who approved the appointments of both Mr Brian Molefe and Mr Anoj Singh as Group CEO and Group CFO of Eskom, respectively, without any competitive process and in the case of Mr Brian Molefe, in breach of the Department's Guidelines for the appointment of CEOs of state owned entities. Both Mr Brian Molefe and Mr Anoj Singh have been found by this Commission to have been Gupta associates who helped the Guptas, their associates and their entities to steal money from Transnet and Eskom
1362. Furthermore, Ms Brown impliedly gave an instruction to the 2014 Board of Eskom on 11 March 2015 to suspend four executives when she had no business giving such instructions to the Board on an operational matter such as the suspension of employees. Mr Baloyi who was a board member at the time gave evidence to the effect that, although Ms Brown said that she could not instruct the Board to suspend the Executives, it was clear that she was in fact instructing the Board to suspend them. Dr Ngubane also testified that, although Minister Brown said that she could not instruct the

Board as to what to do, it was clear that she wanted the Board to suspend the executives. Also, when the Acting Director-General of her Department, Ms Mokholo, repeatedly asked Minister Brown that they should leave the meeting because it was dealing with operational matters, she did not listen to her; when she did agree to leave the meeting, she told the Board that she was going to be in the vicinity so that, if they needed guidance from her, she could provide it. This shows how determined she was to see the executives concerned suspended. She was not prepared to simply leave the matter in the hands of the Board. She was putting pressure on the Board to suspend the executives concerned.

1363. While prior to Minister Brown addressing the Board meeting on the morning of 11 March 2015, there had only been talk of the suspension of three executives which did not include the Financial Director of Eskom, Ms Tsholo Molefe, the Eskom Board heard for the first time from Minister Brown on the morning of 11 March 2015 that the Financial Director, Ms Tsholo Molefe, was also to be suspended. This was when Minister Brown addressed the Board that morning. Interestingly, the only other person who had included Ms Molefe among the executives to be suspended prior to 11 March 2015 was Mr Essa in the meetings that he and Mr Koko had with Ms Daniels and Mr Masango on the 10th March 2015 at Melrose Arch. The evidence heard by the Commission was that Mr Essa introduced himself to Ms Daniels as advisor to Minister Brown. On the evidence that the Commission has before it including the cell phone records showing that there were several calls between Minister Brown and Mr Essa from November 2014 to March 2015, the probabilities are that it was from Mr Essa that Minister Brown obtained the information that Ms Molefe should also be suspended. It is no surprise that it was Mr Essa who was the first person to include Ms Molefe among the executives to be suspended in circumstances where her name had not been featured at the Durban meeting among the executives who were to be suspended. This is so because in 2014 Mr Essa had tasted Ms Molefe's strong opposition to wrongdoing in regard to a certain

agreement which Mr Essa wanted Eskom to enter into with Regiments in breach of procurement law and procedures and ultimately it was Mr Matjila as Acting Group CEO who was prepared to bend the rules for Mr Essa. Mr Essa knew very well that Ms Molefe would be a stumbling block to their scheme. That Mr Essa came up with Ms Molefe's name late but in the end she was also suspended speaks to how influential Mr Essa was.

THE SUSPENSION OF THE FOUR ESKOM EXECUTIVES

1364. On the 11th March 2015 the Eskom Board of Directors unexpectedly suspended three Eskom Executives and the following day, namely, 12 March 2015, it suspended the fourth one. The executives who were suspended on the 11th March 2015 were Mr Tshediso Matona who was the Group Chief Executive Officer and had only been with Eskom for about five months, Ms Tsholofelo Molefe, the Financial Director, Mr Matshela Koko, the Group Executive: Technology and Commercial, and Mr Dan Marokane, Group Executive: Group Capital. The first three of the executives were suspended on 11 March 2015 but Mr Marokane was only suspended on 12 March 2015 because he was on leave on the 11th March and had to be requested to come in on the 12th March to meet with Mr Tsotsi.

1365. The suspension of these executives was a crucial step to pave the way for the capture of Eskom by the Guptas.

1366. The evidence uncovered by the Commission revealed that the Guptas and their associates and President Zuma were behind the suspension. The aim of the suspension of the executives was, except with regard to one executive, namely, Mr Koko, to remove persons who occupied certain strategic positions at Eskom who the Guptas did not think would co-operate with them in their agenda to capture Eskom so that the Guptas and their associates could then have persons who would co-operate with them appointed to those positions. Mr Koko was not someone who would not co-operate with the Guptas. The evidence revealed that, prior to the 11th March 2015, he was working with at least an associate of the Guptas, seeking to put in place plans of what would happen once the suspensions, including his own, had been effected.

1367. While it was never intended that the three executives would ever return to Eskom after the suspensions, the Guptas intended that Mr Koko would return to Eskom in due

course and he knew it even as he was told on the 11th March 2015 that he was to be suspended and he pretended as if the suspension took him by surprise. Here is how the events that led to the suspension of the four executives and the ultimate removal of the three executives unfolded. Those events were:

- 1367.1. President Zuma's instruction for the postponement of the Eskom Board meeting of 26 February 2015;
- 1367.2. the meeting between Ms Dudu Myeni and Mr Linnell on 6 March 2015;
- 1367.3. the Durban meeting at President Zuma's official residence on 8 March 2015;
- 1367.4. the Eskom Board meeting of the 9th March 2015;
- 1367.5. the events of 10 March 2015 including the Melrose Arch meetings; and
- 1367.6. the Board meeting of 11 March 2015.

These are dealt with below.

The postponement of the Eskom Board meeting of 26 February 2015

1368. Ms Matsietsi Mokholo was the Acting Director-General of the Department of Public Enterprises as at 25 February 2015. Minister Brown was out of the country at the time.

- 1368.1. Ms Mokholo testified that on 25 February 2015 at about 20h00, she was returning to the hotel in Strand Street, Cape Town where she was staying when she received a call from President Zuma.
- 1368.2. Ms Mokholo testified that President Zuma greeted her in isiZulu by saying: "Sawubona ntombazana" which Ms Mokholo said means "hello or good evening

young lady". Ms Mokholo testified that President Zuma told her that he had tried in vain to get hold of Minister Brown and the Deputy Minister. She testified that she told President Zuma that the Minister was travelling. Ms Mokholo testified that in their conversation the President used a mixture of English and isiZulu.

1368.3. Ms Mokholo stated that President Zuma then said to her: "You are the Acting DG, so you are in charge" and went on to state that there was a meeting of the Eskom Board scheduled for the following day i.e. 26 February 2015. After President Zuma had said this, Ms Mokholo responded by saying that they (i.e. the Department) would not particularly know of Board meetings at Eskom. Ms Mokholo then testified that the President said that he was not asking her but informing her that he was unable to reach the Minister and as she was the Acting DG, she should call the Chairperson of the Eskom Board and ask him to postpone the meeting until the Minister had returned. When Ms Mokholo pointed out that the Eskom chair would require reasons for the postponement, President Zuma responded by saying that she should ask the Chair of the Eskom Board to postpone the meeting and await instructions from his shareholder Minister.

1368.4. Ms Mokholo testified that she tried to call Minister Brown, who did not pick up her call. Ms Mokholo also sent Minister Brown a text message, to which the Minister did not respond. Ms Mokholo testified that, after considering the matter she called Mr Tsotsi and asked him to postpone the meeting and said that, when the Minister returned, she would give him the reasons for the postponement of the meeting. She testified that Mr Tsotsi insisted on being told the reasons for the postponement of the meeting until Ms Mokholo told him that the postponement was at the request of the President. Ms Mokholo testified that she had not intended to disclose to Mr Tsotsi that the postponement of the

Board meeting was at the request of the President but had to when she was put under pressure by Mr Tsotsi to give him the reasons for the postponement.

1368.5. Mr Tsotsi confirmed the telephone conversation that Ms Mokholo said the two of them had on the evening of 25 February 2015 regarding President Zuma's request or instruction that the Board meeting of 26 February 2015 be postponed. Mr Tsotsi also testified that, after his telephone conversation with his Ms Mokholo, he received a call from President Zuma who wanted the Board meeting to be postponed. Mr Tsotsi did get the meeting postponed. Mr Tsotsi did not ask President Zuma for the reasons for his request or instruction that the Board meeting be postponed. He testified that he thought that he would get the reasons from Minister Brown on her return. There is no reason why Mr Tsotsi did not ask President Zuma for the reasons because he needed to know the reasons before he could agree to postpone the Board meeting. This shows that Mr Tsotsi was weak. He was scared to displease President Zuma by asking him for the reasons. He was a weak leader.

1368.6. On the return of Minister Brown to the country, Ms Mokholo reported to her the events concerning the postponement of the Board meeting of 26 February 2015 at the instance of President Zuma. Ms Mokholo testified that the Minister did not seem to be surprised and just said "Eish Matsi", which Ms Mokholo took to be an acknowledgment that Minister Brown knew what had transpired in her absence. "Matsi" was Ms Mokholo's abbreviated name.

1369. Ms Mokholo was an impressive witness. Her account was probable in all its elements; she was concerned, more than her principal, Ms Brown, with the proper boundaries of Ministerial power and she seemed to me to have no motive to falsely implicate President

Jacob Zuma, Ms Lynn Brown or any Eskom official in wrongdoing. In short, in my view she came to the Commission to tell the truth and succeeded in doing so, with clarity.

1370. In calling both the Acting Director-General and the Chairperson of the Eskom Board to secure the postponement of the meeting of the Eskom, President Zuma interfered in the running of the affairs of the Board of Eskom. That was unlawful because he had no power to decide when the Board could hold its meetings nor had he any power to dictate what matters the Board could discuss or not discuss in any of its meetings. Obviously his decision that the meeting of the Board should be postponed meant that there were matters that he did not want the Board to discuss at its meeting of 26 February. President Zuma was advancing the agenda of the Guptas in securing the postponement of the meeting of 26 February 2015. Later events suggest that the Guptas probably did not want certain matters to be discussed and decided by the Board while the Chairperson of the Board was Mr Tsotsi because they must have felt that he was no longer co-operating with them. They wanted to have Mr Tsotsi removed first and their own associate, Dr Ngubane, to be appointed as Chairperson of the Board.

1371. President Zuma's interference in the affairs of the Board marked the beginning of the implementation of the Gupta's plan to capture Eskom and President Zuma was a critical player in that plan. After the postponement of the Board meeting scheduled for 26 February 2015, a series of meetings aimed at facilitating the capture of Eskom by the Guptas were held.

1372. The first of these meetings appears to have been a meeting between Ms Dudu Myeni (Ms Myeni) and President Zuma at which President Zuma would have told Ms Myeni about the need to have an inquiry into the affairs of Eskom and the need for the suspension of certain executives at Eskom. The Commission was not told where such a meeting took place and when it did so. However, the discussion between Mr Linnell

and Ms Myeni on 6 March 2015, as told to the Commission by Mr Linnell, suggests that such a meeting did take place. The next meeting was on 6 March 2015 between Ms Myeni and Mr Linnell.

Ms Myeni's meeting with Mr Linnell on 6 March 2015

1373. According to Mr Linnell, he received a call from Ms Dudu Myeni on the morning of 6 March 2015. He testified that Ms Myeni was then the Chairperson of South African Airways (SAA). Mr Linnell testified that he knew Ms Myeni very well as she had been his client over a number of years on various projects in her capacities as the Chairperson of the Mhlathuze Water Board in KwaZulu-Natal and as Chairperson of SAA. Mr Linnell testified that Ms Myeni asked him to immediately travel to Pretoria to attend an urgent meeting with President Zuma. Mr Linnell lived in Cape Town at the time. He is a lawyer by profession but he was not admitted as a lawyer in South Africa which means he could not practise as a lawyer in South Africa. He came to South Africa from Zimbabwe. As to what services he provided, Mr Linnell said that he provided coordinating services even though lawyers may be retained to represent an SOE in a matter. He was vague as to the services he actually provided.

1374. Mr Linnell said that in effect Ms Myeni wanted him to drop everything and fly to Pretoria there and then. Mr Linnell flew to Pretoria on the same day and around midday met Ms Myeni at Mahlamba Ndlopfu, the official residence of the President. Upon his arrival he met with Ms Myeni and they went into an office and began their discussions without the President. Ms Myeni told Mr Linnell that President Zuma was concerned about the state of Eskom and wanted an in-depth investigation into its affairs, and that she had recommended him to the President as the suitable candidate to co-ordinate the inquiry.

1375. Ms Myeni proceeded to brief him on the background for an inquiry which included reference to some documentation in her possession. Mr Linnell testified that eventually

the President did not join them in the meeting. Mr Linnell said that he understood from Ms Myeni, after some time, that President Zuma had left for Durban. Mr Linnell said that he would imagine that on this occasion there was a discussion about the suspension of Eskom executives during the inquiry. He testified that quite a bit of background information was provided to him. Mr Linnell testified that Ms Myeni told him that he would have to travel to Durban to attend a meeting with President Zuma on 8 March 2015. Mr Linnell was agreeable to this. The meeting between Mr Linnell and Ms Myeni ended on the basis of the agreement that Mr Linnell would travel to Durban to meet with the President on Sunday, 8 March 2015 to complete this briefing and mandate. Mr Linnell testified that at the meeting on 6 March 2015 no mention was made of Mr Tsotsi and that at that time he did not know who the Chairman of the Eskom Board was, nor had he ever met or heard mention of Mr Tsotsi prior to the meeting of 8 March 2015.

1376. Ms Myeni refused to answer many of the questions that were put to her about her version of this meeting. However, whatever she said cannot be accepted if it is in conflict with what Mr Linnell said because Mr Linnell was a credible witness. The only thing that may be material that Ms Myeni said was to suggest that she never said to Mr Linnell he was going to have a meeting with President Zuma or that the idea of an inquiry into the affairs of Eskom came from President Zuma. She suggested that she called Mr Linnell in order to help Mr Tsotsi who, according to her, had approached her for advice on how to handle the Eskom Board that allegedly wanted to pass a vote of no confidence in him. Ms Myeni was being untruthful in this regard in order to try and shield President Zuma and support her version that President Zuma had nothing to do with the proposal for the institution of an inquiry into the affairs of Eskom and the suspension of Eskom executives.

Ms Myeni calls Mr Zola Tsotsi to Durban meeting on 7 March 2015

1377. Mr Zola Tsotsi's evidence is that on 7 March 2015 he received a telephone call from Ms Myeni, a trusted adviser and ally or companion of President Zuma, informing him that President Zuma requested an audience with him at his official residence in Durban on Sunday, 8 March 2015.

1378. According to Mr Tsotsi, he did enquire from Ms Myeni what the purpose of the meeting was but she declined to answer. He said that, in his mind, Ms Myeni's communication with him was simply one as a messenger to ask him to go and meet with the President because the President wanted an audience with him.

1379. Mr Linnell also stated that he had a telephone conversation with Mr Tsotsi on 07 March 2015. Although he could not specifically recall whether he called Mr Tsotsi or that it was Mr Tsotsi who called him, he recalled the conversation with Mr Tsotsi in which he requested Eskom company documents and policies. Mr Linnell said that he gathered from that conversation that Mr Tsotsi would be attending the meeting with the President on 08 March 2015. The next day, Mr Tsotsi emailed documents to Mr Linnell. Mr Linnell said that he prepared for the meeting by researching Eskom on the internet.

1380. Mr Linnell stated that he had checked his cell phone records and they confirmed that he had a telephone call with Mr Tsotsi on Saturday, 07 March 2015. This becomes a very important point in relation to Ms Myeni's version of why and how the meeting of 08 March 2015 at the President's residence in Durban took place.

1381. The next day, Mr Linnell and Mr Tsotsi made their respective ways to Durban and met for the first time at President Zuma's official residence.

The Durban meeting at President Zuma's official residence on 8 March 2015

1382. When Mr Linnell arrived at the President's official residence in Morningside, Durban, he was welcomed by Ms Myeni, in whose presence was also her son, Thalente, as well as Mr Tsotsi and another gentleman called "Jabu". Mr Linnell did not know who "Jabu" was and learnt later through his own research that Jabu's surname was Maswanganyi.

1383. Ms Myeni started the discussions and had assumed the role of co-ordinator or maybe more of a facilitator of the meeting with all of them joining the discussions, with the exception of Thalente who did not speak or participate. According to Mr Tsotsi, Ms Myeni referred to the problems at Eskom, that there needed to be an enquiry into these problems and that certain executives within Eskom needed to be suspended for this enquiry to proceed. Mr Linnell was there, she said, because he had managed such an enquiry at SAA and could do the same for Eskom.

1384. This meeting lasted several hours during which there was an extended discussion about suspensions. Mr Linnell testified that at the meeting he advanced the view that the proposed enquiry should be independent, external, transparent and free from internal and external influences. There was consensus that there should be an enquiry, which Mr Linnell would coordinate and the three executives would be suspended. Mr Tsotsi testified that it was said that it was the Heads of three portfolios who would be suspended and their names were not mentioned either initially or at all. However, being Chairperson of the Eskom Board, Mr Tsotsi knew the identities of the executives who were leading these portfolios. The portfolios whose heads were going to be suspended in terms of the discussion at the Durban meeting were Mr Matona, the Group CEO, Mr Koko and Mr Marokane. It needs to be pointed out that the Financial Director of Eskom was not one of the executives who were to be suspended in terms of the Durban meeting.

1385. The meeting happened in two parts. In the first part of the meeting President Zuma did not attend. After the first part of the meeting, the meeting moved from where it was to another room. The second part of the meeting took place in the latter room. After they had been in the second room for about five minutes, President Zuma joined the meeting. This was according to the evidence of Mr Tsotsi and Mr Linnell. Ms Myeni denied that President Zuma attended the meeting. She said that President Zuma popped in for a few minutes to only greet the people in the meeting and did not participate in the meeting. However, her denial was dishonest. She sought to protect President Zuma. Ms Myeni refused to answer questions and her denial has no credibility whatsoever. On Mr Tsotsi's and Mr Linnell's evidence Ms Myeni introduced the subject and did much of the talking, and Mr Linnell described what he could contribute to the process. Mr Tsotsi expressed concern about the impact of suspending the executives. According to Mr Linnell, Mr Tsotsi supported the idea of an inquiry into the affairs of Eskom, but, when it came to the suspension of the executives, he was very uncomfortable being at this meeting and seemed more like a reluctant participant.¹²⁸¹ Mr Linnell testified that Mr Tsotsi seemed very disturbed by the proposed suspensions of the executives against which he strenuously fought.¹²⁸²

1386. According to both Mr Linnell and Mr Tsotsi President Zuma was not very engaging in the meeting, but was certainly aware of the purpose of the meeting when he came into the room. According to both Mr Tsotsi and Mr Linnell President Zuma asked if Mr Tsotsi knew who the people were who were to be suspended to which Mr Tsotsi responded in the affirmative. Mr Tsotsi said that he would prefer some process equivalent to a recusal. The meeting ended with President Zuma saying that he would like Mr Tsotsi to test the proposal of an inquiry and the idea of the suspension of the executives with the Eskom Board and that he would inform the Minister.¹²⁸³ According to Mr Linnell, the

¹²⁸¹ Transcript 5 October 2020, p 83 lines 16-20.

¹²⁸² Transcript 5 October 2020, p 85 lines 1-7.

¹²⁸³ Transcript 8 September 2020, p 134.

President told those present “to go and do it”. Mr Linnell was to be the coordinator of the enquiry.¹²⁸⁴

1387. Ms Myeni’s version was that the Durban meeting took place at the behest of Mr Tsotsi who called her, out of concern for his position, in that the Eskom Board was allegedly seeking to pass a vote of no confidence in him. Further, she said that her reason for introducing Mr Linnell to Mr Tsotsi was so that Mr Linnell could advise Mr Tsotsi on the process to be followed when suspending executives. Ms Myeni testified that Mr Tsotsi wanted the assistance of the President with regard to his concern.

1388. Both Mr Tsotsi and Mr Linnell disputed Ms Myeni’s version. Mr Linnell said that there was nothing to suggest that Mr Tsotsi was under threat of removal. Mr Linnell said that, if the purpose of the meeting had been as alleged by Ms Myeni, i.e. that Mr Tsotsi was seeking advice against the board’s intention to remove him as chairperson, there would have been no need for a meeting in Durban. He also said that, in that event, he would not have gone to Durban to assist Mr Tsotsi on a perceived risk or threat of removal, as that was neither his area of expertise nor could he have assisted Mr Tsotsi in any way in that regard.¹²⁸⁵

1389. Ms Myeni denied that her son was with her at the meeting. Ms Myeni’s version that her son was not present at the meeting and that the President did not participate in the meeting has also been denied by Mr Zola Tsotsi and Mr Linnell. In this regard, they refer to the evidence above and to the agreement reached at the end of the meeting, with President Zuma instructing them to “go do it”. Documentation thereafter prepared by Mr Linnell and exchanged with Mr Tsotsi also serves to corroborate their version, regarding President Zuma’s participation, and refutes Ms Myeni’s version. The fact that Ms Myeni’s version was disputed even by Mr Linnell is significant because, on her own

¹²⁸⁴ Transcript 5 October 2020, p 114-115.

¹²⁸⁵ Transcript 29 June 2020, p 100-101.

version, she and Mr Linnell had worked together for some time and she had been giving Mr Linnell business. Why would Mr Linnell contradict Ms Myeni and thereby risk losing business with a client who had been giving him a lot of business unless he was simply telling the truth?

1390. Mr Linnell said he did not ask Ms Myeni why she was dealing with issues relating to Eskom because he knew the answer he would receive. That is that she was and was known publicly to be a close confidant and political ally of President Zuma.¹²⁸⁶ He admitted that, in retrospect, the participation of Ms Myeni and President Zuma constituted political interference.

1391. In assessing Ms Myeni's evidence, it can be clearly rejected in favour of Mr Tsotsi's and Mr Linnell's version because Mr Linnell, who was Ms Myeni's associate and was recommended by her to the President, clearly denied her version in unequivocal terms. Mr Linnell can verify the reasons he attended Pretoria, he spoke to Mr Tsotsi for the first time on Saturday, 07 March 2015, and then met him in Durban to discuss the inquiry into the affairs of Eskom and the suspension of the three of the Executives with the President. This resonates with why he was then present at Eskom especially on 11 March 2015 and was introduced to the Eskom Board, as it would make absolutely no sense for him to be at Eskom discussing the suspensions of the Executives if any credence is given to Ms Myeni's version of why the Durban meeting took place.

1392. Ms Myeni did not provide any sound reason or explanation as to why the Durban meeting was held at President Zuma's residence if it had nothing to do with him. Nor did she explain why she would have met with Mr Linnell at President Zuma's official

¹²⁸⁶ Transcript 5 October 2020, p 72.

residence in Pretoria on the 6th March 2015. Ms Myeni's version is utterly dishonest and intended to try and protect Mr Zuma.

1393. Mr Linnell summarised the key points conveyed to President Zuma at the meeting in his third affidavit. Mr Linnell advanced the view that it was necessary to have an investigator from outside an SOE to investigate corruption because corruption was pervasive within such organisations and it was unfair or inadequate to require subordinates to investigate their bosses, particularly at the higher levels within the organisation.

What Mr Linnell did on 8 March 2015 after the Durban meeting

1394. Mr Linnell agreed to travel to Johannesburg the following day and be available for an Eskom board meeting on 9 March 2015 and to draft certain documents. That evening of 8 March 2015 he drafted a memorandum to support the Board in conducting pre-suspension interviews with the executives to be suspended. He sent the draft memorandum to a law firm for vetting. Mr Linnell also drafted proposed resolutions, an aide memoire and a draft suspension letter which, he testified, were also vetted by a lawyer.

1395. During the same evening of Sunday 8 March 2015 (at 18h37 – that is after the Durban meeting), Mr Linnell wrote to Mr Tsotsi and sent him copies of the memorandum and proposed resolutions. One of the things he asked Mr Tsotsi to do was to call each director and tell them that the “President has engaged both you as chairman and the Minister regarding the current state of Eskom...He believes that the board is obliged to address the weaknesses and challenges facing the company...You also had a conversation with the Minister who has concurred with the initiative as proposed by the

President and formulated by yourself ...”¹²⁸⁷ It is extremely unlikely that Mr Linnell would have written this if President Zuma had not been at the meeting that day or had not approved the process recommended and mapped out by Mr Linnell in his evidence. The contents of the documentation also stand in stark contrast to Ms Myeni’s version of what she testified was the purpose of the meeting.

1396. The executives to be suspended were identified at the meeting in Durban and included in a briefing document Mr Linnell and sent to Mr Tsotsi. They were Mr Matona, Mr Marokane and Mr Koko.

1397. Following that, Mr Linnell went with a labour lawyer to Eskom's offices on 9 March 2015. However, he was later told that the board meeting which it had been anticipated would take place that day had been cancelled. Mr Linnell and the lawyer then left.

The Board meeting of 9 March 2015

1398. After the Durban meeting Mr Tsotsi went back to Johannesburg and called a special Board meeting for 9 March 2015 in order to brief the Board about what had transpired at the Durban meeting. Mr Tsotsi testified that, at the Board meeting on 9 March 2015 he informed the Board that he had been summoned by the President to a meeting in Durban and that there was a proposal for an inquiry to be conducted into the state of affairs of the company. This was met with much scepticism as the Board members were not convinced by what Mr Tsotsi had reported. Their attitude was that they had been asked to do something very big and had not had enough time to think about it. They said that they were new on the Board and had not even had their first meeting as the Board. They expressed concern that the action being contemplated would have far reaching consequences for the organisation and impact the shareholder’s role in

¹²⁸⁷ Exhibit U16, p 40.

different ways, primarily because of the “War Room” which was a government initiative, and they did not want to do anything that would contradict or undermine the “War Room”.¹²⁸⁸ Ultimately, they insisted on hearing directly from the shareholder representative, Minister Brown.

1399. The suspension of executives was not discussed at this meeting because the executives to be suspended or at least one of them was at the meeting. That is Mr Matona

1400. The meeting was short in duration and, seemingly, did not achieve its purpose. It ended on a note that Mr Tsotsi would invite Minister Brown to a meeting with the Board for her, as the Shareholder representative, to address the Board on the issue and the queries raised. Mr Tsotsi duly obliged and contacted the Minister, inviting her to a meeting with the Board on 11 March 2015. The Minister agreed to meet the Board on the 11th March.

1401. However, quite astonishing is the fact that at the meeting on 9 March 2015, Dr Ngubane expressed concern that people might be suspended, and Mr Pamensky similarly said that the Board could not afford to lose personnel at high level positions as they were difficult to replace. This begs the question: why these two board members expressed such concerns about suspensions or losing executives in high level positions, when Mr Tsotsi had not told the Board anything about suspensions at the meeting of the 9th March. To my mind, this is indicative of prior knowledge on their part of the scheme that was about to unfold, associated with the suspension of the executives. When they were confronted with this in the Commission and asked why they made the remarks or comments that they made in that meeting, Dr Ngubane and Mr Pamensky could not

¹²⁸⁸ Transcript 8 September 2020, pp167-168.

offer any satisfactory explanation. That must be because, as they were both Gupta associates, the Guptas had told them their plan.

The meetings involving Mr Salim Essa and Mr Koko at Melrose Arch on 10 March 2015

1402. Three Eskom officials or employees testified that they each received a call from Mr Koko on the 10th March 2015 inviting them to meet with him at Melrose Arch. These officials or employees were Ms Suzanne Daniels, Mr Abram Masango and Ms Nonkululeko Dlamini (formerly Veleti). Two of them, namely, Ms Daniels and Mr Masango testified that they agreed to the request or invitation and went to meet Mr Koko at Melrose Arch. Ms Dlamini said that she did not go because she was attending a strategy planning session at work and her supervisor, Ms Tsholofelo Molefe, who was with her when she got Mr Koko's call, was not prepared to release her to go to Melrose Arch.

The meeting involving Ms Daniels, Mr Koko and Mr Essa

1403. Ms Daniels testified that she went to Melrose Arch where she initially met with Mr Koko alone at a well-known restaurant but Mr Koko soon took her to certain offices at Melrose Arch. Upon arrival Ms Daniels was asked to hand in her cell phone at reception and then ushered into a boardroom. She stated that she could not remember seeing an office plaque nor company name.¹²⁸⁹ She said that in those offices she met Mr Salim Essa who introduced himself to her as the advisor to Minister Brown.¹²⁹⁰ Ms Daniels testified that in that meeting Mr Salim Essa asked her what the procedure was at Eskom for suspending an executive. Ms Daniels said she responded that, firstly, she was not a labour lawyer, but what she could say was that one needed a very good reason to suspend people. "You cannot just suspend them willy nilly", she said. Ms Daniels

¹²⁸⁹ Transcript 15 September 2020, p 73.

¹²⁹⁰ Transcript 15 September 2020, p 74.

testified that Mr Salim Essa told her that four Eskom executives were going to be suspended and their names were given as Mr Matona, Mr Marokane, Ms Tsholo Molefe and Mr Koko. Ms Daniels testified that when she heard that Mr Koko was also going to be suspended, she looked at him but saw no sign that Mr Koko was worried or concerned about that. Mr Daniels testified that Mr Essa went on to say that there would be an inquiry into the affairs of Eskom and that some of the executives to be suspended would not return to Eskom after the suspensions.¹²⁹¹

1404. Ms Daniels said that there was also a discussion of who would act in the positions that would be vacated by the four executives who would be suspended. Ms Daniels testified that she was shocked to learn of these plans at the meeting. Thereafter, Mr Koko walk her out of the building, and on their way out she enquired from him how this was possible. She testified that his response was: “well this is what is going to happen”, and she left and Mr Koko remained behind.¹²⁹²

1405. Ms Daniels testified that on her way home she was still in shock about what had just transpired and contacted a friend who was also working in government, one Mr Rustom Muhammad, to enquire if Mr Essa had that much power or influence within the political sphere and he confirmed that it was most likely. Ms Daniels then contacted Mr Dan Marokane to urgently speak to him about the meeting, but could not get hold of him and left a message. She said that Mr Marokane returned her call and they arranged to meet at her house that evening where she told him about the meeting she had attended at Melrose Arch. She testified that she told Mr Marokane that in terms of what she had been told at that meeting, he, too, was due to be suspended.¹²⁹³

¹²⁹¹ Transcript 15 September 2020, p 75-76.

¹²⁹² Transcript 15 September 2020, p 78-79.

¹²⁹³ Transcript 06 October 2020, p 157.

1406. Mr Marokane testified before the Commission and corroborated this part of Ms Daniels' version. Startled by the news, Mr Marokane said he telephoned Ms Tsholo Molefe and asked to have an urgent meeting with her that evening, which they did and met at a restaurant in Midrand, where he told her what Ms Daniels had told him about her meeting with Mr Koko and Mr Salim Essa at Melrose Arch earlier that day.¹²⁹⁴ Ms Molefe also testified and corroborated Mr Marokane's evidence that he called her that day and they met, that evening and he told her what Ms Daniels had told him.

1407. Mr Koko admitted that he had called Ms Daniels on the 10th March 2015 and asked her to come to meet him at Melrose Arch and she came. He said that he needed to get legal advice from her on how to handle his possible suspension that he was expecting in connection with a certain matter. He said that he and Ms Daniels sat in a restaurant at Melrose Arch about the legal matter. Mr Koko denied that he took Ms Daniels to some offices where she had a meeting with him and Mr Salim Essa. He said that no such meeting took place. He said that Ms Daniels was dishonest and her evidence could not be relied upon. However, he admitted that as at March 2015 he and Ms Daniels were close and got on well.

1408. If I had to rely only on Ms Daniels' evidence, I would have been reluctant to prefer her evidence to that of anybody else. This is because in certain respects she did not impress me as a truthful witness. In fact, in her disciplinary hearing, the Chairperson of her disciplinary hearing, Adv Nazeer Cassim SC, found her in his ruling to have been a liar. However, in this case there is other evidence to corroborate Ms Daniels' evidence. Mr Marokane has confirmed that Ms Daniels told him on the same day about the Melrose Arch meeting and what had transpired there. Ms Tsholofelo Molefe has also, in her main affidavit and evidence before this Commission, confirmed the version of Mr Marokane, which is therefore further corroboration of Ms Daniels' version. Since, on

¹²⁹⁴ Transcript 6 October 2020, p 157.

Mr Koko's own evidence, he and Ms Daniels were close at that time – their relationship soured later – the question that arises is “why would Ms Daniels have wanted to falsely implicate him in such a matter” if they were close and got on well with each other. Mr Koko did not suggest any reason that would have been in existence at that time as to why Ms Daniels would have falsely implicated him in wrongdoing when they were as close as Mr Koko himself said they were.

The meeting involving Mr Masango, Mr Koko and Mr Essa

1409. Mr Masango testified that he had meeting at Megawatt Park (Eskom) on 10 March 2015 where he made a presentation. When he had finished with his presentation and was leaving, he received a call from Mr Koko requesting him to meet him at Melrose Arch. Mr Masango replied that he was not familiar with the area and Mr Koko assured him that he would give him directions and did so telephonically right until he got to Melrose Arch. Mr Masango testified that when he received Mr Koko's call on 10 March 2015, he had a driver who took him to Melrose Arch to meet with Mr Koko. He said that it was his first time to go to Melrose Arch. He testified that, when he was approaching Melrose Arch, Mr Koko was on a telephone or cell phone call with him directing him how to get to the place. Mr Masango said that at a certain point he saw Mr Koko on the balcony of a building from where he was calling him giving him directions. When they got closer to the building, Mr Koko came down as he got off the car and walked him to an office. Mr Masango also testified that he did not see any no office plaque or company name. As a result of this Mr Masango could not tell where he was going. He testified that at the entrance Mr Koko asked him for his phone at the reception and also took his own phone and handed both cell phones to someone before entering a small office.¹²⁹⁵

¹²⁹⁵ Transcript 1 December 2020, p 20.

1410. Mr Masango testified that he went to the building where Mr Koko was and had a meeting with Mr Koko and another man who was introduced to him as Mr Essa. Mr Masango said that Mr Koko did all the talking and told Mr Masango that “maki we are going to be suspended”, that four Eskom Executives who were going to be suspended and that Mr Koko was one of them; and he mentioned them by name: Mr Tshediso Matona, Ms Tsholofelo Molefe, Mr Dan Marokane and Mr Koko himself. Mr Masango testified that Mr Koko went further to say that, after the suspension the other three would not come back, but that he, Mr Koko, would come back.¹²⁹⁶ Mr Masango testified that Mr Koko said that it was necessary to identify Eskom employees or officials who could act in those positions once the four executives had been suspended. Mr Masango also did not see that Mr Koko was in any way perturbed by his impending suspension. Clearly, he had no reason to be perturbed, because he knew that he was the executive who was going to come back from his suspension.

1411. Mr Masango testified that he was shocked and confused and asked Mr Koko why four executives were to be suspended, and said that this would create chaos for Eskom and that it could not be done. He testified that Mr Koko never gave him a reason. Instead, said Mr Masango, Mr Koko carried on with the discussion and told Mr Essa saying Mr Masango had the capability to act as Group Chief Executive, which according to Mr Masango, got him even more confused given the hierarchy of EXCO at Eskom. Mr Masango testified that he then said: “no but that cannot be true why four executives will be suspended?”, but Mr Koko continued to address Mr Essa and said that “Abram is one of the guys that can act”, which Mr Masango understood to mean act as Group Chief Executive, in Mr Matona’s position, as Mr Koko did not say ‘act as Group Executive for Group Capital’.¹²⁹⁷

¹²⁹⁶ Transcript 1 December 2020, pp 22-23.

¹²⁹⁷ *Id* p23/10 to 24/10.

1412. Eventually Mr Koko finished and assured Mr Masango that everything was fine.¹²⁹⁸ Mr Masango testified that Mr Koko then walked him out where he was given back his cell phone at the exit, and he went to his car. In the car, while still assimilating the information he had just received, he decided to immediately call Mr Marokane to seek answers and to inform him of what he had just heard, but Mr Marokane's phone was off. Mr Masango then saw a missed call from Ms Nonhlanhla Kraai, which he returned and told her about the meeting at Melrose Arch. Mr Masango testified that he and Ms Kraai agreed to meet somewhere along the road that afternoon which he said happened.

1413. Ms Kraai testified before the Commission and corroborated Mr Masango's version. Ms Kraai was employed by Eskom as the Financial Manager at the Kusile Project and reported to Mr Masango. The two of them had agreed to have a meeting on 10 March 2015 to discuss certain matters, but Mr Masango had failed to turn up. Ms Kraai had tried to reach him by telephone, but was unable. Ms Kraai testified that, Mr Masango returned her call at some stage on the 10th March and explained why he had failed to turn up for their meeting. Ms Kraai testified that Mr Masango said that he had been held up in a strange meeting with Mr Koko and a short Indian man at Melrose Arch, and was unable to answer his phone as he had had to surrender it at the entrance. She said that he did not tell her about the suspensions. The two agreed to meet the next day and this took place on the morning of 11 March 2015 at an office or boardroom at Kusile Power Station. Ms Kraai testified that they did not meet on the side of the road, as testified by Mr Masango. The fact that Ms Kraai contradicted Mr Masango as to them having met on the side of the road is an indication that the two of them did not conspire to tell the same story.

¹²⁹⁸ *Id* p26.

1414. Mr Koko told the Commission that for a long time he and Mr Masango were very close.

He said that they called each other “Makhi” which is an abbreviation form of the word “Makhelwane” which is isiZulu for “neighbour”. When Mr Koko sought to show how close he and Mr Abram Masango were, he would put two fingers together. On Mr Koko’s version they were still that close in March 2015. In the light of this I asked him the question why Mr Abram Masango – his “makhi” – would have falsely implicated him in regard to the Melrose Arch meeting if there was no such meeting. In response to this Mr Koko said that Mr Abram Masango was bitter against him because he had laid a criminal complaint of corruption against him with the Police or lodged such complaint with the Eskom Board. However, it transpired that, if ever he did that, it would have been in 2017 and not in or before March 2015. Mr Koko could not advance any other reason why Mr Abram Masango would have falsely implicated him in March 2015 when they were as close as he himself said they were.

1415. Dealing with Ms Kraai’s evidence before the Commission that Mr Masango told her of the meeting at Melrose Arch, Mr Koko pointed out that there were discrepancies between the versions of Ms Kraai and Mr Abram Masango. These discrepancies are whether the report of the Melrose Arch meeting was made on the day of the Melrose Arch meeting or the day after and whether the report was made over the phone or face to face at the side of the road. Both versions, however, describe Mr Masango as having met a short Indian man at Melrose Arch in the presence of Mr Koko.

1416. Mr Koko further accused Mr Masango of having himself been involved in corrupt conduct. Mr Koko did not deny that Mr Essa was or could be described as a short Indian man. He could have denied this if it was not true because, on his own version as revealed elsewhere in this report, he knew Mr Essa from at least early in 2016. So, he could have said: but Mr Essa is not short! The fact that he did not refute this suggests that he accepted that Mr Masango’s description of Mr Essa as a short Indian man was

correct. That being the case, the question arises: how would Mr Masango have known that Mr Essa is a short Indian man if it is not that he met him at the meeting at Melrose Arch that he told the Commission about?

1417. The purpose of Mr Koko calling Mr Masango to a meeting in Melrose Arch was, clearly, to talk to him about the possibility of him acting in one of the positions that were going to be vacated by the executives who would be suspended.

1418. Mr Masango was also asked by the Commission to point out the offices where his Melrose Arch meeting with Mr Koko and Mr Salim Essa took place and he did. His evidence in this regard was corroborated by Mr Pamensky, who also pointed out the offices to the Commission and has unequivocally said that those offices were rented by Mr Salim Essa and Trillian Consulting. Mr Pamensky testified that he knew where Mr Essa's offices were at Melrose Arch in March 2015. Mr Pamensky was told what offices and what building Mr Masango had identified in 2021 as the offices where he had met Mr Koko and Mr Essa on the 10th March 2015 and he was asked whether those were the offices which to his knowledge were occupied by Mr Essa and his company in Melrose Arch in March 2015 and he confirmed that those were the offices. Mr Koko did not deny that that there was where Mr Essa and his company had offices in Melrose Arch.

Interaction between Ms Dlamini and Mr Koko on 10 March 2015

1419. Ms Dlamini testified that on the 10th March 2015 she and her colleagues working under Ms Tsholofelo Molefe had a strategic planning session. She testified that she and her colleagues were going back to another session after lunch when she received a call from Mr Koko. Ms Dlamini testified that Mr Koko asked her to go and meet him at Melrose Arch. She testified that, after receiving Mr Koko's call, she had told her supervisor or manager, Ms Tsholo Molefe, that she had received a call from Mr Koko

who wanted her to go to Melrose Arch and meet him there. Ms Dlamini testified that Ms Molefe said she could not release her because they were busy. Ms Molefe testified before the Commission and corroborated this part of the Ms Dlamini's version. Ms Dlamini testified that she told Mr Koko that she could not go to Melrose Arch because she was busy. She testified that Mr Koko then asked her to email him her CV. She testified that she thought she had sent it but she discovered later that it had not gone through.

1420. Ms Dlamini testified that Mr Koko called her later and they arranged to meet after hours. She said that they met either at a KFC outlet or at a McDonald outlet where Mr Koko told her that he had not received her CV and once again asked for it. Ms Dlamini testified that she either emailed it to Mr Koko there and then or did so after their meeting. Ms Dlamini estimated that she and Mr Koko may have spent about 20 minutes in that meeting during which Mr Koko also told her that there were executives who would be suspended and did not exclude himself. She said that Mr Koko indicated that she might be asked to act in the role of Financial Director.¹²⁹⁹ She said that their meeting was short and she drove home after the meeting.

1421. Mr Koko's testified that Ms Dlamini was not only Mr Koko's colleague, but also a family friend. Mr Koko said that he called her on 10 March 2015 and they met for dinner in the evening in Midrand. Mr Koko denied that he asked her to come to Melrose Arch. According to Mr Koko, both Ms Dlamini and he were very surprised when she was appointed the Acting CFO after Ms Tsholo Molefe had been suspended. Ms Dlamini denied Mr Koko's version and firmly maintained her version, and said that she would not have "dreamt up and decided to tell Ms Molefe that she was being called to Melrose Arch" by Mr Koko.¹³⁰⁰ She denied that they met for dinner that evening.¹³⁰¹ She also

¹²⁹⁹ Transcript 7 October 2020, p 25.

¹³⁰⁰ Transcript 7 October 2020, p 36.

¹³⁰¹ Transcript 7 October 2020, p 37.

denied Mr Koko's version that they were both surprised at her appointment as the Acting Financial Director or Chief Financial Officer. She said that Mr Koko was not at the office and certainly not with her when the announcement was made that she would act as the Financial Director. According to her, it was not a surprise because she had heard it directly from Mr Koko on 10 March 2015.¹³⁰²

1422. With regard to, Mr Koko's evidence that Ms Dlamini was a family friend. I asked him why Ms Dlamini would have falsely implicated him when they were family friends. Mr Koko could not offer any explanation in this regard. He sought to suggest that the Commission investigators may have been responsible for Ms Dlamini falsely implicating him. There are two problems with that. The first is that Mr Koko had no evidence that the Commission's investigators pressurised or intimidated Ms Dlamini to lie. The second is that Ms T Molefe testified before the Parliamentary Portfolio Committee on the Eskom Inquiry on 08 November 2017 about the incident when Ms Dlamini received a telephone call from Mr Koko to come to Melrose Arch. That was even before the Commission was established. In other words, Ms Dlamini's version that she told the Commission was a version that Ms Dlamini and Ms Molefe had told even before the Commission was established. It was suggested to Mr Koko that his explanation could not hold in the light of this and Mr Koko had no answer.

1423. Mr Koko admitted that on the 10th March 2015 he spent a number of hours at Melrose Arch. It was also established that in March 2015 Mr Essa or his company had offices at Melrose Arch. If Mr Koko's version that he and Mr Essa did not have a meeting with Ms Daniels and Mr Masango separately at Melrose Arch on the 10th March 2015 is accepted, it would mean that three persons who were all close to Mr Koko in March 2015 independently and separately decided to fabricate a story about him namely, that he had called each one of them and asked them to go to Melrose Arch to meet with

¹³⁰² Transcript 7 October 2020, pp 39-40.

him. Those people are Ms Daniels, Mr Masango and Ms Dlamini. If each one of those three people with whom he had good relationships fabricated their versions, all one can say is: What a coincidence! If Mr Koko's version is true and they fabricated these stories, then it means that they also had decided independently of each other that their fabricated stories would have the following common features:

- 1423.1. they were each called by Mr Koko who asked each one of them to go to Melrose Arch and meet him;
- 1423.2. Mr Koko was at Melrose Arch on the day;
- 1423.3. each one of the two who agreed to meet him at Melrose Arch decided that his or her fabricated story should include that, when he or she arrived at the offices where the meeting was to be held, he or she was asked to hand in his or her cell phone;
- 1423.4. he and Mr Salim Essa met with each one of them and they told each one of them that four executives would be suspended and, indeed, four executives were suspended;
- 1423.5. they each decided to tell their fabricated stories to Mr Dan Marokane and they each told someone else apart from Mr Marokane about their respective meetings at Melrose Arch.
- 1423.6. they each located Mr Koko at Melrose Arch on the 10th March 2015 and, coincidentally, on Mr Koko's own version, the 10th March 2015 happened to be a day on which he spent several hours at Melrose Arch.
- 1423.7. Ms Daniels and Mr Masango had, independently of each other, decided to say that at Melrose Arch they had met not only Mr Koko but also Mr Salim Essa.

1423.8. Furthermore, a third person who was also close to Mr Koko, Ms Dlamini, decided to join in and also independently fabricate a story that Mr Koko had called her and asked her to go and meet with him at Melrose Arch just like the other two.

1424. Mr Koko's denial of the meetings at Melrose Arch involving him, Mr Essa, Mr Masango and Ms Daniels is a fabrication. Ms Daniels and Mr Masango told the truth when they testified as they did about the Melrose Arch meetings. I also find Ms Dlamini to have been truthful in her evidence. Her evidence is corroborated by not only Ms Tsholofelo Molefe, but actually by Mr Koko himself, who admitted in his affidavit of 27 July 2021 that he asked Ms Dlamini for her CV and said half in jest that she might take over his job. Ms Dlamini's CV would have been useful in the process of getting her appointed to act in the place of one of the executives to be suspended. Therefore, where Mr Koko's version conflicts with the versions of these three former Eskom officials, Mr Koko's version must be rejected as false.

1425. Apart from the above, the evidence heard by this Commission which appears throughout the length and breadth of the Eskom section of the Commission's Report reveals quite conclusively that Mr Koko was working with the Guptas or their associates to facilitate the capture of Eskom. This finding is fundamental to the story of the capture of Eskom by the Guptas with the active assistance of a number of people including Mr Koko, President Zuma, Ms Lynn Brown and others.

1426. The Melrose Arch meetings reveal that the suspensions of Mr Matona, Mr Marokane and Ms Tsholo Molefe on 11 March 2015 were to enable the capture of Eskom. Mr Koko's suspension was for a different purpose. It was meant to cause confusion and to ensure that, when later, the Guptas used him, there would be no suspicion of his association with the Guptas.

1427. Mr Koko denied ever having had telephonic communication with Mr Essa or any of the Gupta brothers. The Commission obtained cell phone record evidence of calls which had passed between the cell phones used by Mr Koko and his wife, on the one hand, and Mr Essa and Mr Atul Gupta, on the other. This evidence was put to Mr Koko by way of a directive issued in terms of Regulation 10(6) of the Regulations of the Commission. In an affidavit deposed to in response to the Regulation 10(6) directive on 28 July 2021, Mr Koko repeated his denial of any telephonic communication with Mr Salim Essa or any of the Gupta brothers and added: "The same applies to my wife".

1428. There is nothing in the evidence or in the affidavit deposed to on 28 July 2021 to suggest that anybody other than Mr Koko and Mr Essa was likely to have used the cell phones belonging to these two persons, respectively, to have telephonic conversations. The proper inference is therefore that the users of the cell phones when the conversations were held were indeed Mr Koko and Mr Salim Essa. Mr Koko testified that he only got to know Mr Essa early in 2016. In other words, he was denying having known Mr Essa in 2015. Mr Koko's denials in this regard are not true and fall to be rejected. He and Mr Essa knew each other by no later than 10 March 2015 and they met Ms Daniels and Mr Masango at Melrose Arch separately on that day.

The events of the 11th March 2015

1429. It will be recalled from what has been said above that at its meeting of the 9th March 2015 the Board asked Mr Tsotsi to invite Minister Brown to come and address it on the issue of an inquiry into the affairs of Eskom. A meeting of the Board was then scheduled for the 11th March 2015 and the Minister agreed to address the Board in that meeting.

1430. Although the Commission heard a lot of evidence on the discussions that took place in the Board meeting on 11 March 2015 as well as in the meeting or meetings of one or two other committees of the Board on that day, such as the P&G Committee, in the light

of the finding made above concerning Mr Koko's role in the meetings of the 10th March 2015 at Melrose Arch involving Mr Koko, Mr Essa and Ms Daniels and involving Mr Koko, Mr Essa and Mr Masango, it is not necessary to go into great details about the discussions at the meetings of 11 March 2015.

1431. The finding to which reference is made in the preceding paragraph is the finding that Mr Koko and Mr Salim Essa held separate meetings with Ms Daniels and Mr Masango at Melrose Arch on the 10th March 2015 where they told them about the four executives who were to be suspended and also talked to them about acting positions during the suspensions. The reasons why it is not necessary to go into details about the discussions is that that finding establishes beyond any doubt that the suspensions of the Eskom executives (minus Mr Koko) was a scheme that was pursued by the Guptas and their associates to move out of certain strategic positions at Eskom employees or officials whom they viewed as possible obstacles in their agenda to capture Eskom.

1432. What remains to be said about the meeting of the Board on the 11th March 2015 is the following:

1432.1. Mr Matona was not allowed to complete presenting to the Board his turn-around strategy for Eskom which he had started to present to the Board at the meeting of the 11th March 2015 when Minister Lynn Brown arrived and she was allowed to address the Board; he was suspended even though he had only served as the Group CEO of Eskom for five and a half months.

1432.2. the Board made the decision to suspend the four executives very hastily and did not give them enough time to make representations or to be heard; except for Mr Tsotsi, officially, the directors of the Eskom Board are supposed to have heard for the first time about the proposal that certain executives should be

suspended on the 11th March 2015 and the Board made the decision to suspend the executives on the same day.

- 1432.3. the Board did not concern itself with why the decision to suspend had to be taken on the same day on which the idea of their suspension of the executives was raised for the first time officially with the Board.
- 1432.4. the Board made up its mind to suspend the executives before it could hear them.
- 1432.5. the 2014 Board of Eskom went along with the idea of the suspension of the executives because the Guptas and their associates wanted the suspensions to happen and also because the politicians (Minister Brown) and President Zuma wanted the suspension to be effected; that is why at its meeting of the 9th March 2015 the Board took the view that they wanted to hear from Minister Brown whether the proposed inquiry into the affairs of Eskom should be given a go-ahead or not; once they had heard from Minister Brown that she wanted the executives to be suspended, they were happy to suspend the executives.
- 1432.6. Minister Brown was the person who included the Financial Director, Ms Tsholo Molefe, among the executives who should be suspended when the Financial Director had not been mentioned in the Durban meeting of 8 March 2015 as one of the executives to be suspended. Both Mr Pamensky¹³⁰³ and Mr Tsotsi¹³⁰⁴ confirmed in their evidence that, when Minister Brown mentioned the portfolios whose Heads she said should be suspended, she included the Finance portfolio which meant that the Financial Director should also be suspended.

¹³⁰³ Transcript 11 February 2021, p 81.

¹³⁰⁴ Transcript 9 September 2020, p 117.

1432.7. prior to the 11th March 2015, only Mr Salim Essa seems to have included the Financial Director among the executives who would be suspended; the question that arises is: where did Minister Brown get the list of the executives who were to be suspended which included the Financial Director from? The probabilities are that she got that information from Mr Essa because it was Mr Essa whose list included the Financial Director; in this regard two things need to be mentioned. The first is that on 10 March 2015 and at Melrose Arch Mr Salim Essa introduced himself to Ms Daniels as Minister Brown's advisor. The second is that, although Ms Lynn Brown denied knowing Mr Essa, the Commission's investigations revealed that Ms Brown and Mr Essa spoke several times with each other on the phone from November 2014 to 19 March 2015 and Ms Brown has been unable to explain this.

1432.8. the Board made it clear that the decision to suspend the executives was not based on any belief or allegation that the executives had committed any misconduct.

1432.9. the Board said it was necessary to suspend the executives so that they would not interfere with the investigation that was to be conducted into the affairs of Eskom.

1432.10. the Board spoke for the first time with officials who would act in the positions of the suspended executives only on the 11th March 2015.

1433. After the four executives had been suspended, the Board appointed certain officials to act in the positions of the suspended executives. At least two of the acting officials, namely Ms Dlamini and Mr Masango, had, as already discussed above, been called by Mr Koko on 10 March 2015 to meet with him at Melrose Arch, at which meetings Mr Koko told them either that they would be appointed to act or that they should be

prepared to act in positions of some of the executives who were to be suspended. It is significant that these discussions took place exactly on the day before the P&G appointed the two officials to act in the place of those it had just suspended. I find that it was therefore no coincidence that two of the acting officials were those who had been approached by Mr Koko the day before. This plainly shows how steeped Mr Koko was in the Gupta scheme. The Board also appointed Mr Khoza, one of the Board members, as the Acting Group CEO. Mr Khoza testified that he was surprised when his name was suggested for this position. He said that he did not think he had enough experience to justify being appointed as Acting Group CEO of Eskom. When one has regard to all the evidence heard by the Commission, it is quite clear that the Guptas were in control of the Eskom Board. The President of the country, Mr Jacob Zuma, and Minister Brown were manipulating the situation at Eskom to advance the business interests of the Guptas.

1434. In explaining how the acting persons were appointed, Mr Tsotsi testified that, after lunch on 11 March 2015, he walked into a P&G meeting that was in progress. There was a list of executives who it was said would be acting in the places of the suspended executives. He said that, when he asked where these names had come from, he was told by Dr Ngubane that they came from Minister Brown.¹³⁰⁵ When Dr Ngubane was questioned about this evidence before the Commission, he denied having obtained the names from the Minister, although he admitted calling the Minister while the P&G meeting was going on. He said that the names of the officials who were going to act in the positions of the executives to be suspended came from Mr Zola Tsotsi.

1435. I believe Mr Tsotsi's version in this regard and reject that of Dr Ngubane. The probabilities favour Mr Tsotsi's version. We know that Mr Essa and Mr Koko were busy on the 10th March 2015 consulting Eskom officials whom they wanted to ask to act in

¹³⁰⁵ Transcript 8 September 2020, p 217.

the positions that were to be vacated by the executives. We also know that Mr Essa introduced himself to Ms Daniels as an advisor to Minister Brown. We also know that on the 11th March 2015 Minister Brown included the Financial Director in the list of the executives who were to be suspended in circumstances where the only other person who had included her up to that point was Mr Essa. Contrary to Ms Brown's denials that she knew and had spoken to Mr Essa, this Commission's investigations have revealed that from November 2014 to 19 March 2015 Minister Brown and Mr Essa had several telephone or cell phone conversations which she has been unable to explain in the light of her earlier denial that she knew Mr Essa. From the evidence of people like Mr Baloyi it has been revealed that Minister Brown was keen for the Board to suspend the four executives. It is clear from the evidence of Dr Ngubane, Mr Tsotsi and other Board members who testified that the decision as to which officials were going to act in the positions of the executives to be suspended was not taken by the Board of Eskom. This has to be so because the then Chairperson of the Board, Mr Tsotsi, did not know who chose those people. Dr Ngubane did not say that they were chosen by the Board. In this regard it is to be remembered that at the Koko/ Essa meeting at Melrose Arch, Mr Essa and Mr Koko talked to some of the officials they wanted appointed to act in the positions some of whom were appointed temporarily to act.

1436. The four suspensions were approved by the P&G on that day and "pre-suspension letters" were prepared, signed and handed to three of the executives. Mr Marokane was on leave. The three executives were invited in the pre-suspension letters to advance reasons why they should not be suspended. Mr Tsotsi and Ms Klein took an active role in the charade by which the executives were invited to advance reasons why the committee should not do what they had already decided to do.

1436.1. Mr Matona was the first to be called into the Board meeting on the afternoon of 11 March 2015, where it was explained to him that the Board had resolved to

conduct an enquiry into the current situation at Eskom and that he would have to “absent” himself from the company.

1436.2. According to Mr Matona, this was a strange conversation as to what to “absent” himself meant and he questioned the Board on whether they were suspending him, to which they said no, whereupon he stated that he disagreed with the need for the inquiry that was proposed. Mr Matona told the Board that there were enough hands dealing with the issues which included the “War Room”, management and suitable plans to deal with the issues raised. However, he testified that this did not deter the Board from its decision. After asking him to recuse himself from the meeting for the Board to discuss his submissions, he was recalled to the meeting and his suspension letter was served upon him.¹³⁰⁶

1436.3. Ms Tsholo Molefe’s version was very similar to that of Mr Matona, in that she was called into the Board meeting on 11 March 2015, late in the afternoon, where she was addressed by Mr Tsotsi who informed her that there was to be an inquiry into the affairs of Eskom and the investigation required unfettered access into all the information. Ms Molefe testified that Mr Tsotsi said that therefore the Board was going to ask all the executives responsible for the portfolios concerned “to step aside” while this inquiry was being conducted.¹³⁰⁷ The areas were finance, generation, commerce and technology.

1436.4. According to Ms Molefe, Mr Tsotsi stated that the inquiry would be concerned with financial challenges, power delivery challenges and the delays in the construction of the power stations,¹³⁰⁸ and at no point was it ever mentioned that there were issues of inaccurate or inadequate reporting at the War Room

by the executives. She, too, was sent out and called back shortly thereafter, only to be presented with the letter of immediate suspension.

1436.5. Mr Marokane was on leave on 11th March 2015. He was called by the company secretary in the evening on the 11th March 2015 and arrangements were made for him to come in the following morning to meet the Chairperson of the Board. He came in the following morning. Mr Tsotsi told him that the Board had made a decision to institute an independent inquiry into the affairs of Eskom and that the investigation had to be free from the influence of the executives and that for that reason the Board had made a decision to suspend him.

1436.6. Mr Tsotsi had made it very clear that the investigation would not take longer than three months and according to Mr Marokane, Mr Tsotsi was at pains to explain that there was nothing wrong or that there were no allegations of misconduct against him, as the intention was to create a conducive atmosphere that would enable the inquiry to get to the bottom of the issues.

1436.7. Mr Marokane was then presented with a letter for his immediate suspension. Mr Marokane testified that he immediately noticed some inaccuracies in the letter, such as the incorrect date (11 March 2015) and that he had made representations in respect of his possible suspension, which the Board had considered thoroughly, all of which was not true. The wrong information was on the letter because the letters had been prepared on the assumption that the Board would have given the executives an opportunity to be heard and they would have made representations. The letters anticipated that the Board would have thoroughly considered the representations but the fact of the matter is that the Board had made up its mind before the executives were called in. Mr Marokane then corrected the letter by deleting these inaccuracies and initialled

the deletions together with Mr Tsotsi.¹³⁰⁹ He would only later, after having had the opportunity to study the suspension letter further, formulate a response thereto by way of a letter dated 18 March 2015, addressed to Mr Tsotsi and the P&G.¹³¹⁰

1437. Thus, after individual sessions with the executives of them on 11 March 2015, the P&G confirmed the suspensions which came into force with immediate effect. Mr Marokane received his suspension letter the next day, on the morning of 12 March 2015. The suspensions were effected and endured until the Board reached settlement agreements with three of the four executives in terms of which they resigned and were paid millions of rands. The fourth executive, Mr Koko, was allowed to return to work under strange circumstances. However, when one has regard to the fact that he and Mr Essa had meetings with Mr Masango and Ms Daniels on 10 March 2015, one understands that it could never have been the intention of the Guptas to get Mr Koko out of Eskom. They needed him as the evidence heard by the Commission has revealed. He was later to be appointed the Acting Group CEO – when Mr Brian Molefe left Eskom at the end of December 2016. The Guptas made sure that, when one Gupta associate who was the Group CEO of Eskom left, another Gupta associate took over as Acting Group CEO.

1438. Although to a large extent, what has been said above about the events of the 11th March 2015 may be considered enough in the light of the finding made earlier on that Mr Koko was with Mr Salim Essa when the two of them met with Ms Daniels and Mr Masango on the 10th March 2015, it may be important to highlight certain other events of that day. This is done below.

¹³⁰⁹ Exhibit U15, pp 123-124 and p 6.

¹³¹⁰ *Id*, Exhibit U15, pp 6-10.

The emails suggesting prior knowledge of suspension of executives on the part of Mr Zethembe Khoza.

1439. As already discussed above, the board meeting of 9 March 2015 did not last a long time. It was concluded with an agreement that Mr Tsotsi would contact Minister Brown and invite her to address the Board, on the proposed inquiry, in her capacity as the Shareholder representative. Mr Tsotsi duly contacted the Minister and, the Minister made herself available to address the board.

1440. The Commission's investigation uncovered a trail of emails, exchanged partly in the morning on 11 March 2015, and, thereafter in the afternoon, between Ms Elsie Pule, Eskom's Group Executive: Human Resources, and one Mr Phillip Mashego (an Eskom employee in Human Resources), and from Ms Pule to Mr Khoza pertaining to a process for the suspension of F-band employees, i.e. executives such as the CEO, the CFO and other senior executives. The trail starts with an email from Ms Pule to Mr Mashego at 09h27 requesting him to urgently compile a step-by-step process to follow when suspending an F-band, to which Mr Mashego responded at 11h36 with three attachments: "SuspensionProcess_240811(3) covering Safety Rules Violations.doc", "Confirmation Suspension.docx" and "Draft Letter of Suspension.doc".

1441. On the same day at 14h30, Ms Pule sent an email to Mr Khoza, with the subject line: "as discussed", to which was attached two documents: "Copy of F Band List Assets Jan 2015.xls" and "Disciplinary Process.xlsx". She did not include a message in the body of her email. Given the subject line of the email, simply "as discussed", the two would have known what it is they had discussed that prompted Ms Pule to send the email to Mr Khoza, despite Ms Pule claiming not to recall why she had even sent the email to Mr Mashego. She maintained that she could not recall what Mr Khoza had discussed with her, nor how he had asked her for the information or what he did with it; only

resorting, conveniently, to non-committal speculation that he might have asked her directly during the first Board meeting of 11 March 2015 which she had also attended.

1442. Ms Pule sent a second email to Mr Khoza at 16h06, with the subject line "Suspension Process", to which was attached the three documents she had received by email from Mr Mashego above. Her message to him was simply "Mr Khoza, Additional information".

1443. Mr Khoza, too, claimed to have no recollection of these emails, yet the evidence is irrefutable and, thus, a conclusion inescapable that he must have known about the scheme to suspend the executives even before the idea was introduced at the subsequent Board meeting with the Minister on 11 March 2015.

1444. On the morning of the 11th March 2015 the Eskom Board started its meeting at 09h00. Mr Matona addressed the Board on his turnaround strategy for Eskom as the new Group Chief Executive Officer. However, while he was still addressing the Board, the Minister arrived and he had to stop as the Minister was to be allowed the opportunity to address the Board as arranged. The discussion then turned to the topic of an investigation into the affairs of Eskom and other operational matters, which ultimately included the suspension of the executives. Ms Mokholo testified that she sent two messages to the Minister, advising her to withdraw from the meeting, as the issues being discussed were operational in nature which should be dealt with by the Board itself, but the Minister ignored this advice. Eventually Ms Mokholo spoke out in the meeting, stressing the need for the Minister to withdraw. Then the Minister agreed to withdraw stating to the board that: "Matsi is right, the Board must deliberate on these issues", but that she would remain in the vicinity in case she was needed, and would await feedback from the Chairperson, Mr Tsotsi. The Minister and Ms Mokholo then

left the meeting. However, the Minister did indeed remain in the vicinity, at a holding room at Eskom, but Ms Mokholo left to go to her office¹³¹¹.

1445. The scheme required that it be implemented by the Eskom board. Why did every single board member ultimately acquiesce? It is true that board member Mr Baloyi spoke against the idea of suspensions. However, not a single board member voted against the suspension proposals. It seems as if the Eskom board and its committees did not vote on proposals. I found all the board members who testified to be unimpressive witnesses. It seemed to me that each of them looked to see which way the wind was blowing and then went along with whoever was perceived to be the most powerful actor, or the actor who could do the individual board member the most harm if that actor sought vengeance for an act of perceived disloyalty or disobedience.

1446. The appointment of the acting executives was finalised hardly an hour after the end of the Board meeting which decided on the suspensions. When Ms Mabude announced the names in the P&G Committee of the executives who were going to act. Mr Tsotsi had once again objected stating that nobody in the Committee knew the executives besides himself, so how could they recommend them.

1447. This had fallen on deaf ears, as the Board went ahead with the appointment of the acting executives. Mr Zola Tsotsi recalled that, when questioning the Board on how they came up with the names, Dr Ngubane had responded that they had obtained the names from the Minister, which was even more surprising because, as far as he knew, the Minister simply could not have known anything about who would have the capacity to act and it was at this point that he stated that he had a sense that there was an external hand that was driving this particular process.¹³¹²

¹³¹¹ Transcript 14 January 2021, p 97.

1448. What was even more concerning to Mr Tsotsi was that Mr Khoza was reluctant to act as Group CEO and when he voiced his concern at the meeting, it was simply dismissed on the basis that he would be fine.¹³¹³

1449. The evidence of Ms Daniels, Ms Dlamini and Mr Abram 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 to replace them with officials who would co-operate with the Guptas. 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 suspend certain Eskom executives and thus witting participants in the Gupta family's larger scheme to capture Eskom.

1450. On the evidence, this was not the only time that Mr Salim Essa knew in advance what personnel changes were to be made in an SOE. 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 Henk Bester, Mr Salim Essa's motive in disclosing this to Mr Henk Bester was that he wished to demonstrate to Mr Henk Bester the reach and extent of the Gupta family's power or influence in state affairs.

1451. Following the board meeting of 11 March 2015, at which Minister Brown addressed the board, processes within Eskom were then put into operation by which three of the 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 three of the four executives were suspended had been completed. The fourth

¹³¹³ Transcript 9 September 2020, p104.

executive was suspended on 12 March 2015 because he was on leave and was, therefore, not at work on the 11th March 2015.

1452. The suspension of executives was a key component of the scheme from the outset. The only proper conclusion is that the proposed enquiry 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 Group CEO and Mr Anoj Singh as the Financial Director or Group Chief Financial Officer because those who devised and implemented the scheme believed that Mr Brian Molefe and Mr Anoj Singh would favour the Gupta family and channel resources of Eskom towards the Gupta family.

1453. The evidence proves a scheme by the Guptas to capture Eskom, procure the suspension of the four executives under the guise of an enquiry into the affairs of Eskom, install the Guptas' selected officials in positions of influence within Eskom in the places of the four suspended executives and then divert Eskom's assets to the Guptas' financial advantage. As I refer to the suspension of four executives, it must be remembered that the executives that the Guptas really wanted to push out of Eskom were Mr Matona, Mr Marokane and Ms Molefe and not Mr Koko.

1454. Many of the members of the 2014 Eskom Board had connections in one way or another with the Guptas or with some or other associate of the Guptas. For that reason, it may well be that many of them knew exactly what the suspensions were about and what the proposed inquiry was about. That may mean that in supporting the inquiry into the affairs of Eskom and the suspension of the executives, they knew that they were supporting a scheme of the Guptas. However, even if some of them or all of them did not know that, in my view each one of those board members would at least have chosen to support the suspensions because they wished to do the bidding of President Zuma and Minister Brown and not because they regarded the suspensions as being in the interest of

Eskom. For that reason, those board members, therefore, breached their fiduciary duties to Eskom.

1455. In this regard, I have taken significant note of the fact that in one of the board meetings on 11 March 2015, members of the Board were at pains to shield President Zuma and Minister Lynn Brown from responsibility for the decisions the Board had been directed by them to make. Ms Mabude, in particular, sternly cautioned her fellow board members not to mention the name of the President or of the Minister when talking about the decision to suspend the executives, as she said that this would expose the President and the Minister to serious repercussions. She stated that the decision was of the Board and it must be referred to as such to which all present agreed.

Evidence of Minister Lynn Brown

1456. As to the board meeting of 11 March 2015 at which the plan for the enquiry into the affairs of Eskom and the suspensions of the four executives were put forward, Ms Lynn Brown admits that she was in favour of an enquiry, provided that it was independent, and just wanted Eskom to stabilize and if this meant suspending the executives, “so be it”.¹³¹⁴

1457. Part of the evidence pointing to Ms Lynn Brown's complicity in the scheme to replace the four executives with Gupta nominees is that before the board meeting, Ms Lynn Brown had a telephone discussion with President Zuma on the topic of Eskom. She owed her Ministerial job to President Zuma and, as I read her character, she would have wanted to give President Zuma what he wanted and would certainly not have taken any position she understood to be contrary to his wishes. However, I do not think that evidence goes far enough. There is no evidence of the contents of that discussion.

¹³¹⁴ Exhibit U40, p 13 para 85.

It might have suited President Zuma not to tell her that part of the plan and to leave the implementation of the suspensions to Mr Zola Tsotsi and other board members who knew that the suspensions were part of the plan.

1458. In his affidavit to the Commission, Dr Ngubane stated that although during her meeting with the Board, Minister Brown did not direct the Board to suspend the four executives, she raised concerns of her own against them, and said that the presence of the four executives might hinder the investigation. Dr Ngubane stated that, after the meeting, “it was clear to the Board that government, as shareholder of Eskom, required the inquiry to proceed and that the four executives had to ‘step aside’ whilst the inquiry was underway”.¹³¹⁵ Although there is some level of double talk in Dr Ngubane’s statements, the upshot is clear that the Minister wanted the four executives suspended.

1459. Further, there is the evidence of Mr Tsotsi on how the name of the Financial Director was added to the list of the executives to be suspended. Mr Tsotsi testified that at the P&G meeting on 11 March 2015, Dr Ben Ngubane stated that the name of the Financial Director should be added to the list of executives to be suspended, to which Mr Tsotsi immediately raised serious objections because this executive’s name was not among the names approved by the Board. His concern was that suspending the Financial Director was going to generate shock waves even internationally, especially with Eskom’s investors and lenders because the Financial Director was seen as the custodian of their investments. Mr Tsotsi testified that Dr Ngubane said that the Minister had instructed that the Financial Director’s name be added. Mr Tsotsi immediately called the Minister to raise his concerns and objection, but the Minister did not help. As a result, the Financial Director was also suspended.

¹³¹⁵ Exhibit U19, p13 para 4.17- 4.18.

1460. By a directive dated 19 July 2021 under Regulation 10(6) of the Regulations of the Commission, Ms Lynn Brown was called upon to respond to a schedule containing evidence of telephone records which showed that there had probably been, firstly, a telephone conversation between her and either Mr Howa or Mr Atul Gupta and, secondly, several telephone conversations between her and Mr Salim Essa.

1461. The period after the suspensions up to the departure of the three executives

1462. Following his suspension Mr Matona decided to exercise his legal rights and on 20 March 2015 lodged a dispute of unfair labour practice with the CCMA on the grounds that his suspension had been implemented without a fair reason and without a hearing. He sought reinstatement and compensation as relief. He simultaneously brought an urgent application in the Labour Court seeking an order to have his suspension lifted pending the outcome of the CCMA dispute. The Labour Court heard the urgent application on 26 March 2015 and handed down its judgment on 27 March 2015, in which the Labour Court found that there was *prima facie* evidence that the suspension was *unfair*, as the Board had failed to give Mr Matona a fair opportunity to make representations and failed to show reasons, by reference of Eskom's policy, why it was necessary to suspend him pending the outcome of an enquiry. However, the Labour Court found that not all of the requirements for urgent relief had been met, *inter alia*, because it held that Mr Matona had an alternative remedy to pursue the suspension dispute at the CCMA. The Court accordingly gave an order striking the application from the roll, with no order as to costs.¹³¹⁶

1463. It would seem that, prior to the CCMA conciliation process starting the Eskom Board had decided to initiate negotiations with the suspended executives aimed at what it called "settlement". To that end, the Board had formed a team of its members who

¹³¹⁶ Exhibit U13, pp 34-40.

would negotiate with the suspended executives. According to Dr Ngubane, the Board took this step because it had been told or it understood that the suspended executives wanted to settle the matter and leave Eskom. Of course, the steps that Mr Matona had taken were not consistent with that. In fact, they were the opposite of that. When the matter came up for conciliation at the CCMA on 13 April 2015, it was postponed at Eskom's request. Eskom was represented by, *inter alia*, Dr Ngubane who was its acting Chairperson.¹³¹⁷ Thereafter the delegation of the Board members met with Mr Matona twice. At the second meeting, Mr Kumalo who said to Mr Matona, "you know the idea of you going back to Eskom is off the table".¹³¹⁸ He further said that the Board had an explicit mandate from the shareholder to do a deal but the deal did not include an offer for Mr Matona to return to Eskom. According to Mr Matona when the matter was postponed at the CCMA, Dr Ngubane said that he or the Board wanted to consult with the Minister about what Mr Matona could be offered in settlement.

1464. According to Mr Matona, he was told: "so we are not talking about an outcome which would include you going back to Eskom".¹³¹⁹ Mr Matona testified that at a certain point he concluded that fighting Eskom legally was going to be too costly and he reconciled himself to the fact that his return to Eskom was off the table. He said that, in the light of this, he decided to cut his losses.

1465. In the same meeting a settlement was reached in terms of which he would resign and Eskom would pay him a salary or remuneration equivalent to twelve months. He resigned with effect from 31 May 2015.

1466. A media statement was later released which read:

¹³¹⁷ Dr Ngubane was accompanied by Ms Winile Madonsela (standing in for Eskom's General Manager: Legal and Compliance, Mr Neo Tsholanku) and an attorney from Bowman Gilfillan, Mr Jerry Kapau. Exhibit U24, p 56 para 4.1 & p 93 para 1.2.

¹³¹⁸ Transcript 7 September 2020, pp.79-80.

¹³¹⁹ Transcript 7 September 2020, p.81.

“Eskom and its Chief Executive, Mr T J Matona have mutually agreed to part ways on an amicable basis. It is expressly noted that no misconduct is alleged by Eskom against Mr TJ Matona ... Eskom is of the view that Mr Matona can still play a vital role for South Africa whether he is in commercial business or public service”.¹³²⁰

1467. It is noted that these are the same sentiments which were expressed in respect of Mr Vusi Pikoli; Mr Nxasana and now Mr Matona. More so with all of them, none of them appeared to have been found to have committed any misconduct, yet they were removed from their positions by Government.

1468. At some stage after Mr Brian Molefe had been seconded to Eskom, Minister Brown was quoted in the media as having made a statement which suggested that, even if Mr Matona won the case in court or in the CCMA Mr Brian Molefe would continue in Eskom and the two of them would work alongside each other. That was a clear indication that, as far as Minister Brown was concerned, Mr Matona was no longer going to be allowed back at Eskom as Group CEO. Of course, it was unlikely that, if Mr Matona had won his case, he would be prepared to accept anything less than being Group CEO if he remained in Eskom’s employ. Mr Brian Molefe was also unlikely to accept any position other than that of Group CEO. After all, at Transnet he had been Group CEO.

1469. Mr Matona testified that during his suspension he had requested a meeting with President Zuma but this had not materialised. He said that some time after he had left Eskom, he received a message that President Zuma wanted to see him and he went to see him.

1470. Mr Matona testified that President Zuma asked him how he was doing to which he responded by saying that under the circumstances he was well, but did not have a job. He said that the President responded: “you know, what happened at Eskom, you know it has got absolutely nothing to do with you. It is not a reflection upon you”. The President

¹³²⁰ Transcript 7 September 2020, pp.157-158.

further commented: “you know you got caught up in the middle of a spaghetti” and asked him if he wanted to come back to Government. Mr Matona says he did not know what the President meant by him being “caught up in the middle of a spaghetti” nor did he ask the President what he meant by that comment. Mr Matona testified that he told the President that indeed he would like to come back to Government. Mr Matona told the Commission that in August 2015 he was appointed to the position of Head: Secretariat of the National Planning Commission which was an advisory body to the President.¹³²¹ There is great significance in what President Zuma said to Mr Matona in this meeting and in the fact that President Zuma clearly organised a new job for Mr Matona or offered Mr Matona a new job.

1471. The remark that President Zuma made was that what happened at Eskom had nothing to do with Mr Matona but that he was simply “caught up in a spaghetti”. The fact that President Zuma made that remark means that President Zuma knew who the people were that the suspensions had something to do with and who were not just “caught up in a spaghetti” but who were the real targets. Of course, he should know because of the role he played in the whole matter of the suspensions and the capture of Eskom by the Guptas. The fact that President Zuma effectively offered Mr Matona another job so soon after he had been kicked out of Eskom suggests that the Guptas and President Zuma really had no issues with Mr Matona. After all, there was evidence by Mr Kona in Vol 1 Part 1 of this Commission’s Report which suggested that Mr Matona may have sought to advance the cause of the Guptas when he resisted when Mr Tony Gupta sought to give him instructions about a certain tender at SAA. However, it may well be that in 2015 the Guptas trusted Mr Brian Molefe more than Mr Matona as Group CEO of Eskom because Mr Brian Molefe had demonstrated quite clearly at Transnet how dependable he was.

¹³²¹ Transcript 7 September 2020, p.168

1472. The fact that Eskom paid Mr Matona an amount equivalent to his twelve months' remuneration or salary in April or May 2015 and in August he got a job as the Head of the Secretariat of the National Planning Commission meant that for the remaining months of the 12-month period from August 2015 Mr Matona was effectively paid a double salary – one from Eskom and the other from the National Planning Commission.

Ms Tsholofelo Molefe

1473. In respect of Ms Tsholo Molefe and Mr Marokane, the Board had opted for a deliberate manner of ignoring all their correspondence and/or any communication until they were frustrated enough to want to leave.

1474. When Ms Tsholo Molefe was confronted with Minister's Lynn Brown version that the President complained about information from the executives at the "War Room" in that it was inadequate and inaccurate,¹³²² she emphasized that no one complained about the accuracy of the information, yet there were many challenges on the assumptions which was quite normal and required a healthy debate and engagement from all the stakeholders.

1475. Within a week or so after her suspension – and on 17 March 2015 – Ms Tsholofelo Molefe addressed a letter dated 17 March 2015 to Eskom.¹³²³ Ms Molefe stated in her letter that when she was suspended, she had been told that the areas which were to be investigated included financial challenges, power delivery challenges and the delays in the construction of the power stations. However, she stated that she had not been informed which executives were to be suspended. Ms Molefe said that, after a media statement issued by Eskom after the suspensions or after Eskom's media briefing subsequent to her suspension, it came to her attention that the General Group

¹³²³ Exhibit U12, p 823. Transcript 6 October 2020, p 246 *et seq.*

Executive should also have been suspended if power delivery was one of the areas to be investigated but that executive, namely Mr Thava Govender or Mr Mongezi Ntsokolo had not been suspended. Ms Molefe found this in conflict with the rationale that had been given to her to justify her suspension.

1476. Ms Molefe's letter was ignored by the Board and in April 2015 via the media, Ms Molefe found out that a law firm, Dentons, had been appointed to conduct the enquiry and this was almost six weeks after their suspensions.

1477. Thereafter about 29 April 2015, Ms Molefe once again wrote to the Chairman of the Board, this time Dr Ngubane, addressing concerns of how long she was to remain at home, requesting the terms of reference of the inquiry to prepare for the inquiry, and the directors' liability policy and insurance to which as an Executive of Eskom, she was entitled.

1478. This time there was a response letter dated 30 April 2015 from Mr Jerry Kapau of Bowman & Gilfillan,¹³²⁴ representing Eskom and who was very dismissive of her requests. Mr Kapau denied that Ms Molefe's suspension was unfair and stated that it was a suspension made pending an inquiry that was expected to be completed within 3 months, and that the suspension would not be for any time longer than that period. He refused to provide Ms Molefe with a copy of the terms of reference for the inquiry and did not provide answers to her other requests. Ms Molefe responded by letter dated 03 May 2015 in which she rejected Mr Kapau's contentions and reserved her rights to pursue the matter legally, whereafter Dr Ngubane via Ms Daniels, contacted her to schedule a meeting with Ms Molefe for 4 May 2015 at the Protea Hotel in Midrand.

¹³²⁴ Exhibit U12, p.832.

1479. At the meeting, Eskom was represented by Dr Ngubane, Ms Klein, Mr Kumalo and Mr Khoza. Ms Molefe states that although Ms Klein had introduced the subject for discussion at the meeting, the discussion ended up as a dialogue between herself and Mr Kumalo. Essentially, Mr Kumalo started off by saying: “we understand that you have been writing to Eskom, wanting to talk about your exit”,¹³²⁵ Ms Molefe testified that she denied that in writing to Eskom, she wanted to talk about her exit from Eskom. She then provided her reasons for writing to Eskom, which included that upon her suspension, she was informed that she had to remain contactable, and she would be informed about the enquiry, but to date, there had been no form of communication whatsoever, especially regarding the enquiry and that she had requested to be provided with the terms of reference to prepare for the inquiry.

1480. Mr Kumalo responded that the process had been compromised by Mr Tsotsi and they had only just finalized the terms of reference of the inquiry and appointed a law firm to conduct the investigation. Mr Kumalo pointed out to Ms Molefe that, therefore, she was not going to be called back in June 2015 as previously anticipated. Mr Kumalo further said that the enquiry was going to take a much longer period than they had anticipated and they wanted to find out if she would be amenable to having a discussion on “amicably parting ways”.¹³²⁶

1481. Ms Molefe responded by emphasizing it was not her reason for writing to the Board, and raised her concerns that Eskom was not treating her or the process fairly. Mr Kumalo reiterated that the process was compromised by Mr Tsotsi and asked her if they could put something together for her to consider and to revert. Her response was that, if the Board wanted to do so, they could go ahead and she would consult her lawyers and think about it. The meeting ended on that note.

¹³²⁵ Transcript 6 October 2020, p.255.

¹³²⁶ Transcript 6 October 2020, p 256.

1482. The very next day Ms Molefe received an invitation from Eskom to another meeting for 8 May 2015 as a follow up meeting at the same hotel. When she attended the meeting, it was Ms Klein, Mr Khoza and Ms Daniels who were present. Ms Klein had a proposal of a 12 month exit package, which she had already signed and when when Ms Molefe viewed it, she stated that this was a “slap in the face, considering she had no intention of exiting”,¹³²⁷ but she did take it to consult and undertook to get back to them. Ms Molefe stated that she subsequently addressed a letter to Ms Klein, dated 11 March 2015, in which she rejected the offer.

1483. Ms Molefe testified that following her rejection of the Board’s offer, Mr Kumalo arranged to meet with her privately regarding the Board’s proposal for an amicable separation, but explained at the meeting that he was coming to her in his personal capacity, not sent by the Board. Ms Molefe testified that Mr Kumalo urged her to settle the matter on the basis of the Board’s proposal and move on, as “the issues were bigger than [she thinks]”. He also said that the Minister was not going to give her more than had been offered and her response was that she was not being greedy but rather evaluating her circumstances and career prospects and therefore she was prepared to go to court, whereupon Mr Kumalo told her, “You don’t want to take on the State”.¹³²⁸

1484. Eventually, the Board decided to improve its offer and added a further six months’ remuneration to her exit package which then meant that the Eskom Board was offering her eighteen (18) months’ remuneration in return for her resignation. The package offered to her differed from the packages offered and accepted by the other two executives in that whereas the two executives were given packages that represented their remuneration or salary over a 12-month period, she was given a package that was equivalent to her remuneration or salary over an 18-month period. She decided to

¹³²⁷ Transcript 6 October 2020, p 257.

¹³²⁸ Transcript 6 October 2020, p 270.

accept the offer and resign. It is noted that in comparison to the settlement packages with the other executives, Ms Tsholo Molefe's package had an additional six months' remuneration which Eskom was prepared to pay her to get her to leave Eskom.

1485. What emerges from the discussions that the Board had with Ms Molefe during the exit negotiations were clear misrepresentation of facts, in that they were aware of the terms of reference of the enquiry, that there was no wrongdoing on the part of any of the executives, and that by 11 June 2015 the investigation had been stopped and therefore would not take longer than anticipated. The intention to remove the Group CFO was clear and to that extent the Board had even exceeded its mandate in offering her the settlement package.

1486. Further, what became clear in the process is the attitude of the Board members, in that, despite Ms Molefe categorically stating that she wished to return to Eskom and was prepared to go to court to fight for her position, the Board members, especially Mr Kumalo, sought to convince her otherwise to the extent he called upon her in his personal capacity to ask her to accept the offer, and making a threat that "you don't want to take on the State".

Mr Marokane

1487. An interesting fact is that Mr Marokane was only permanently appointed as the Group Executive Group Capital at Eskom, from 1 November 2014, after acting in this position for more than a year. This portfolio was responsible for the construction of all infrastructure, which included Medupi, Kusile and Ingula power stations. Just before his suspension he was responsible for bringing the first unit of the Medupi Power station online between the 4th and 6th March 2015 which was hugely celebrated by the Board and Eskom as a major achievement. What was strange about Mr Marokane's suspension on the 12th March 2015, is that, the previous week, namely 3 – 6 March

2015 Eskom had celebrated his good performance but a week later it was suspending him – not on the basis that he had allegedly committed any misconduct but it suspended him nevertheless. His suspension could also not have anything to do with any allegations of poor performance on his part.

1488. After his suspension, Mr Marokane wrote an elaborate letter to Mr Tsotsi on 18 March 2015 to address three specific issues; firstly, the inaccuracies in the suspension letter; secondly the issue of intentional sabotage or tampering of the power station; and thirdly the fact that they had just completed two intense forensic studies at Medupi and these were Board instituted processes less than a year before which was now being executed and gaining traction. He suggested that therefore it was not the right time actually to start another enquiry that is not well defined.¹³²⁹ ¹³³⁰ It is apposite to quote salient features of Mr Marokane's letter. He sated, *inter alia*, that:

“Now that I have had the opportunity of (1) studying the letter [of suspension] closely, (2) considering the somewhat limited information made available to me at the time the letter was presented to me and (3) considering the media reports relating to my and other of my colleagues' suspensions, it is clear that the letter was prepared prior to our meeting with no contemplation of any influence from engagement with me. For context purposes, it bears mention that whilst on leave the previous day I was telephoned at 21h00 on 11 March 2015 with the request that I meet the Board later that evening which proved difficult and we scheduled a meeting at 08h00 the following morning.

Both the publicly stated reason for my suspension and that stated in paragraph 1 of the suspension letter implies that there will be an attempt by me to unlawfully interfere with the inquiry's business. There can be no rational or objective explanation – however illogical that reasoning may be. In this regard no explanation has been tendered to me as to why it is I might do – or not do – that would improperly or unlawfully influence the inquiry.

I would remind you that I was appointed to the role of Group Executive – Group Capital from 1 November 2014 after holding the acting position for a period of a year.

¹³²⁹ Transcript 6 October 2020, pp123-124.

¹³³⁰ Transcript 6 October 2020, pp123-124.

Within a period of a month I reverted to the Board Committee that oversees Mega Projects and clearly articulated three areas that needed to be resolved in order to get the projects, including Medupi, back on track. These areas were:

- a. the resolution of the boiler welding defects;
- b. the resolution of the control and instrumentation system non-compliance;
- c. the creation of a stable environment for a productive labour force.

I developed a plan to address the three challenges above.

I ensured that we lift the standard of project execution across the business by making all projects learn from challenges encountered in other projects.

I set up the appropriate organisational structures to support these initiatives and created a central contract management unit to standardise our approach to contracts.

I implemented performance management to include lower levels to ensure that everyone is doing what is required and prioritise where necessary.

All of the above elements were identified as crucial by a number of independent reviews conducted by external parties which reviews were done on behalf of the Board. During my tenure as Group Capital Executive, I created meaningful and tangible progress in the execution of various projects which saw, in particular, the delivery of the first unit of Medupi – achieved one week prior to my suspension.

It is for inter alia the above reasons that I am of the opinion that I will add valuable insight in assisting the inquiry to establish and identify where Eskom is with regard to various project delays and cost overruns. After all, I was specifically engaged to resolve these problems which were pre-existing and pre-dated my appointment and were obviously not of my making.

If the Board has an absolutely genuine desire to (1) get to the heart of all of Eskom's problems, (2) understand how those problems came about, (3) and how they were over time handled (and mishandled) and (4) what Eskom needs to do in order to overcome its challenges, I am willing to co-operate with the independent investigation on the basis that I will be allowed to advance and share my genuinely held open and frank views without fear of retribution or any other adverse consequences to me, my professional integrity, my reputation in the

marketplace and importantly my career in Eskom and my anticipated and indeed hoped for career path within Eskom".¹³³¹

1489. Mr Marokane testified and stated in his affidavit to the Commission that his letter was never acknowledged nor responded to that. It is clear from Marokane's letter that he wanted to take part in the inquiry and still wanted to continue working for Eskom, but the Board refused him that opportunity.

1490. As a follow up, on 20 March 2015 Mr Marokane, through his attorneys Brian Khan Inc sent another letter to Mr Tsotsi and the company secretary of Eskom advising of Eskom's failure to acknowledge receipt of his letter of 18 March 2015, contending that Mr Marokane was a victim of an unfair labour practice and requesting a copy of the terms of reference for the inquiry. Mr Marokane testified that this letter too was ignored.

1491. Mr Marokane's attorneys sent another letter dated 28 April 2015 to Eskom, reiterate their request for the terms of reference and their dismay at the Board's failure to acknowledge receipts of the previous letters. Mr Kapau of Bowman and Gilfillan responded on behalf of Eskom, by letter dated 30 April 2015, in which he denied that the suspension of Mr Marokane was unlawful and that he was a victim of an unfair labour practice, and stated that his suspension would not last longer than a 3 months' period of the inquiry into Eskom's affairs. He refused to provide a copy of the terms of reference. According to Mr Marokane after almost 9 weeks of silence with absolutely no contact from the employer, and then this letter, which did not genuinely engage with the issues he raised as being material, was an indication of the breaking of trust with the Board. Therefore, he decided to call Dr Ngubane whom he had known very well, prior to him coming to Eskom and said his honest assessment was that their working relationship of trust was broken and asked whether they could find a way of separating.

¹³³¹ Transcript 6 October 2020, p.125.

1492. According to Mr Marokane, Dr Ngubane was quite grateful for the call and undertook to identify Board members who could start the exit negotiations with him. Mr Marokane testified that Dr Ngubane reverted to him the very next day. Dr Ngubane told Mr Marokane that Mr Kumalo and Mr Khoza, would meet with him and negotiate a peaceful separation. The two Board members subsequently met with Mr Marokane and over two engagements and several emails later they had arrived at a settlement package, and the settlement agreement was signed by both parties on 28 May 2015, with Dr Ngubane signing on behalf of Eskom.

1493. This conduct demonstrates that the Board was only willing and timeously communicated with Mr Marokane only once he had expressed his desire to leave. Prior to that, the Board blatantly ignored him and as Mr Marokane stated, “as time progressed it became clear to me that the board was deliberately frustrating me...I then called the interim chairman of the board to indicate to him that I had come to the conclusion that I could no longer trust the board and as such I wanted us to discuss how to separate”.¹³³²

1494. Mr Marokane confirmed that his settlement package was equivalent to 12 months’ salary.

Mr Koko

1495. The Board’s variance in attitude becomes clear with Mr Koko who also did not want to leave Eskom, but instead of the Board asking him to consider their proposal, he was asked if he could trust the Eskom Board again and will be able to work with them.

1496. Ms Daniels was part of the delegation of the Board that met with Mr Koko to negotiate with him. She testified that the Board members were markedly different in their approach and manner in which they handled negotiations with Mr Koko. She said that,

¹³³² Transcript 6 October 2020, p143.

with Mr Koko, the atmosphere was more relaxed, and they allowed him to talk more and, once again, make representations on his suspension. It was neither a dismissive approach nor persistently asking him to consider resigning or exiting. She testified that, instead of the Board delegation giving Mr Koko, as they had asked the other executives, a proposal and asking him to consider it, they asked him whether he would be able to work with it. Although Mr Koko was still complaining about the alleged unfairness of his suspension, he made it clear that he wanted his job back. He was allowed back at Eskom on 20 July 2015. Mr Koko was the only executive who was allowed to return to Eskom. This accorded with what Mr Salim Essa had stated at the Melrose Arch meetings on 10 March 2015.

1497. With the exception of Mr Koko, the other three executives were paid substantial sums to go quietly rather than demand their reinstatements. This reinforces the proposition that there was a faction within Eskom, supported by Mr Salim Essa and other external parties, which wanted those executives out of the way. This is particularly so in the case of the Group CFO, Ms Tsholo Molefe, who was paid 18 months' salary by way of settlement. All the suspended executives were suspended on full pay.

1498. Ms Klein was especially instrumental in ensuring the return of Mr Koko from suspension. On her own version, she enquired from Dentons whether they had made any findings of wrongdoing against Mr Koko, when she knew or ought to have known, as a member of the Board and of the P&G that effected the suspensions, that the executives had not been suspended for any wrongdoing and that Dentons' mandate did not include any investigation into allegations of misconduct by any of the suspended executives. The response from Dentons was exactly that Dentons was not mandated to investigate any alleged misconduct on the part of the suspended executives. Ms Klein would subsequently solicit an opinion from Mr Jerry Kapau of Bowman Gilfillan, regarding the Board's decision to allow Mr Koko back. The instruction to the attorney is succinctly

captured in paragraph 1 of his letter of advice to Eskom, addressed to Ms Klein, as follows:

“Eskom is considering uplifting the suspension of the fourth executive, Mr Matshela Koko. Eskom has therefore requested that we advise it on whether the uplifting of Mr Koko’s suspension will impact on the settlement agreements entered into with the other three executives.”¹³³³

1499. The advice from the attorney was essentially that uplifting the suspension of Mr Koko would not have any effect on the settlement agreements with the other three executives; that the three executives would not have any claim in law against Eskom, whether to be reinstated or otherwise, as a result of Mr Koko’s suspension being uplifted.¹³³⁴

1500. It is necessary to reveal the exact amounts that Eskom paid to the three executives, namely, Mr Matona, Mr Marokane and Ms Molefe. Mr Matona and Mr Marokane were paid amounts that were equivalent to their remuneration over a period of twelve months whereas Ms Molefe was paid an amount that was equivalent to her remuneration over a period of eighteen months. Here are the amounts that were paid to them:

1500.1. **R6 000 000** for Mr Matona, plus a contribution by Eskom to the Government Employee Pension Fund (“GEPF”) to ensure that Mr Matona would receive benefits from the Fund as if he had been employed in the Public Service for a period of 10 years or more;¹³³⁵

1500.2. **R6 237 634.33** for Mr Marokane, plus an unspecified amount in respect of his pensionable earnings;¹³³⁶

¹³³³ Exhibit U24, pp 21-23.

¹³³⁴ *Id* p 25.

¹³³⁵ Exhibit U13, pp 337-338; Matona’s settlement agreement, clause 4.2 and 4.3.

¹³³⁶ Exhibit U15, p 169; Marokane’s settlement agreement, clauses 4.3 and 4.4.

1500.3. **R8 178 362.86** for Ms Molefe, plus an unspecified amount in respect of her pensionable earnings.¹³³⁷

1501. The amounts that Eskom paid to these three executives were large amounts, particularly because Eskom was in financial difficulties at the time. Furthermore, these payments were made in the context of the fact that these executives had been on suspension on full pay for two or three or four months and, Eskom had appointed people to act in those executives' positions and they were being paid.

1502. During the hearing of evidence, I asked Dr Ngubane and other former members of the 2014 Eskom Board the question whether, when the Board suspended the executives, it did not want them to come back after the suspension. Dr Ngubane and, I believe, all of the former Board members whom I asked this question answered that the Board wanted these executives back at work because their suspensions were never on the basis they were alleged to have committed misconduct or anything of that nature. I then asked why, therefore, the Eskom Board paid millions of rands to these executives if it wanted them back as Dr Ngubane said was the case. Dr Ngubane and other former Board members testified that the reason they paid the three executives the millions of rands they paid them was to settle the matter of their suspensions and to effectively prevent them from going to court.

1503. I pointed out to Dr Ngubane and other former Board members that, assuming that, indeed, the suspended executives could take Eskom to Court over their suspensions, I did not understand why Eskom would pay them millions of rands to prevent them from going to Court because, even if they were successful in Court, there was no risk that Eskom could have been ordered to pay them any money or compensation because their suspensions had been on full pay throughout. There was no clear answer to this

¹³³⁷ Exhibit U12, pp 852-853, Molefe's settlement agreement, clause 4.3-4.6.

from Dr Ngubane and the other former Board members. I pointed out further to Dr Ngubane and the other former Board members that the only risk to Eskom if the executives went to Court was that the Court could have ordered Eskom to reinstate them or to uplift the suspensions Dr Ngubane explained that the Board could not take the risk that the Court could order the reinstatement of the executives while the investigation into the affairs of Eskom was continuing because, if they were reinstated, they could interfere with the investigation. I drew Dr Ngubane's attention to the fact that, in the event that the Court ordered Eskom to reinstate the executives, Eskom could have noted an appeal or instituted a review application and, since the Denton's investigation was meant to last no longer than three months it is unlikely that the matter would have been finalised within three months. An appeal would have suspended any order of reinstatement and a review application could have been accompanied by an order for the suspension or stay of the order of reinstatement or once there was a review application, the parties could have agreed to maintain the status quo until the review application was decided.

1504. I also drew Dr Ngubane's attention to the fact that the evidence heard by the Commission was that within six weeks from the appointment of Dentons to conduct the investigation, the Eskom Board had issued an instruction to Dentons to stop the investigation and prepare their report even though the investigation had not been completed. I pointed out that the six week period meant that the instruction to Dentons to stop the investigation would have occurred about the end of April or early May 2015 which meant that, for example, when the Board delegation concluded its settlement agreement with Ms Molefe and they agreed to pay the highest amount paid to the three executives, the Board knew that the investigation had been stopped and, therefore, should have wanted Ms Molefe back at work if it had no problem with her. There was also a suggestion that it was the executives who wanted to leave – not that the Board wanted them to leave. I put it to Dr Ngubane and the other former Board members that,

if the Board wanted the executives to return to work but the executives wanted to leave Eskom, there was no reason for Eskom to pay them millions of rands because in that event Eskom's attitude should have been that, if they wanted to leave, they could resign in the normal way and Eskom would not have been liable to pay them anything. Neither Dr Ngubane nor any of the other former Board members was able to give a logical explanation why in the circumstances the Board paid such large sums of money to executives that it had no problem keeping if that version was true.

1505. In the end what is clear is that the Board paid the three executives the millions of rands that it paid them in order to secure their resignation from Eskom. It is not true that the Board wanted Mr Matona, Mr Marokane and Ms Molefe back at Eskom. They did not want them. They only wanted Mr Koko back in accordance with the instructions of the Guptas and their associates. The reason the Board did not want them back was to make sure that the Gupta associates, Mr Brian Molefe, and Mr Anoj Singh, could be appointed to the strategic positions to which they were ultimately appointed so that they could advance the business interests of the Guptas. That is the long and short of it. Indeed, the Guptas succeeded in this in due course and Eskom was captured.

Mr Tsotsi's removal from the Board

1506. Mr Tsotsi testified that as at February 2015 he had met with Mr Tony Gupta on some three occasions while serving on the Eskom Board and the latter generally asked him for assistance on matters in which they were experiencing problems at Eskom as well as in situations where they (i.e. Mr Tony Gupta and them) would be seeking assistance to advance their business interests.

1507. Mr Tsotsi confirmed that he found Mr Tony Gupta difficult to deal with. He said that the first instance was when the Guptas' had to supply gas to the Western Cape and they saw Eskom's Open Cycle Gas Turbine Plant as an anchor tenant for that business.

Consequently, the Guptas were looking for exclusivity and wanted to sign a Memorandum of Understanding with Eskom. It transpired that this MOU had already been negotiated by another company and at that juncture was with the Department of Energy for signature by the Minister. Mr Tsotsi explained to Mr Tony Gupta that not only was the MOU agreed to with another party but also it was beyond the jurisdiction of Eskom. When Mr Tony Gupta discovered who the beneficiary of the MOU was, he promptly accused Mr Tsotsi of working with “Babas” enemies. The reference to “Baba’s enemies” was a reference to President Zuma’s enemies.

1508. Then another occasion was in 2014, when another contract with The New Age newspaper (TNA) was signed by then Acting Group CEO, Mr Colin Matjila without the Board’s approval when the Board’s approval was required. In short, the contract was believed to have been entered into irregularly, and was being investigated by both an external auditing firm and a law firm. Mr Tsotsi testified that around this time he met with Mr Tony Gupta who asked him, “Can’t you make this problem go away?” Mr Tsotsi did in fact meet with one of the investigators. He said he did so in order to ask him to make sure of their results, apparently out of concern that litigation could follow. However, Mr Tsotsi said that he did not remember whether he met Mr Tony Gupta before or after this, but said that it was during the time of the investigations.

1509. Mr Tsotsi admitted that he had “been in touch before” with Mr Tony Gupta. They appear to have been on first name terms, to the extent that Mr Tsotsi would gladly meet with Mr Tony Gupta at his Midrand offices and discuss a contract with him and entertain ideas on what should be done about it. Mr Tsotsi testified that he told Mr Tony Gupta that he could not help with the investigation. He testified that Mr Tony Gupta was upset by that response and he said that Mr Tsotsi was not interested in helping him.

1510. It was stated earlier on that Mr Tsotsi was one of two people who had served in the 2011 Board of Eskom who were re-appointed as members of the 2014 Board of Eskom. Mr Tsotsi was re-appointed as Chairperson of the Board. However, his stay in the 2014 Board was short lived because on 30 March 2015 he was pushed out of Eskom by the 2014 Board on spurious allegations. He resigned both as Chairperson of the Board and as a director but he resigned because it was clear that the 2014 Board was determined to kick him out. It seems that the Board was not only looking to get rid of executives who would appear to be a 'spanner in the works', but it was also quick to rid itself of Board members who asked too many questions. This was evident with Mr Zola Tsotsi and eventually Mr Baloyi. Briefly this is how this occurred.

1511. The day before the opening of Parliament in February 2015 – or put differently, the day before the State of the Nation Address by the President, President Zuma, two things happened which must be connected with Mr Tsotsi's ultimate constructive removal from Eskom by the 2014 Board of Eskom. The first is that he was called to a meeting with Minister Brown. Mr Tsotsi agreed to meet the Minister. The other is that a few hours after his meeting with the Minister he got a call from Mr Tony Gupta. Mr Tsotsi also agreed to meet with Mr Tony Gupta. In his affidavit of 13 February 2020 Mr Tsotsi relayed what happened at these two meetings in the following terms:

"7.1 A day or two before the State of the Nation Address ("SONA") of February 2015, I was summoned by Minister Brown to her office. The substance of our conversation was as follows: "Chairman, I have received complaints from management and Board members that you are interfering in management. Please refrain from doing so, because if you don't, I shall have to find someone else to do your job!" My response was "Most Board members hardly know what I look like, let alone not having worked with me yet. As for management, if scrutinizing their behaviour and decisions and calling them to account constitutes interference with management, then I will happily continue doing so. If you had acceded to my request that we have regular briefing sessions, even this meeting would not have been necessary."

7.2 The Minister's verbatim response was "Chairman, you go and do what you have to do, and I will go and do what I need to do. There is no reasons for you and I to talk about anything." That is how the meeting ended.

7.3 On the same day, (the day or two before the SONA in Cape Town), Tony Gupta called and requested that we meet. He suggested that the meeting be at their residence in Constantia, to which I agreed. It turned out that the meeting was intended to tell me that I am not supportive of their business endeavours. He went on to say, "Chairman, we are the ones who put you in this position, and we are the ones who can take you out!", whereupon I responded that "You do what you have to do, let me carry on with the job that the Cabinet has given me".

7.4 What was ironical about this incident is that it occurred a mere few hours after my encounter with the Minister, who, for all intents and purposes, said the same thing to me.

7.5 Following the breakfast meeting the President hosted the morning after the SONA, he did a walk about among the guests and when he approached our table, I stood up to greet him, whereupon he inquired how things are going at Eskom. I fleetingly said in response that I have an idea that we institute an external inquiry into the problems the company is experiencing. His response was "qhubekani nisebenze", meaning carry on working."

1512. Mr Tsotsi testified that prior to the Board meetings of 9 and 11 March 2015 everything had gone smoothly in his relationship with the new Eskom Board. He said that this was evidenced by the fact that the Board even asked him personally to deal with the issue of the suspensions on 11 and 12 March 2015.¹³³⁸ However, Mr Tsotsi said that, following the suspensions, "hardly a week went by and I was faced with having to defend myself against accusations from several board members that I was not consulting the Board in the preparatory work on the inquiry".¹³³⁹

¹³³⁸ Transcript 9 September 2020, p 90.

¹³³⁹ Exhibit MM6, p 17 p 14 para. 4.18.

1513. Mr Tsotsi relayed his view that between 16 and 19 March 2015 something very specific had happened, referring to an alleged secret meeting on 16 March 2015, alleged to have been attended at a private residence by Minister Brown, certain board members and certain suspended executives.¹³⁴⁰ Mr Tsotsi's believes that "...whatever was discussed at that meeting...(i)t certainly had a direct impact on what Mr Linnell was supposed to be doing...and ultimately, I think, on what I...my own position".¹³⁴¹ There had at the same time been a change in attitude towards Mr Linnell and his participation further from the Board's activities around the inquiry was blocked.

1514. The Board had a meeting in the morning of 19 March 2015 and then an in-committee meeting that evening. He testified that the evening meeting was very strange. He said that, when Mr Kumalo walked into the meeting, it seemed that Mr Kumalo came with a certain message because he spoke to Dr Ngubane and some other Board members whereafter he (i.e. Mr Tsotsi) was asked, at 23h40, to leave the meeting.¹³⁴² Shortly thereafter, he was recalled to the meeting where he was informed that the Board had unanimously resolved that it had lost confidence in the Chairman as a Director of the Board and recommended his removal as a director.¹³⁴³ He was told that the Board would bring charges against him.¹³⁴⁴ The Board said that supporting documents should be put together to indicate that the charges that Mr Tsotsi would face the following charges:

1514.1. failure to get Board approval for the release of a certain media statement;

¹³⁴⁰ Mr Linnell says he became aware of it because someone he knew told him that in the middle of the night, but could not remember who but argued that the only people he knew who would be contacting him in the middle of the night would be Mr Jabu Maswanganyi, who believes was the likely source, or else Mr Tsotsi. Mr Tsotsi would subsequently draw a letter to the Minister complaining of the Board's actions 'behind his back', and Mr Linnell admits to having assisted him with to draft it, with input from Mr Maswanganyi (Nicholas Linnell, Transcript 6 October 2020, p 92-94). However, Mr Zola Tsotsi refers to Mr Linnell's affidavit as his source (Zola Tsotsi, Transcript 9 September 2020, p 118).

¹³⁴¹ Transcript 9 September 2020, p 119.

¹³⁴² Exhibit U24, p 224.

¹³⁴³ Transcript 13 October 2020, p 74.

¹³⁴⁴ Transcript 9 September 2020, p.119 & 123, pp 130-131.

1514.2. appointing Mr Linnell without following procurement processes

1515. It appears from Dr Ngubane's affidavit that the Board was now charging Mr Tsotsi with even the suspension of the executives as if he was the one who made the decision to suspend them and not the Board.

1516. Ms Klein described how at the meeting of 19 March 2020 the Board unanimously agreed that they had lost confidence in Mr Tsotsi.¹³⁴⁵ She also described how the Board felt uncomfortable as to where Mr Tsotsi's instructions were coming from, saying "there were underlying tones of influence on the Board from the Presidency and the 'war Room'".¹³⁴⁶ However, Ms Klein took an active role in the suspension of the executives by the P&G Committee, as well as in the negotiation processes that ultimately led to the removal of three of the executives.

1517. Mr Baloyi said that some days after the events of 11 March 2020, there was discontent amongst some Board members over the involvement of Mr Linnell, but also that there was consensus amongst members that "the immediate way of carrying suspensions is not how the board should suspend executives, without any tangible evidence or reports in hand and making proper preparations for handovers".¹³⁴⁷ Mr Baloyi was the only board member who was opposed to the suspensions.

1518. The Board meeting of 19 March 2015 ended after midnight, at 00:45.¹³⁴⁸

1519. The Guptas and their associates had prior knowledge of the Board's plan to remove Mr Tsotsi from the Board. The Commission's investigation uncovered an email exchanged between Mr Howa, Chief Executive: The New Age and African News Network 7 and Mr

¹³⁴⁵ Exhibit U17, p 241, para 67.

¹³⁴⁶ Exhibit U17, p 285, para.4.20.

¹³⁴⁷ Exhibit U20, p 6.

¹³⁴⁸ Exhibit U24, p 225.

Salim Essa on 19 March 2015 at 19h46, with the subject line: "Statement from new board" and to which was attached a document titled: "Statement from new board, represented by its chairperson on behalf of the board". The email from Mr Nazeem Howa to Mr Salim Essa read:

"Sirs

A first draft. Let me have your thoughts and I will work to polish further."

1520. The statement sought to communicate several issues about Eskom's challenges, including what it refers to as the Board's "decisive step to ask four of our most senior executives to step down". However, the most curious of these issues is one regarding Mr Tsotsi, that the Board had taken a decision to relieve Mr Tsotsi of his chairpersonship due to a growing lack of confidence in his leadership and the greying of his role as a non-executive chair. This draft statement was exchanged between Mr Howa and Mr Essa before the Board could make a decision on Mr Tsotsi's removal; in fact, even before he could be excused from the Board meeting that night, at 23h40, for the Board to deliberate on his removal. The statement was intended to be released the next day. This has to be so because it read: "Yesterday at a meeting of the board it was decided to relieve Mr Zola Tsotsi of the chairpersonship".

1521. Several questions arise here, chief among which are how Mr Howa and Mr Essa would have known about the Board's intention to remove Mr Tsotsi before such decision could even be made and how it came about that they, being outside of Eskom, were the ones who prepared a statement for the new board with such detailed information about Eskom which they, as outsiders, would otherwise not know.

1521.1. When questioned on this, Dr Ngubane tried to speculate that Mr Linnell had drawn up the statement, as part of the set of documents he had been creating to help the Board steer the inquiry and suspensions. However, the documents

that Mr Linnell had drafted were for Mr Tsotsi, and it would not make sense that he would draft a statement for Mr Tsotsi announcing his own removal to which he was opposed.

1521.2. The statement that was attached to Mr Howa's email to Mr Essa is fundamentally important in understanding the capture of Eskom by the Guptas. For that reason, the statement deserves to be quoted in full. It reads:

“Statement from new board, represented by its chairperson on behalf of the board

It is now a week since we took the decisive step to ask four of our most senior executives to step down from their day-to-day roles to allow the board to appoint independent minds to assist us to develop a plan to ensure that Eskom is able to deliver a sustainable, secure and efficient supply to its consumers.

Yesterday at a meeting of the board it was decided to relieve Mr Zola Tsotsi of the chairpersonship due to a growing lack of confidence in his leadership and increasing discomfort, particularly around the greying of his role as a non-executive chair and the confusion it was causing within the business.

The board once again re-affirmed its approach around the investigation and the request for key individuals to stand down and is convinced on the basis of information they have gathered so far that this approach is the only way forward to provide a long-term strategy to resolve the current issues at Eskom.

None of these decisions were taken lightly, rather in the spirit of meeting our obligations as the board responsible for a utility which needs to support our economic growth and the overall wellbeing of our nation.

The board spent several hours yesterday to address the process around the investigation and to finalise the key areas of work to be delivered as a matter of urgency by the team we appoint.

As a board, we have spent the time since our appointment to assess the business and to get some understanding of some of the key issues facing Eskom.

We were saddened by the decision of S&P to downgrade Eskom. While we believe their decision is based on a failure to understand the current conditions at Eskom and our comprehensive plan to ensure a stable and reliable supply, the board will use this opportunity to redouble our efforts to meet the challenges faced by Eskom.

The board once again confirmed the key challenges impacting on Eskom and its ability to provide a sustainable, secure and efficient electricity supply.

These are:

1. Cash constraints at the utility
2. An overburdened energy system leading to unprecedented load-shedding
3. An ageing fleet, and a seriously flawed maintenance programme
4. Rapidly increasing price of electricity
5. Delays and cost overruns of the new build programme
6. Overpaying for major procurement items and consumables.

It was against this backdrop that we took the step to launch the enquiry so that we as a Board are able to understand what has caused this sad state of affairs and to develop strategies to begin to remedy the situation. As part of this process it is planned to benchmark costs and structures required to run Eskom efficiently.

It is our express desire that the investigation determines whether the current situation was exacerbated by incompetence, ill-formed decision-making, mismanagement or untoward actions.

We will also look into the current operating policies and processes and the business structure to understand how we can introduce further efficiencies and best practices to get Eskom to be the utility we all wish it to be.

Our aim of this element of the investigation is to secure the supply of our primary energy inputs so we can align our outputs to the demands of our economy.

We will use this investigation to:

1. To plan and correlate a holistic fleet management programme to ensure operation efficiency of our current fleet
2. To review and analyse our new build programme to ensure energy is generated soonest. This will include all contracts and performance agreements.
3. Introduce checks and balances to mitigate any fraud and manipulation within our operations.
4. Analyse and restructure of our balance sheet and all our incumbent debt instruments.
5. Realign key performance indicators for senior leadership to ensure better performance aligned to the board's current strategy.
6. Introduce an effective demand-side solution aimed at reducing the need for .
7. Review current non-core assets and look to sale and lease options to fund further requirements at the utility.

The board spent many hours yesterday reviewing our strategy so far and confirming the way ahead. We know that there is no alternative but to implement several radical solutions and we call on all South Africans to assist us in dealing with the challenges at Eskom.

The board has adopted a position that it will not tolerate incompetence, tardiness, any dereliction of duty from any member of the Eskom team.

Our priority is to deliver an efficient and reliable service to our consumers and we will expect each of our executives to step-up to the plate to deliver on this commitment.”

This was a statement that, it seems, Mr Howa and Mr Salim Essa prepared for the Eskom Board which was intended to be issued by Dr Ngubane the following morning to reflect what had transpired at the meeting of the Board that evening.

1521.3. The statement was exchanged between Mr Howa and Mr Essa at 19h46 on 19 March 2015. This was even before the Board meeting could ask Mr Tsotsi to leave the meeting so that the Board could discuss him. This means that people outside of Eskom, in this case Mr Salim Essa and Mr Howa, had knowledge of what the Board was going to do even before the Board could start discussing Mr Tsotsi. This is clear proof that Mr Tsotsi's removal was orchestrated from outside the Board and it was planned by the Guptas and their associates. This is also proof that the 2014 Board of Eskom was captured and was manipulated from outside Eskom. It was carrying out the instructions of the Guptas. Just as the Guptas and their associates had planned the suspension and ultimately the removal of certain Eskom executives, they also planned and orchestrated Mr Tsotsi's departure from Eskom.

1521.4. The conclusion is inevitable that Mr Essa and Mr Howa, being external third parties, must have acted in cahoots with certain Eskom board members to manipulate and control the affairs of Eskom. There is sufficient evidence to show that Dr Ngubane, as a chairperson of the Board, did allow this to happen.

1522. There is no better proof than this draft media statement which Mr Salim Essa and Mr Howa prepared before the Board could deal with Mr Tsotsi's matter and reflected what Mr Salim Essa must have instructed the Board to do about Mr Tsotsi. The statement was meant as a media statement which Dr Ngubane was required to release the following day. Mr Howa and Mr Essa jumped the gun and prepared a statement that reflected what they had instructed the Board to decide about Mr Tsotsi but which the Board have not as yet succeeded in doing by the time the draft media statement was ready. Indeed, this Eskom Board was completely captured by the Guptas.

On 20 March 2015 a team of the Board members, apparently led by Ms Klein, went to meet with Minister Brown in Cape Town to report on their decision regarding Mr Tsotsi. The Minister did not question their decision and did not engage with Mr Tsotsi on the issue, despite her being the person responsible for appointing board members, including the chairperson. Having essentially received the Minister's blessing for its decision, on 23 March 2015 the Board gave Mr Tsotsi an ultimatum to resign or be charged with lack of fitness to be a director.¹³⁴⁹ Mr Tsotsi defied the ultimatum and the Board called him to a meeting on 30 March 2015, to answer certain charges.¹³⁵⁰

1523. At the meeting of 19 March 2015, the Board had agreed that supporting documents should be put together to indicate the following charges: (a) failure to get board approval, (b) Matters considered as aggravating actions of the Chairman and (c) Preparing and distributing a media statement in the name of the Board without Board approval.¹³⁵¹ However, on 30 March 2015, a total of five charges featured, namely:

1523.1. that Mr Tsotsi had procured the services of an external consultant, Mr Linnell, to provide consulting services without following Eskom's prescribed

¹³⁴⁹ Exhibit MM6, p 14 para 4.18.

¹³⁵⁰ Transcript 9 September 2020, p 140.

¹³⁵¹ Exhibit U24, pp 224-225.

procurement processes or informing the Board of his actions. It was alleged that in doing so, the Mr Tsotsi had crossed the line from being a non-executive director to exercising executive power without the requisite authority;

1523.2. that the Consultant, Mr Linnell, commenced with his work to the knowledge of Mr Tsotsi without the Board being informed. That Mr Tsotsi was aware that no contract of engagement for Mr Linnell had been concluded, thus exposing the Company to non-compliance with applicable statutes and procedures;

1523.3. that Mr Tsotsi authorised the commissioning of a media statement in relation to an inquiry into the affairs of Eskom with the assistance of Mr Linnell without the knowledge and/or consent of the Board. This media statement consequently fell into the public domain. The media statement contained numerous inaccuracies and misinformation which may lead to Eskom facing potential legal action from third parties named therein;

1523.4. that Mr Tsotsi's actions put the integrity of the process of establishing an inquiry at risk, and his conduct has undermined the reputation of the Board; and

1523.5. that Mr Tsotsi's actions did not meet the minimum requirements of the standard of care expected of him as a director and member of the Board.¹³⁵²

1524. These charges might as well have been brought against the very members of the Board who were accusing Mr Tsotsi of these alleged acts of misconduct because they all acted in concert to welcome Mr Linnell, solicit his advice and utilise his services in the suspension of the executives. If any Board member brought the Board into disrepute, it would have been all of them.

¹³⁵² Exhibit U24, pp 228-229.

1525. At the Board meeting where Mr Linnell was first introduced to the Board, on 11 March 2015, the transcript of the audio-recording reflects Board members actively engaging with Mr Linnell and seeking his advice. Moreover, it was made clear that Mr Linnell had not yet been contracted, but was available to assist on a pro bono basis until contracted by the Board.¹³⁵³ It is also apparent that Board members then asked Mr Linnell to assist on the matter of the inquiry at meetings that were to follow.¹³⁵⁴

1526. The transcript also reflects Dr Ngubane addressing Mr Linnell, in the presence of the other Board members, thus: "Nick we are contracting with you not ENS", which directly contradicts the allegation that Mr Tsotsi had engaged Mr Linnell without the Board's knowledge, approval or involvement.¹³⁵⁵ Also significant is the email of Mr Baloyi to the Board on 23 March 2015, before the meeting of 30 March 2015, in which he said: "So, first Nick was endorsed by the board" and "I know there was an endorsement of Nick on Wednesday afternoon of the 11 March 2015 by the board and there was every right by the chairperson to consult with Nick and the shareholder as there is or was no proper defined process that has been developed such as Board first then Nick then shareholder".¹³⁵⁶

1527. As regards the media statement that was alleged to have been leaked by Mr Tsotsi, the transcript of the audio recording of 11 March 2015 also reflects that it was the Board itself that had requested Mr Linnell to assist in drafting a media statement for the Board, which statement, Mr Tsotsi explained, was reviewed by the P&G Committee and then sent to Mr Dlamini (an Eskom employee in Eskom's Business Communications Division) for further review. Mr Tsotsi testified that he was unaware how the media

¹³⁵³ Exhibit U17, p 15 paras 13.5-13.9.

¹³⁵⁴ Exhibit U17, p 690-906.

¹³⁵⁵ Transcript 11 September 2020, p 212.

¹³⁵⁶ Transcript 13 October 2015, pp.174-175 and Exhibit U20, p 35.

statement got into the public domain,¹³⁵⁷ and the Board itself admitted that the leak might have happened at DPE and not on account of Mr Tsotsi's handling of the matter.

1528. Although not apparent from the charges, Mr Tsotsi was also alleged to have misled the Board in recommending Mr Sekhasimbe for an acting appointment, without disclosing that Mr Sekhasimbe was on suspension. The minutes of the Board meeting of 30 March 2015 refute this allegation and show that Mr Tsotsi had in fact said the opposite, that Mr Sekhasimbe, although a good candidate, could not be considered for appointment, as he was on suspension.¹³⁵⁸

1529. Board members who testified also said that they had lost trust in Mr Tsotsi for having failed to produce a report which he had said existed on the investigation into Eskom's affairs and misconduct on the part of the executives who were to be suspended. However, once again, the transcript of the audio recording of one of the meetings of 11 March 2015, reflects Dr Ngubane's dismissive response to Mr Baloyi's inquiry about the alleged report and cautioning the Board not to proceed without such report. The transcript reflects that Dr Ngubane said that: "there might be a report out there, but it is not Eskom's report. The Board is making its own decision". This meant that the Board did not require the alleged report to make its decisions and none of the Board members disagreed with Dr Ngubane. In fact, the Board proceeded to make final decisions on that day without the report.

1530. The Board mandated Dr Ngubane and Mr Kumalo to speak to Mr Tsotsi and urge him to rather resign to avert a vote of no confidence or to avoid the charges of misconduct against him in which case they said that the Board will drop the charges against him. The Board suggested that if Mr Tsotsi resigned of his own accord, this would be better

¹³⁵⁷ Exhibit U24, p 229.

¹³⁵⁸ Exhibit U24, p 230.

for him than to go through the humiliation of being removed.¹³⁵⁹ Mr Tsotsi ultimately elected to resign, with effect from 30 March 2015, but says he did so under duress.¹³⁶⁰

1531. The conclusion is inevitable that Mr Tsotsi was forced out based on trumped-up charges because he had fallen out of favour with the Guptas.

1532. It is perhaps strange that a new Board could move so early offer its appointment to remove four top executives who were critical to running the company, causing three of them never to return, at a time when the company was in crisis; doing all this in response to a proposal that came from outside. The same Board then turned on its Chairperson, who had been around for some time at Eskom, causing further instability to the organisation.

Another Statement by Mr Howa and Mr Salim Essa

1533. Following the resignation of Mr Zola Tsotsi, another email was sent by Mr Howa to Mr Salim Essa on 31 March 2015 at 7h46, with the subject line “Statement from new board March 31”, and an attachment with the same file name. The message simply read:

“Salim bhai

An amended version for your approval.”

1534. Attached to the email was a draft statement with details that are remarkably similar to the draft statement that had been attached to the email of 19 March 2015, with some relevant material differences, especially in the heading where Dr Ngubane’s name was inserted as “chairperson of Eskom”, and in the body where reference was made to the Board (“yesterday at a meeting”) having accepted Mr Zola Tsotsi’s resignation as both chairperson and director. The heading read: “Statement by Dr Ben Ngubane,

¹³⁵⁹ Transcript 9 September 2020, p142.

¹³⁶⁰ Exhibit MM6, p 14 para 4.18.

chairperson of Eskom, on behalf of the board”.¹³⁶¹ That statement, which was meant for Dr Ngubane to issue to the media as chairperson of the Board, is important. For that reason, it is also quoted in full. It read:

“Statement by Dr Ben Ngubane, chairperson of Eskom, on behalf of the board

Nearly a month has passed since we took the decisive step to ask four of our most senior executives to step down from their day-to-day roles to allow the board to appoint independent persons to assist us to develop a plan to ensure that Eskom is able to deliver a sustainable, secure and efficient supply to its consumers.

Yesterday at a meeting of the board it was decided accepted the resignation of Mr Zola Tsotsi, as both chairperson and a director.

On behalf of the Board, I want to express our sincere thanks to Mr Tsotsi for his selfless decision and I want to wish him well for his future endeavours.

The board has once again re-affirmed its approach around its broad-ranging investigation and the request for key individuals to stand down in order for the process to take place without fear or favour.

We are convinced on the basis of information we have gathered so far that this approach is the only way forward to provide a long-term strategy to resolve the current issues at Eskom. We are relieved, too, by the recent decision of the labour court on the appeal of the suspended CEO.

None of the board’s decisions are taken lightly, but rather in the spirit of meeting our obligations as the board responsible for a utility which needs to support our country’s economic growth and the overall wellbeing of our nation.

The board spent much time over the past few weeks to discuss and debate the processes around the investigation and to finalise the key areas of work to be delivered as a matter of urgency by the team we have appointed.

As a board, we have spent the time since our appointment to assess the business and to get some understanding of some of the key issues facing Eskom.

We were saddened by the recent decision of S&P to downgrade Eskom. We believe this decision is based on a lack of understanding of the current conditions at Eskom and our comprehensive plan to ensure a stable and reliable supply. However, the board will redouble our efforts to meet the challenges faced by Eskom and is determined to win back lost ground with ratings agencies.

¹³⁶¹ Exhibit U24, p 438.

The board once again confirms the key challenges impacting on Eskom and its ability to provide a sustainable, secure and efficient electricity supply.

These are:

1. Cash constraints at the utility
2. An overburdened energy system leading to unprecedented load-shedding
3. An ageing fleet, and a seriously flawed maintenance programme
4. Rapidly increasing price of electricity
5. Delays and cost overruns of the new build programme
6. Overpaying for major procurement items and consumables.

It was against this backdrop that we took the step to launch the enquiry so that we as a Board are able to understand what has caused this sad state of affairs and to develop strategies to begin to remedy the situation. As part of this process it is planned to benchmark costs and structures required to run Eskom efficiently.

It is our express desire that the investigation determines whether the current situation was exacerbated by incompetence, ill-formed decision-making, mismanagement or untoward actions.

We will also look into the current operating policies and processes and the business structure to understand how we can introduce further efficiencies and best practices to get Eskom to be the utility we all wish it to be.

Our aim of this element of the investigation is to secure the supply of our primary energy inputs so we can align our outputs to the demands of our economy.

We will use this investigation to:

1. To plan and correlate a holistic fleet management programme to ensure operational efficiency of our current fleet
2. To review and analyse our new build programme to ensure energy is generated soonest from this critical element of our strategy. This will include all contracts and performance agreements which could be inhibitors to our urgent delivery of power.
3. Introduce checks and balances to mitigate any fraud and manipulation of processes within our operations.
4. Analyse and restructure of our balance sheet and all our incumbent debt instruments.
5. Realign key performance indicators for senior leadership to ensure better performance aligned to the board's current strategy.

6. Introduce an effective demand-side solution aimed at reducing the need for loadshedding.

7. Review current non-core assets and look to sale and lease options to fund further requirements at the utility.

The board spent much time reviewing our strategy so far and confirming the way ahead. We know that there is no alternative but to implement several radical solutions and we call on all South

Africans to assist us in dealing with the challenges at Eskom. To do nothing, is not an option. Eskom requires a radical, well-thought through intervention and our investigation is aimed at delivering that solution.

The board today is determined to ensure a turn-around at Eskom and has adopted a position that it will not tolerate incompetence, tardiness, any dereliction of duty from any member of the Eskom team in the delivery of this turn around.

Our priority is to deliver an efficient and reliable service to our consumers and we will expect each of our executives to step-up to the plate to deliver on this commitment.”

1535. The statement appears to have also been exchanged with Mr Tony Gupta, who on 31 March 2015 at 8h19, replied to Mr Howa with the message “Ok”,¹³⁶² suggesting that he was happy with the statement and approving its contents.

1536. Dr Ngubane was named as the “chairperson of Eskom”, when in fact he was not, but only became one not long thereafter. At that stage Dr Ngubane was the acting Chairperson of the Board, not the chairperson. This means that Mr Howa, Mr Salim Essa and the Guptas must have known beforehand that Dr Ngubane would become the chairperson of the Eskom Board. That is if they did not themselves make that decision for Minister Brown. Dr Ngubane claimed not to have known how this happened, but sought to profer an explanation that, when he was made Acting Chairperson, everyone knew because of media clips showing this.¹³⁶³ However, he failed to produce those

¹³⁶² *Id*, p 442.

¹³⁶³ Transcript 13 October 2020, p 79.

media clips. Strangely, Dr Ngubane then said this only applied to him being Acting Chairperson for the meeting of 19 March 2015.¹³⁶⁴

1537. Once again, questions arise as to why the Guptas and their associates would get involved in a matter that was the business of Eskom, and taking the trouble to draft a long-detailed statement containing points on various Eskom matters. How would they have known about these matters? Dr Ngubane did not offer any plausible explanation beyond speculating that maybe Mr Howa thought he could be useful, but said “*I do not know*” and that he did not know if it was sent to anyone at Eskom.¹³⁶⁵ This explanation that Mr Howa thought he could be useful, presumably to the Board and Dr Ngubane, betrays Dr Ngubane’s posture of ignorance.

1538. When it was suggested to Dr Ngubane that the one way in which Mr Essa, Mr Howa and the Gupta family would have interacted or got insight into the Board’s affairs would have been through him (Dr Ngubane), Dr Ngubane said that would be quite a serious allegation, but did not deny it outright. He sought to downplay his business links with the Guptas and their associates by saying that he had business links with many people, and at one stage was involved in about 23 companies but “that [this] does not, therefore, entitle people to ... make me a puppet”.¹³⁶⁶ Unfortunately for Dr Ngubane, all evidence heard by the Commission reveals that he was clearly taking instructions from the Guptas and doing their bidding.

1539. To the proposition that Dr Ngubane was properly the one who gave Mr Salim Essa insight into the Eskom Board’s affairs, because Dr Ngubane appears to have exchanged emails with Mr Salim Essa on the email address infoportal1@zoho.com,¹³⁶⁷ Dr Ngubane could only say that this was a dangerous proposition, and that ‘just because

¹³⁶⁴ Transcript 13 October 2020, p 83.

¹³⁶⁵ Transcript 11 September 2020, p 100-106.

¹³⁶⁶ Transcript 13 October 2020, p 124-125.

¹³⁶⁷ Transcript 13 October 2020, pp 105-106.

he had appeared at the Zondo Commission; and the fact that he could not name who else from the Board knew Mr Salim Essa, did not mean that others were not having contact with the Guptas and their associates'. His understanding, he explained, was that Mr Salim Essa was already active at Eskom before he (Dr Ngubane) became a Board member there.¹³⁶⁸ These responses of Dr Ngubane have very subtle concessions by him of Mr Salim Essa's control over Eskom.

1540. As already indicated the two draft media statements referred to above which the Guptas and their associates prepared for Dr Ngubane are proof that Dr Ngubane and the majority of the Eskom Board had been captured by the Guptas.

Removal of Mr Baloyi

1541. Mr Baloyi submitted an affidavit to the Commission to which he deposed on 7 September 2020. Mr Baloyi was appointed to the Eskom board by Minister Lynn Brown as a non-executive director on 11 December 2014. He was removed by her as a director with effect from 22 April 2015. This was on the recommendation of the Eskom Board.

1542. It is not in dispute that Mr Baloyi was the only Board member who spoke against the proposal to suspend the executives. He testified that he was the only person to do so at the P&G meeting on 11 March 2015, whilst Mr Tsotsi was only opposed to the inclusion of the Financial Director among the executives to be suspended. The transcripts of the audio recordings of the Board meetings of 11 March 2015 indeed show that Mr Baloyi repeatedly cautioned the Board not to act in haste and without proper information and documentation, but the Board was dismissive of his warnings.

1543. Mr Baloyi testified that the chairperson of the P&G Committee, Mr Khoza, had told him that he (Mr Khoza) had been called to the DPE and told by the officials in that

¹³⁶⁸ Transcript 13 October 2020, pp 127-128.

Department that the executives had to be suspended. During the P&G meeting, there were many breaks during which Dr Ngubane made calls to the President's office. Mr Baloyi said that this was not done in secret. From time to time, Dr Ngubane reported on who the officials had told him had to be suspended. Mr Baloyi testified that it was possible that there could have been other persons in the meeting obtaining names of those to be suspended.¹³⁶⁹

1544. During the discussion of the proposal to remove Mr Tsotsi as Chairman of the Eskom Board, Mr Baloyi disputed the Board's charges against Mr Zola Tsotsi and relayed in emails to the Board that there was no evidence of disapproval by the Board to Mr Linnell being appointed as the consultant on 11 March 2015.¹³⁷⁰ According to Mr Baloyi, no one objected, rather the concern was only to the procurement processes that were to be followed to speed up the process because it was not envisaged that the normal process would be followed in appointing service providers. Mr Baloyi confirmed that they all accepted Mr Linnell on 11 March 2015. He said that, if Board members wanted to disagree with Mr Linnell's engagement, they should have done so on the very first day but no Board member had objected.¹³⁷¹

1545. . Mr Baloyi said that during the time of dealing with the suspensions, he had inquired whether a certain IT tender was going to be brought to the Board for approval. Given the high value of the tender: he had expected the tender to be concluded during a certain time. This was an extension of the T-Systems' contract to provide IT services to Eskom. Instead of this high value tender being brought to the Board, it was taken to the Board Tender Committee, a committee of the Board, for approval. Mr Baloyi said that he telephoned Dr Ngubane as the Chairperson of the Board Tender Committee to

¹³⁶⁹ Transcript 7 October 2020, pp 87-88.

¹³⁷⁰ Transcript 7 October 2020, pp.124-127, Exhibit U10, pp 363-364.

¹³⁷¹ Transcript 7 October 2020, pp123-124.

establish if the transaction had been concluded, but the response was very negative from Dr Ngubane, who shouted at him.¹³⁷²

1546. Mr Baloyi explained that a contract on the IT services had been awarded to T-Systems about 5 years before, with an initial contract price of R2.5 billion, which had then escalated to R4.5 billion. This contract had expired, but renewed several times pending the outcome of a tender process. However, Mr Baloyi did not know about the true status of the contract. That was why he made the inquiry. The Audit & Risk Committee had been presented with three tenders at its first meeting in 2015, with prices in the region of R2 billion, but no decision was made as there was an effort to negotiate a lower price. Whilst the Audit & Risk Committee understood that negotiations were being pursued and feedback would be provided, there was a parallel process in which a submission was made to the Board Tender Committee to extend the T-Systems' contract, which the Board Tender Committee did, despite the escalating contract price.¹³⁷³

1547. Mr Baloyi proceeded and contacted Mr Koko, under whom IT reported directly, and Mr Koko affirmed that it had been awarded. It appears that the discussion between the two strayed into that of Mr Matona's CCMA case Mr Baloyi testified that he then asked whether Mr Koko was intending to also go to the CCMA. Mr Baloyi stated that Mr Koko said that he was considering it and asked Mr Baloyi whether he could recommend a lawyer, which Mr Baloyi did via email.¹³⁷⁴ Mr Koko then used the information to address an email to Dr Ngubane in which he suggested to the Board that Mr Baloyi was trying to influence him to go to the CCMA and was thus working against the Board.¹³⁷⁵ The

¹³⁷² Exhibit U20, p 307 para 3.16.

¹³⁷³ *Id* p 307 to 309. Transcript 7 October 2020, p 137.

¹³⁷⁴ Exhibit U20, p 310.

¹³⁷⁵ Exhibit U20, p 373.

Board obtained a legal opinion on the matter, on the basis of which it recommended to Minister Brown that Mr Baloyi should be removed from the Board.¹³⁷⁶

1548. A meeting was held in Cape Town involving Minister Brown, the Deputy Minister, Dr Ngubane, Ms Klein, the Eskom Company Secretary and Mr Baloyi, on 14 April 2015, where Mr Baloyi was questioned about Mr Koko's allegations. As there was no rule prohibiting interaction between board members and executives on suspension, Minister Lynn Brown said that she would issue written instructions to board members not to contact the suspended executives. Mr Baloyi expected such instructions, but instead, shortly afterwards, the Minister sent him a letter dated 20 April 2015 removing him from the Board with effect from 22 April 2015.¹³⁷⁷

1549. It can safely be concluded that Mr Baloyi was removed from the Eskom Board because he was questioning decisions that the Board was taking that sought either to facilitate the capture of Eskom by the Board or that sought to remove those that the Guptas wanted removed from Eskom – be they the executives or Board members.

Mr Brian Molefe's and Mr Anoj Singh's secondments to Eskom and appointments as GCEO and CFO, respectively

1550. In Vol 1 of Part II of this Commission's Report – which is the one that relates to Transnet – the matter of how Mr Brian Molefe got to be appointed as the Group Chief Executive Officer of Transnet is discussed at length. That discussion is not repeated here except to refer to two or so features thereof. The first is that the Guptas knew before the vacancy for the Group Chief Executive Officer of Transnet was advertised that Mr Brian Molefe was the person who would be appointed to that position. They said so in an article in their newspaper, *The New Age*, on or about 7 December 2010. The second is

¹³⁷⁶ Exhibit U20, p 310 para 3.20.

¹³⁷⁷ Exhibit U20, p 407-408.

that Mr Brian Molefe was appointed as Transnet's Group Chief Executive Officer among the top three candidates after the interviews even though he had not obtained the highest points in the interviews. Another feature is that the Cabinet Minister under whom Transnet fell and who picked Mr Molefe for the position was a Gupta associate, namely, Mr Malusi Gigaba. Of course, the President of the country was also a big friend of the Guptas.

1551. Mr Brian Molefe was appointed as Transnet's Group Chief Executive Officer in February 2011. He was still serving in that position when the Eskom Board suspended four Eskom Executives on 11 and 12 March 2015. Sometime during 2014 Mr Salim Essa had told Mr Henk Bester that they – which is to be understood to be the Guptas and their associates – had decided that the next Eskom Boss would be Mr Brian Molefe. That evidence was given by Mr Henk Bester in relation to Transnet. That may have been before or around mid-year in 2014 or may have been early in the second half of 2014.

1552. Mr Tshediso Matona – and not Mr Brian Molefe – was appointed as Eskom's Group Chief Executive Officer with effect from 1 October 2014. The Commission did not hear any evidence as to how it came about that Mr Brian Molefe was not appointed as Eskom's Group CEO in the second half of 2014. It may well be that something went wrong and Mr Matona was then appointed. However, the Guptas must have felt very strongly that their man – Mr Brian Molefe – had to get appointed to lead Eskom. They must have got President Zuma to buy into the idea if he had not been part of the plan from the beginning. I say that because, as can be seen in the discussion that relates to the suspension of the executives above, President Zuma was part of the Gupta scheme to suspend and ultimately to remove certain Eskom executives who were ultimately pushed out of Eskom.

1553. It would seem that the Guptas were not prepared to allow the “small” matter of the appointment of Mr Matona as Eskom’s Group CEO to stand in the way of their plan that they had already decided upon in 2014 as Mr Salim Essa told Mr Henk Bester. Hence, they came up with the idea that there should be an investigation into the affairs of Eskom and, pending the outcome of that inquiry or investigation, certain Eskom executives, including Mr Matona, should initially be suspended and then later they or some of them would have to leave Eskom so that the Guptas would be able to get Mr Molefe appointed as the Group Chief Executive Officer of Eskom.

1554. It does not appear to me that they only wanted Mr Molefe at Eskom. They must have also wanted Mr Anoj Singh at Eskom because both Mr Molefe and Mr Singh had served them very well at Transnet. Having thought about this plan already in 2014, the Guptas could not have been happy that only Mr Molefe should move to Eskom. They would have appreciated that, if the Financial Director or Chief Financial Officer at Eskom was not someone who would co-operate with them, such a person could prove to be a stumbling block to their plans even for a Group CEO who is their associate. They knew Mr Anoj Singh and they knew how well he had served them at Transnet. The suspension of Eskom executives was, therefore, part of the plan of the Guptas to remove from certain key strategic positions at Eskom executives who they believed would not co-operate with them and then get people of their own choice appointed to those positions.

1555. About a month after the four executives had been suspended, Minister Lynn Brown made a public announcement that Mr Brian Molefe was seconded to Eskom as the Acting Group Chief Executive Officer. Mr Molefe testified that the person who approached him for the first time about the possibility of him being seconded to Eskom was Minister Brown. He testified that she asked him whether he would have any objection to being seconded to Eskom and he indicated that he would not have any objection or he said something more or less to that effect. Ms Brown also confirmed

that she spoke to Mr Molefe. It was not clear from Ms Brown's evidence whether she took Mr Molefe's name to President Zuma or whether President Zuma was the one who came up with the idea that Mr Molefe should be approached and requested to take a secondment to Eskom. When President Ramaphosa testified before this Commission, he also said that he had also thought that Mr Brian Molefe would be the person who should be asked to lead Eskom. I think he was thinking of this after the suspension of the executive. President Ramaphosa testified that he may have conveyed this view or thought to President Zuma at the time. Quite obviously, President Ramaphosa was unaware of the existence of the Gupta plan – which was already in existence at some stage in 2014 – to get Mr Molefe to Eskom.

1556. Mr Molefe assumed duty as Eskom Acting Group CEO on or about 20 April 2015. In due course he told either the Board of Eskom or the Chairperson of the Eskom Board that he wanted Mr Anoj Singh to be seconded from Transnet to Eskom as the Financial Director or Chief Financial Officer. Mr Anoj Singh was at that time Transnet's Chief Financial Officer. The evidence concerning Mr Singh's secondment to Eskom was not clear but he was seconded to Eskom with effect from either July or August 2015. It is very strange that an entity such as Transnet was made to lose two of its most senior executives more or less at the same time. Dr Ngubane testified that he could not remember how Mr Anoj Singh's secondment to Eskom came about. That is what he had also said in his affidavit. It is very strange that the Chairperson of the Board would not know how someone as important in an SOE as the Chief Financial Officer came to be the SOEs Chief Financial Officer, particularly after his Board had pushed their previous Chief Financial Officer out the way they did.

1557. In October 2015 Mr Brian Molefe was appointed as Eskom's Group Chief Executive Officer with effect from October 2015. The position was not advertised whether internally at Eskom or externally. In other words, there was no competitive process. This

was in breach of the guidelines that had been issued by the Ministry of Public Enterprises in 2011 regarding the recruitment of Chief Executive Officers of state owned entities. Those guidelines contemplated a competitive process. Minister Brown would obviously have been aware of those guidelines. So, too, would have been officials in her Department who would have been advising her. The Eskom Board should also have been aware of the guidelines. In due course Mr Anoj Singh was also appointed as Eskom's Financial Director or Chief Financial Officer. His appointment, too, was not the result of a competitive process.

1558. The Board actually sought legal advice whether, if they did not advertise the position or did not effectively consider other people or candidates and simply gave the Minister Mr Molefe's name, there would be any problem legally. Clauses 13.3.1 and 13.3.2 of Eskom's Memorandum of Incorporation provided as follows:

“13.3.1 The Board shall identify, nominate and evaluate potential candidates for appointment as the CEO in accordance with the Guidelines.

13.3.2 The Shareholders shall appoint the CEO from the shortlist of candidate provided by the Board, in accordance with the Guidelines.”

1559. It is quite clear from these provisions of the MOI that what was contemplated is a competitive process for the appointment of the Chief Executive Officer. That is why in terms of clause 13.3.1 the Board was required to “evaluate potential candidates” and not evaluate a candidate. That is also why in terms of clause 13.3.2 of the MOI the Shareholder was required to “appoint the CEO from the shortlist of candidates provided by the Board in accordance with the Guidelines”.

1560. Incomprehensibly, the law firm which gave the Board legal advice said that, if the Board gave the Minister one name – namely Mr Molefe's name – that should be a shortlist of candidates from which the Minister could appoint. It is difficult to understand how

anybody could say when you are required to give somebody a list of candidates from which that person may make an appointment, giving that person one name is giving him or her a list of candidates. The Board and Minister took that advice because, one has to conclude, it was the advice that allowed them to do what they wanted to do and, if they were criticised later, they could always hide behind the legal advice. The legal advice was clearly wrong and one did not need to be a lawyer to see that.

1561. The Guidelines that had been issued by the Minister of Public Enterprises in December 2010 made it clear that the process leading to the appointment of a CEO had to be competitive – and the Board should submit three names to the Minister in their order of preference. However, it had a provision to the effect that “where a Board believes that the Guidelines or part thereof does not lend itself to implementation or application to address its requirements, and seeks to depart from such application, the Board must notify the Minister in writing of any such departure, providing reasons for any such departure.” The law firm said, if the Board could not identify a second and third candidates – to make it three candidates as required by the Guidelines, the Board could depart from the Guidelines and simply notify the Minister.

1562. First of all, the Guidelines did not provide for the Board to depart from the requirements of the MOI. The requirements of the MOI had to be complied with and there was no valid reason for the Board not to comply with them. There was also no valid reason for the Minister not to insist that they be complied with. Even with the Guidelines, there was simply no justification why the Board did not open the process up so that there was a transparent, competitive and fair appointment process. Accordingly, Mr Molefe’s appointment was unlawful for, at least, being in breach of Eskom’s Memorandum of Incorporation and the Guidelines for the appointment of CEOs.

1563. When Dr Ngubane gave his evidence, I asked him why the Board did not advertise the position of GCEO so that other candidates could apply. Apart from referring to the fact that the Board got legal advice, his answer was: we had found our man! He said that they believed that Mr Brian Molefe was the right man for the job. We now know that the Guptas would not have wanted someone else other than Mr Brian Molefe to be appointed as the GCEO of Eskom because he was part of their plan about Eskom from 2014 already and a competitive process could have led to someone else being appointed who was not part of their plan. Actually, the appointment of someone else as Group CEO of Eskom could have scuppered their whole plan. They could not afford that risk. The best thing for them was that the position should not be advertised and Mr Molefe should simply be appointed to the position. They may have been aware of what happened and what nearly happened at Transnet and they did not want to take another risk.

1564. At Transnet the Guptas had announced in their newspaper in advance that Mr Brian Molefe would be the next GCEO of Transnet. This was in December 2010. It is important to point out that in their article the Guptas did not say that there were rumours that Mr Brian Molefe would be the next GCEO of Transnet or some statement along those lines. They effectively announced that he was going to be the next GCEO of Transnet. Thereafter, the position was advertised and a number of candidates applied and one candidate got higher points than Mr Molefe which meant that that candidate was nearly appointed instead of Mr Molefe. Fortunately for the Guptas, they had friends in high places. The relevant Minister was a friend of theirs and he picked their man, Mr Molefe. They could not take another risk at Eskom.

1565. By the time the Guptas wanted Mr Brian Molefe appointed as the Group CEO of Eskom, during the second half of 2015, they had nothing to fear. They had completely captured Eskom. They had a President of the country who did whatever they wanted. If they

wanted an official or Minister who was not cooperating with them fired, the President made sure such official or Minister was fired. The Guptas had wanted Mr Themba Maseko fired or removed from GCIS because he was not cooperating with them and President Zuma made sure Mr Maseko was removed from GCIS. By 23 October 2015 the Guptas had already decided that they did not want Mr Nhlanhla Nene continuing as Minister of Finance because he was not cooperating with them and they knew that he was going to be fired and indeed in due course he was fired.

1566. We also know now that the Minister of Public Enterprises at the time, Ms Lynn Brown, was a Gupta associate. So, the Guptas had the Minister responsible for Eskom on their side. Furthermore, they had a number of the members of the Board of Eskom on their side. They had made sure that the Chairperson of the Board of Eskom who had begun not to co-operate – Mr Tsotsi – was removed from the Board and they had made sure that Dr Ngubane – who was also doing whatever the Guptas wanted him to do – was appointed as the Chairperson of the Board. So, the Minister was their Minister; the President was their man. The Chairperson of the Board was their man and the Acting Group CEO was their man. The Acting Chief Financial Officer was also their man. That is Mr Anoj Singh. The Guptas were in complete control of Eskom. All the positions of strategic importance were occupied by their people. In these circumstances there was no way that, if they said that Mr Brian Molefe should be appointed Group CEO without a competitive process, a competitive process would be initiated.

1567. South Africans thought that the ANC government was in control of Eskom but it was not. It had relinquished the control to the Guptas and those people the Guptas wanted. The ANC and the ANC Government should be ashamed that this happened under their watch. The question that the people of South Africa are entitled to ask is: where was the ANC as the Guptas took control of important SOEs such as Transnet, Eskom and Denel? Where were they? What were they doing? Were they aware of everything but

lacked the courage to stop President Zuma and his friends, the Guptas, in what they were doing? Were they looking the other way?

1568. These questions are not being asked because it is accepted that the ANC should get involved in the appointment of members of the Boards of SOEs and in the appointment of Chief Executive Officers and Chief Financial Officers of SOEs but they are being asked because the ANC's position – which both President Ramaphosa and Mr Mantashe made clear in their oral evidence – is that it has a right to have a say on the people who are appointed as members of the Boards of State Owned Entities, and those who are appointed as Chief Executive Officers of such entities. It takes the view that it is entitled to deploy its own people or members in those positions. Whether this position taken by the ANC is correct or not is an issue that will be dealt with in a later Part of this Report. At this stage the above questions are being asked on the assumption that the ANC is entitled to have a say on the filling of these positions or that they have a right to deploy people they want for those positions as the ruling party.

1569. The question is: since the ANC's position is that it is entitled to deploy or to have a say on who fill these positions and it must be taken that it was or would have been consulted about the appointment of Dr Ngubane as Chairperson of the Eskom Board and the appointment of all the members of the 2014 Board of Eskom, the secondment and, ultimately, the appointments of Mr Brian Molefe and Mr Anoj Singh at Eskom, what was its role and did it do the "homework" it was supposed to do in order to ensure that these were the right people and that they were people of integrity? If the ANC has a right to deploy people in SOEs or if it has a right to have a say on the people who are appointed to these positions, is the position not that such a right, if it exists, would go with the duty or responsibility on the part of the ANC not only to ensure that people who are appointed to these positions are people of integrity and with the right qualifications, knowledge

and experience but that it should also monitor their performance when they are in these positions?

1570. The Cabinet should also be asked these questions because the Minister of Public Enterprises would have taken the names of the proposed members of the Eskom Board to the Cabinet either for a decision or for endorsement or for noting. How was Eskom such an important state owned entity – allowed to be captured like this under their watch? The Guptas were able to effectively remove executives that they did not want and to install those that they wanted. The Guptas were able to remove a Chairperson of the Board that they did not want and install one that they wanted. The Guptas realised that Mr Baloyi, a member of the Board, was asking too many questions for their comfort and they got him kicked out of the Board. Did members of the Cabinet not know any of these things that were happening at Eskom? Did they ask President Zuma the questions which should have been asked? Did they ask their Colleague, Minister Lynn Brown, what was going on at Eskom? Did they ask for a full report?

1571. One would have expected them to ask for reports on these matters because in terms of section 92(2) of the Constitution “members of the Cabinet are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions”. Therefore, every member of the Cabinet should be able to raise concerns about what is happening in the portfolio of another Cabinet member because the Constitution does not limit accountability to the Cabinet member under whose portfolio a certain matter falls. The Constitution is clear: members of the Cabinet are accountable collectively and individually for the exercise of the powers and the performance of their functions. It is not an excuse to say: but that is not my portfolio. There is a reason why the drafters of the Constitution included collective accountability for members of the Cabinet in section 92.

1572. As I conclude, I go back to the fact that Mr Brian Molefe and Mr Singh were appointed to their respective positions at Eskom without the vacancies being advertised and, therefore, without any competition. Dr Ngubane's answer that the Board did not see the need to advertise the position of Group Chief Executive Officer before Mr Molefe was appointed because they had found their man shows a complete failure to understand the significance of the need for a transparent and fair recruitment process. The manner in which Mr Brian Molefe was appointed was not transparent and lacked fairness. Other potential candidates who would have liked to be considered for that position were not given a chance to compete for the position.

1573. If Mr Brian Molefe was, indeed, the right man or person for the job, the Board and Minister ought not to have dispensed with the need for a transparent and fair recruitment process because, if he was the best person for the job, he would have emerged as the best candidate for the job even after a competitive process. That is assuming that the process was a fair one. However, it seems that the Board and the Minister feared that, if there was a transparent and fair process, Mr Molefe might not make it and the Guptas were going to have none of that. The same can be said of Mr Anoj Singh's own appointment. It will be necessary that relevant legislation be amended to ensure that from now on, it will be compulsory to have a fair, transparent and public recruitment process, including the interviews, for the appointment of the Chief Executive Officer and the Chief Financial Officer of a state-owned entity. There is no reason why other senior positions cannot also be subjected to a transparent, competitive and fair recruitment process even if, in regard to positions other than the Chief Executive Officer and Chief Financial Officer, the interviews are not public.

1574. We have now seen what happened at Transnet after Mr Molefe was appointed as GCEO in breach of a fair and transparent recruitment process. We also saw what happened at Transnet when Mr Siyabonga Gama was appointed as GCEO without a

transparent, competitive and fair appointment process. We have also seen what happened at Eskom when Mr Brian Molefe and Mr Singh were appointed to important positions in the entity without a transparent, competitive and fair appointment process. In each case they caused serious damage to those institutions as the reports of this Commission reveal.

1575. Before I conclude I need to ask this question: where was Parliament as all these things were happening at Eskom? The Portfolio Committee on Public Enterprises should have been holding the Board, the Minister and the Cabinet accountable for what was happening at Eskom. Did it call everybody concerned to appear before it? Did the Committee ask the questions that should have been asked? Did it know what questions to ask? Some of these questions are dealt with in the part of the Commission's Report which relates to Parliamentary Oversight.

1576. Section 92 of the Constitution provides that members of the Cabinet are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions.

1577. Section 92(3) further provides:

“Members of the Cabinet must

(a) act in accordance with the Constitution; and

(b) provide Parliament with full and regular reports concerning matters under their control.”

1578. Was Parliament provided with full and regular reports about what was happening at Eskom and other SOEs? If they were, did they read them and interrogate them did they make follow-ups?

1579. It would appear that there must have been a complete dereliction of duty on the part of many government and state functionaries which or who should have prevented the capture of Eskom.

The appointment of Mr Mosebenzi Zwane as Minister of Mineral Resources

1580. Prior to September 2015 Mr Mosebenzi Joseph Zwane had been confined to the local government in the Free State and to the Free State Provincial Government for all the time under democracy during which he was involved in government. He had been a mayor, a member of the Free State Provincial Legislature and a Member of the Executive Council of the Free State Provincial Government and served in that capacity in different portfolios. He was a teacher by profession and had taught at a secondary school before going into politics full-time.

1581. From May 2009 to March 2011 Mr Zwane was MEC for Human Settlements. From March 2011 to April 2013 he was MEC for Agriculture and Rural Development. From April 2013 to June 2015 he was MEC for Economic, Small Business, Tourism and Environmental Affairs. From June 2015 to September 2015 he was MEC for Agriculture and Rural Development. In September 2015 he joined the National Assembly as an ANC Member of Parliament. Within two weeks or just after two weeks as a member of Parliament, Mr Zwane was appointed as Minister of Mineral Resources after President Zuma had moved Minister Ramatlhodi from the Department of Mineral Resources to the Ministry of Public Service and Administration. In these different portfolios not only did Mr Zwane not distinguish himself as an MEC, he in fact performed very badly. When he was MEC for Agriculture, he initiated and oversaw what has since become known as the Estina debacle or the Vrede farm debacle. That project is to be dealt with in one of the remaining parts of this Report. Anyone who wishes to read about Mr Zwane's role in regard to that project will be able to read it in the relevant part of the Report.

However, there is already a lot that is in the public domain about it and the South African public is fairly informed about it. When Mr Zwane was the MEC for Human Settlements, he was responsible for the Free State R1 Billion Housing Project that was simply a disgrace. Millions of rands which were meant for the building of houses for poor people in the Free State were paid out to various building contractors and other service providers by Mr Zwane's Department and yet either none or just a handful of houses were built. Millions of rands of taxpayers' money was effectively paid out to enrich service providers and was not used to build houses for people which was its purpose and Mr Zwane was the political head of the Department which did that.

1582. This is the man that President Zuma identified some time in 2015 as deserving of appointment as Minister of Mineral Resources in the national government – which was a huge promotion. President Zuma could have identified any one of the more than 200 ANC members of Parliament including the Chair and members of the Portfolio Committee on Mineral Resources – people who had experience in dealing with mineral resource issues but no – President Zuma overlooked all of those people and went out of his way to look for an MEC in the Free State Provincial Government who had been a complete failure in two of the Portfolios that he had been given to lead. Mr Zwane had to be taken to the National Assembly and be sworn in as a Member of Parliament in order to be eligible for appointment as Minister of Mineral Resources. The question that arises about President Zuma's decision is why he chose Mr Zwane above all the eligible ANC members of Parliament. What is it that President Zuma thought none of the more than 200 ANC members of Parliament could do that he thought Mr Zwane could do or was it that he thought that Mr Zwane could do better than anyone of them?

1583. The answer is that there was nothing and there could not have been anything that President Zuma could possibly have thought Mr Zwane could do better than all the more than 200 ANC Members of Parliament in terms of performing the legitimate,

constitutional and legal duties of Minister of Mineral Resources. Instead, there was every reason to believe that Mr Zwane should not have been allowed to continue as an MEC after the Vrede Farm/Estina debacle that he oversaw as MEC for Agriculture in the Free State. The ANC ought not to even have allowed him to be a Member of the Provincial Legislature— after that dismal performance. Yet, the ANC allowed him to not only continue as a member of the Provincial Legislature and as an MEC but they allowed him to be made MEC for Human Settlements after he had performed as poorly as he did as MEC for Agriculture. As MEC for Human Settlement, he performed even worse than he had done as MEC for Agriculture. Certain questions arise out of this. Some of these are: Where was the ANC as Premier Magashule continued to keep Mr Zwane as an MEC after these dismal performances? Why was Premier Magashule himself doing this? Was the ANC not monitoring the performance of its Premier and his MEC's? If it was, what did it think of all this? Why did it not intervene and say to Premier Magashule: what are you doing? How can you continue to have Mr Zwane as an MEC when he has performed so badly as MEC for Agriculture and as MEC for Human Settlements? Why was the ANC quiet?

1584. The reason why Premier Magashule continued to keep Mr Zwane as an MEC despite his dismal performance is probably connected with the reason why President Zuma identified him as most deserving to be appointed as Minister of Mineral Resources. There could have been no basis for President Zuma to have thought that there was anything that Mr Zwane could do better than Adv Ramatlhodi as Minister of Mineral Resources in terms of the performance of his constitutional, legal and legitimate duties as Minister of Mineral Resources. After all, there is no suggestion in Adv Ramatlhodi's evidence that President Zuma ever expressed any concern to him about his performance as Minister of Mineral Resources.

1585. Out of all evidence heard by the Commission that may be relevant to Mr Ramatlhodi's removal as Minister of Mineral Resources and the appointment of Mr Zwane as Minister of Mineral Resources the only reason that presents itself as the most probable reason why President Zuma chose Mr Zwane is that the Guptas wanted Mr Zwane for Minister of Mineral Resources and President Zuma also wanted somebody that had the blessings of the Guptas and who would co-operate with the Guptas. Minister Ramatlhodi had consistently refused to have anything to do with the Guptas and was not prepared to do any favours for the Guptas. On all the evidence, that is probably why President Zuma removed him as Minister of Mineral Resources and deceptively said to him he was promoting him to the position of Minister of Public Service and Administration. President Zuma and the Guptas wanted someone who would advance the Guptas' business interests and, in this connection, it must be remembered that the Gupta business interests were inextricably intertwined with the Zuma family business interests as represented by Mr D Zuma's partnership with the Guptas.

1586. The evidence before the Commission reveals that there was a strong connection or relationship between Mr Zwane and the Guptas. This is dealt with below.

1586.1. during or about October 2011, when Mr Zwane was the MEC for Agriculture and Rural Development, his department concluded a contract with Nulane Investments 204 (Pty) Ltd (Nulane), a company whose sole director was Mr Iqbal Sharma (Mr Sharma), a known associate of Mr Salim Essa and the Guptas;

1586.2. during or about June 2012, in the same capacity aforesaid, Mr Zwane admittedly promoted and initiated the establishment of a mega Vrede Integrated Dairy Project, with Estina (Pty) Ltd (Estina) as the service provider, a company whose sole director was Mr Kamal Vasram, an IT salesman with no

farming experience, with a cost to the Free State government of approximately R280 million, in which the Guptas benefited;

1586.3. Mr Zwane was instrumental in at least the first prepayment of R30 million to Estina, an amount believed to have been used to pay exactly R30 million bill for the Guptas' wedding at Sun City in April/May 2013;

1586.4. not long after the conclusion of the contract with Estina, Mr Zwane and his local Gospel choir undertook a trip to India in October 2012 which was paid for by the Guptas or their entities or associates. The choir's itinerary for the choir included a lunch at Mr Gupta's house on 16 October 2012;

1586.5. during or about March 2013, again as MEC for Agriculture and Rural Development, Mr Zwane provided an official invitation to a Minister in India that was used to facilitate the landing of an aircraft at the Waterkloof Air Force Base, in Pretoria, with guests for the Gupta wedding at Sun City;

1586.6. prior to his appointment as a Member of Parliament, Mr Zwane was invited to several meetings with Mr Tony Gupta in the period 2012 to 2014;

1586.7. during 2013 and 2014, Mr Zwane undertook overseas trips to India, Dubai and Switzerland with, *inter alia*, Mr Tony Gupta and Mr Salim Essa;

1586.8. prior to his appointment by President Zuma as Minister of Mineral Resources on 23 September 2015, Mr Zwane seems to have been vetted by the Guptas, as a copy of his CV was sent to Mr Tony Gupta on 1 August 2015 who then forwarded it to Mr Duduzane Zuma, President Zuma's son;

1586.9. as the Minister of Mineral Resources, Mr Zwane appointed Gupta associates as his special advisors, namely Mr Kuben Moodley and Mr Malcolm Mabaso;

- 1586.10. as the Minister of Mineral Resources, Mr Zwane abused his position by intervening in negotiations to secure the acquisition of Glencore's OCH/OCM by the Gupta-owned company, Tegeta;
- 1586.11. on his watch as the Minister of Mineral Resources, Mr Zwane's special advisors have according to Mr David Msiza, the Chief Inspector of Mines at the DMR,¹³⁷⁸ acted on his instructions to cause notices to be issued against Glencore-owned mines to suspend their mining licences, thus hampering mining operations and putting the mines under financial strain;
- 1586.12. during 2016, after the banks had closed the bank accounts of the Guptas, Mr Zwane as chairperson of the Inter-Ministerial Committee, played an active role in seeking to put pressure on the banks to reopen the bank accounts of the Guptas and issued a media statement in which he misrepresented what Cabinet had decided;
- 1586.13. when Mr Zwane met with Mr Glasenberg in Switzerland at the beginning of December 2015, he introduced Mr Salim Essa to Mr Glasenberg as his advisor when this was not true and the only reason why he did so is that he sought to assist the Guptas conclude a deal with Glencore with regard to their acquisition of OCM.
- 1586.14. as Minister of DMR, Mr Zwane was assisted by the Guptas and their associates in preparing his media statements and responses to questions raised by journalists; those who assisted him include Mr Tony Gupta, Mr Howa, D Zuma and the Gupta-hired PR firm, Bell Pottinger;

¹³⁷⁸ Exhibit U34, p 207-210.

1587. In the light of the above it can safely be concluded that Mr Zwane was a Gupta Minister in the sense that he must have been appointed at their instance or request or with their blessing.

The acquisition of the Optimum coal mine by Tegeta

1588. On 4 January 1993, a Coal Supply Agreement was concluded between Eskom and Trans-Natal Coal Corporation Limited and Trans-Natal Collieries Limited (TNC), in terms of which TNC undertook to supply the Hendrina power station with an annual volume of 6 500 000 tons of coal (with certain specifications) from the Optimum coal mine at a fixed price per tonne for a period of 25 years until 31 December 2018.

1589. Changes of control took place in relation to the Optimum coal mine. On 15 March 2006 Optimum Coal Holdings (Ltd) (OCH) was formed as a BBBEE coal mining and exploration company. Some time in 2008 OCH acquired control of Optimum Coal Mines (Pty) Ltd (OCM) which by then owned the Optimum coal mine. In 2011 Glencore acquired control of OCH and, accordingly, OCM.

1590. In a series of transactions between June 2011 and March 2012, Glencore, a multinational company with headquarters in Switzerland, acquired a majority stake in OCH, alongside other parties which acquired the remaining minority stake. One of the minority shareholders was Lexshell 894 (Pty) Ltd (Lexshell), a shelf company in which Mr Cyril Ramaphosa was the sole shareholder.¹³⁷⁹ OCH was the holding company of OCM, a company that operated a mine called Optimum Collieries and had supplied coal to Eskom since the 1970s.¹³⁸⁰ Mr Clinton Ephron (Mr Ephron), the CEO of Glencore's coal business in South Africa and a director of both OCH and OCM said:

“Prior to the acquisition of its interest in OCH, Glencore was not able to undertake a comprehensive due diligence exercise. In particular, Glencore only had publicly 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.”¹³⁸¹

¹³⁷⁹ CR3, p116 para 225.6.

¹³⁸⁰ Exhibit U5 p 352.89.

¹³⁸¹ *Id* p3 para 14, Exhibit U5.

1591. Mr Ephron continued to explain in his affidavit to the Commission that, following Glencore's acquisition of an interest in OCH, differences continued to arise, on historically disputed issues, between OCM and Eskom, particularly in relation to the size and quality of the coal supplied to the Eskom Hendrina power station. However, Eskom continued to accept and use the coal.¹³⁸²

1592. In his oral evidence, Mr Ephron explained that over decades of its development, the mine had extended over 30km away from its inception point and the ore was no longer representative of the coal originally produced. To bring the coal back along its 30km stretch required a conveyor belt system of the length that contained many change-over points and inevitably the size of the coal would break down along the route.¹³⁸³

1593. Protracted negotiations took place between Eskom and OCM. Failure by OCM to adhere to specifications in relation to coal entitled Eskom in certain circumstances to deduct penalties from the invoiced amounts of coal deliveries.

1594. At that time about half of OCM's coal was supplied to Eskom. The price at which OCM was selling coal to Eskom pursuant to the Coal Supply Agreement was significantly below the cost of production. In April 2013 OCM invoked the relevant provisions of the Coal Supply Agreement to issue a formal request to renegotiate the coal sizing provisions with Eskom.¹³⁸⁴ By July 2013 and following a post-acquisition review on coal price, OCM considered that the Coal Supply Agreement was no longer commercially viable, as the sale price was significantly lower than the production cost. Based on March 2013 invoice prices, OCM was losing approximately R150 p/t on coal supplied, the equivalent of R829 million per annum.¹³⁸⁵

¹³⁸² *Id* p3 para 15.

¹³⁸³ Transcript 27 February 2019, pp 40-41.

¹³⁸⁴ Mr Ephron's affidavit *supra*, p3 para 15

¹³⁸⁵ *Id* p 4 para 17.

1595. The Coal Supply Agreement between Eskom and OCM contained a hardship clause that provided that “in entering into this agreement the parties declare [it] to be the intention that this agreement shall operate between them with fairness and without undue hardship”,¹³⁸⁶ and then laid out the process to be followed with Eskom when such hardship materialises. OCM invoked the hardship clause. On 12 December 2013 it concluded a Hardship Arbitration Agreement with Eskom, referring a hardship dispute to arbitration.¹³⁸⁷ Pending the hardship arbitration, the parties engaged in discussions on various other disputes concerning penalties, delivery shortfalls and other alleged breaches of the Coal Supply Agreement.¹³⁸⁸

1596. While the mine was controlled by Glencore, it was making a substantial loss. This was because Glencore had become party to the Coal Supply Agreement with Eskom which obliged Glencore to supply coal to Eskom at Eskom's Hendrina power station at prices far below the market rate.

1597. The supply of coal from the Optimum coal mine was commercially critical to Eskom because Optimum's coal could simply be loaded on conveyers at the mine which unloaded the product at the power station. For coal from any other source, Eskom would be forced to pay for road haulage which would significantly raise the price to Eskom.

1598. For many years prior to the events of 2015, Eskom and Glencore had disputes about the coal price. However, these disputes were all eventually settled and the coal supply from the Optimum coal mine to Hendrina power station continued without interruption.

¹³⁸⁶ Exhibit U5, p 71 - clause 27 of the Coal Supply Agreement.

¹³⁸⁷ Mr Ephron's affidavit *supra* at p4/18.

¹³⁸⁸ Mr Ephron's affidavit *supra* p4/18-19.

1599. A large dispute developed. The dispute about whether the coal price ought to rise and by how much was complicated by a further dispute about the quality of the coal supplied. The quality dispute revolved around two complaints made by Eskom: that the abrasiveness index of the coal supplied was too high and that the size of the individual coal lumps supplied did not meet the specifications laid down in the Coal Supply Agreement. Eskom calculated its penalty entitlement at R2.1 billion but this figure was disputed by Glencore. This two-pronged dispute was negotiated over a lengthy period and arbitration proceedings were initiated but put to one side while the negotiations proceeded.

1600. In early 2014, Eskom approached OCM with a proposal to suspend the Hardship Arbitration and allow for a period of negotiations on the hardship claim and other disputes. OCM agreed. On 23 May 2014 OCM/OCH and Eskom entered into a Cooperation agreement (the Cooperation Agreement) providing for a process to further negotiate potential amendments to and an extension of the Coal Supply Agreement, as well as a possible settlement of disputes in relation to the hardship and penalties.¹³⁸⁹ Certain interim arrangements were put in place, including the suspension of the penalties, and Eskom continued to accept coal from OCM.

1601. By early 2015 it appeared that significant progress had been made toward resolving the dispute. For this purpose, Glencore provided substantial confidential information to Eskom regarding its supplying Eskom with coal at a loss. This enabled Eskom to evaluate the commercial worth and production capacity of the Optimum coal mine with far greater accuracy than, say, one of Glencore's competitors could have done. The parties to the Coal Supply Agreement had from time to time modified the terms of the Coal Supply Agreement by addenda. They had concluded three addenda and had co-operated in drawing up a draft fourth addendum. The terms of the proposed settlement

¹³⁸⁹ *Id* p4/20.

agreement were approved by Eskom's executive procurement committee. This level of approval was subject to the consideration of Eskom's Board Tender Committee, which was scheduled to meet on 15 April 2015. The Eskom executives supported the settlement.

1602. On 17 April 2015 Minister Brown announced that Mr Brian Molefe had been seconded from Transnet to Eskom as the Acting Group Chief Executive Officer (Group CEO). This secondment of Mr Brian Molefe from Transnet to Eskom took place just over a month after the suspension of four Eskom executives including Mr Tshediso Matona who was Eskom's Group Chief Executive Officer. It would have been this public announcement that would have reminded Mr Henrie Bester of what Mr Salim Essa had told him way back in 2014 at Melrose Arch, Johannesburg. According to Mr Bester Mr Salim Essa had told him that they (i.e. the Guptas and their associates) had already decided by then that Mr Brian Molefe would be the next Group CEO of Eskom. Mr Bester told the Commission that Mr Essa was telling him this in 2014 as a way of showing how powerful they were. Mr Bester testified that he had not taken what Mr Essa said seriously but, when he heard the announcement that Mr Brian Molefe had been seconded to Eskom, he realised how powerful the Guptas were.

1603. Mr Molefe became the acting Group CEO of Eskom on 20 April 2015. The Board referred the matter to Mr Brian Molefe to handle as the Acting Group CEO. After Mr Molefe became the Acting Group CEO of Eskom on 20 April 2015 the terms of the settlement negotiations between Glencore and Eskom changed drastically. Mr Brian Molefe insisted that Eskom would hold Glencore to the terms of the Coal Supply Agreement as they were then and would not agree to an amendment of the Coal Supply Agreement. Mr Brian Molefe terminated the negotiations with Glencore. There is a dispute between Mr Ephron, on the one hand and, Mr Brian Molefe and Mr Koko, on the other. Glencore argued that Eskom's intransigence led to the breakdown in the

negotiations. The Eskom officials argued that Glencore was unreasonable in its demands.

1604. Mr Ephron testified that he understood that, prior to Glencore's acquisition of interest in OCM, he understands that the export operations of OCM had generally subsidised the price at which coal was supplied locally to Eskom pursuant to the Coal Supply Agreement.¹³⁹⁰ However, the export coal price began to decline in 2012, to a level at which it became impossible for OCM to operate profitably on the same basis. Following OCM's review of its operations, OCM commenced a process, in January 2015, to consider the closure of the opencast section of the Mine for the export market. The closure was effected in July 2015.¹³⁹¹ For this reason, Mr Ephron has denied Mr Koko's evidence that OCM had invoked the hardship clause due to a downturn in the export market.

1605. Commenting on the criticism against OCM for the hardship, Mr Johann Bester, a former employee of Eskom,¹³⁹² said the following in his supplementary affidavit to the Commission:

“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.”¹³⁹³

¹³⁹⁰ Mr Ephron's affidavit *supra* p5/22-23.

¹³⁹¹ *Id* p5/25.

¹³⁹² Employed as General Manager: Fuel Sourcing during 1 December 2010 to 20 August 2015; Mr Johann Bester's first affidavit to the Commission, exhibit U4, p 4-5.

¹³⁹³ Exhibit U34, p 1464, para 10. See also, in the same affidavit, from paras 11 to 27.

1606. However, with its deep pockets, Glencore continued to fund the Optimum coal mine and supplies to Hendrina power station were not interrupted. However, the standoff with Eskom continued.

Mr Brian Molefe assumes control and ends negotiations with OCM - The Guptas then emerged from cover

1607. After many months of negotiations, and an expert assessment of OCM's financial position commissioned by Eskom, it appears that Glencore and Eskom arrived at a recommended position, during March 2015, which included an increase in price to R442 coal per tonne (said to be intended to cover costs only, with no profit margin for OCM).¹³⁹⁴

1608. Eskom's Executive Procurement Committee gave its approval for the management team to conclude the negotiations in March 2015. However, when the matter went to the Board Tender Committee in April 2015 for its approval, the Board Tender Committee, chaired by Ms Nazia Carrim, deferred the matter to the Board to decide, and then the Board itself decided to refer the matter to the new Acting Group CEO, Mr Brian Molefe at a meeting on 23 April 2015. This was then followed by Mr Brian Molefe assuming control of the matter to decide – in his own words – 'as he saw fit',¹³⁹⁵ and with no apparent pressure by the Board at any stage for the matter to be referred back to it,¹³⁹⁶ even though certain members of the Board testified that the Board expected Mr Brian Molefe to report back to it before making a final decision.

1608.1. Mr Brian Molefe had only been in his position for less than a week, and had no background in the coal industry, in electricity supply or in Eskom's business at

¹³⁹⁴ Expert assessment undertaken at Eskom's behest by Nedbank and Basis Point Capital, cf: Exhibit U34, supra p 1479/45 & p 1481/51.

¹³⁹⁵ Transcript 2 March 2021, p 18.

¹³⁹⁶ Exhibit U 4, p 145.

all. Despite this, he personally usurped the powers of the experienced coal contract managers who were responsible for the negotiation process, sidelining them from any further involvement.

1608.2. As dealt with earlier, Mr Brian Molefe had in fact been transferred to Eskom under dubious circumstances where the previous Group CEO, Mr Tshediso Matona, and other executives had, for no valid reason, been suspended and then exited from Eskom.

1608.3. It is not an accepted business practice at Eskom that any transaction adjudication be referred to an individual for decision-making.¹³⁹⁷

1609. Mr Brian Molefe adopted a stance that there would be no renegotiation of the Coal Supply Agreement terms with OCM and proceeded to terminate the Cooperation Agreement by letter dated 10 June 2015, but delivered only on 22 June 2015,¹³⁹⁸ and insisted that a penalty claim of R2.17bn be put to OCM/Glencore for immediate payment.¹³⁹⁹ Mr Brian Molefe has claimed a number of reasons for this unsympathetic stance towards Glencore/OCM:

1609.1. that it was not just OCM that was experiencing hardship, but that Eskom, too, was experiencing hardship;

1609.1.1. While this may be true, it would seem that, according to Mr Ephron, it needed to be weighed against the real prospect of OCM not being able to operate and thus supply coal to Eskom, resulting in a significant risk to electricity supply to the country. The extent of the losses is evident in that

¹³⁹⁷ Exhibit U4, p 144.

¹³⁹⁸ Mr Ephron's statement *supra*, p9/36.

¹³⁹⁹ That was done by CDH by letter dated 16 July 2015. See Mr Moodley's affidavit, p893/29, EB14(d); also Ephron's statement *supra* p10/42.

Glencore began subsidising the operation at an estimated R48 million for January and February 2015 alone – in addition to having utilised all of the R2.5 billion loan facility available to Optimum from its banks;¹⁴⁰⁰

1609.2. that there was no threat to electricity supply because in a country with “400 years of coal” there was not a security problem; Eskom could explore alternatives;

1609.2.1. However, according to Mr Johann Bester, Eskom’s General Manger: Fuel Sourcing at the time, alternative coal supply to the Hendrina power station from other mines would have to be trucked in at an estimated total cost of R450 per tonne, and with the stations having to accommodate 1,000 truck deliveries a day, for which Hendrina power station and its surrounding roads were not built to accommodate;and¹⁴⁰¹

1609.3. that Glencore was at fault for not having done due diligence when considering taking over the mine, and that Eskom should not pay for this.

1609.3.1. that according to Mr Ephron, the fact that coal specifications could change as a mine was developed over the long-term was an industry reality that appeared to be the very reason why Eskom’s Coal Supply Agreement included the hardship clause to ensure conditions of “fairness and without undue hardship” and other clauses that allowed for renegotiating Eskom’s coal supply contracts as circumstances change;¹⁴⁰² Mr Gert Opperman also testified that Glencore was entitled to request a renegotiation of the sizing specification, according to the First Addendum of the Coal Supply

¹⁴⁰⁰ Transcript 27 February 2019, pp 40-73.

¹⁴⁰¹ Transcript 12 March 2019, p 40 and Transcript 8 March 2019, p 78. See also Mr Johann Bester’s supplementary affidavit *supra* EB18 p 1473/37 & p 1483/57-62.

¹⁴⁰² Transcript 27 February 2019, pp 40-41.

Agreement;¹⁴⁰³ Mr Johann Bester asserted that no amount of due diligence could have in any case accurately forecast international commodity prices, not least the low international prices that prevailed between 2014 and 2015, which had almost halved since 2011;¹⁴⁰⁴

1609.4. that while lower coal export prices may have been the cause for OCM's lower overall profitability, it was not fair for Eskom to pay for this as Eskom did not benefit when coal export prices were high and when Optimum was allegedly experiencing "super profits".¹⁴⁰⁵

1609.4.1. that the question may rather be why OCM or its previous owners did not try to rectify the problem sooner. Mr Johann Bester asserted that, had the mine still been owned by the previous owners, the low export prices would have made it uneconomical even for them to export coal,¹⁴⁰⁶ and that the losses were not sustainable. Mr Johann Bester further stated that OCM's export operations were only able to cross-subsidise the Eskom supply contract at an international coal price over USD75 per tonne; but the international price had fallen to USD60 per tonne by January 2015.¹⁴⁰⁷ This point seems to be buttressed by the fact that, once Tegeta acquired ownership of OCM, Tegeta also sought relief from Eskom, and not long thereafter went into business rescue in February 2018 and ultimately closed down.

1609.4.2. that further, Dr Pat Naidoo, an Eskom board member at the time, testified that Eskom was paying an exceptionally low price for OCM coal supply

¹⁴⁰³ Transcript 8 March 2019, p 26.

¹⁴⁰⁴ Exhibit U34, *supra* p 1464 para 10.

¹⁴⁰⁵ Exhibit U38, p 26 para 84, read with Mr Molefe's opening statement p 3/11.

¹⁴⁰⁶ Exhibit U34, *supra* p1464 para 10 and p1469 para 25 – Mr Johann Bester's assertion that irrespective of who owned the mine, Optimum mine would still have experienced hardship with the low coal prices being experienced.

¹⁴⁰⁷ *Id* p467 para 20-22.

to Hendrina power station, relying on the low-price contract OCM to be “a cash machine for Eskom”; hence it may not be surprising that it began to cause hardship for the mine’s owners.¹⁴⁰⁸

1609.5. that OCM was a “cost-plus” mine where Eskom would have provided the original capital for the development of the mine, and so it was even more unfair that Optimum could just benefit from exporting the export quality coal and operating the mine, whilst Eskom had provided the capital.

1609.5.1. that this argument gave a false impression as, according to Mr Johann Bester, OCM was no longer a “cost-plus” mine and had not been so since 1993, which is when it began trading on a “fixed-price” contract with Eskom, as did many other mines.¹⁴⁰⁹ At the point at which this happened, OCM’s owners would have taken over the responsibility for providing capital, which arguably would certainly have been needed as the mine developed over its 30km stretch.

1609.6. that Eskom had a contractual right to enforce the existing contract terms.

1609.6.1. that this assertion overlooks the fact that the Coal Supply Agreement also contained an enforceable hardship clause that could and was invoked by OCM on the basis that OCM’s circumstances had triggered reliance on that clause.

1609.6.2. that the more important matter for Eskom, apart from honouring the hardship clause, was whether attempting to stick to such terms would be

¹⁴⁰⁸ Transcript 10 February 2021, pp 16-17.

¹⁴⁰⁹ Exhibit U34, *supra* p1465 para 13-19.

in Eskom's interests if it meant the mine could not operate. Mr Johann Bester pointed out in his supplementary affidavit to the Commission that:

"Further, what Mr Molefe does not mention is that I had set out that the alternative would be far worse and would cost Eskom and the country even more, which we now know has cost Eskom and the country dearly. But we cannot forget the cost to the people in the town of Hendrina, the Optimum Mine employees and their families, thousands of individuals have been directly affected and have lost everything."¹⁴¹⁰

1609.7. that Eskom had a contractual right to R2.17 billion in penalties because it had been owing for years and it was not clear why Eskom was reluctant to recover it, when it was a requirement of the PFMA that entities collect all revenue due to them and would otherwise be inconsistent with Eskom demanding that the residents of Soweto should pay their debts to Eskom.

1609.7.1. It appears from Ms Daniels' evidence and that of Eskom's lawyers, Cliff Dekker Hofmeyr (CDH), that Mr Brian Molefe and other senior managers would have been advised that the full R2.17 billion was not claimable. The reasons for this lay in the methodology employed in the calculations, the veracity of the underlying evidence and, ultimately, that Eskom had essentially waived its rights by, for instance, continuing to accept coal from OCM.¹⁴¹¹ However this was not a waiver. There was a clause in the agreement that meant that, if Eskom did not give notice of the defect within a certain time and in writing, it could not thereafter pursue any claim and Eskom could not prove that it had given such notices.

1609.7.2. Mr Brian Molefe testified that he had been told by Mr Snehal Nagar (Mr Nagar) that the R2.17 billion was a legitimate claim. However, this was

¹⁴¹⁰ *Id* p1485/66.

¹⁴¹¹ Exhibit U35.1 p 891 para 22.

not supported by Mr Nagar, whose evidence was to the effect that he had found that only R1.17 billion of penalties could be calculated and not all of this was claimable.¹⁴¹²

1609.8. that Glencore/OCM's threat that they may have to resort to shutting down the mine was not credible and was designed to instil fear in Eskom (of more load-shedding) as a negotiating tactic to get better terms for themselves.¹⁴¹³

1609.8.1. It appears not to have been in dispute that OCM was operating at below cost and not sustainable as a business. Eskom's managers, its advisors and indeed Mr Brian Molefe too, had been given open access to OCM's books to verify the claims for themselves. Mr Brian Molefe did not deny that OCM was operating at below cost, appearing in his arguments to accept it as fact, and, therefore, it could be argued that shutting down the mine should not have appeared to be an unreasonable prospect.¹⁴¹⁴

1609.8.2. According to Mr Johann Bester, if OCM had managed to supply to Eskom under the current terms until the end of 2018, when its contract expired, they could then decide to cut their losses and no longer supply Eskom, or else decide to offer at only a very high price, given how they had been treated by Eskom before, and which they would be in a position to dictate. Therefore, it was better to pre-empt those possibilities by maintaining goodwill and negotiating a new contract price that allowed the business to be sustainable.¹⁴¹⁵

¹⁴¹² Exhibit U34, p 139-140 para 7.8-7.9.

¹⁴¹³ Exhibit U38, *supra*, p 28 para 90.

¹⁴¹⁴ First Assessment referred to in Exhibit U34 *supra* p1479 para 45 and Second Assessment referred to in Mr Rishaban Moodley's affidavit *supra* p894 para 33 & p936-939 para 76-84.

¹⁴¹⁵ Transcript 12 March 2019, pp 28-30.

- 1609.8.3. Even when OCM and OCH went into business rescue in August 2015, and the business rescue practitioners insisted that OCM could not operate at the existing contract price level, this did not change Mr Brian Molefe's stance. This is peculiar as Mr Brian Molefe should have known that the BRPs would be obliged to close down the operations, if not liquidate the mine, if they could see no reasonable prospect of returning the mine to profitability. This stance stands in stark contrast to how Eskom would favourably treat Tegeta after it acquired OCH, as will be shown below.
- 1609.8.4. It appears that Mr Brian Molefe took a hard stance from the beginning, being unwilling to interact with Glencore, ignoring letters and meeting requests - and making his decisions unilaterally without much internal consultation first.
- 1609.9. that furthermore, there was an intention by Glencore to leverage the political influence of Deputy President, Mr Ramaphosa, who indirectly owned part of OCM and was Chairperson of OCM at one stage, and was Chair of the War Room.
- 1609.9.1. President Ramaphosa has confirmed that he indirectly held 9.64% of OCH through his company, Lexshell, for the period June 2012 to 22 May 2014, and that he was a non-executive Chairperson of OCH from June 2012 until he resigned in 6 June 2013. He asserted that he had no operational involvement in OCH or OCM during this time.¹⁴¹⁶

¹⁴¹⁶ Exhibit BBB3.1, President Ramaphosa's affidavit dated 24 May 2021, p117 para 225.9.

- 1609.9.2. President Ramaphosa refuted as false the evidence by Mr Brian Molefe and Mr Koko that Glencore had sought to involve him in a business relationship with OCM in return for his political influence, as Glencore did not first acquire shares in OCH/OCM and then sell a percentage to him. Rather, Mr Ramaphosa was, through Lexshell, part of a consortium with Glencore that acquired shares in OCH jointly.¹⁴¹⁷
- 1609.9.3. President Ramaphosa testified that he had disposed of his interests in OCH by the time of the events referred to by Mr Brian Molefe.¹⁴¹⁸ Furthermore he said that he did not attempt to influence Eskom's decision-making process in matters pertaining to OCM when he was Deputy President.
- 1609.9.4. President Ramaphosa has stated that he was not the Chair of "the War Room". Rather, he was assigned by then-President Jacob Zuma to oversee two intervention measures decided upon by Cabinet in December 2014.¹⁴¹⁹ The first intervention measure concerned the establishment and implementation of turnaround strategies for Eskom and two other SoEs (viz. SAA and the Post Office). President Ramaphosa's mandate was to ensure that there were credible, implementable and costed turnaround strategies in place, and his role was to chair an Inter-Ministerial Committee, which President Ramaphosa describes as a political supervisory role.¹⁴²⁰ President Ramaphosa says this assignment did not include involvement in Eskom's operational matters.

¹⁴¹⁷ *Id* President Ramaphosa's affidavit, p122 para 226.2.

¹⁴¹⁸ *Id* p124 para 230.

¹⁴¹⁹ CR3, *supra* p57 para 118.

¹⁴²⁰ *Id* p 57/118-119.

1609.9.5. The second intervention measure was a Five-Point Plan for Eskom in order to address the strain on the country's electricity system.¹⁴²¹ In order to implement the Five-Point Plan, a "Technical Implementation War-room on the Electricity Crisis", known as the "War Room", was established to focus on issues that required collaboration between departments and entities concerned, and resolve blockages where they occurred, relating to Eskom's short-term electricity supply shortages. "War Room" matters were dealt with by department officials, who were overseen in day-to-day matters by a set of Deputy Ministers. President Ramaphosa says he was not the Chair of "the War Room", although he had a role to play to provide political leadership, as he was the Chair of the Inter-Ministerial Committee on Energy, which coordinated energy-related work at a ministerial level.¹⁴²²

1610. Mr Koko further testified that Eskom could not agree to pay higher prices to OCH because the NERSA ruling on Eskom's allowed tariffs for the period of 2013/2014 to 2017/2018 left it in a position where it would not have the available budgeted funds to do so.¹⁴²³

1610.1. However, even if this were an accurate view of how tariff regulation affected Eskom's expenditure, this did not seem to have been a relevant factor later on when Tegeta was taking over OCM and was offered higher prices on coal supply, or when Eskom approved a prepayment of R1.68 billion and later R659 million to Tegeta.

¹⁴²¹ *Id* p 58/120.

¹⁴²² *Id* p 58/120 & p61/122.3.

¹⁴²³ Exhibit U27, p 68/252.

1611. Mr Koko also argued that Glencore/OCM failed to pursue arbitration because they feared they would lose as their reason for claiming hardship, viz. the closure of the export section of the mine, was expressly excluded by the Coal Supply Agreement as a valid reason for invoking the hardship clause.¹⁴²⁴

1611.1. As already shown from the facts above, Mr Koko's averment is not true.

1611.2. Further, Mr Ephron testified that, when hardship was declared, the mine was in full production, and this was long before the decision to cut exports. Moreover, Mr Ephron testified that it was the lack of sufficient price escalation under the Coal Supply Agreement that caused the financial hardship at OCM.¹⁴²⁵

1612. Mr Koko further asserted that Glencore/OCM chose to go into business rescue in order to avoid having to fulfil its coal supply obligations to Eskom.¹⁴²⁶

1612.1. Mr Ephron responded by saying that the mine was losing a significant amount of money because the annual price escalation given by Eskom had failed to keep up with mining inflation.¹⁴²⁷ He further pointed out that there had already been an extensive process that Glencore/OCM had been through over the previous three years with Eskom to get relief, and had been suffering significant losses already that required financial funding. Further, there was a feeling at Glencore/OCM that Eskom was just trying to put the maximum pressure on Optimum, that the R2.17 billion penalty claim was frivolous and that they were facing a disastrous situation which only business rescue practitioners could try to salvage. Mr Ephron said Eskom knew that OCM was experiencing hardship; that Eskom had done a full due diligence on OCM and could see that it was "up

¹⁴²⁴ Transcript 19 May 2021, pp 12-13.

¹⁴²⁵ Transcript 10 June 2021, p 87.

¹⁴²⁶ Transcript 19 May 2021, pp 63-64.

¹⁴²⁷ Transcript 10 June 2021, pp 42-43.

against the ropes”, yet opted to hit the company with R2.17 billion in penalties they knew it could not afford. Thus, OCM was left with very little choice.¹⁴²⁸

1613. As a result of the termination of the negotiations process, OCM/Glencore says on 23 June 2015 it recommenced the Hardship Arbitration and the arbitration was scheduled for 16 to 27 May 2016.¹⁴²⁹ However, it would seem that this matter was overtaken by events, because on 10 December 2015, the sale of shares agreement for Tegeta to acquire OCH/OCM was entered into, and fully executed on 14 April 2016.

1614. The contentions of Mr Brian Molefe and Mr Koko above also fall away when regard is had to a series of events that occurred from September 2015, in terms of which OCM/Glencore resolved to honour the Coal Supply Agreement with Eskom.

1614.1. First, the Business Rescue Practitioners (BRPs) and Eskom concluded Interim Arrangements/Agreements in terms of which OCM continued to supply coal to Hendrina power station for the rest of the duration of OCM’s business rescue proceedings, from September 2015 to August 2016.¹⁴³⁰

1614.2. Second, at a meeting with, *inter alia*, Mr Koko at Eskom on 24 November 2015, Mr Koko was informed by the OCM/Glencore representative that Glencore had secured funding for OCM pending the outcome of the sale agreement with Oakbay/Tegeta and that there would be no interruption of coal supply to Eskom.¹⁴³¹

¹⁴²⁸ Transcript 10 June 2021, pp 53-54 & 62.

¹⁴²⁹ Exhibit U5, p 9/39.

¹⁴³⁰ Exhibit U35, p 894 para 32 and the annexures thereto. Exhibit U34, p 352.121 para 17-19.

¹⁴³¹ Mr Marsden *id* p352.128/35, Annexure PMM27 (Exhibit 11.1 p 148). See also Exhibit U27, p97/343 [p1014/76] and Annexure MMK15 p204 (e-207).

- 1614.3. Third, on 1 December 2015, Mr Koko was officially informed by letter from BRPs' attorneys, Werksmans that OCM's supply of coal to Eskom [in terms of the interim agreement] had been extended to 31 January 2016.¹⁴³²
- 1614.4. Fourth, again on the same day, 1 December 2015, at another meeting with Mr Koko, Mr Marsden and Mr Ephron informed Mr Koko of Glencore's final decision to take OCM out of business rescue and fund it to honour the Coal Supply Agreement with Eskom until the expiry of the Coal Supply Agreement by the end December 2018.¹⁴³³ This development was to be quickly overtaken by what transpired at two meetings convened by Minister Zwane on 1 and 2 December 2015 at Zurich, Switzerland, where the sale of OCH/OCM to Tegeta/Oakbay was agreed upon.

1615. Therefore, by the time Mr Koko and his colleagues engaged in drafting the 8 December 2015 submission, for a prepayment of R1.68billion to Tegeta, and caused it to be presented to the Board for an urgent round robin resolution, Mr Koko, in particular, would have known that the contractual situation with OCM had changed and that his motivation for the prepayment was false and misleading,¹⁴³⁴ on a number of respects,¹⁴³⁵ as will be shown later below.

The Gupta's offer to purchase as pressure intensifies

1616. From 1 July 2015 onward, the Guptas, through their company Oakbay Investments (Pty) Ltd (Oakbay Investments), started negotiating with Glencore to buy the Optimum coal mine. Initially, Glencore was not interested in Oakbay Investments' approaches.

¹⁴³² Exhibit U27 *supra* p101/356 Annexure MMK16, p 207 (e-210).

¹⁴³³ Mr Marsden *supra*, EB18(a), p352.130/38-41 & Ephron p352.111/92. See also Exhibit U27 *supra* p 101/357.

¹⁴³⁴ EB18, p527-531 (or e-851).

¹⁴³⁵ EB18, p281 (or e-284).

1617. In the midst of being denied further opportunity to renegotiate the contract, by letter received on 22 June 2015,¹⁴³⁶ Glencore began receiving offers from an interested party, which turned out to be the Gupta's Oakbay Investments (Pty) Ltd, to purchase OCM. The first offer came on 1 July 2015, through KPMG, which first said that its client wanted to remain anonymous.¹⁴³⁷ On objection from Glencore, KPMG revealed the client's identity and, on 25 July 2015, the parties concluded a confidentiality and non-disclosure agreement pursuant to which OCM/OCH provided Oakbay Investments with high level information concerning OCM.¹⁴³⁸

1618. By this time, Eskom had issued OCM with a letter of demand, on 16 July 2015, demanding immediate payment of the R2.17billion penalties.¹⁴³⁹ The demand was made for that amount despite Eskom's lawyers, CDH, having raised concerns, back in October 2013, regarding the merits of the claim and the methodology employed in calculating the penalties. Mr Rishaban Moodley, of CDH, explained in his affidavit, that Eskom itself was unclear as to how the penalty regime contained in the Coal Supply Agreement should be applied.¹⁴⁴⁰

1619. OCM and OCH went into business rescue on 4 August 2015, where the (BRPs) were tasked with returning OCM into a viable business or else placing it in liquidation. The pressure on OCM from Eskom continued as, according to Mr Ephron, Eskom withheld payment from OCM, for no justifiable reason, in the amount of approximately R58 million for coal delivery in July 2015 and again an amount of approx. R34million for coal delivered in August 2015 (a total sum of about R92 million), and refused requests to reopen negotiations on the contract with the BRPs.¹⁴⁴¹ Payments were withheld despite Eskom's letter to the BRPs, dated 14 August 2015, in which Eskom had agreed to make

¹⁴³⁶ Mr Ephron's statement *supra*, p9/36.

¹⁴³⁷ Mr Ephron's statement, p10/40.

¹⁴³⁸ Exhibit U5, p 11/44.

¹⁴³⁹ Exhibit U5, p 10/42.

¹⁴⁴⁰ Exhibit U35 *supra* p 891/22.

¹⁴⁴¹ Mr Ephron's statement *supra* p12/48. See also Mr Marsden's affidavit *supra* p352.121/15-16.

payment within 30 days of coal supply. Mr Ephron stated that payments were eventually made in June 2016, when Tegeta (a subsidiary of Oakbay) had become the owner of the Mine.¹⁴⁴²

1620. According to Mr Marsden, the BRPs had, as a result, no option but to suspend OCM's coal supply to Eskom and did so by letter dated 20 August 2015.¹⁴⁴³ In his affidavit, Mr Moodley, of CDH, explained that in reaction to the BRPs' said letter, he received instructions from Eskom to advise on, *inter alia*, the prospects of successfully launching an application to remove the BRPs and the effect of Eskom's refusal to negotiate with the BRPs on the terms of an Interim Agreement proposed by the BRPs.¹⁴⁴⁴ Mr Koko testified that these instructions were from him.¹⁴⁴⁵ A legal opinion secured by CDH from a senior counsel on 22 August 2015 advised,¹⁴⁴⁶ *inter alia*, that Eskom had no grounds to apply for the removal of the BRPs.¹⁴⁴⁷

1621. The Memorandum from Counsel was later, on Mr Koko's request,¹⁴⁴⁸ emailed to him by Mr Moodley, and Mr Koko forwarded it from his private email address, viz. matshela2010@yahoo.com, to infoportal1@zoho.com on 4 November 2015 at 23:46.¹⁴⁴⁹ This is a significant distinction from Mr Koko's email address, viz. KokoMM@eskom.co.za, that he used on 22 August 2015 when he forwarded the same Memorandum to Mr Brian Molefe.¹⁴⁵⁰ Mr Koko's email to "Business Man" (infoportal1@zoho.com) was forwarded by "Business Man" on 5 November 2015 to "Western": wdrsa1@gmail.com, an email address believed to be of Mr Rajesh 'Tony'

¹⁴⁴² Mr Ephron's statement *supra* p17/47.

¹⁴⁴³ Confirmed in Mr Moodley's affidavit *supra*, p934/71 EB14(d).

¹⁴⁴⁴ *Id* Mr R Moodley's affidavit p935/72.

¹⁴⁴⁵ Transcript 19 May 2021, p 26. See also Mr Koko's email to Mr Brian Molefe on 22 August 2015 at 22:30, p1577 EB18(b), attaching the Memorandum from Counsel and stating that he had given instructions to the lawyers to bring an interdict application and also to remove the appointed BRPs for Optimum.

¹⁴⁴⁶ EB14(d), p1089 (e-3821).

¹⁴⁴⁷ EB14(d), p1090, see p1100 of Memorandum from Counsel.

¹⁴⁴⁸ Mr R Moodley states in his affidavit that on 4 November 2015 he received a call from Mr Koko requesting Moodley to email to him a copy of Counsel's Opinion (being the Memorandum from Counsel), which Mr Moodley did at 15:02 on the same day. See EB14(d), p939/86 and p1089.

¹⁴⁴⁹ EB18(b), p1600.

¹⁴⁵⁰ EB18(b), p1577.

Gupta.¹⁴⁵¹ From the email address wdrsa1@gmail.com, the email was forwarded to Mr Ashu Chawla, a well-known associate of the Guptas. Mr Koko refers to an email that he sent to infoportal1@zoho.com on 4 December 2015 with a message “please give the Boss. The fight begins” which he says had a letter attached from Mr Joe Singh of Just Coal, which he explains was meant to bring to Dr Ngubane’s attention that Just Coal was resisting Eskom’s termination of its Coal Supply Agreement. Mr Koko claims no knowledge of why this email was forwarded to wrdsa1@gmail.com or whose address this is. Mr Koko makes no mention of an email of 4 November 2015 having to do with a legal opinion obtained from CDH regarding the possibility of removing OCM’s BRPs in any of his affidavits.¹⁴⁵²

1622. In claiming that, when he sent Counsel’s memorandum to infoportal1@zoho.com, *he thought he was sending it to Dr Ngubane, the Chairperson of the Board of Eskom, Mr Koko was being untruthful. He sought to mislead both the Commission and the public. As has been found elsewhere in this Report, the email address infoportal1@zoho.com was an email address used by Mr Salim Essa and Mr Koko knew that. When he referred to the “Boss” in that email, he was not referring to Dr Ngubane, he was referring to Mr Salim Essa.*

1623. Having received a “negative” opinion, Eskom, through Mr Brian Molefe and Mr Koko, called for a meeting with the BRPs.¹⁴⁵³ The meeting was convened at Eskom on 3 September 2015, but Mr Koko and Mr Brian Molefe insisted on having the meeting only with Mr Ephron and refused the BRPs into the meeting.¹⁴⁵⁴ At this meeting, Mr Koko and Mr Brian Molefe undertook and agreed to return to negotiations with OCM in good faith,¹⁴⁵⁵ and in consequence of that undertaking, Glencore agreed to provide further

¹⁴⁵¹ EB18(b), p1600.

¹⁴⁵² Exhibit U27, p 2168 para 447.

¹⁴⁵³ Mr Marsden’s affidavit *supra* p352.121/17; Mr Ephron’s statement *supra* p13/50 Exhibit U5 (CME).

¹⁴⁵⁴ Mr Marsden’s affidavit *supra* p352.121/17; Mr Ephron’s statement *supra* p13/50.

¹⁴⁵⁵ Mr Marsden’s affidavit *supra* p352.121/17. Mr Ephron’s statement *supra* p13/50-51.

funding, for the duration of negotiations, in order to enable OCM to continue supplying coal to Eskom. The BRPs also agreed to recommence the supply of coal to Eskom in terms of the Coal Supply Agreement. To that end, an interim arrangement was agreed upon that included Eskom waiving the imposition of penalties during the period of negotiations, i.e. 60 days.¹⁴⁵⁶

1624. Although the interim arrangement would later be extended, on several occasions, until August 2016 when OCM came out of business rescue,¹⁴⁵⁷ both Mr Marsden and Mr Ephron said that Eskom reneged from the fulfilment of the interim agreement and failed to engage in negotiations with OCM.¹⁴⁵⁸ A long-term proposal made by the BRPs to Eskom, on 17 September 2015, was rejected and there was insistence on compliance with the Coal Supply Agreement as it was and for OCM to settle the penalties claim in full.¹⁴⁵⁹

1625. This sharply focussed the commercial limits of Eskom's strategy, whatever might have been its legal strengths: without coal from the Optimum coal mine, Eskom would be put to enormous additional expense at a time when it was in financial peril and load shedding was a constant threat. Eskom was acutely aware of the political pressures which the ruling party in the government would face if it allowed the situation to develop.

1626. Eskom's commercial predicament was identified in a memorandum to which the Commission was referred by Mr Opperman. This memorandum was dated 17 November 2016 and was signed by the General Manager: Coal Operations, Mr Mazibuko, the Chief Procurement Officer: Group Commercial, and on behalf of Mr Koko. The memorandum stated in paragraph 10:

¹⁴⁵⁶ Mr Ephron's statement *supra* p15/52-53; Mr Marsden's affidavit *supra* p352.122/18-19.

¹⁴⁵⁷ Mr Moodley's affidavit *supra* p894/32 EB14(d). Mr Marsden's affidavit *supra* p352.122/19.

¹⁴⁵⁸ Mr Ephron's statement *supra* p14/54; Mr Marsden's affidavit *supra*, p352.123/23.

¹⁴⁵⁹ Mr Marsden's affidavit *supra* p352.123/23-24.

“Should Eskom consider [and] decide to implement the existing agreement Eskom would have to charge Optimum’s shortfall to supply penalties in the region of R585m. It is Eskom’s view that this will probably cripple the company and put it into liquidation. The next best alternative option for Eskom would exceed the cost of Hendrina Coal Supply. It therefore makes business sense to keep Optimum afloat and supplying Eskom at the current terms and conditions of the contract even if the supply is reduced”

1627. Events around this time and those that followed are both intriguing and perplexing, and evince some political interference seemingly in favour of the Guptas.

1627.1. On or about 1 September 2015, Mr Brian Molefe and Dr Ben Ngubane went to meet with Minister Ngoako Ramatlhodi, then Minister of Mineral Resources. Present in the meeting were also two other DMR officials, viz. Dr Thibedi Ramontja, then Director General (DG) of the DMR, and Mr Joel Raphela, then Deputy Director General (DDG) of the DMR. Minister Ramatlhodi’s evidence, the main features of which are confirmed by Dr Ramontja, is that Dr Ngubane requested him to suspend all mining licences of Glencore. When Minister Ramatlhodi asked for more time to consider the request, Dr Ngubane became impatient and said that he needed to brief President Zuma on the outcome of the meeting before the President was to leave for a BRICS meeting that afternoon; implying that he had been sent by President Zuma to make the request. Indeed, on that day President Zuma was flying out of the Country.

1627.2. Dr Ngubane and Mr Brian Molefe have both denied Mr Ramatlhodi’s version of the meeting and claim that they were there to persuade Minister Ramatlhodi to lift a suspension that had been placed on OCM on 5 August 2015 and that they were acting in the interest of securing continued coal supply to Eskom. However, the August 2015 suspension was lifted as soon as the underlying issues were resolved, on or about 7 August 2015, with the union. Both Mr Brian Molefe and Dr Ngubane could not provide a date for their meeting with Minister

Ramatlhodi, whilst Dr Ngubane's suggested date fell well after the lifting of the August 2015 suspension, some time in November 2015.

1627.3. Mr Ramatlhodi's version finds strong corroboration not only in the evidence of Dr Ramontja,¹⁴⁶⁰ but also in the media article of 07 August 2015,¹⁴⁶¹ shortly after the suspension was lifted, reporting that Glencore was to resume mining operations as the DMR had lifted the suspension. I am therefore satisfied that the versions of both Dr Ngubane and Mr Molefe on this issue must be rejected.

1627.4. Both Mr Brian Molefe and Dr Ngubane's versions also imply a level of concern that is completely absent just a few months later, in November 2015, when the DMR, under Minister Mosebenzi Zwane's watch, issued suspensions on several of Glencore's coal mines. It is notable that when defending himself on other issues (such as Exxaro's coal supply contracts), Dr Ngubane invoked the defence to the Commission that these are very specialised things that he would not know about and are dealt with at the relevant divisional level, yet here he got himself involved.

1628. On 22 September 2015, after President Zuma had returned from his overseas trip for a BRICS meeting, he called Minister Ramatlhodi to the President's official residence and informed him that he was moving him to the position of Minister of Public Service and Administration. On the same day, 22 September 2015, President Zuma announced the appointment of Mr Mosebenzi Zwane as the new Minister of Mineral Resources with effect from 23 September 2015. Minister Ramatlhodi believes that he was removed from his position due to his refusal to co-operate with the Guptas.

¹⁴⁶⁰ Exhibit U34, p 352.178

¹⁴⁶¹ Exhibit U34, p 352.184

1629. Negotiations between Glencore and Oakbay then resumed, following a revised offer from Oakbay Investments. This coincided with the event of 23 September 2015, when President Zuma appointed Mr Zwane as Minister of Mineral Resources in the place of Mr Ramatlhodi. The evidence given by Mr Ramatlhodi reveals that he was a Minister who had repeatedly refused to have anything to do with the Guptas. Firstly, he rejected the Guptas' invitation to have dinner with them. Secondly, he refused to meet with Mr Ajay Gupta when Mr Duduzane Zuma (Mr D Zuma) had approached him and asked him to have a meeting with the Guptas. The evidence led in this Commission demonstrated overwhelmingly that Mr Zwane was a Gupta associate and, in all probability, was appointed to the position of Minister of Mineral Resources because President Zuma and the Guptas wanted in that position a Minister who would facilitate the Gupta agenda. Glencore received offers for OCM from persons other than Tegeta. However, without the consent of Eskom, no transaction was feasible and Eskom made it plain to each of Tegeta's potential competitors for the purchase of OCM that it would not compromise on its claims against Glencore.

1630. During October 2015, Mr Brian Molefe advised Phembani Group (Pty) Ltd (Phembani), a company that had made an offer to acquire all the shares of OCH in OCM, that Eskom would not consent to the transaction unless Phembani agreed to take over the responsibility for the R2.17 billion penalty claim; a claim that would later be significantly reduced to R255 400 819.18, in favour of Tegeta and was in any event never fully paid by Tegeta, despite being given a period of 20 months to pay, from 1 April 2017 to 31 December 2018.¹⁴⁶² An amount of R133 781 381.48 remained outstanding in February 2018 when Tegeta went into business rescue.¹⁴⁶³ In any event, CDH had consistently raised concerns about the merits of the claim and its calculation.¹⁴⁶⁴

¹⁴⁶² Mr Rishaban Moodley's affidavit p928/60 & p429/64, EB14(d).

¹⁴⁶³ Mr Rishaban Moodley's affidavit *supra*, p430/64.

¹⁴⁶⁴ Mr Rishaban Moodley's affidavit *supra*, at p928/58.

1631. On 12 November 2015, the BRPs signed a non-binding Term Sheet with Oakbay/Tegeta for the proposed acquisition of the shares in OCM,¹⁴⁶⁵ based on Oakbay's non-binding indicative offer of R1.00 first made on 10 September 2015.¹⁴⁶⁶ Interestingly, in their correspondence with the BRPs, Oakbay advised that it was confident that Eskom's consent to Oakbay taking over the Coal Supply Agreement from OCM would be forthcoming.¹⁴⁶⁷
1632. During November 2015, Mr Ephron was contacted by Mr Raphela of DMR, for a meeting at Melrose Arch. At that meeting Mr Raphela indicated that the transaction with Oakbay/Tegeta should include not only OCM, but also other subsidiaries of OCH. The same message was to be repeated by Mr Koko in a subsequent meeting at Eskom on 24 November 2015, in the presence of Oakbay/Tegeta representatives and those of Glencore/OCM, where he said that Eskom would not consent to the acquisition unless the transaction included all the assets of OCH. Mr Koko did not dispute this evidence. This meeting had been arranged at the behest of Tegeta, as Eskom had expressed an interest in meeting with Oakbay representatives regarding the non-binding offer of 10 September 2015.
1633. While it was not unusual for the DMR to take an interest in transactions in the mining industry that were subject to their approval, Mr Ephron found it surprising that Mr Raphela appeared to have detailed knowledge of Glencore's negotiations with Oakbay Investments.
1634. A meeting was called with Eskom on 24 November 2015 in order to update them regarding the discussions with Oakbay. The meeting was attended by Mr Blankfield on behalf of Glencore, the BRPs, Mr Nazim Howa, Mr Ashu Chawla and Ms Ronica

¹⁴⁶⁵ Mr Ephron's statement *supra*, p18/71.

¹⁴⁶⁶ *Id* p14/55.

¹⁴⁶⁷ *Id* p14/57.

Ragavan on behalf of Oakbay and Mr Koko, Ms Daniels, Mr Edwin Mabelane and Dr Ayanda Nteta on behalf of Eskom. The meeting was chaired by Mr Koko and a minute was kept of the proceedings. Mr Koko stated Eskom's position that Eskom expected OCM to honour the Coal Supply Agreement until 2018 and that Eskom would not waive any penalties. Mr Koko further stated that Eskom would not provide consent to any transaction with Oakbay unless the transaction extended beyond OCM to include all assets of the OCH Group, including OCH's interest in the Richards Bay Coal Terminal, through Optimum Coal Terminal (Pty) Ltd (OCT) and Koornfontein. Mr Koko required Glencore to state by the end of that weekend whether this would be acceptable.

1635. Mr Koko's stated reason for insisting on a sale of OCH's interest in OCT and Koornfontein was that, without such a sale, OCM would not be a viable business. Mr Ephron considered that Mr Koko's position had some merit, but noted that it was the same message that he had received from the DMR earlier that month. Since a transaction with Oakbay appeared to be the only option at that stage, Glencore agreed to engage further with Oakbay in respect of a transaction for all the assets of OCH.

1636. Also on 24 November 2015, Mr Ivan Glasenberg, CEO of Glencore, received a call from Minister Zwane's office, that Minister Zwane would be visiting Switzerland and would like to meet with Mr Glasenberg.¹⁴⁶⁸ A meeting was ultimately scheduled for 1 December 2015, without indication of the purpose thereof to Mr Glasenberg.

1637. On 25 November 2015, Mr Ajay Gupta met with Mr Ephron to inform him of Oakbay's offer of R1 billion as a purchase consideration for OCH. On 26 November 2015, Mr Ephron advised Mr A Gupta that the offer was declined, as it was not sufficient to cover the significant debt of R2.5billion that OCM owed to the consortiums of banks.¹⁴⁶⁹ On the same day, at 14h00, Mr Ephron says the DMR issued a section 54 notice to

¹⁴⁶⁸ Exhibit U34, p352.170/38-41.

¹⁴⁶⁹ Mr Ephron's statement *supra*, p20/77-80.

Glencore's Koornfontein mine ordering immediate suspension of mining operations.¹⁴⁷⁰

Three more notices were to be issued during the next four days, to other mines in which Glencore had an interest, namely Wonderfontein Colliery, Tweefontein Opencast Mine and Goedgevonden Colliery.¹⁴⁷¹

1638. In his affidavit to the Commission, Mr David Msiza, Chief Inspector of Mines at DMR, explained how on 27 November 2015 he received a telephone call from Mr Malcolm Mabaso, one of the special advisors to Minister Zwane, asking Mr Msiza to urgently meet with him at the DMR offices.¹⁴⁷² At the meeting, Mr Mabaso informed Mr Msiza, *inter alia*, that complaints had been received about health and safety at the Glencore coal mines, but failed to provide details. Mr Msiza was not aware of such complaints. In the end, Mr Mabaso told Mr Msiza that Minister Zwane had issued an instruction for Mr Msiza to direct the Mpumalanga Regional Inspectors to conduct inspections at the Glencore coal mines, commencing on 28 November 2015, which was on a weekend.¹⁴⁷³ That is what led to further notices being issued.

1639. Mr Msiza explained further that during the course of the following week, Minister Zwane's two special advisors, viz. Mr Mabaso and Mr Kuberan Moodley (Mr Kuben Moodley), informed him that "they would like to direct how the inspections were conducted" and that Minister Zwane would decide when to lift any injunction if a Section 54 notice was issued. Mr Msiza stated that notwithstanding his objection, officials in the DMR continued to insist on controlling the conduct of the inspections and thereby interfered in the manner in which inspections were conducted.¹⁴⁷⁴

¹⁴⁷⁰ Mr Ephron's statement *supra*, p21/81-84.

¹⁴⁷¹ Mr Ephron's statement *supra*, at p21/82.

¹⁴⁷² Exhibit U34, p207/17.

¹⁴⁷³ *Id* p207/18-19.

¹⁴⁷⁴ Mr Msiza's affidavit *supra*, p209/25-27.

1640. In his affidavit, Mr Zwane denied that he had instructed officials to unfairly issue section 54 notices against Optimum.¹⁴⁷⁵ Mr Zwane defended the notices on the basis that they had been issued in the ordinary course of business, and claims that more notices were issued against Tegeta-owned Optimum Coal Mine during his tenure than any other mine.¹⁴⁷⁶ When asked about Mr Msiza's allegations, he claimed to have no knowledge thereof.¹⁴⁷⁷

1641. Mr Ephron explained Glencore's view of the section 54 notices as follows:

"Glencore was of the view that the Section 54 Notices had been issued and the inspections ordered for the purpose of pressurising Glencore in respect of Optimum. It was not clear to me at the time what the exact purpose of the pressure was, but I suspected that it was a warning to Glencore that there would be consequences for Glencore were it to allow OCM to go into liquidation and therefore that it must support the offer that we had at the time, which was the Third Oakbay Offer. What the Section 54 Notices also appeared to signal was that the DMR was prepared to jeopardise Glencore's other mines in response to how we were handling the Optimum negotiations."¹⁴⁷⁸

1642. Section 54 of the Mine Health and Safety Act No. 29 of 1996 (MHSA) provides:

"Inspector's power to deal with dangerous conditions

(1) If an inspector has reason to believe that any occurrence, practice or condition at a mine endangers or may endanger the health or safety of any person at the mine, the inspector may give any instruction necessary to protect the health or safety of persons at the mine, including but not limited to an instruction that-

(a) operations at the mine or a part of the mine be halted;

(b) the performance of any act or practice at the mine or a part of the mine be suspended or halted, and may place conditions on the performance of that act or practice;

¹⁴⁷⁵ Exhibit U41.1, p248/126.

¹⁴⁷⁶ *Id* Mr Zwane's affidavit p248/129.

¹⁴⁷⁷ Transcript 27 April 2021, p 62.

¹⁴⁷⁸ Mr Ephron's statement *supra*, p22/87.

- (c) the employer must take the steps set out in the instruction, within the specified period, to rectify the occurrence, practice or condition; or
 - (d) all affected persons, other than those who are required to assist in taking steps referred to in paragraph (c), be moved to safety.
- (2) An instruction under subsection (1) must be given to the employer or a person designated by the employer or, in their absence, the most senior employee available at the mine to whom the instruction can be issued.
 - (3) An inspector may issue an instruction under subsection (1) either orally or in writing. If it is issued orally, the inspector must confirm it in writing and give it to the person concerned at the earliest opportunity.
 - (4) If an instruction issued under subsection (1) is not issued to the employer, the inspector must give a copy of the instruction to the employer at the earliest opportunity.
 - (5) Any instruction issued under subsection (1)(a) must either be confirmed, varied or set aside by the Chief Inspector of Mines as soon as practicable.
 - (6) Any instruction issued under subsection (1) (a) is effective from the time fixed by the inspector and remains in force until set aside by the Chief Inspector of Mines or until the inspector's instructions have been complied with.”

1643. Mr Ephron stated that the Section 54 notices were lifted between 30 November 2015 and 9 December 2015, at a significant cost to the business.¹⁴⁷⁹

1644. Glencore considered its position in a telephone conference in which its relevant executives participated. The choices were to stop funding OCM and allow it to go into liquidation or to continue funding OCM for the life of the Optimum coal mine. It chose to continue funding. That would result in the termination of the business rescue as in those circumstances OCM would no longer be distressed.

1645. On 29 November 2015, after Glencore/OCH had declined Oakbay's R1 billion offer and had received Section 54 notices, Glencore held a meeting and decided to provide

¹⁴⁷⁹ *Id* p22/88.

further funding to OCM and OCH to operate in the normal course and allow the BRPs to terminate business rescue proceedings.¹⁴⁸⁰

1646. On 1 December 2015, the BRPs and Mr Ephron had a meeting with Mr Koko to inform him of Glencore's aforesaid decision, the effect of which was for OCM to honour the Coal Supply Agreement until its expiry in December 2018.¹⁴⁸¹ As Mr Marsden puts it, "OCM had effectively then conceded on everything Eskom had wanted".¹⁴⁸²

1647. It is also notable that Mr Koko sent an email to infoportal1@zoho.com containing information on Eskom's coal contracts.¹⁴⁸³ By reason of the finding made earlier in this report that that email address was used by Mr Essa, it can be said that by sending that email to that address Mr Koko was communicating with Mr Essa.

1648. There is a credible body of evidence that shows that Eskom officials fed Mr Salim Essa with confidential information that gave him, and therefore the Guptas, an advantage over others in relation to Glencore's situation and enabled the Guptas to adjust their dealings with Glencore to their advantage.

1649. One of the modes by which the transfer of information was effected was by email. It was proved to the satisfaction of the Commission that an email address infoportal1@zoho.com was used by someone whose alias was "Business Man". Many confidential documents were sent to this address by, amongst others, Ms Daniels, Dr Ngubane and Mr Koko. The person behind the alias "Business Man" was Mr Salim Essa. There were suggestions that "Business Man" was not a single individual but that is improbable and the evidence in that respect is contradictory. For example, Dr Ngubane said that he was told by Ms Daniels that "Business Man" was a Director-

¹⁴⁸⁰ Mr Ephron's statement *supra*, p22/89-91; Marsden's affidavit *supra*, p352.130/38-39

¹⁴⁸¹ Cf: EB15(a), Mr Koko's affidavit *supra* p101/357.

¹⁴⁸² Mr Marsden's affidavit *supra*, p352.130/41.

¹⁴⁸³ Mr Jabu Mabuza, Statement and Annexure, pp.JAM-521-523 (Exhibit U1).

General in the DPE, Mr Richard Seleke. Ms Daniels, however, denied telling this to Dr Ngubane and said that Dr Ngubane told her that “Business Man” was Mr Richard Seleke. Mr Koko said that Ms Daniels told him that “Business Man” was in fact Dr Ngubane, which she denied.

1650. The claim that “Business Man” was Mr Richard Seleke was coupled with the assertion by the Eskom officials who conceded that they had sent Eskom's confidential information to “Business Man”, that the information in question had been sent to Mr Richard Seleke as DG of the DPE. Therefore, they said, no breach of confidentiality had taken place. However, some of the emails received by Eskom officials from this email address or sent by certain Eskom officials to this email address were sent before Mr Richard Seleke became the DG of the DPE. This was put to Dr Ngubane to suggest that he could not have thought that he was sending emails to Mr Richard Seleke before Mr Richard Seleke was appointed DG of the DPE. Dr Ngubane could not explain this. This revealed him as having given dishonest evidence when he said that he had thought that the correspondence emanated from or that he was sending it to Mr Richard Seleke as DG of DPE.

1651. In addition, Mr Pamensky, an Eskom Board director who was also on the Board of Oakbay Resources and Energy (which is within the same group of associated companies as Tegeta, at the apex of which sat the Oakbay Investments, which held the controlling interest in them all),¹⁴⁸⁴ also emailed advice on 22 November 2015 to Mr Atul Gupta on negotiating the sale – specifically that they should include a condition precedent for Eskom to withdraw the R2.17 billion penalty or make it the seller's responsibility. Mr Pamensky also offered to get involved in the acquisition, stating: “I'm happy to get involved to assist with this acquisition and monthly monitoring/analyzing

¹⁴⁸⁴ <http://www.sharedata.co.za/sens.asp?id=262972>.

of all investments from today. I can meet anyone you require. If you need me in India or Dubai to discuss, I'll meet you there".¹⁴⁸⁵

1652. In his second affidavit to the Commission,¹⁴⁸⁶ Mr Pamensky stated that his statement above for Eskom's claim to be withdrawn or to be made the sellers' problem, meant to suggest to Oakbay Investments not to accept liability for Eskom's R2.17 billion claim, but to ensure that "the seller procure either that the arbitration claim is withdrawn or that the seller accepts liability for the claim".¹⁴⁸⁷ He further explained that "in no way was I suggesting that Eskom should withdraw its claim; the idea was that it should either come to an end by way of settlement or liability be assumed by Glencore".¹⁴⁸⁸ During his evidence, Mr Pamensky said that this was an interpretation given to him by his lawyers. However, "settlement" of the claim is not what he wrote in his email. He clearly stated: "please ensure that a condition precedent is that the R2 billion claim from Eskom is withdrawn". The seller (Glencore/OCH) could not have withdrawn what was not its claim, but Eskom's claim against the seller. Only Eskom could withdraw the claim.

1653. Mr Pamensky's explanation did not make sense. He clearly knew about the OCM/Tegeta transaction and was at pains to advise the Guptas, against Eskom's interests, to have Eskom withdraw the penalty claim, when Eskom's position was that whoever purchased OCM should also assume liability for the claim. It was for this very reason that Mr Brian Molefe had advised Phembani that Eskom would not consent to its purchase of OCH if Phembani did not assume liability for the penalties. Mr Pamensky was clearly conflicted, and his alleged recusal from decision making, in regard to the R1.68 billion pre-payment, would have amounted to nothing more than a charade.

¹⁴⁸⁵ Exhibit U39.2, p 693/26-27 & Annexure MPZ5, p717.

¹⁴⁸⁶ *Id* p693-695/27.3-27.5.

¹⁴⁸⁷ *Id* p694-695/27.4.

¹⁴⁸⁸ *Id*.

1654. On 10 December 2015, Mr Pamensky sent another email Mr Atul Gupta to congratulate him on the acquisition of OCH.¹⁴⁸⁹ This is what he wrote:

“Congratulations (Mazeltov) on a brilliant and well thought out, planned and strategized acquisition of the Optimum group of companies.

Well done and I'm proud of you all. This is only the beginning of the resource group growth and many more to come into play.

I'm more than sure that you and the team will make a huge success of this acquisition. I wish you all the success on the deal.

The hard work begins now and we as a team will produce the results. Let me know when you are ready to discuss the operational implementation. I'm truly proud to be part of this group.

Enjoy the well deserved holiday.

Mark”

1655. This email was sent on the same day that the OCH sale of shares agreement was concluded, which was also the same day on which Mr Anoj Singh secured the R1.68 billion guarantee in favour for Tegeta. Mr Pamensky stated that he came to learn about the transaction in the press. He asserted that there was no conflict of interest on his part, as he excused himself from Board meetings that were making decisions relating to Tegeta from early December 2015. However, he would still have been privy to confidential information, and given the wording of his emails above, this raises the question of whose interests he was concerned with, the Gupta coal companies' or Eskom's. From his emails, it can certainly be inferred that it was the Guptas' coal interests (and ultimately his own interest in the Guptas) that he was concerned with.

1656. On 1 December 2015, following the decision by Glencore to continue funding OCM, a meeting was held at Eskom's offices, attended by Mr Koko (representing Eskom), Mr Marsden (representing the BRPs), Mr Blankfield and Mr Ephron (representing

¹⁴⁸⁹ *Id* Mr Pamensky's 2nd affidavit p696/26 & Annexure MPZ6 p718.

Glencore). At this meeting it was conveyed to Eskom that the most recent Oakbay Investments offer had been rejected, that Glencore would continue to support OCM and that both OCM and OCH would be discharged from business rescue. Mr Koko was asked whether he was happy with the decision. Mr Koko replied to the effect that, of course, he was happy, as OCM would be honouring the Coal Supply Agreement. He conveyed the message to Mr Anoj Singh, Eskom's CFO, as the visitors left the meeting.

1657. At around this time, Minister Zwane, then Minister of Mineral Resources, travelled to Zurich, Switzerland to meet with Mr Glasenberg. Minister Zwane urged Glencore to sell the Optimum coal mine to the Guptas. The meeting between Minister Zwane and Mr Glasenberg also took place on 1 December 2015. Minister Zwane said that he had used government resources to advance the interest of these private individuals because he feared that OCM would go into liquidation and thousands of jobs would be lost. However, he must have known that Glencore had by the time of his meeting decided to fund OCM and Mr Glasenberg is said to have told this to Minister Zwane at their meeting.

1658. As Mr Ephron and Mr Blankfield were in the Eskom parking lot after their meeting with Mr Koko on 1 December 2015, Mr Ephron received a call from Mr Glasenberg to tell Mr Ephron that Minister Zwane had told him (Mr Glasenberg) that Mr Rajesh "Tony" Gupta (Mr Tony Gupta) wanted to meet Mr Glasenberg on 2 December 2015 in Switzerland and that he wanted Mr Ephron to join the meeting.

1659. Mr Ephron, accordingly, travelled to Switzerland on the same day and on 2 December 2015 meetings were held there regarding OCM. The first part of the meeting commenced mid-morning and was attended by Minister Zwane, Mr Salim Essa, Mr Tony Gupta, Mr Glasenberg and Mr Ephron. It was opened by Minister Zwane, who noted the importance of securing employment at the mine, expressed concern that the

mine should not enter a liquidation process and stated that the best outcome would be for Glencore and Oakbay to reach a deal. Minister Zwane then left the meeting. Mr Glasenberg and Mr Rajesh Gupta then negotiated on the transaction, reaching an agreed sale price of R2.15 billion for the mine and other assets of OCH, with Glencore agreeing to put in R400 million to settle the Consortium of Banks' debt. Mr Zwane stated that his motivation was trying to save mine-workers' jobs.¹⁴⁹⁰

1660. However, jobs of mineworkers were not at risk, as Glencore had finally decided to make funding available and take OCH/OCM out of business rescue and honour the Coal Supply Agreement with Eskom. According to Mr Glasenberg, Minister Zwane was informed of this fact.¹⁴⁹¹ In fact, the risk of job losses had been averted since 3 September 2015 when Mr Brian Molefe and Mr Koko agreed to an Interim Arrangement with Glencore/OCM and the BRPs; an arrangement that subsisted until August 2016.

1661. Even if such an intervention by the Minister were justifiable, it appears selective, given that, at the same time, Exxaro (a black-empowered mining company) had to close its Arnot coal mine operations and retrench 1 200 workers when Eskom decided not to renew their contract at the end of 2015. Minister Zwane appears to have not paid this matter any attention and, according to Exxaro, did not respond to their pleas for his assistance. Mr Mxolisi Mgojo, CEO of Exxaro Resources Ltd that supplied coal to Eskom's Arnot power station until December 2015, stated the following in his affidavit¹⁴⁹² to the Commission:

“On the same day [4 February 2016] we also wrote to Mr Mosebenzi Zwane, the then Minister of Mineral Resources, and Ms Nomvula Mokonyane, the then Minister of Water and Sanitation. In these letters we asked for the Ministers' assistance in expediting the grant of licences necessary to operationalise Exxaro's plan to

¹⁴⁹⁰ *Id* p244-245/116-119.

¹⁴⁹¹ Mr Glasenberg's affidavit *supra*, p352.172/58.

¹⁴⁹² Affidavit of Mr Mxolisi Mgojo to the Commission, dated February 2021. EB-18-1318.

reduce costs at Arnot. We pointed out that over a thousand jobs were at stake. But the Ministers did not respond to our letters.

Eskom's dramatic turnaround with respect to the termination date of the CSA occurred despite the fact that there were coal reserves (of approximately 70 million tons) that could be mined economically in terms of Exxaro's plan (which is referred to above). The termination of the CSA led to the closure of the Arnot mine and to the loss of around 1200 jobs"

1662. With the risk of OCM liquidation seemingly averted, there was no need at all for Minister Zwane to spend an extra day in Switzerland and attend a further meeting to make the same point. The true reason Minister Zwane attended the meeting on 2 December 2015 was to emphasise to Glencore that the SA government supported the Oakbay Investments offer to Glencore.

1663. Given the evidence above, Mr Zwane's evidence that his concern was the job losses is rejected. On the probabilities, he sought to assist the Guptas.

1664. There are other circumstances around the meeting that were peculiar:

1664.1. According to Mr Glasenberg, Mr Zwane arrived with Mr Salim Essa and introduced him to Mr Glasenberg as Mr Zwane's advisor¹⁴⁹³. Mr Zwane claims Mr Salim Essa was present in the meeting as a representative of Tegeta.¹⁴⁹⁴

1664.2. Mr Zwane thereafter travelled with the Guptas on their private jet to India. Mr Zwane testified that he did so because of a throat condition causing him to struggle with his voice and so the Guptas told him of a good doctor in India and offered to give him a lift as they were also going to India.¹⁴⁹⁵ From India, Mr Zwane travelled with the Guptas back to the Middle East where there is

¹⁴⁹³ Mr Glasenberg's affidavit supra p.349.170/38 and p.349.172/52-54.

¹⁴⁹⁴ Transcript 27 April 2021, p.17.

¹⁴⁹⁵ Transcript 27 April 2021, pp.18-19. See Zwane's affidavit, EB19 p353.225/9.1.14-9.1.15 where he says that he became sick during his stay in India, which is not the same as his explanation during oral testimony.

evidence to show that the Guptas paid for Mr Zwane to be chauffeured in BMW 7 series on 7 December 2015.¹⁴⁹⁶ Both the flight from Delhi to Muscat on 4 December 2015 and the chauffeur use in Dubai on 7 December 2015 was charged to Guptas.

1665. Mr Zwane maintained for a long time, even to Parliament, that he never attended the Switzerland meeting,¹⁴⁹⁷ and that he had not met the Guptas or their associates since being appointed Minister, which he has now clearly contradicted.

Preferential treatment to Tegeta as it sought to fulfil the sale conditions

1666. The second and third parts of the meeting were held to discuss the terms on which the Guptas would acquire Glencore's coal interest in South Africa. At that meeting, Glencore and Oakbay agreed in principle that Tegeta would buy Glencore's SA coal interest, including its rights in relation to OCT and Koornfontein, for R2.15 billion cash. This was a much higher offer made by Oakbay than the third offer.

1667. On 10 December 2015 a sales agreement was concluded for the Oakbay Investments' subsidiary, Tegeta, to purchase OCH and all its assets, including OCM. A number of suspensive conditions were included, to be fulfilled by 31 March 2016, such as obtaining various approvals, ceding the coal supply contract with Eskom, obtaining the consent of the Consortium of Banks to whom the R2.5 billion debt was owing, and transferring sufficient funds to meet the sale price. The latter two requirements meant that Tegeta had to prove that it had sufficient funds available. In April 2015 KPMG compiled a financial assessment of Tegeta for Eskom which stated that Tegeta "is not relatively sound enough financially to be awarded a contract of R4.3 billion for the supply of coal

¹⁴⁹⁶ EB19, p353.246 & p353, 255; EB19, p353.251 to p353.252.

¹⁴⁹⁷ EB19, Mr Theron's affidavit *supra* p353.30/51.

to Majuba power station over a period of ten years".¹⁴⁹⁸ Even Mr Koko appears to have been in doubt about Tegeta's financial capacity to survive after acquiring OCM/OCH.¹⁴⁹⁹

1668. The day before the sale agreement, the Eskom Board had on 9 December 2015 and by round robin, approved a prepayment R1.68 billion for coal from OCM to Hendrina, although it was then switched for a guarantee instead on 10 December 2015. The circumstances were highly unusual and vitiated by numerous irregularities and inexplicable or collusive behaviour as outlined in detail below.

Mr Koko's submission for a R1.68 billion pre-payment to Tegeta

1669. Ms Daniels gave evidence that on or about 4 December 2015, she received a request from Mr Koko for her to assist him in drafting a letter to the DG of DMR, Dr Ramontja, regarding OCM. Ms Daniels did so, drafting various versions whilst Mr Koko and Mr Raphela, of DMR, deliberated by email over the contents on 5 and 6 December 2015 (a weekend) until Mr Koko was satisfied to sign off on the final version dated 6 December 2015.¹⁵⁰⁰ Mr Koko then emailed it to Dr Ramontja and Mr Raphela on the evening of 6 December 2015, copying his Eskom colleagues, Mr Brian Molefe, Mr Mboweni, Mr Anoj Singh, and Ms Daniels.¹⁵⁰¹ These facts are common cause, in that Mr Koko's own evidence is the same.¹⁵⁰²

1670. It is unclear from the letter exactly what intervention Mr Koko wanted from the DMR. The letter created the impression that there was a credible threat of OCM stopping supply and being liquidated and that the DMR's assistance was needed.¹⁵⁰³ Yet, as

¹⁴⁹⁸ Transcript: 26 February 2019, pp.111-118.

¹⁴⁹⁹ Refer to the minutes of the meeting of 24 November 2015 where the minutes show that Mr Koko "questioned the financial strength of the new buyer that is, firstly would it be able to sustain a loss of ZAR 130M per month and secondly, how will the buyer survive?" EB15 Mr (Koko's bundle), p205 Annexure MMK15 to Mr Koko's affidavit.

¹⁵⁰⁰ Ms Daniels' affidavit on transactions, EB18(a), p240/17-19 and EB18, p424, p423, p425-8. EB15(a), Mr Koko's affidavit, p104/371 & Annexure MMK18 & MMK19, p212 & p215.

¹⁵⁰¹ EB18, p429, Koko's email to the DMR, Mr Joel Raphela and Dr Ramontja.

¹⁵⁰² EB15(a) p104/368-369, Mr Koko's affidavit to the Commission & p1018/84-85, Mr Koko's submissions to the Parliamentary Portfolio Committee.

¹⁵⁰³ EB18, p430-431.

already shown above, Glencore had agreed to fund OCM to the level that would allow it to come out of business rescue and to continue its coal supply to the end of its contract at the Hendrina power station,¹⁵⁰⁴ and Mr Koko was aware of this fact. However, he failed to disclose that the supply of coal had continued without issue since the Interim Agreement on 3 September 2015 and that there was no sudden “about-turn” of events as he alleged in his letter to the DMR.¹⁵⁰⁵

1671. Mr Koko admitted to having requested Ms Daniels to assist with drafting the letter, as well as the interactions with Mr Raphela of the DMR, before sending it to the DG.¹⁵⁰⁶ He said that he was working with DMR to solve a problem, and that there was nothing in law preventing him from doing so.¹⁵⁰⁷ However, he failed to explain the alleged problem, especially given Glencore’s decision above (firmly communicated to Mr Koko on 1 December 2015) to fund OCM and honour the Coal Supply Agreement until expiry date.

1672. Around 7 December 2015, Dr Ramontja found a pre-drafted response letter to Eskom for his signature in his in-tray.¹⁵⁰⁸ He says the letter came from the Minister’s office and was not drafted by him.¹⁵⁰⁹

1673. The sudden appearance of the letter was mysterious, as it had neither been requested by Dr Ramontja, nor had its contents been discussed with him by anyone in his department, which was not normal practice. The DMR draft letter strangely promised to fast-track the transfer of mining rights of Optimum, thus anticipating the requirements of the sale agreement that would be concluded only a few days later, on 10 December 2015. It moreover recommended that Eskom prepay for a year’s worth of coal from the

¹⁵⁰⁴ Transcript 13 March 2019, p 160-161.

¹⁵⁰⁵ EB18 p430.

¹⁵⁰⁶ EB15(a), Mr Koko’s Affidavit, p103/367-371 & EB18, p420 to 428 – emails exchanged between Mr Koko and Mr Raphela on 5, 6 & 7 December 2015.

¹⁵⁰⁷ Transcript 17 May 2021, p 357.

¹⁵⁰⁸ Transcript 14 March 2019, p 69. EB18, Dr Ramontja’s affidavit *supra* p 7/16-17 & p8/25.

¹⁵⁰⁹ *Id* Dr Ramontja’s affidavit p8/25.

'proposed owners" (viz. Tegeta/Oakbay) of the mine, none of which Eskom or Mr Koko had requested nor even mentioned in his letter.¹⁵¹⁰ Therefore, Mr Koko and Mr Raphela had anticipated the conclusion of the sale and conceived of a prepayment proposal in order to provide financial assistance to Tegeta.

1674. Dr Ramontja explained that he assumed the proposals in the letter resulted from his department's engagements over the Optimum matter, which then led them to come up with a proposal and include it in the response to Eskom.¹⁵¹¹ Dr Ramontja proceeded to sign the latter. However, he decided not to date it nor send it out yet, because there were still aspects he wanted to check on.¹⁵¹² Yet, the letter managed to leave his office and make its way to Eskom, undated.¹⁵¹³ Later enquiries revealed that there was no official record of the response letter ever coming in or out of his office, as would happen with all official correspondence.¹⁵¹⁴

1675. Ms Daniels testified that on 7 December 2015 Dr Ngubane, then Chairperson of the Eskom Board, called her and requested that she assist Mr Koko and Mr Anoj Singh in drafting a submission for the Board, and to convene a meeting of the Board.¹⁵¹⁵ Dr Ngubane denied that he initiated this, saying Ms Daniels was the one who had requested an urgent meeting based on Mr Koko's letter to the DMR.¹⁵¹⁶ Ms Daniels testified that she got the information from the two executives, worked on two versions¹⁵¹⁷ and then a final version, signed by both Mr Koko and Mr Anoj Singh, was returned to

¹⁵¹⁰ Exhibit U34, p430-431.

¹⁵¹¹ Transcript 14 March 2019, p 48.

¹⁵¹² Dr Ramontja's affidavit *supra* p7/16.

¹⁵¹³ EB18, p432-434: the signed but undated letter emailed to Mr Koko on 7 December 2015 at 17h23; p437-439: the signed and date letter emailed to Mr Koko on 7 December 2015 at 18h18.

¹⁵¹⁴ Transcript 14 March 2019, p 46-72.

¹⁵¹⁵ Ms Daniels' affidavit *supra*, EB18(a), p241/20.

¹⁵¹⁶ EB9 (Exhibit U19.1) Dr Ngubane's affidavit *supra* p53/12.3.

¹⁵¹⁷ EB18, p443: version 1 of the draft submission emailed to Mr Koko on 7 December 2015 at 15h16; p448: version 2 of the draft submission emailed to Mr Koko on 7 December 2015 at 15h58.

her with additions she did not make. This is supported by evidence obtained by the Commission.¹⁵¹⁸

1676. Evidence before the Commission shows that Mr Anoj Singh was involved in emailing a draft of the submission to Regiments officials or employees, *inter alia*, Mr Wood and Mr Mohammad Bobat, who made changes and sent the draft back to Mr Anoj Singh's office. Thereafter Mr Anoj Singh sent it on to Mr Koko to consider and for them both to sign. Mr Anoj Singh's proffered reason for this is that he wanted Mr Wood to look at the financial implications, as he was assisting with doing financial work at Eskom and he did not think Ms Daniels and Mr Koko had considered this adequately.

1677. However, there is no indication from the email contents that this is in fact what these external parties were doing. Moreover, it is notable that one of these external parties, namely "Business Man", was emailing instructions to Mr Wood, intended for Mr Anoj Singh that key governance requirements should be removed from the draft that Ms Daniels had earlier put in: this included obtaining PFMA approvals (such as from the Minister of Public Enterprises), as well obtaining Investment and Finance Committee approval for the prepayment before going to the Board. These instructions were evidently adhered to, as mention of both requirements were removed in the final version.

1678. It is to be noted that Mr Bobat appeared as one of the advisors to Mr Des van Rooyen when he was appointed as Minister of Finance after Mr Nhlanhla Nene was fired on 9 December 2015.

1679. The submission was emailed to the full Board on 8 December 2015 at 17h52, seeking an urgent approval, by round robin, by 9 December 2015 at 12h00, of a R1.68 billion

¹⁵¹⁸ Transcript 7 December 2020, p 37-48.

pre-payment. The submission was confusing as to who the payment should be made to. The title of the submission was “the pre-purchase of coal from Optimum Coal (Pty) Ltd”, and the content motivated that “(t)he proceeds of R1.68 billion prepayment of coal are to be used by OCM to extinguish liability to ensure that the business continues as a going concern”. However, the Resolution required was that “the Group Chief Executive together with Group Executive for Generation and Chief Financial Officer are hereby authorised to negotiate and conclude a pre-payment of coal agreement with the proposed owners of OCM (coal supplier)”. Another twist was that the submission also made reference to there being “a potential proposal from the business rescue practitioner supported by the Department of Mineral Resources” and that the solution related “to a prepurchase of coal to the value of R1.68 billion which mitigates supply risk”. This created the impression that the submission was meant to act on the proposal made by the BRPs when, in fact, this was not true.

1680. The submission reasoned that it was an emergency situation, where the prepayment was needed essentially to stabilise OCM’s ability to operate and thus secure a supply of coal to Eskom and prevent load-shedding. The alleged emergency did not make sense, as firstly, Glencore had committed itself to continuing subsidising OCM so that it could fulfil its obligations in terms of the Coal Supply Agreement, as was even mentioned in the submission itself; secondly, OCM was expected to come out of business rescue as a result of this commitment, but in any event being in business rescue had not stopped OCM from supplying coal to Eskom; thirdly, the prepayment agreement could not lock-in any security for Eskom over the coal inventory at OCM in the event that OCM was liquidated, as the Consortium of Banks had a general notarial bond that gave it security over OCM’s coal. That meant that no-one else could encumber the OCM coal and, fourthly, the BRPs retained control over OCM, and their consent should have been sought, but they were not even aware of the submission.

1681. A number of false and misleading aspects of Mr Koko and Mr Anoj Singh's submission may be summarised as follows:

1681.1. The submission was not for a pre-purchase of coal from OCM, as stated in paragraph 1 of thereof. No pre-purchase of coal was ever made from OCM, nor even from Tegeta, pursuant to a resolution taken in terms of the submission.

1681.2. Eskom did not face a risk of coal supply to the Hendrina power station (of 5.5Mtpa by OCM as a result of business rescue proceedings), as stated in paragraph 2.2.1 of the submission. OCM/Glencore had just committed to honouring the Coal Supply Agreement.

1681.3. As stated by Mr Marsden's, during the period December 2015 to April 2016 there was no material threat that OCH and/or OCfM would be placed in liquidation or that coal would not be supplied to Eskom in terms of the Coal Supply Agreement.

1681.4. In his affidavit, Mr Rishaban Moodley, an attorney from Eskom's lawyers, CDH, stated that the interim arrangement between Eskom and the BRPs for continued coal supply to Eskom persisted for the duration of the business rescue proceedings, from about August 2015 to July 2016.

1681.5. Further, Mr Marsden's evidence was that during or about January 2016 OCM had been informed by Mr Gert Opperman, Eskom's Coal Unit Supply Manager for Hendrina power station, that Eskom did not require the minimum contracted amount of coal, as the power station had excess stockpiles of coal. The surplus coal was thus sold to Tegeta to supply to Eskom at Arnot power station, during

January 2016 to April 2016, before Tegeta could acquire ownership of the OCM mine.

- 1681.6. There was no potential proposal from the BRP supported by the DMR, as stated in paragraph 2.2.2 of the submission. Mr Marsden denied Mr Koko's statement and confirmed in his second affidavit to the Commission that he had no knowledge of the alleged proposal or of any request for the pre-purchase of coal by Eskom, and that the BRPs had no engagements with the DMR on the proposals the DMR had made to Eskom, as referred to in the Submission.
- 1681.7. There could not have been any commercial benefit to Eskom, as alleged in paragraphs 2.2.5 & 2.2.6 of the submission. If anything, the submission secured commercial benefit only for Tegeta.
- 1681.8. It is not true that as at the date of Mr Koko's submission, namely 8 December 2015, Eskom had not received formal notification of the status of OCM from the BRPs, as alleged in paragraph 3.1.11. As apparent from the submission itself, paragraph 3.1.9, on 1 December 2015 Eskom was formally informed of Glencore's official position to take OCM out of business rescue and honour the Coal Supply Agreement.
- 1681.9. It is not true that OCM was going to cede an unsupplied portion of coal under the pre-purchase agreement as security, as alleged in paragraph 3.4.2 and 3.6.1 of the submission. Mr Marsden confirmed in his second affidavit to the Commission that he was not aware of any cession of coal. The BRPs were in control of OCM and were the only ones who could consent to any cession. No consent was ever sought or given. Further, Mr Marsden stated that the Consortium of Banks to which OCH was indebted for R2.5 billion, had already

perfected the general notarial bond they held over, inter alia, OCM coal. Accordingly, the BRPs and OCM could not encumber the coal further.

1681.10. It is not true that the proceeds of R1.68 billion prepayment of coal were to be used by OCM to extinguish existing liabilities to ensure that the business continued as a going concern, as alleged in paragraph 3.6.2 of the submission. OCM did not know about this prepayment request. It was not engaged by either Eskom, Tegeta or the DMR in regard to this request, nor did it receive any such prepayment for coal from Eskom.

1681.11. OCM was not going to shut down and, therefore, there was not to be any job losses, as alleged in paragraph 3.6.4 of the submission. The evidence already referred to above belies the allegation that there were to be job losses.

1681.12. The description of “the risk” in paragraph 3.6 of the submission, negated the very urgency with which the submission sought the Board to make a prepayment decision. It also appears to have been in conflict with paragraph 2.2.1 which stated that “Eskom faces a supply risk of coal to the Hendrina power station of 5.5Mtpa by OCM as a result of business rescue proceedings”. This suggested that the “supply risk of coal” was ongoing and required immediate or urgent action. This statement was itself false and misleading, as business rescue proceedings did not impact on OCM’s ability to supply coal to Eskom. Nonetheless, paragraph 3.6, postulated a different picture regarding the risk. It stated: “The risk identified at this stage relate to security of supply being compromised, regulatory approvals not timeously obtained and that there would be no contract in place by end December 2016”.

1681.13. If the contractual risk would only eventuate in December 2016, as suggested, it is unclear why a prepayment decision had to be made on such extreme

urgency, overnight and by round robin, without any deliberations by the Board, more than 12 months before the alleged risk could materialise.

1681.14. The submission gave no specifics about regulatory approvals that it alleged might not be obtained timeously. OCM's continued supply of coal to Eskom did not require any regulatory approvals and could thus not be delayed for want of such approvals. The reference to regulatory approvals could only have related to Tegeta's acquisition of OCH. Therefore, the reference to regulatory approvals not only showed that the Eskom executives anticipated the suspensive conditions that were to form part of both the guarantee and Eskom's prepurchase of coal agreement with Tegeta, but also betrayed their alleged innocence in regard to the matter. They knew what the real purpose of the submission was and acted in concert with the Gupta associates, e.g. Mr Salim Essa and Mr Wood, to conceal it.

1682. Therefore, the only sensible conclusion is that prepayment submission by Mr Anoj Singh and Mr Koko had nothing to do with addressing the risk of coal supply to Eskom, but everything to do with providing financial assistance to Tegeta or providing the appearance that Tegeta had the requisite financial capacity to acquire OCH.

1683. The showing of financial capacity by Tegeta was a requirement implicit in the suspensive conditions of the Sale of Shares Agreement between it and OCH/Glencore, in that one of the conditions required the consent of the Consortium of Banks to the Agreement. As Mr Marsden explained, in order to obtain the consent of the Consortium of Banks, the lenders required Tegeta to demonstrate that it had sufficient funds for the transaction. The guarantee, premised on the Board's R1.68billion prepayment resolution, served as a tool, in Tegeta's hands, to meet this requirement. On the strength thereof, Tegeta obtained a letter from the Bank of Baroda which it used to show

the BRPs that Tegeta had sufficient funding for the transaction, but declined to provide a copy. How Tegeta obtained the letter from the Bank of Baroda is dealt with below.

1684. All the Board members went along with the very rushed round robin and gave their approval in individual emails sent on 8 and 9 December 2015, with very limited requirement, if any, that the Eskom executives give better explanations or demanding more time to make a considered decision; despite the fact that a very large amount was involved, that such pre-payments were not usual practice at Eskom and that there was no opportunity for proper in-person discussion.

Mr Anoj Singh involves Gupta associates to respond to Eskom Board queries

1685. Email evidence before the Commission shows that, when two Eskom Board members did submit queries regarding the prepayment request, Mr Anoj Singh allowed external parties, Mr Eric Wood, Mr Mohammad Bobat, Mr Nazeem Howa (of Oakbay) and the account holder of “Business Man”, to assist in answering queries from Board members. The “Business Man” can be taken to have been Mr Essa. Mr Anoj Singh’s proffered reason that he was seeking assistance to look at the financial implications, does not help to explain why he forwarded queries from the Board to external parties, rather than to his own colleagues at Eskom, and then sent external parties’ responses back as his own answers.

1686. Moreover, the approval that was obtained for a prepayment to be made to “the proposed owners of OCM”, i.e. Tegeta/Oakbay, was at odds with the submission’s motivation that OCM, which was still owned by Glencore, needed a prepayment to ensure it continued to operate. This fact appears to have been overlooked by each and every Board member. Moreover, Ms Daniels, who compiled the submission, did not question it either.

1687. Lastly, it is notable that the need for Investment and Finance Committee approval was only done after some of the Board members had already approved the prepayment and only because a Board member indicated that Investment and Finance Committee should consider the request. This went against the required governance processes, and, arguably, thus negated the main Board's approval.

The Guarantee by Mr Anoj Singh

1688. Despite the assertion that a prepayment was urgently needed, the payment in fact did not take place, as Mr Anoj Singh decided on 10 December 2015 to arrange to give Tegeta a guarantee on the prepayment of R1.68 billion of coal instead. Further, the way the guarantee came into being was equally the result of extraordinary and suspicious circumstances:

1689. The terms of the guarantee originated externally, from a "Business Man" email that was sent to Mr Koko's private email address, shortly after midnight on 10 December 2015. Mr Koko then forwarded the email to Ms Daniels, who in turn had CDH draft a pre-purchase of coal agreement to be entered into between Eskom and Tegeta, based on the terms received from "Business Man". It can be accepted that "Business Man" was Mr Salim Essa.

1690. It appears that neither Mr Koko nor Ms Daniels had a problem with acting on this external email. Mr Koko testified that he thought it was coming from Dr Ngubane, but did not question why the Chairman, who just the day before had been part of a Board decision to approve a prepayment, would now send an email about a guarantee on the same matter. Mr Koko gave two slightly different explanations: that it was one of the most important topics that Eskom was dealing with and, therefore, when he saw the email, he immediately reacted by getting Ms Daniels to deal with it, and that he did not concern himself much with the contents and passed it on to Ms Daniels who he

understood was handling the matter. Given the operational nature and degree of financial and technical detail involved, it would be strange for the email to have originated from Dr Ngubane. Mr Koko ultimately conceded that the email could not have come from Dr Ngubane, but from somebody outside of Eskom. However, it must be said that the truth is that Mr Koko knew all along that the email was from Mr Salim Essa.

1691. Ms Daniels did not only claim not to remember what instructions were given her by Mr Koko when he forwarded the email to her, but also failed to explain how the contents of “Business Man’s” email to Mr Koko were used in her email to CDH requesting them to draft a pre-purchase of coal agreement. Her explanation amounted to nothing more than that she moved to act on the email because Mr Koko had sent it to her. She also described an atmosphere to have prevailed at Eskom that was abnormal and in which did not feel she could question things. I reject this explanation by Ms Daniels. Both she and Mr Koko knew what was happening and supported it and knew that Mr Essa was also involved.

Mr Anoj Singh involves Gupta associates in finalising a draft pre-purchase of coal agreement with the Tegeta and the terms of the R1.68 billion guarantee

1692. Once CDH had drafted an agreement, it was sent back through the chain from Ms Daniels to Mr Koko and Mr Anoj Singh, and Mr Anoj Singh’s office sent it to Mr Wood, who immediately forwarded it to Mr Salim Essa. Mr Wood was even privy to the emails between Mr Anoj Singh and ABSA, forwarded to him by Mr Anoj Singh. He was also involved in the transaction to the degree that he suggested bank account details to be used for Tegeta, and also received a copy of the final version of the agreement, which he also shared with Mr Salim Essa.

1693. The guarantee agreement would include suspensive conditions that had to be fulfilled by 31 March 2016. That was the same date for the fulfilment of suspensive conditions

in the Sale of Shares Agreement between Tegeta and OCH which had been concluded on 10 December 2015. This is significant because it means that the purchase and supply of coal from Tegeta could only take place after the fulfilment of the suspensive conditions. In effect this implied that Eskom was prepared to wait for coal delivery up to 31 March 2016. As nonsensical as this sounds, it was nonetheless the essence of Mr Anoj Singh's explanation to the Parliamentary Portfolio Committee that he pursued the guarantee because he was aware that coal was not going to be supplied until the suspensive conditions were fulfilled. This explanation negates the very suggestion that coal was required urgently for Hendrina.

1694. Mr Anoj Singh signed the guarantee agreement having never sought Board approval. Neither did Ms Daniels, as Company Secretary, inform the Board about this or the fact that the R1.68billion prepayment that the Board had approved was never executed. Mr Anoj Singh claimed Ms Daniels had advised him he could authorise the guarantee himself. Ms Daniels said she had thought this was correct because she saw a memorandum by Ms Caroline Henry that said it was Mr Anoj Singh who had the authority to sign the guarantee documentation. Ms Daniels also suggested that the Board resolution for the prepayment was wide enough to include a guarantee where it said "the Chief Financial Officer is hereby authorised to take all necessary steps to give effect to the vote including the signing of any consensus of any documentation necessary or related thereto". However, the PFMA provides that a guarantee can only be issued by an accounting authority, which in this case would be the Eskom Board, and the Board only had authority to issue a guarantee up to the value of R750 million, and thereafter it would require Ministerial approval.

1695. It is significant that all of the above was done at the stage when Oakbay Investment/Tegeta was not even the owner of the mine.

1696. Mr Brian Molefe was on sick leave from 1 December 2015 to mid-January 2016, but even if not complicit in arranging the guarantee, he took no action to terminate it on his return, nor was he critical of the matter nor of the colleagues involved in his evidence.

1697. The guarantee agreement was concluded, but never utilised. The BRPs for OCM say that they had never asked for a guarantee (or prepayment) and knew nothing about it.

1698. Whilst the guarantee for Tegeta was not called up, the paperwork of the final version had been shared by Mr Anoj Singh with Mr Wood. Mr Wood had been making enquiries on the afternoon of 10 December 2010 whether it was ready yet. It may be necessary to understand what was taking place at the same time in order to determine the purpose of this paperwork.

1699. Following the sale agreement of 10 December 2015, Tegeta needed to demonstrate that it had sufficient funds for the purchase of Optimum, in order to gain the consent of the Consortium of Banks for the sale. To this end Tegeta presented a letter on a letterhead from the Bank of Baroda purporting to demonstrate that Tegeta did have sufficient funds and promising that the Bank of Baroda would make the full payment of the purchase price on behalf of its client, if all the conditions of the Sale of Shares Agreement were met.

1700. However, Tegeta would not allow the BRPs or the banks to retain a copy of the letter, in order for its veracity to be ascertained. Consequently, the banks did not at this stage provide their consent. Ultimately, when the amounts owing to the Consortium of Banks was settled in full in April 2016, it was considered that the need for their consent was no longer required and the relevant condition precedent was waived.

1701. By letter dated 7 December 2015, Dr Thibedi Ramontja (Dr Ramontja), formally wrote as the DG of the DMR to Mr Koko to commit the DMR to fast tracking the necessary

mining licences to Tegeta to enable it to mine OCM's mines and invited Eskom to provide for a pre-payment to Tegeta to assist it with financial provision estimated at R1.7 billion.

1702. A little more than a week later, after having committed Eskom to a firm refusal to meaningfully negotiate with Glencore, senior executives of Eskom managed to get the Investment and Finance Committee of the Eskom board to hold a telephonic meeting on 9 December 2015.

1703. The Eskom Group CEO, Mr Brian Molefe, was off sick. However, the Group CFO, Mr Anoj Singh, and Mr Koko, the Group Executive: Generation, made a written submission which they signed on 8 December 2015 and presented to the Investment and Finance Committee the following day. In that submission, the board was called upon as a matter of urgency to authorise a pre-purchase of coal to the value of R1.68 billion from OCM, as represented by the proposed owners of OCM. Members of the Investment and Finance Committee who considered the proposal were Ms Klein, Mr Khoza and Dr Pathmanathan Naidoo (Dr Pat Naidoo). The chairperson, Mr Pamensky recused himself.

1704. There was considerable confusion on the part of all the members of the IFC on the question whether the prepayment was to go for the benefit of Glencore or the proposed new owner. What is clear however is that nowhere in the submission document was there any reference to Tegeta or Oakbay or the Guptas, who by that stage had achieved a great measure of notoriety in the eyes of the South African public.

1705. On 9 December 2015 the Investment and Finance Committee recommended to the Board a resolution to authorise the Group CEO, Mr Brian Molefe, the Group CFO Mr Anoj Singh, and Group Executive: Generation, Mr Koko, to negotiate and conclude a pre-purchase agreement with the proposed owners of OCM. The Board approved that

resolution via a round robin. It is appropriate to point out at this stage, based both on the evidence led in regard to Eskom and in regard to Transnet as far as Mr Brian Molefe and Mr Anoj Singh are concerned and in regard to Eskom, in respect of Mr Koko. In fact, what was meant in the submission document was a long term coal supply agreement, and the prepayment against coal committed to be delivered from Optimum never materialised. Instead, Eskom provided Tegeta with a guarantee for the sum expressed in the submission document, i.e. R1.68 billion. At the cost of Eskom, ABSA issued a guarantee to Tegeta against the risk that Eskom would not make the proposed R1.68 billion pre-payment. It seems that Tegeta did not ever use the guarantee, probably because of the way events turned out in the next few months.

1706. Based on evidence from the Bank of Baroda, as referred to later, the guarantee was provided to the Bank by Tegeta and was used by the Bank to issue a letter of comfort to the lenders of OCH to the effect that Tegeta would be in a position to pay the acquisition price of R2.15 billion.

1707. The facts on how Tegeta received the letter from the Bank of Baroda (Johannesburg branch) can be gleaned from an affidavit¹⁵¹⁹ of the Bank's official, one Mr Manoj Kumar Jha, dated 29 July 2021, to which is attached a letter¹⁵²⁰ from Tegeta to the Bank, dated 18 December 2015 and marked Annexure 1. In that letter, Mr Ravindra Nath, a director of Tegeta, wrote:

“As you are aware that we have entered into an agreement with Optimum Coal Holdings (Pty) Ltd to purchase all its shares and claims in its subsidiaries, including but not limited to Optimum Coal Mine (Pty) Ltd. The agreement is subject to condition that the present outstanding of the lenders of OCH has to be cleared by Tegeta before the transfer of shares. The present outstanding is R2 550, 000.000. Out of this R400, 000,000 shall be paid by OCH and Tegeta to pay R2, 150,000,000.

¹⁵¹⁹ Affidavit of Mr Manoj Kumar Jha to the Commission, dated 29 July 2021.

¹⁵²⁰ Letter from Tegeta to Bank of Baroda, dated 18 December 2015.

Tegeta has since entered into an agreement with Eskom, (copy enclosed) for an advance payment of coal to be sold to Eskom in the next 12 months, i.e. R1,680,000,000 (one billion six hundred and eighty million rand only) subject to certain terms and conditions, which have to be met by Tegeta on or before 31.03.2016. Eskom had issued a bank guarantee through ABSA Bank in favour of Tegeta for R1,680,000,000. Once the conditions are fulfilled, Eskom shall release the payment of the above amount. In case of a default on the part of Eskom, Tegeta shall have the option to invoke the Bank Guarantee.

In the light of the above we request the Bank to issue a letter on our behalf that the Bank will pay upon the amount of R2,150,000,000 to Tegeta to meet its commitment to the lenders of OCH. The original Guarantee from Eskom shall be handed over to the Bank as security and to collect money from Eskom/ABSA on our behalf for onward payment to the Lenders of OCH.”

1708. In response to Tegeta’s letter above, the Bank of Baroda (Johannesburg) obliged and issued a letter, dated 18 December 2015¹⁵²¹, on these terms:

“WHOM SO EVER IT MAY CONCERN

This is for information that our valued customer Tegeta Exploration and Resources Pty Ltd (“Tegeta”) has entered into an agreement with Optimum Coal Holdings (Pty) Ltd (OCH) for purchase of all OCH’s shares and claims in its various subsidiaries including but not limited to Optimum Coal Mine (Pty) Ltd. In this connection Tegeta had to pay R2,150,000,000 (Two Billion One Hundred and Fifty Million Rand) to the Lenders of OCH to complete this transaction.

We, Bank of Baroda on request of Tegeta ... with reference to the aforesaid, has agreed to make payment to the extent of R2,150,000,000.00 (Two Billion One Hundred and Fifty Million Rand) to the lenders of OCH to close the above transaction provided the following terms and conditions are fulfilled before 31.3.2016:

- ▶ All Approvals and consents under the Mineral and Petroleum Resources Development Act, No. 28 of 2002 (“MPRDA”) required for the share Transfer, including but not limited to section 11 approval, [have] been obtained by the parties;
- ▶ All agreements and transactions contemplated in this Agreement (to the extent necessary) have been approved by the competition authorities in terms of the Competition Act, No 89 of 1998;

¹⁵²¹ Letter from Bank of Baroda, dated 18 December 2015.

- ▶ The company secretary of Optimum Coal Mine (in business rescue) ... has delivered a confirmation notice to the Bank confirming that pursuant to the Share Transfer, the shares in OCM [have] been transferred to Tegeta and Tegeta is registered as such in the register of members of OCM;
- ▶ The legal advisors of the Bank have issued a confirmation letter that the conditions precedent set out in this Agreement have been fulfilled.

This letter has [been] issued on specific request of Tegeta.

For Bank of Baroda"

1709. In his affidavit, Mr Jha explained why the Bank issued this letter. He said:

"The Performance Guarantee was provided to the Bank by Tegeta in order to indicate Tegeta's ability to raise the funds making up the Tegeta Portion. Put simply, the Performance Guarantee was intended to give the Bank its own comfort before it issued the Letter of Comfort for the benefit of the Lenders. I also wish to point out that the provision of the Performance Guarantee established and confirmed to the Bank that the Eskom Agreement had been concluded."

1710. The relevant witnesses were questioned at length on the events of December 2015 leading up to the issuing of this guarantee, but the essential facts are that Eskom approved the issue of the guarantee against the risk of Eskom defaulting on the pre-payment. The contractual framework between Eskom and Tegeta for the issue of the guarantee is to be found in what was described as the letter agreement.¹⁵²² The pre-payment was in fact never made although those responsible for the payment of some R700 million to Tegeta in April 2016 claimed that the latter payment was justified by the authorisation in December 2015 to effect a pre-payment of R1.68 billion. This can, however, not be the case as the two prepayments are unrelated, both in the proffered rationale, the real rationale and the power stations they ostensibly sought to supply with coal.

¹⁵²² A copy of the letter agreement, signed on 10 December 2015 by Mr Ravindra Nath on behalf of Tegeta but not signed on behalf of Eskom is to be found at Eskom-18-779. It was forwarded to Mr Nath under cover of an email sent by the executive assistant to Mr Koko on the same date.

1711. The BRPs approved the sale to Tegeta. On 10 December 2015 a written sale of shares and claims agreement was concluded between OCH (OCM's direct holding company), Tegeta, Glencore International AG and Oakbay. On 6 January 2016 the BRPs confirmed the sale of OCH's shares and requested regulatory consent to the transaction from the DMR. The conditions precedent in the agreement were fulfilled on 8 April 2016 and the transaction was implemented. On 31 March 2016, the business rescue plan for OCH was published. The business rescue plan was ultimately approved on 8 April 2016.

1712. Therefore, from the available evidence, it is plain that a prepayment for coal was never the true purpose of Mr Koko's submission to the Board on 8 December 2015, much less the guarantee orchestrated by Mr Anoj Singh; more so this is evident as Tegeta never supplied coal to Eskom in terms of that submission nor in terms of the pre-purchase coal agreement that Mr Singh, acting for Eskom, concluded with Tegeta on 10 December 2015. The entire scheme was a sham carefully calculated to conceal the real purpose for the prepayment.

1713. Similarly, Mr Anoj Singh's purported guarantee was never intended to secure coal from Tegeta, but to enable Tegeta to show that it had the necessary funds to pay for the acquisition of OCH/OCM. Mr Anoj Singh would have been complicit in this ploy, as it was not Eskom's practice to issue a guarantee as security for payment of future coal supply to Eskom.

1714. The Sale of Shares Agreement also required that Eskom consent to cede the Optimum Coal Supply Agreement from Glencore to Tegeta, and release OCH from the guarantee they had provided to Eskom. That would release them from the claim of R2.17bn in penalties accrued by OCM. The Eskom Board agreed to this on 10 February 2016, but, according to Mr Dan Mashigo, Acting Head of Primary Energy, a due diligence was

normally required before the Board could make such an approval; and this was not done on Tegeta upon its acquisition of OCH. This omission is probably one of the indications that the Eskom Board was, a Captured Board – captured by the Guptas with the assistance of President Zuma and Minister Lynn Brown.

1715. In order to release OCH from the guarantee, it was a requirement of the Sale of Shares Agreement that Tegeta needed to provide a substitute guarantee that it could meet all financial requirements pertaining to the Coal Supply Agreement. Yet, Mr Gert Opperman stated that, although the Board approved that OCH be released from the guarantee was on 10 February 2016, he never became aware of a guarantee from Tegeta. According to Mr Ian Sinton of Standard Bank, in the context of engagements regarding the closure of the Gupta's bank accounts in 2016, the Bank had occasion to ask Mr Howa, an executive at the Oakbay group of companies, whether the substitute guarantee for OCH had been provided to Eskom, now that Tegeta had taken ownership. Mr Howa apparently answered: "not yet". Standard Bank would flag Eskom's implied willingness to release OCH from the guarantee, and thus the R2.17bn penalty claim on it, as suspicious, arguing that it would have been highly unusual of Eskom to have done this if they genuinely thought they had such a claim. Further, Mr Sinton stated that continuing obligations under the Coal Supply Agreement were now not covered by a guarantee, leaving Eskom exposed.

1716. Note that Ms Daniels exchanged emails with a Gupta associate, Mr Howa, in early March 2016. Mr Howa sent Ms Daniels a draft letter that she had to place on an Eskom letterhead. The letters related to the reassignment of contracts for coal supply between Optimum Coal and Eskom to Tegeta Resources. Ms Daniels did this and then sent it back to him. Mr Howa's email was literally dictating to Eskom what should be the terms of Eskom's consent letter to the cession of the coal agreement from OCM to Tegeta.

1717. During the week of 4 April 2016, Mr Salim Essa called Mr Ephron to say that Tegeta was short of R600 million to pay the purchase price of R2.15 billion under the sale of shares agreement. Mr Salim Essa asked that Tegeta be allowed to pay the balance of R600 million from the revenue derived by Oakbay from coal sales to Eskom. Glencore declined this request. On 11 April 2016 Mr Howa, the Tegeta CEO, repeated that Tegeta was R600 million short and asked Mr Marsden, one of the BRPs, to approach the banks which had been funding OCM with the request that these same banks finance the Guptas' purchase of Glencore's SA coal interests. The banks declined to provide finance.

Short-term Coal Supply Agreements with Tegeta

1718. It is notable that during the period January to April 2016, Tegeta benefitted from a number of short-term supply contracts that were offered to it by Eskom. First, the Business Rescue Practitioners (BRPs) were told by Eskom that OCM could supply less coal than the minimum contracted amount to Hendrina, apparently because Hendrina's stockpiles were now high (despite all the concerns just a month earlier in Mr Koko's submission of 8 December 2015 above).

1719. The extra coal from OCM was then obtained via a contract with Tegeta to Arnot power station, where Eskom had decided not to renew Exxaro's coal supply contract. Given that Tegeta did not own OCM at the time, but was acting as an intermediary buying from OCM and selling to Eskom, this was against Eskom policy, which does not allow the use of non-value adding agents. It was also fortuitous that from 15 March 2016, Eskom agreed to pay Tegeta weekly instead of monthly. All this was helpful to Tegeta in that from the time of the conclusion of the Sale of Shares Agreement to its coming into effect (the period from 10 December 2015 to 15 April 2016), Tegeta was responsible for providing post commencement funding to keep Optimum operational;

therefore, the additional earnings from the short-term contracts would have helped to reduce the financial burden on Tegeta.

1720. It is significant that these short-term contracts between Eskom and Tegeta, in respect of which no prepayment was requested or required, preceded Tegeta's request in early April 2016 for a prepayment of R659 million. Tegeta's request was made under the guise that Tegeta wished to increase production of the mine it did not even own at the time and, to address the shortage of coal supply at the Arnot power station (a motivation proffered by Eskom executives), which was not true. The R659 million prepayment is dealt with below.

The R659 million Prepayment submission

1721. What remained was for Tegeta to pay the purchase price on the third business day after the date on which the Sale of Shares Agreement became unconditional, which was 13 April 2016, and for Glencore to pay its respective contribution. Tegeta, however, was apparently R600 million short of funding, despite the Bank of Baroda providing a letter one month earlier assuring that Tegeta did have sufficient funds and the bank would be in a position to make the payment on behalf of their client. The facts regarding the shortfall can be gleaned from the evidence of both Mr Marsden and Mr Ephron, which has not been controverted.

1722. In his affidavit, Mr Ephron explained that in the week of 4 April 2016 he received a telephone call from Mr Salim Essa that Tegeta had a shortfall of R600 million on the purchase price. He said that Mr Salim Essa requested that Glencore fund the shortfall of R600 million and undertook that Oakbay would get Eskom to pay the first R600 million from coal sales to Glencore. Glencore declined the request.

1723. Mr Marsden's evidence is that on 11 April 2016 he received a telephone call from Mr Nazeem Howa requesting a meeting at Tegeta's offices in Sandton on the same day. At this meeting, Mr Howa informed Mr Marsden that Tegeta was R600 million short on the purchase price and requested Mr Marsden to approach the Consortium of Banks to provide a bridging loan in order to finance the shortfall or defer payment of this amount. Mr Marsden made the request to the consortium of banks but the banks rejected the request. Mr Marsden informed Mr Howa of the rejection at approximately 15h00 on 11 April 2016.

1724. During the same period, Mr Ravindra Nath, of Tegeta, was seemingly exploring an alternative option directly with Eskom in order to remedy the shortfall before 13 April 2016 (i.e. the due date for the payment of the full purchase price). He made unsolicited approaches to Dr Ayanda Nteta, then Acting General Manager: Fuel Sourcing, with a verbal offer for Tegeta to supply coal from OCM to Eskom; again when Tegeta was not yet the owner of the mine and had no contract with OCM for the coal offered.

1725. Dr Nteta's evidence was that when Mr Nath first approached her, during early April 2016 and, in particular, on 8 April 2016, Tegeta's unsolicited offer was made telephonically, apparently without any details as to quantities and process. However, Dr Nteta could certainly recall that no mention was made of Tegeta requiring a prepayment. She could also recall that the initial discussion suggested that it was possible to secure coal from OCM through Tegeta, which makes one wonder why Eskom did not go directly to OCM to procure coal for Arnot.

1726. Dr Nteta said that the request for a prepayment was only made in a subsequent telephonic conversation, apparently for an amount of R500 million. This is in accordance with Dr Nteta's draft submission to Ms Daniels late at night on 10 April 2016. The offer was therefore only made verbally. It was on the strength of that verbal offer

that Eskom executives strained themselves, over a weekend, to put together a misleading submission to the Board Tender Committee. Dr Nteta could not explain how the amount of R500 million ultimately increased to R659 million.

1727. Ms Daniels and Dr Nteta worked on a submission for the prepayment over the weekend of 9 to 10 April 2016 which was finalised on Monday, 11 April 2016, for a special Board Tender Committee meeting at 21h00 in the evening. On Sunday, 10 April 2016, at 20h17, Dr Nteta sent an email to Ms Daniels with a draft of what she referred to as the Executive Summary, stating that she had not addressed the prepayment issue, but that it was in the resolution [portion of the draft]. The document was the draft submission for the prepayment of R500 million to Tegeta.

1728. At 22h06, Ms Daniels replied attaching the draft submission marked 'v3', stating: "See if it makes sense". Ms Daniels had made changes to the draft by adding, inter alia, the motivation for the prepayment. The motivation was Ms Daniels' own conception, not provided by Tegeta.

1729. On 11 April 2016 at 7h22, Dr Nteta emailed 'v4' of the draft submission to Mr Koko, Mr Mabelane and Mr Vusi Mboweni and advised that this was a submission for the Board Tender Committee and she would arrange for signatures first thing in the morning, "after confirming figures with finance, as submission deadline is 9am".

1730. At 08h41 on 11 April 2016, Dr Nteta emailed to Ms Daniels the Board Tender Committee submission for signature, with the message "Hi, Electronic versions. Copies getting signed". At 8h52, Mr Koko replied to Dr Nteta, stating: "include Anoj [Singh] to sign the submission please. Anoj will need to guide on the value proposition for the upfront payment i.e. the discount and the security in the event [of] a default. I will talk to him".

1731. At 14h13, Dr Nteta forwarded to Ms Daniels a revised draft with Mr Anoj Singh's name added as one of the signatories. At 18h26, Dr Nteta forwarded to Mr Mabelane some information with the subject line "Umsimbithi volume recon". They thereby decided to add Umsimbithi to the submission, so that it would not appear to be a submission only about Tegeta. At 18h28, Mr Mabelane replied to Dr Nteta, attaching the draft submission and asking her to "fill in the information for Umsimbithi". The irony is that in the same submission, for urgent procurement of coal, they stated that Umsimbithi was under-performing due to a protracted industrial action.
1732. At 18h56, Ms Daniels (working from Mr Mabelane's computer), sent an email to Dr Nteta, in which Mr Mabelane was copied, asking Dr Nteta to fill in the blanks. At 19h36, Dr Nteta emailed to Mr Koko, Ms Daniels and Mr Mabelane the final document "circulated for signature". At 19h51, Mr Mabelane emailed the signed submission to Ms Daniels stating: "As discussed, for special BTC".
1733. At 19h56, Ms Daniels replied to Mr Mabelane that she would "arrange a teleconference for 21h00, as agreed with the chairman of BTC".
1734. At 20h17, Ms Daniels sent an email to the Board Tender Committee members about the special Board Tender Committee meeting at 21h00. The submission attached to her email was signed by Dr Nteta, Mr Mboweni and Mr Koko. Mr Koko has stated that the submission is his; that he owns the submission and takes responsibility for it.
1735. This extensive exchange above, including the Board Tender Committee "special" meeting and decision, took place without any written offer from Tegeta on the terms it was offering and the motivation for prepayment. The motivation for the prepayment originated from the drafters of the submission, viz. the Eskom executives mentioned above.

The submission document

1736. The submission document motivated for R659 million prepayment to Tegeta for coal supply for Arnot Power Station on an urgent basis, to avert an apparent shortage of coal at Arnot. The prepayment was motivated as necessary in order for Tegeta to finance production from the export component of the Optimum mine, a wording added by Ms Daniels. In order to do this, Ms Daniels would have deleted the following passage from the draft provided to her by Dr Nteta on 10 April 2016 at 20h17:

“Eskom has a contract with Optimum Coal Mine (Optimum) which expires in December 2018 and Optimum mine currently supplies Hendrina Power Station. There is excess capacity at the mine to supply coal from their export production.”

1737. The motivation added by Ms Daniels implied that the coal was not immediately available, and thus at odds with the alleged urgency, and not least contradicting the submission’s assurance that “the coal is being mined and can be delivered without delay”. Dr Nteta also conceded in her testimony that coal was not going to be available to be delivered immediately, but in fact would be available for delivery in a few weeks’ time.

1738. In an interview with Carte Blanche in June 2016 Mr Nazeem Howa of Oakbay gave a different motivation, saying that the prepayment was needed because OCM was in business rescue and required funding for its liquidity and start-up of operations.

1739. Dr Nteta explained that from Eskom’s side they were under pressure to secure coal and were looking for suppliers. However, this does not align with the fact that it was Tegeta who had made an unsolicited offer to Eskom.

1740. Dr Nteta ultimately admitted in her evidence that, according to the April 2016 Supply Plan on which she relied, there would not be a shortfall over the winter months. Mr

Andre van Heerden, Senior Manager of Integrated Planning, was responsible for co-ordinating and planning the coal requirements of each coal power station in the Eskom fleet. He explained in his affidavit that the April 2016 Supply Plan did not relate to the 2016 financial year, but to the 2017 financial year, and that the coal supply emergency that was declared in December 2015 did not apply in April 2016. Mr van Heerden explained that the emergency had been premised on a risk that might occur in January 2016, viz. potential disruptions to coal deliveries caused by striking mine workers, which did not apply in April 2016 and, in any event, did not materialise in January 2016.

1741. Mr van Heerden further explained that: (1) there were no serious concerns about coal supply at the Arnot power station during the 2016 financial year; (2) the April 2016 Supply Plan was not compiled to communicate an emergency situation at Arnot and could hardly be used as a basis to say that there was to be a shortage of coal at Arnot during the winter months in 2016; (3) the Arnot power station had “healthy” stock levels until September 2016. Mr van Heerden said that it would go in the red only in October 2016, if additional coal was not procured in the quantities identified by him.

1742. It bears emphasis that Tegeta already had a number of other short-term contracts with Eskom for the supply of coal from OCM to Arnot Power Station, since January 2016. In none of those contracts did Tegeta require a prepayment.

1743. According to Dr Nteta, Mr Koko, Mr Mabelane and Mr Vusi Mboweni also gave inputs into the submission, and she (Dr Nteta), Mr Mabelane and Mr Koko signed off on it.

Tegeta’s offer letters

1744. Dr Nteta had a rather peculiar exchange of “offer letters” with Mr Nath. It was only on 11 April 2016 at 16h28 that Mr Nath sent an email to Dr Nteta, attaching a draft offer letter dated 11 April 2016. This was only a draft, and not on Tegeta’s letterhead. Dr

Nteta explained (in her affidavit) that this draft was sent to her after her request for a written offer, but because Mr Nath was unsure of why a letter was required and what it should contain, he first sent a draft to her to consider. The draft letter read:

“Att: Ayanda

Dear Sir

11 April 2016

OFFER TO SUPPLY ADDITIONAL COAL TO ESKOM OPTIMUM COAL MINE (PTY) LTD

Kindly refer to the discussion we had in this regard. In this connection Tegeta ... offers Eskom to supply additional 1,250,000 tonnes of coal from the Optimum Coal Mine (Pty) Ltd over a period of 5 months. For increasing the production of the mine and beneficiation thereof we need funds for smooth execution of this contract. We therefore request you as under:

- a. The rate per gigajoule shall be R20.41 plus Vat;
- b. The whole of the price for 1.25 Mn tonnes i.e. R650 Mn (approx.) shall be prepared by Eskom to meet the cost for the additional production;
- c. Tegeta is ready to offer a 3.50% discount on the selling price to Eskom in lieu of prepayment;
- d. As security for the prepayment Eskom shall be entitled to appropriate the full sale proceeds of coal supplied to Eskom by Tegeta under various contracts in case of default.

In case our request is considered favourably we are ready to sign the agreement in this regard.

Yours sincerely”

1745. The timing of this email, viz 16h28, is significant because it was submitted to Eskom after Mr Marsden had informed Mr Howa at around 15h00 on the same day that the banks were not willing to consider any financing or deferment of payment of R600 million of which Mr Howa had said Tegeta was short in order to fund the OCH acquisition.

1746. In the draft, Mr Nath referred to a discussion he had had with Dr Nteta on the matter, for a prepayment of about R650 million on the basis that it was “For increasing the

production of the mine and beneficiation thereof we need funds for smooth execution of this contract”, which is not the same reason as that given in the submission (Ms Daniels’ conception).

1747. Further, whilst the offer was for the supply of coal over a period of 5 months, with a shortfall over that period (from May 2016 to September 2016) allegedly estimated at 850 000 tonnes (as opposed to 1.25m tonnes), Dr Nteta admitted to drafting the submission with a projected shortfall of over 12 months instead; 7 months longer than the alleged 5 months, which was still incorrect, as Dr Nteta deliberately relied on a Supply Plan that gave projections for coal required in the 2017 financial year (2017FY), and not the 2016FY.

1748. In the result, Eskom paid for coal it did not need; certainly not immediately or urgently. Dr Nteta and her colleagues acted in concert to deliberately include information in the submission that was calculated to mislead the Board Tender Committee or the reader.

1749. After receiving Tegeta’s draft letter above, Dr Nteta forwarded it to Mr Mabelane on the same day at 16h57. On 12 April 2016 at 9h22, after the Board Tender Committee had already made the decision, Dr Nteta replied to Mr Nath, attaching the draft offer letter with Dr Nteta’s tracked changes. She had crossed out reference to the discussion Mr Nath had had with her and the 3.5% discount offer, on the basis that the discount would be negotiated with the CFO, which the CFO (Mr Anoj Singh) never did. However, Eskom did agree to a 3.5% discount, but the removal thereof from Tegeta’s offer and subsequent inclusion in the coal supply contract would have been calculated to create the impression that Mr Anoj Singh had negotiated this discount, which was not true.

1750. Dr Nteta said in her affidavit that she had also removed a reference to “prepayment” on the offer letter. However, this is incorrect, as the draft letter with her edits still had a reference to prepayment.

1751. It was only on 12 April 2016 at 11h32 that Mr Nath sent an email to Dr Nteta, with a signed offer letter on Tegeta's letterhead. Dr Nteta's changes to the draft offer were not effected. Mr Nath simply signed his original offer letter, dated 11 April 2016, only to change it shortly thereafter. At 11:46, Dr Nteta forwarded Mr Nath's email to Mr Mabelane.
1752. In a little over an hour, at 12h54, Mr Nath sent an email to Dr Nteta with another signed offer letter, backdated to 8 April 2016 and the reference to "discussion" deleted. At 14h07, Mr Nath sent a pro forma invoice to Dr Nteta which she forwarded to Mr Mabelane and Ms Daniels. Whilst stating in her affidavit that she was uncertain where the pro forma invoice should go, Dr Nteta nonetheless forwarded it to Eskom's Finance Division (at Primary Energy Division) on 12 April 2016 at 14h45 for payment before the scheduled Board Tender Committee meeting of 13 April 2016 could take place.
1753. That was not the end of the exchange. On 29 April 2016 Mr Nath sent yet another email to Dr Nteta, with another signed offer letter, now dated 11 April 2016, and, significantly, excluding reference to prepayment; an omission Dr Nteta herself could not explain. However, she conceded before the Commission that this letter was submitted at her request on her understanding that Mr Gert Opperman required a final formal offer from Tegeta, reflecting final volumes and price, in order to operationalise the contract.
1754. However, her explanation does not make sense, firstly because the letter from Tegeta is silent on the total contract price, making reference only to the fee rate and, secondly, because Dr Nteta was already in possession of signed offers from Tegeta received on 12 April 2016, showing not only the fee rate, but also the total contract price required for the prepayment. By this time, Tegeta had already been paid that amount and Dr Nteta could simply have provided Mr Gert Opperman with the signed offers already received by her on 12 April 2016. She does not explain in her affidavit why she did not

do so. It would seem that Dr Nteta was colluding with Tegeta in order to conceal the prepayment arrangement from other Eskom executives.

1755. In his affidavit, Mr Gert Opperman (Coal Supply Unit Manager) stated that he was not aware, when approached in May 2016 to sign documents relating to the prepayment, that payment to Tegeta had already been made. He said that he was under the impression that payment was yet to be made and Dr Nteta, well aware of the true facts, failed to correct that impression.

The Board Tender Committee's "Special" meeting on 11 April 2016 at 21h00

1756. An urgent meeting of the Board Tender Committee was then held at very short notice at 9pm on Monday 11 April 2016 by teleconference, in which the prepayment submission was considered, despite a Board Tender Committee meeting being scheduled just two days later, on 13 April 2016. The Board members who were present in the teleconference were Mr Zethembe Khoza (Board Tender Committee chairperson), Ms N Carrim, Ms D (Viroshini) Naidoo and Ms C Mabude. It is significant that this meeting lasted for only about 28 minutes. It commenced at 21h04 and ended at 21h32, with Ms Mabude recorded to have joined the teleconference only at 21h17, clearly with no sufficient time for the Board Tender Committee to properly and thoroughly consider the matter.

1757. None of the parties who drafted the submission and/or took part in this meeting was able to explain why the meeting was urgent. In fact, some have conceded that there was no urgency. Mr Zethembe Khoza and his fellow Board Tender Committee members did not question the need for this meeting, despite knowing that a Board Tender Committee meeting was already scheduled for 13 April 2016. It is unthinkable that members of a Board of an entity as big as Eskom could be asked to attend a meeting of a Committee of the Board at 21h00 (in the night) at the short notice at which

they were asked to meet and they would do so without questioning what the grounds of urgency were, especially unless they know what was going on. This is more so when, as was the case here, there was to be a scheduled Board meeting in two days' time. The most natural question that any member of the Board would ask is: why can't this issue wait for the day we are going to be at the Board meeting and we can deal with it as a Committee either before or after the Board meeting? It would seem that none of the members of the Board Tender Committee asked this simple question.

1758. The outcome of the Board Tender Committee meeting was, inter alia, that the CFO "is hereby authorised to approve the basis for prepayment to secure the fixed coal price for the period of extension provided that there is a discount in the price, the supplier offers a guarantee in favour of Eskom and that the CFO can provide assurance to the committee that the transactions are economically viable for Eskom".

How the minutes of this meeting were prepared

1759. Shortly before the meeting scheduled for 21h00 could commence, Ms Naidoo sent a list of questions by email to Ms Daniels at 20h53, on 11 April 2016. She followed up with another email at 21h10, asking further questions: "Why is the shortage discovered so late, why were these two companies chosen over the others". If the minutes are correct that the teleconference only started at 21h04, then her email would have been sent during the meeting, which leaves one to wonder why did she not simply raise these questions during the meeting and seek answers in the meeting. The answers to her questions were only provided by Mr Mabelane the next day, 12 April 2016 at 15:50, in an email to Ms Daniels, Dr Nteta and Mr Koko. At 16h02, Mr Koko replied that he was happy, and immediately at 16h03 Ms Daniels replied that she would "include this in the minutes". At 17h27, Ms Daniels forwarded Mr Mabelane's answers to Mr Anoj Singh.

1760. Despite the answers to her questions only being exchanged internally between the executives a day after the meeting, Ms Naidoo by email on 11 April 2016 at 21h36, just four (4) minutes after the meeting, Ms Naidoo requested Ms Daniels to get the minutes out by Wednesday [13 April 2016] for sign off, to which Ms Daniels responded that she would.

1761. Mr Mabelane's responses, evidently contrived a day after the teleconference, were partly used to draft the minutes of the Board Tender Committee "special" meeting. The minutes had material discrepancies between his original responses and the final responses recorded in the minutes. The table below illustrates the point:

Ms Naidoo's Questions	Mr Mabelane's Responses: email of 12 April 2016 at 15h50	Mr Mabelane's responses as per Ms Daniels' email to Mr Singh: 12 April 2016 at 16h03	Responses according to the minutes of 11 April 2016
"When is the RFP going to be ready?"	It is estimated that the contracting and mobilization will be completed by end of September 2016. Currently negotiations are underway with 4 identified (successful) tenderers. It has taken longer than expected due to added requirements by Generation (end-user) to ensure that the spec is narrowed to resolve persistence load losses at the station	RFP will be completed around September as we are in negotiations	The RFP will be completed around September as we are in negotiations
Is the delay not costing us money; if we compare the current prices, we will we not be in a worse off situation than as we are now? Can other people in the vicinity not supply at better prices?	Difficult to say and/or quantify the extent to which the delay will cost Eskom over the next 5 months as negotiations are still underway and there is no final price to compare with. However it is prudent to navigate negotiations with due diligence to ensure that concluded contracts will improve Eskom operations and management thereof simplified	If we compare to current prices we will not be in a worse off situation	If we compare the current prices we will not be in a worse off position
Has Umsimbithi already supplying us (sic), and if so	No impact is anticipated on the current negotiations. This extension is on the same basis as the current running contracts.	Yes they are a current supplier by way of a short term contract which is the one which we require to extend.	Yes they are a current supplier in the STC which is the one which we require

Ms Naidoo's Questions	Mr Mabelane's Responses: email of 12 April 2016 at 15h50	Mr Mabelane's responses as per Ms Daniels' email to Mr Singh: 12 April 2016 at 16h03	Responses according to the minutes of 11 April 2016
why are we not negotiating a cheaper rate, they know we going out to tender they may agree to cheaper rates?		In the current context, it is quicker to extend this contract	to extend. Much quicker to extend
Can't they give us a better price		(Authors note: The question was not addressed nor included in the email to Mr Singh)	They are one of the people whom we are negotiating with. A member sought to clarify her understanding by stating that is she correct in stating that no other supplier has this type of coal at this point plus we need to keep the contract on a short term basis while we negotiate the longer term contracts. The CPO confirmed this understanding as correct (Authors note: The response does not address the question)
Is Tegeta the new company that bought Optimum, was Optimum supplying us before and at a better rate?	Again this extension only focuses on the current short-term contract with the 2 suppliers. It will not impact or relate to the contract Eskom has for Hendrina (Authors note: The response does not address the question)	They are one of the suppliers with whom we are negotiating. The quality of coal required is towards the high end of the quality spectrum and we want to keep the contract on a short term basis	They are one of the suppliers with whom we are negotiating. The quality of coal required is towards the high end of the quality spectrum and we want to keep the contract on a short term basis
Are they not in business rescue, by prepaying them who gets the money is it the business rescue practitioner, can we lose money by it	This specific point will be clarified during the negotiation for the extension, however, Tegeta has been supplying on the short term contract with the blessing of the Business Rescue Practitioners. (Authors note: This response is false and a misrepresentation. The BRPs	Not answered by the CPO as he needed to check with the legal counsel on the process	The CPO requested that he be granted the opportunity to obtain the answer to this question from the legal counsel

Ms Naidoo's Questions	Mr Mabelane's Responses: email of 12 April 2016 at 15h50	Mr Mabelane's responses as per Ms Daniels' email to Mr Singh: 12 April 2016 at 16h03	Responses according to the minutes of 11 April 2016
going to the administrator?	were not party to the Tegeta/ Eskom supply agreement)		
If we put the money in the bank instead of prepayment and earn interest will I be getting a better deal based on the price I'm paying for the coal?	The CFO has been requested by BTC to approve an acceptable discount for the pre-payment that will ensure Eskom is not worse off. It was determined that a minimum 3% discount be achieved. (Authors note: It should be noted that Tegeta offered a 3.5% discount even before the BTC meeting)	We are going to negotiate. At this time we have approached the 2 suppliers to ascertain interest. U – has labour issues and anticipate being able to supply from July; T – yes willing to supply but will request a prepayment in each for (i) discount (ii) guarantee for performance	Management confirmed that the team was going to negotiate. At the time of the meeting, the 2 suppliers had been approached by Eskom to ascertain interest and it was established that both suppliers were interested in extending for the period. Umsimbithi was limited by its current labour unrest and would be able to supply from July while Tegeta was willing to continue with supply but indicated that it would request upfront payment and was willing to offer a discount plus a guarantee for performance
Can we justify the price we are paying for this coal to the public and DPE?	The prices for the short-term supply, even though above average, are within the current band of short term rates. They are therefore be (sic) justifiable	Yes, we are paying comparable prices for export coal. We are paying the contract price which is on par with the average price we are currently paying	It was confirmed that Eskom is paying comparable prices for export coal. As we are extending the contracts on the same terms and conditions, we will be able to justify the price
Why is the shortage discovered so late?	The shortage is the result of undersupply by current suppliers with the most significant being from Umsimbithi Short Term Contract that has been impacted by a protracted industrial action. Both the industrial action and the overall short supply was not anticipated	(Authors note: The question was not addressed nor included in the email to Mr Singh)	There is a weekly review by the Primary energy operations centre and now that the impact of the pace of the delay in conducting the longer term contracts is fully assessed, this shortfall was identified
Why were these two companies	The transaction seeks to extend ONLY the short term contracts whilst giving	(Authors note: The question was not addressed nor	These suppliers have the high end quality coal and are able to

Ms Naidoo's Questions	Mr Mabelane's Responses: email of 12 April 2016 at 15h50	Mr Mabelane's responses as per Ms Daniels' email to Mr Singh: 12 April 2016 at 16h03	Responses according to the minutes of 11 April 2016
chosen over the others?	ourselves time to complete the Arnot Medium term Supply contracts which are at contracting stage	included in the email to Mr Singh)	supply on short term basis (Authors note: It should be noted that this was not true of Tegeta since the BRP's indicated that the coal delivered to Hendrina was the same coal delivered to Arnot)
How much is the prepayment.	This question was not addressed in Mr Mabelane's email	(Authors note: The question was not addressed nor included in the email to Mr Singh)	It is estimated at R568M
Are we paying export price or normal price?	This question was not addressed in Mr Mabelane's email	(Authors note: The question was not addressed nor included in the email to Mr Singh)	We're paying the contracted price – average price of coal currently paying

1762. Material discrepancies apparent from the responses given to Ms Naidoo's questions show that the minutes were fabricated, evidently after the fact, in order to create the impression that the Board Tender Committee had applied its mind during the meeting, when this was not the case.

1763. A draft of the minutes was exchanged, at least, between Mr Mabelane and Ms Daniels prior to the Board Tender Committee meeting of 13 April 2016. In an email from Mr Mabelane, on 12 April 2016 at 22h15, he advised Ms Daniels that he accepted the minutes and asked that he be assisted to obtain legal counsel's view on, inter alia, doing business with Tegeta on assets that are in business rescue and on the conditions of the contract. He expected to get feedback the next day.

1764. It is, therefore, evident that as at 22h15 on 12 April 2015, a legal opinion had neither been sought nor obtained on the appropriateness of either Tegeta or the BRPs receiving the prepayment. The Board Tender Committee minutes of 13 April 2016 are

silent on this point, leading to the conclusion that the Board Tender Committee failed to consider the matter and that no legal opinion was ever obtained.

1765. From the evidence above it is apparent that the Board Tender Committee members and the concerned Eskom executives collaborated with one another to facilitate the fast tracking of the prepayment to Tegeta, as payment for the purchase price of OCH was due on that same Wednesday when by Ms Naidoo requested the minutes to be ready for approval. The minutes would have been required to provide “authority” for the prepayment to be made on 13 April 2016.

The Board Tender Committee meeting on 13 April 2016

1766. It is notable that when the Board Tender Committee met on 13 April 2016 and were discussing the matter of a guarantee from Tegeta, that Mr Anoj Singh apologised for not having told the Board Tender Committee that Tegeta was actually facing “going concern” issues due to having its bank accounts closed and that “no-one” wanted to give them credit. Mr Anoj Singh denied that he apologised to the Board Tender Committee, but he was subsequently provided with an audio recording of the Board Tender Committee meeting in which he is heard tendering an apology to the Board Tender Committee for failing to make the said disclosure. Despite the belated disclosure, the Board Tender Committee still proceeded to implement the decision of a prepayment to Tegeta, thus knowingly advancing money to Tegeta because nobody else was prepared to do so, as their bank accounts were closed, and knowingly that it may not be able to trade at all. It is astonishing that the Board Tender Committee (Chaired by Mr Zethembe Khoza) was prepared to take this risk with Tegeta, when it could have purchased coal directly from OCM.

1767. It appears little regard was paid at any stage to the financial impact such a large prepayment would have on Eskom’s cash flow, or the financial risk that Eskom was

exposed to by having paid before having the certainty of delivery of the coal, especially given that at that point in time when the actual payment was made, the required guarantee/security from Tegeta was not yet in place.

Irregularities with the prepayment

1768. The execution of the prepayment appears to be tainted with irregularities. The prepayment contract was signed by Mr Anoj Singh and Mr Koko on 13 April 2016, yet Eskom had already accepted an invoice from Tegeta for the payment on 12 April 2016.

1769. The contract stipulated that payment was to be made on 13 April 2016. Mr Anoj Singh's office made an urgent request for payment to be made that day by 2pm (i.e. within 2 or 3 hrs). In his affidavit, Mr Nagar said that this was not only unusual and out of line with Eskom's normal practice, but also impractical, as there was not sufficient time to comply with Eskom's financial management system. That system required that various documents and information be loaded into the SAP accounting system first, and various sign-offs obtained from specified individuals. Therefore, the payment was incorrectly processed against Tegeta's different coal supply contract for Majuba power station (supplied from the Brakfontein mine), and not the one for Arnot power station supplied from OCM.

1770. Mr Brian Molefe also sent an email to a colleague instructing that they ensure a pending payment to a vendor would be made that day, and for which Mr Brian Molefe was obtaining the necessary banking details. Mr Brian Molefe claims his email must have been hacked. In order to make this possible, a series of required governance processes were skipped, mid-level managers bypassed and false information fed into Eskom's financial management system together with various manual overrides to force it to trigger a payment. Once Eskom Treasury had made their confirmation that funds were available, the Shared Services Department made the payment, at around 2pm.

The real purpose of the prepayment

1771. Eskom's prepayment enabled Tegeta to suddenly have sufficient funds to make full payment of the price on 14 April 2016, despite the alleged shortfall two days before the due date. This is confirmed in the affidavit of Mr Jha of the Bank of Baroda, on Eskom's the R659 million prepayment to Tegeta.

1772. Evidence before the Commission shows that on 14 April 2016. Tegeta transferred R2,084,210,206.10 from the company's Bank of Baroda account to Werksmans Attorneys to purchase OCH. Bank account records show that Tegeta only had R100 million of the over R2 billion required before funds flowed in on 13 and 14 April 2016 from a number of sources, of which R1.8 billion was identified by Mr Paul Holden of Shadow Worlds' and detailed in the report as "derived from criminal sources and, in particular, the theft of state funds through State Capture". These include:

- 1772.1. the R659 million payment to Tegeta from Eskom on 13 April 2016;
- 1772.2. a further payment of R68 million from Eskom on 13 April 2016 pursuant to coal supply contracts awarded to Tegeta by Eskom;
- 1772.3. a loan of R158.5 million from the Gupta's Oakbay Investments;
- 1772.4. a loan of R104.5 million from Albatime on 14 April 2016, which in turn originated from contract work that Regiments had undertaken at Transnet;
- 1772.5. a loan of R152 million from Trillian Management Consulting on 14 April 2016, which, in turn, had originated from contract work that Regiments had undertaken at Transnet; and

1772.6. a loan of R842.2 million from Centaur Mining, which was sourced from its parent company, Centaur Ventures in Bermuda, which in turn was funded from a loan by a UAE-based entity Griffin Line, which Mr Holden has demonstrated to be a 'Gupta Enterprise front company' involved in laundering funds from their dealings in South Africa. Mr Holden also presented evidence that the Centaur companies were operating as partners to the 'Gupta Enterprise' or even a front for same, particularly for laundering money abroad received from State Capture for the Guptas.

1773. The above is also confirmed in the affidavit of Mr Jha of the Bank of Baroda on the R659 million prepayment, on Eskom's R659 million prepayment to Tegeta.

1774. Later, on 14 April 2016, all parties to the sale to OCH were informed that the full amounts required to be paid had been settled in full, and on 15 April 2016 the shares were formally handed over.

1775. Mr Marsden has confirmed that no prepayment was received by OCM, that he was surprised to learn that such a prepayment existed, and confirmed that it had not been required by Optimum for its liquidity. In fact, OCM was providing a thirty-day payment term to Tegeta for coal purchased from OCM. On learning of the prepayment from the Carte Blanche episode, Mr Marsden responded by submitting a report to the Directorate of Priority Crime Investigations (the Hawks), in accordance with South Africa's corruption legislation (The Prevention and Combatting of Corrupt Activities Act, PRECCA).

1776. It is notable that Mr Brian Molefe did not express any criticism or disapproval for what took place. In fact, he defended the prepayment in a press conference held on 5 July 2016, with Mr Anoj Singh by his side, stating that the prepayment was made because the Guptas' bank accounts had been closed and no one wanted to do business with

them. He also said that Tegeta needed cash, as it had just paid for the acquisition of OCH. These reasons have nothing to do with resolving Eskom's alleged urgent need for coal at the Arnot power station.

1777. This is all by way of background. In my view, it is proved that Messrs Zwane, Brian Molefe, Koko and Anoj Singh made themselves complicit in knowingly assisting the Guptas to acquire the Optimum coal mine, and ultimately, all of Glencore's coal interests in South Africa. What I have described above demonstrates an act of state capture. What follows shows that substantial moneys were then misappropriated from Eskom to enable the Guptas to implement the sale of shares agreement and take control of Glencore's SA coal interests.

1778. The suggestion that the April 2016 payments to Tegeta constituted pre-payments against coal supplies is untenable. The money was, to the knowledge of all the executive actors concerned, not intended to be used and was not used to procure coal for delivery to Eskom. Instead, the money was intended to be used, and was used, to pay for the shares in the companies holding Glencore's coal interests in South Africa which the Guptas had bought but were financially unwilling or unable to pay in full. The cash flow analysis performed on the R659 million confirms that it was used for settling part of the acquisition price of OCH.

1779. The unlawful conduct of the Eskom officials is confirmed and aggravated by their conduct in swiftly thereafter settling the penalties dispute which had so bedevilled relations between Eskom and Glencore for a fraction of the sum for which Eskom had been holding out against Glencore. Although Eskom had strenuously demanded and held out for some R2.1 billion in penalties from OCM, on 14 March 2017, Eskom settled this claim with Tegeta, the new Gupta controlled owner of the Optimum Coal mine, for some R577 million, of which Tegeta was only required to pay some R255 million.

Furthermore, although Tegeta was obliged to provide Eskom with a guarantee for amounts which might be owed under the assigned Coal Supply Agreement to Eskom, no guarantee of any commercial value was supplied.

1780. How did the Guptas raise the shortfall in the purchase price which they needed to take control of the Optimum coal mine? As I shall show, they got it from Eskom.

1781. Mr Nagar is a chartered accountant and had been employed by Eskom in a position called a Finance Business Partner: Primary Energy since about 2008. On 12 April 2016, he received an email from Ms Nteta, the Head of the Fuel Sourcing part of Eskom's primary energy division, reading "As discussed". Mr Nagar could not recall any relevant discussion. Attached to the email was a pro forma invoice for coal dated 12 April 2016, referring to order number 194 and addressed by Tegeta to Eskom, in the sum of R659 558 079,38 (six hundred and fifty-nine million, five hundred and fifty-eight thousand and seventy-nine Rands and thirty-eight Cents). Eskom did not customarily make any payments on a pro forma invoice.

1782. The next day, i.e. 13 April 2016, Mr Nagar received a phone call from Ms Bhana (Naidoo). Ms Bhana (Naidoo) told Mr Nagar that payment of the invoice was urgently required by 14h00 that day and had been approved by Eskom's Board Tender Committee. Ms Bhana (Naidoo) was Mr Nagar's line superior at the time. She also told Mr Nagar that Eskom's Treasury and Shared Services teams were on board or would be on board to enable payment to be made. Mr Nagar asked Ms Bhana (Naidoo) for the necessary documentation. Mr Nagar had never before known of any payment on such an urgent basis where it was not owed by Eskom.

1783. On the same day, Mr Nagar received documents by email from Ms Bhana (Naidoo) which included an extract from the agreement between Eskom and Tegeta regarding coal supply. On the face of it, that agreement had been concluded on the same day,

i.e. 13 April 2016. Mr Nagar also received a copy of a resolution of the shareholders of Tegeta pledging its shares to Eskom as security for the pre-payment. The pledge of shares was manifestly worthless, in commercial terms. The email from Ms Bhana (Naidoo) requested payment of the amount mentioned as well as two other Tegeta invoices and informed Mr Nagar that the necessary resolution of the Board Tender Committee was to be provided by Ms Daniels of Eskom's legal department. Ms Daniels in fact supplied a copy of a resolution of the Board Tender Committee. The request to Mr Nagar amounted to an instruction.

1784. With regard to the pledge of the Tegeta shares as security for the prepayment, there's no evidence that Eskom had any regard to the financial position of Tegeta at that point for purposes of assessing the adequacy of the shares pledged as security. Though Mr Anoj Singh, in his evidence¹⁵²³ alluded to the R4 billion coal supply contract Tegeta had with Eskom (Brakfontein contract) in justifying the adequacy of the pledged shares, it is rather surprising that a chartered accountant like him would equate revenues from a contract to some sort of asset value that could be used as security.

1785. The extract from the minute of the Board Tender Committee meeting reflecting the resolution that was forwarded to Mr Nagar bore the signature of Ms Daniels as Eskom company secretary. The extract stated that the Board Tender Committee had met on 11 April 2016 at 21h00 by teleconference. It reads as follows:

“2.1 PRIMARY ENERGY

Addendum to the Short Term Supply Agreement between various suppliers and Eskom Holdings SOC Limited (Eskom) for the supply of coal to Arnot Power Station.

RESOLVED THAT:

2.1.1 Addenda to the Short Term Coal Supply Agreements between various suppliers and Eskom be concluded to extend the supply of coal from various

¹⁵²³ Testimony of Mr Anoj Singh on 24 May 2021.

sources to Arnot Power Station for up to a further five (5) months and/or such period as may be requested by the supplier but no later than 30 September 2016;

2.1.2 The Chief Financial Officer is hereby authorised to approve the basis for prepayment to secure the fixed coal price for the period of extension provided there is a discount in the price, the supplier offers a guarantee in favour of Eskom and that the CFO can provide assurance to the committee that the transactions are economically viable for Eskom;

2.1.3 The Group Executive (Generation) is hereby authorised to take all the necessary steps to give effect to the above, including the signing of any consents, or any other documentation necessary or related thereto.”

1786. In the normal course, and in brief, Eskom's system required a purchase request made and signed by a purchase requester within Eskom. The purchase request would go to the requester's manager and then to the management accountant.

1787. Eskom's system required that a purchase requisition for the transaction had to be created against the contract in question. There was not enough time before the deadline imposed by Ms Naidoo (Bhana) for payment to load this new contract onto their accounting system. The payment was processed against another contract with Tegeta relating to the Brakfontein mine after Ms Naidoo (Bhana)'s signature on the payment control sheet had been obtained. Mr Nagar and his assistant then loaded the correct contract onto their system and amended the transaction details on the system a few days later to reflect the correct position.

1788. In short, the resolution was designed to approve the conclusion by Eskom of short term contracts with, amongst others, Tegeta, to supply coal to Arnot Power Station and to make pre-payments to secure the supplies. The Group Executive: Generation, Mr Koko, was authorised to give effect to the resolution.

1789. In all, Eskom paid Tegeta the amount of R728 281 861,16 (seven hundred and twenty-eight million, two hundred and eighty- one thousand, eight hundred and sixty one Rands and sixteen cents) in respect of the three invoices.
1790. The Board Tender Committee resolution given to Mr Nagar authorised the Eskom Group CFO to approve the basis for pre-payment to secure a fixed coal price for the period of the extension of the Coal Supply Agreement. The payment which Mr Nagar was instructed to make stemmed from clause 4.1 of the contract supplied to Mr Nagar which obliged Tegeta to sell coal to Eskom for a period of five months commencing on 16 April 2015.
1791. The large amount mentioned was ostensibly a pre-payment. Eskom had previously made such pre-payments as an investment in the financial stability of the supplier. However, those payments had been made in respect of long term supply contracts only. The Tegeta contract was, however, for five months. The circumstances of the pre-payment to Tegeta were therefore unusual. Nevertheless, Mr Nagar effected the payment on the strength of the invoice, the approval form signed by Ms Bhana (Naidoo) and the supporting contract.
1792. In my view, 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. The context in which it was made, its timing and the urgency with which it was processed all demonstrate that the payment was not made with the purpose of furthering the interests of Eskom. It was 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.

1793. An issue arose from the affidavits and evidence of Mr Ramatlhodi and Dr Ramontja, of the DMR, on the one hand and Dr Ngubane and Mr Brian Molefe on the other relating to a meeting held between these four men where the question of Glencore's mining licences was discussed. Minister Ramatlhodi was then the Minister of Mineral Resources and Energy. He and Dr Ramontja say that the meeting was called by Dr Ngubane to persuade Mr Ramatlhodi to suspend all Glencore's mining licenses. Dr Ngubane and Mr Brian Molefe, on the other hand, said that Mr Ramatlhodi had suspended Glencore's licenses and the purpose of the meeting was to persuade Mr Ramatlhodi to withdraw the suspensions.

1794. Dr Ngubane hotly, but in the end weakly, sought to depict Glencore and "the man from Switzerland" (i.e. Mr Glasenberg) as unscrupulous corporate raiders who arrogantly sought to do harm to South Africa and advance their own interests. However, in the end Dr Ngubane was forced to admit that the interventions of Eskom made no business sense and that the deal to preserve the Optimum coal supply to Hendrina should have been sought with Glencore, not the Guptas through Tegeta. Dr Ngubane conceded that the decision to make prepayments to Tegeta against anticipated coal supplies did not materialise and that by some "mystery" the decision to make pre-payments was superseded by a decision, which was implemented, to issue a guarantee of R1.68 billion to Tegeta. However, the issue was never pre-payments; it was that Eskom used the cover of its procedures to assist Tegeta to prove to the lenders that it was in a position to meet the acquisition price of OCH.

Eskom's treatment of OCM under Tegeta

1795. When OCM finally came out of business rescue in August 2016, the matter of the R2.17 billion penalty claim remained to be dealt with. Arbitration proceedings were initially pursued, but were superseded by negotiations after Tegeta had approached Eskom

with settlement proposals, and culminated in a settlement being concluded in March 2017.

1796. The opinions of CDH, which were previously ignored, were now used to justify negotiating significant reductions in the claim. Ms Daniels stated in her affidavit that it was during this time, when Mr Koko was the Acting Group CEO after Mr Brian Molefe's resignation, that Mr Koko showed a keen interest in the matter and preferred settlement over arbitration, indicating that a settlement of around R500 million would be acceptable. She testified that Mr Koko's explanation for this was that "he wanted the matter off his desk".

1797. The Eskom Board Tender Committee approved a mandate to conclude the settlement at not less than R500 million; the main Board was never approached despite the original claim value at stake being a large amount of R2.17 billion. The final settlement amount proposed was R255.4 million. The main signatories to the agreement were Ms Daniels, Mr Anoj Singh and Mr Koko. On the evidence heard by the Commission all these three officials were working with the Guptas and their associates.

1798. The settlement agreement afforded Tegeta a period of 20 months, from 1 April 2017 to 31 December 2018, to make payment. Tegeta/OCM only made payment until January 2018, before going into business rescue in February 2018, leaving a balance of R133 781 381.38 (R133.7 million) still owing to Eskom. Therefore, Mr Koko's statement that the settlement amount "just short of R580 million ... was revenue" to Eskom, is simply wrong. Tegeta never paid the full settlement amount.

1799. Mr Brian Molefe claimed to have had nothing to do with the reduced penalty, as he had left Eskom in December 2016. Nevertheless, he justified the reduced penalty by claiming that the same would have taken place under Glencore had they also gone through arbitration. However, he ignored the fact that the Tegeta-OCM penalty amount

was reached through negotiation, not arbitration. Mr Anoj Singh tried to claim that he was not involved in the process, yet he had to concede that he was at the meeting to sign the settlement agreement, and had approved the submission memorandum to the Board Tender Committee.

1800. No sooner had OCM come out of business rescue in August 2016, than Tegeta began requesting an easing of the contract terms to supply Hendrina, which resulted in:

1800.1. a temporary relief agreement issued by Mr Mabelane to Tegeta on 20 December 2016, to apply retrospectively from 1 September 2016 to 31 July 2017; and

1800.2. another temporary relief agreement issued by Dr Nteta on 18 August 2017, also to apply retrospectively from 1 August 2017 to 31 October 2017.

1801. These agreements allowed for a revised, more favourable approach to annual price escalations, a reduction of the minimum monthly supply volumes required and putting a hold on any penalties owing. Interestingly, the motivation used by Eskom's executives to justify this was their concern about pushing OCM back into business rescue or even liquidation.

1802. On 20 January 2018 Eskom signed a 5th addendum to modify the terms of the Coal Supply Agreement, which included a new price escalation basket and rebasing the penalty amounts, changing the monthly volume of coal supply due, and easing the threshold levels on quality after which penalties would apply.

1803. Mr Brian Molefe claims not to have been aware that Tegeta was in breach of fulfilling the contracts from 1 September 2016 and had approached Eskom for relief. This is

surprising given the level of personal interest he demonstrated previously in 2015 in OCM's contractual affairs when under Glencore.

1804. On 20 February 2018 OCM (under Tegeta) once again went into business rescue. The reason indicated by OCM Board director, Ms Pushpaveni Ugeshni Govender, was the closing of bank accounts for Tegeta by several South African banking institutions. The mine subsequently went out of operation. Hendrina power station was 100 percent reliant on Optimum for coal when this happened, leading to the power station immediately being 400,000 tonnes short of coal. Coal that was due for other power stations had to be diverted away to Hendrina, and Hendrina experienced very low stock levels. Indeed, the national average coal stock at Eskom's power stations was reduced "drastically" as a result (by an equivalent of 3.2m tonnes, which is equivalent to 8.3 Eskom system stock days). Mr Dan Mashigo estimated that by the 2018-year end, the cost of having to truck coal in from other mines to Hendrina averaged around R602 per tonne. The proposed contract price for Optimum coal that was turned down by Mr Brian Molefe in 2015 was R475 per tonne, and if the annual prices escalations are were applied that are allowed by Eskom's contracts, this would have been around R576 per tonne in 2018.

Prevention of money laundering by Standard Bank

Evidence of Mr Sinton

1805. Mr Sinton, was the Group General Counsel of Standard Bank Group Limited and its subsidiaries. The witness stepped down from that position in June 2018 but continued to assist in the completion of various legal projects. His statement was signed on 7 March 2019. He testified in an open hearing on 12 March 2019, day 64. The witness also testified on a previous occasion in relation to ToR 1.7 (closure of the bank accounts).

1806. Mr Sinton testified concerning money laundering, which he described in simple terms as being efforts to disguise the origins of the proceeds of crime. They were alerted to possible improprieties by their clients, the Gupta family, when, after the Gupta chartered aircraft had landed at Waterkloof Air Base, they learnt that ABSA had terminated all dealings with the Gupta family and entities it controlled and that KPMG were withdrawing their accounting services from those same entities.
1807. Standard Bank then met with representatives of the Gupta entities and put their concerns to those representatives. The responses received from the Gupta representatives did not allay the Bank's fears that improprieties had been committed.
1808. Shortly after the change of control of OCM to Tegeta was announced, the Bank was asked by Ms Ragavan of Oakbay to transfer some R1.7 billion held in a Standard Bank account on behalf of a trust which held the Rehabilitation Fund for the Optimum mine to Oakbay. The Bank required the approval of the trustees of this trust to the transfer. New trustees were then forthwith appointed and these new trustees approved the transfer of the Rehabilitation Fund to Oakbay. The Bank continued to resist the transfer on the ground that the permission of the Minister of Mineral Resources was required. The Minister duly gave his permission for the transfer. The Bank then terminated its provision of transactional services to OCM.
1809. Mr Sinton read that there were two salient conditions in the share transfer agreement under which control of OCM passed from Glencore to Tegeta: that Eskom released Glencore from the R2.1 billion penalties claim and from its guarantee to Eskom. Mr Nazeem Howa, a representative of Oakbay, confirmed both that Glencore had been so released, that no consideration had been given by Tegeta to Eskom for the release and that Tegeta had not given Eskom any guarantee, although it was said that Tegeta or

Oakbay had promised that it would do so. The Bank was accordingly not satisfied that the take-over of OCM by Tegeta was an arm's length transaction.

The role of Mr Brian Molefe

1810. So, balancing all the factors, I conclude both that Mr Brian Molefe was sought by the elite who controlled Eskom as a solution to their problems and that the Guptas were eager to have their friend in the CEO job and used their influence to bend policy to their advantage.

1811. Mr Molefe regarded Glencore as a malevolent influence both on the politics of the country at large and Eskom specifically. He maintained, with what degree of sincerity I cannot judge, that Glencore funded a press campaign to promote a mythical narrative of state capture to distract attention from the true case of state capture disclosed before the Commission. He quite crudely used the Commission as a public platform to ventilate his views and, in my view, to distract from his own involvement in the coordinated action to loot the coffers of the state which is state capture.

1812. One of his techniques is to inject a strong dose of sentiment and emotion into his narrative. Take, for example, the description of how Dr Sam Motsuenyane converted him to the cause of a bank established or converted specifically to serve lower income Africans. I noted the insertion into this narrative of the detail about Dr Motsuenyane serving him tea "under a tree". This was not mere story telling. Mr Molefe used the incident as the crucial origin of his crusade for enhanced black participation in the economy and the tea under the tree narrative was introduced to enable Mr Molefe to assert the purity of his motives. There is no reason to believe that Mr Molefe's expressed bitterness toward the governor of the SA Reserve Bank who poured cold water on his plans to acquire Nedbank, whom he named, unnecessarily, as Mr Mboweni, was feigned for the benefit of the Commission. That type of grievance in turn

led him to make friends with the Gupta brothers who, he would have it, took up the cause of the oppressed in South Africa as their own; something which led to the demonisation of the Guptas at the hands of the Glencores of the world and their billion rand media budgets.

1813. Mr Molefe's opinion that the cost plus coal supply agreement was evidence of rapaciousness on the part of Glencore is not shared by experts such as Dr Pat Naidoo, who was a member of the board from 2014 to 2018 and whose expertise must surely have been available to Mr Brian Molefe. Dr Pat Naidoo explained in his evidence that the Optimum Coal Mine supplied coal at a very low price to Hendrina, that Hendrina was one of the lowest cost power producers in South Africa and that OCM was allowed to export the higher grades of coal to enable it to make some cash, something it was not doing out of its deliveries to Eskom. On the other hand, Dr Pat Naidoo shared Mr Molefe's view that the predicament in which Glencore found itself arose because Glencore had not performed a due diligence enquiry before it bought OCM.

1814. The fact is that Mr Molefe and the Guptas, particularly Mr Ajay Gupta, were friends and he often visited their home in Saxonwold. It is not necessary to examine the evidence of telephone records worked up by the former Public Protector and which Mr Brian Molefe claims are inconsequential, to come to this conclusion. We have Mr Molefe's own admission that he and the Guptas were friends.

1815. Given Mr Molefe's fierce ideological hostility towards Glencore, it is not surprising that he viewed Glencore's predicament in regard to the coal price at which they were supplying Hendrina from the Optimum coal mine as caused by Glencore's own fault and not something which justified an increase in the coal price under the hardship provisions in the Coal Supply Agreement. This hostility may even have clouded his judgement when he concluded that Glencore's "fault" meant that it was not going to be awarded

an increase in the pending arbitration. However, it is difficult to believe him when he said that Eskom had contingency plans in place that would eliminate the adverse consequences flowing from a cessation in supply from the Optimum coal mine.

1816. The fact is that Optimum coal mine and Hendrina are uniquely connected - literally. There is a conveyor belt system which moves coal directly from the mine to the power station. If that supply stopped, Eskom would not only have to source new supplies on the open market at current market prices but would have to absorb a component of transport costs for every ton of material purchased. Mr Molefe's assertions to the contrary can be dismissed on the basis that it suited him to make them but he knew the truth.

1817. If one needs further grounds to bolster this conclusion, one need look no further than the urgent request to approve the pre-purchase of coal from OCM (as controlled by Tegeta) made under the signatures of Mr Anoj Singh and Mr Koko, or his representative, in their submission dated 8 December 2015 to the Eskom board.¹⁵²⁴ There, the risks are described as an "erratic display of business instability [which] has compromised the security of supply to the Hendrina Power Station in the short to medium term".¹⁵²⁵ The risk was serious enough, thus the submission, for it to be brought to the attention of the Department of Mineral Resources. Both Mr Anoj Singh¹⁵²⁶ and Mr Koko described the prospect of Optimum Coal Mine ceasing to supply coal to Hendrina as bringing potentially grave consequences for Eskom. In the light of the submission document, they could hardly say otherwise.

1818. Mr Brian Molefe was away from work for medical reasons at this juncture but there is no suggestion that, when he returned to work, he reprimanded those who had

¹⁵²⁴ Eskom 18-527.

¹⁵²⁵ Para 3.1.13.

¹⁵²⁶ Mr Anoj Singh described the situation as a crisis: see for example transcript of Mr Anoj Singh day 401, page 187.

authorised the pre-payment to Tegeta or took any steps to deploy the other resources which he had insisted in his evidence justified his heavy handed approach to the negotiations with Glencore.

1819. When Mr Molefe came to Eskom from Transnet in April 2015, he found the Optimum/Eskom penalty dispute on the verge of settlement. He took immediate steps to end all meaningful settlement negotiations. His meetings with Glencore officials were for form alone. He testified, without contradiction, that he had legal advice that he could compel Glencore to continue delivering at the uneconomic R150 per ton. At a purely contractual level this may be correct. However, any commercial lawyer would have told Mr Brian Molefe that OCM could escape any such liability to deliver by recourse to winding up or business rescue; in fact, Eskom's insistence that OCM deliver at R150 per ton would make the case for business rescue or winding up irresistible. Indeed, there was no opposition by Eskom to the OCM business rescue.

1820. Any commercial lawyer would have told Mr Molefe that his inflexible negotiating strategy would place Eskom in a great predicament: in the short term, the Optimum coal mine supply would be denied to Eskom. Worse, the Coal Supply Agreement would come to an end in 2018. Glencore was able to meet the financial costs of stopping production at Optimum coal mine for a protracted period; and when the Coal Supply Agreement with Eskom terminated, Eskom would be faced with the problem of having its best potential supplier of coal to Hendrina extremely ill-disposed toward it.

1821. Why did Mr Molefe then pursue a strategy which was doomed to fail? The most likely reason is that he wished to encourage Glencore to divest itself of its coal interests in favour of those indigenous miners with whom Mr Brian Molefe believed he could do business but not any indigenous miners. There were those whom he did not favour. That, probably, was why Mr Molefe made it impossible for Phembani to conclude any

deal with Glencore. He did this by simply telling the Phembani representative that he would hold any purchaser of OCM to a coal price of R150 per ton and would enforce payment of the R2.17 billion penalty claim.

1822. The consequence of that stance, if followed through, would have been that OCM could not be sold as a going concern. However, the stance was not followed through. There is no suggestion that Mr Molefe, or anyone at Eskom, warned the Guptas that they would be subject to the same inflexible standard. Mr Molefe claimed that he only learnt of the Oakbay approach to Glencore in November 2015, when negotiations were at an advanced stage.

1823. The Guptas would have been throwing their money away unless they had confidence that these two concerns would be addressed by Eskom. The only official at Eskom who could ensure that this was so was Mr Molefe.

1824. Audaciously, but implausibly, Mr Molefe asserted that Glencore did business with the Guptas because, strategically, Glencore chose to do business with the Guptas rather than anybody else. Its motive, according to Mr Molefe, was to bring the Guptas into Eskom's orbit and, by so doing, infect Eskom with the public opprobrium the alleged myth of state capture narrative would bring. This must be nonsense. Firstly, because Mr Molefe himself effectively eliminated Pembani from the contest to acquire OCM. Secondly, because the state capture narrative has been shown by the evidence led before this Commission not to be a myth but to be firmly grounded in reality.

1825. It is simply inconceivable that the Guptas would not have discussed their plans to take over OCM with their friend, Mr Molefe. Firstly, because they were friends with common interests but, secondly, and most importantly, because any rational basis for the acquisition would be destroyed unless, after they had taken over OCM, Eskom sharply

reduced its penalty claim and accepted a sharply increased coal price. That is exactly what happened.

1826. The coal price was increased even before Tegeta took over OCM. In due course, the penalty all but evaporated.

The role of Mr Pamensky

1827. I think it is probable, although there is no direct evidence to that effect, that Mr Pamensky was appointed to the Eskom board to serve the interests of the Guptas. They appointed him to a minor post as director of a Gupta owned subsidiary but do not appear ever to have included him in the many tangled webs which the Guptas wove to advance their interests.

1828. Given that the Gupta's relationships with others who came into their sphere were entirely transactional, the probability is that Mr Pamensky was brought into Eskom to provide the Guptas with inside information. There is no evidence to that effect but I cannot think of any reason why a man with Mr Pamensky's qualifications and qualities would be appointed to the Eskom board unless powerful influence was brought to bear to get him appointed. He was appointed to the board of ORE in September 2014 and to the board of Eskom in December 2014.

1829. The only real evidence that bears upon this topic is the two emails Mr Pamensky wrote to Mr Atul Gupta on 22 November 2015 and 10 December 2015.¹⁵²⁷

1830. I find the following in the email dated 22 November 2015 strange:

“[P]lease ensure that a condition precedent [in the agreement] is that the R2bn claim from Eskom is withdrawn or it becomes the seller's problem.”

¹⁵²⁷ 17-717 and 17-718.

1831. Why would Mr Pamensky presume to give his chairman an instruction on a topic that did not concern him and about which, according to him, he had only read about in the press? Why would he assume that the enormous, deal breaking issue of the penalty claim would not have been considered by the Guptas when they went into the deal? I find the explanation that this transaction would come up in the Investment Committee to which Mr Pamensky had been appointed unconvincing. A discussion about the deal and its parameters within the Committee would perhaps have been appropriate; but not an instruction out of the blue by a subordinate to the chairman. The most likely explanation is that Mr Pamensky knew much more about the OCM deal than he wanted to admit.

1832. The above email is a demonstration of palpable conflict of interest and failure to act in the best interest of Eskom. Both lay bare the insidious relationship he had with the Guptas, which clearly trumped his fiduciary duty towards Eskom.

1833. In the email dated 10 December 2015, Mr Pamensky wrote:

“Congratulations (Mazeltov) on a brilliant and well thought out, planned and strategized acquisition of the Optimum Group of companies.”

1834. How could Mr Pamensky have known that the acquisition had these attributes unless he was privy to the machinations by which it was set up and executed?

1835. I am not certain whether Mr Pamensky was a true insider who falsely portrayed himself at the Commission as a genial, disinterested director of ORE and Eskom who was anxious to cooperate with the Commission to the very best of his ability or whether he was merely a sycophant, seeking to advance a not very distinguished corporate career by associating himself with people he thought were powerful, well connected and shrewd and whether he made a strategic decision to distance himself from the Guptas and portray himself as a victim because he saw that it had all gone wrong.

The role of Ms Daniels

1836. In my view, it is not clear how early Ms Daniels became embroiled in state capture.

There is no doubt that she knowingly advanced the aims of the project to capture Eskom. Although Ms Daniels sought to paint herself in good light by relating an incident about which she said Mr Essa had met with her at a fuel station across Megawatt Park (Eskom) and asked her to name her price and offered her R800 million in order for her not to resist the return of Mr Koko from suspension during 2017, as Mr Essa had promised Mr Koko the position of CEO of Eskom, an offer which Ms Daniels said she declined,¹⁵²⁸ I am nonetheless persuaded that she allowed herself to be used as a conduit of state capture at Eskom for the benefit of Mr Essa and the Guptas.

1837. She advanced the project to capture Eskom by sending confidential Eskom material to “Business Man” at the email address infoportal1@zoho.com.

1838. She motivated the appointment of McKinsey pursuant to a sole source process when she ought to have known that an open competitive process was required.

1839. She allowed herself to be used to enable payments to be made to Trillian which she knew to be legally unjustified. She was party to the approval of a payment by Eskom of some R134 million to Trillian that she knew to be unlawful.

1840. She was party to the creation of documents which created the cover for Tegeta to be paid some R659 million ostensibly as pre-payment for coal supplies to Eskom but in reality to enable the Guptas to raise the shortfall in their resources which they needed to pay the purchase price on their transaction by which they bought Glencore's coal

¹⁵²⁸ Exhibit U18, p1053-1055. At this stage Mr Koko was on suspension for failing to declare a conflict of interest regarding the award of a tender by Eskom to a company called Impulse Trading (Pty) Ltd in which his step daughter was a director and shareholder.

interests. Ms Daniels was also instrumental in facilitating the settlement of the R2.17 billion penalties of OCM for around R255 million after OCM was acquired by Tegeta¹⁵²⁹.

The role of Mr Koko

1841. Mr Koko was exceptionally argumentative, verbose and repetitive. He used the Commission as a platform from which to air his grievances against the media. He repeatedly insinuated that Glencore was in league with President Ramaphosa (then Deputy President of South Africa) to get what Glencore wanted, to the detriment of Eskom and South Africa. He continually attacked persons who and institutions which were critical of him arising from what had been put in the public arena. He regarded the opportunity given to him to testify as a duel between himself and the evidence leader.

1842. Then there is the evidence of the emails from and to the email address infoportal1@zoho.com. It is proved that the infoportal email address was used by Mr Salim Essa and that Mr Salim Essa gave himself, or used, the username "Business Man" "Businessman", "Business Man" or "businessman". The username is user generated and may be changed by the user at will. A correspondent writing to infoportal1@zoho.com could on his or her system choose to link any display name he or she chose to this or any other email address. This is so well known that I think the Commission can take "judicial" notice of it.

1843. Mr Koko's evidence was that he was deceived by Ms Daniels into believing that, when he, Mr Koko, wrote emails to "Business Man" at the email address infoportal1@zoho.com, the account belonged to Dr Ngubane and the emails he wrote were intended for Dr Ngubane. In the light of Mr Koko's proven participation in the scheme to oust the four executives, Mr Koko's evidence in this regard falls to be rejected

¹⁵²⁹ Exhibit U18, p 236.

as completely false. In my view, Mr Koko, consistent with his decision to become a Gupta agent, was feeding Mr Salim Essa with information to enable the Guptas to position themselves advantageously in relation to Eskom's affairs in general and the takeover of Glencore's coal interests in particular.

1844. Mr Koko's position is demonstrated well by the email dated 10 December 2015 which "Business Man" wrote to Mr Koko directing that almost as an addendum to the supply contracts, a two page agreement be drafted between Eskom and Tegeta providing for a bank guarantee by Eskom for R1.68 billion, a pre-payment to Tegeta and other matters.¹⁵³⁰ That email read:

"----- Original message -----

From: Business Man

Date: 2015/12/10 00:15 (GMT+02:00)

To: matshela2010

Subject: 2 Pager

2 pager between Tegeta and Eskom, salient points:

- Eskom will provide bank guarantee for R1.68 Billion
- CP for release is
- Section 11 Approval from DMR
- Competitions Commission Approval
- Tegeta will supply from OCM as per contract, but for the 12 months prepayment (Jan 2016 to Jan 2017) will give a 5% discount off the R154
- Tegeta will supply from Kroonfontein as per contract for same period at the original R380, not the requested increased tariff
- At end of each month starting (end Feb 2016) Eskom shall deduct R140 million from amounts due to recoup the R1,68 Billion

¹⁵³⁰ Eskom-18-1087.

- Tegeta receiving prepayment for 2 mines supply but Eskom can use monies owed from all 3 Mines (Brakfontein also) to recoup the R140m a month
- Therefore if Tegeta does not deliver full volume from OCM or Kroon, the payments due for Brakfontein can be clawed
- Any amounts due over the R140m for each month shall be payable to Tegeta

2 pager, almost as addendum to the supply contracts.”

1845. Despite Mr Koko's attempts to argue the contrary, this email was designed to give the chosen reader, Mr Koko, an instruction to have a two-page contract drafted to reflect what “Business Man” stipulated in the email.

1846. Mr Koko then forwarded the email to Ms Daniels. It is significant, as already found, that he did not reply to it, in his professed understanding that the email was coming from Ms Daniels. He forwarded the email not to convey his inability to understand why the email had been sent to him. He knew, as any reader in a corporate or commercial context would, what was required of him. He forwarded the email to Ms Daniels with the intention that she would act on it and prepare the two-page contract.

1847. The instruction to Mr Koko to prepare a two-page agreement bore fruit. It culminated in the “letter agreement”, containing some two and a half pages of contractual terms, concluded between Eskom and Tegeta on 10 December 2015. I have referred to the letter agreement and the email from Mr Koko's executive assistant under which the text to be worked into the letter agreement was sent to Ms Daniels. The email and its attachment were sent to Mr Ravindra Nath (Mr Nath), a director of Tegeta, on the same day, 10 December 2015, as the letter agreement was signed.

1848. The situation in December 2015 brought about by the threat that Optimum coal mine would stop supplying Hendrina was a crisis which led to the letter from Mr Koko to the

Department of Mineral Resources dated 6 December 2015, the undated reply by the DMR, the submission of Mr Anoj Singh and Mr Koko to the board dated 8 December 2015, the resolution of the Investment and Finance Committee dated 9 December 2015, the letter agreement dated 10 December 2015 and the guarantee issued by ABSA in favour of Tegeta guaranteeing the pre-payment to Tegeta pursuant to the letter agreement.¹⁵³¹

1849. During the period 30 March 2015 to 16 May 2016, there were calls between Mr Koko's cell phone and Mr Salim Essa's cell phone. On 6 November 2015 there was a call of 150 seconds duration. This is when Eskom was conducting negotiations with McKinsey and Trillian for the conclusion of a Master Service Agreement (MSA) on the Top Engineers programme. On 27 April 2016 there was a call of 455 seconds duration. This was when Tegeta needed Eskom money that was paid on 14 April 2016 to implement the coal assets deal with Glencore.

1850. Mr Koko asserted that President Ramaphosa, when Deputy President, exerted pressure on the Eskom board and was captured by third parties.

1851. Mr Koko asserted that he never met Mr Salim Essa before February 2016, when he had a meeting with Mr Salim Essa, followed by another meeting in June 2016. The Commission has also found that Mr Koko and Mr Essa met with Ms Daniels and Mr Masango separately at Melrose Arch on 10 March 2015. Mr Koko asserted that he never met the Gupta brothers and never made or received phone calls from Mr Salim Essa or the Gupta brothers.¹⁵³² I am able, on the evidence, to reject his denials regarding Mr Salim Essa.

¹⁵³¹ Eskom-18-430; 433; 527; 582; 779; 602.

¹⁵³² Mr Koko: sixth affidavit para 27 Eskom-15-2013.

1852. Mr Koko denied that state capture by the Guptas or their associates took place at Eskom. Mr Koko then went on to say that, if anything happened at Eskom related to state capture, Mr Koko was not aware of it. He said that he always acted in the best interests of Eskom. Mr Koko referred to five instances in which he refused to agree to arrangements that might have been in the Guptas' interests. Mr Koko also pointed to achievements during his stay at Eskom, both as Group Executive: Generation and Technology and as interim CEO. He asserted that Eskom's finances improved during his stay at Eskom and load shedding was reduced as operational capacity improved. Mr Koko testified that during the "Molefe/Koko era", maintenance spend increased and coal prices from Eskom suppliers were kept in check.

1853. Mr Koko believes that there is a narrative pursued by the investigators and the legal team presenting evidence to the Commission. I have seen no indication of any such narrative. There is no evidence to support that claim.

1854. Mr Koko asserted that he was unaware that infoportal1@zoho.com was Mr Salim Essa's email address, if in fact it were so. He asserted that Ms Daniels gave him the email address as one he could use to communicate information directly but informally to Dr Ngubane, who was at that time the chair of the Eskom board. Mr Koko failed to explain why, as an executive, with his direct report being the Group CEO, he would have needed to communicate with the Board chairperson, being Dr Ngubane.

1855. Mr Koko devoted considerable time and energy to making the case that Glencore received preferential treatment as a coal supplier to Eskom. He attempted to cast doubt on Mr Ephron's version that Glencore had only publicly available information regarding the OCM Coal Supply Agreement with Eskom. He produced no evidence in support of that assertion, merely saying that Mr Ephron's version was so improbable that it must be false.

1856. Mr Koko further stated that Eskom legitimately refused to settle with Glencore in relation to the penalty and coal price increase issues. It is not possible to determine to what extent, if at all, Eskom was justified in its decision not to settle with Glencore as had been all but agreed prior to the advent of Mr Brian Molefe. What is clear is that the decision to hold out for the full penalty and to refuse any coal price increase was not adhered to once the Guptas, through Tegeta, took control of the Optimum coal mine.

1857. Much of what Mr Koko said in regard to the alleged preferential treatment of Glencore was contradicted by Mr Johann Bester, who was involved in the negotiations with Glencore as a member of the Eskom team. It would be futile to analyse their points of disagreement for reasons given.

1858. Mr Koko stated that Ms Daniels was deliberately misleading the Commission when she stated that the pledge and security arrangements for the R659 million prepayment to Tegeta had not been finalised when the prepayment was made. However, the point is not that the documents were not in place to justify a prepayment but that the money which was paid to Tegeta in April 2016 was not a prepayment against coal to be supplied but a misuse of Eskom's resources to enable Tegeta to complete the purchase transaction with Glencore, something Tegeta could not have done without improper financial assistance from Eskom.

1859. Mr Koko attempted to cast doubt on the credibility of Ms Daniels in her evidence that she still reported to him on 20 July 2015, when he returned from suspension and, on the interpretation of her evidence by Mr Koko, that his version of why he used the email address infoportal1@zoho.com was false.

Mr Koko's complaint against President Ramaphosa

1860. In his main affidavit,¹⁵³³ as well as supplementary affidavit,¹⁵³⁴ to the Commission,¹⁵³⁵

Mr Koko complained about what he said was an intervention by the then Deputy President Ramaphosa to have him dismissed at Eskom. He referred in this regard to a statement released by the Presidency on 20 January 2018 announcing the appointment of a new Board of Directors for Eskom. That statement directed the new Board to-

“(i)mmediately remove all Eskom executives who are facing allegations of serious corruption and other acts of impropriety, including Mr Matshela Koko ...”

1861. Mr Koko also referred in his main affidavit to an SABC interview of Mr Malusi Gigaba, then Minister of Finance, on or about 24 January 2018 in which Mr Gigaba said:

“(t)he Cabinet decision was that Mr Koko must be dismissed by the new Board. The Board has not met. We will allow it in terms of its corporate governance to have its (first) meeting and to look at the process and deal with the issues as they need to deal with them. It is quite urgent”

1862. Mr Koko stated that the substance of this was that Government was directing the Board to find reasons to dismiss him. He said that the Government was overreaching, and its directive to the Board was unlawful and unconstitutional.¹⁵³⁶ Mr Koko's complaint was also that the then Deputy President's conduct in directing the Eskom Board to fire him was inappropriate interference in the operational matters of Eskom. Mr Koko instituted an urgent application in the Labour Court for an order interdicting Eskom from dismissing him.

¹⁵³³ Dated 22 September 2020, EB15(a), p152.

¹⁵³⁴ Supplementary Affidavit dated 13 April 2021.

¹⁵³⁵ EB15(a), p17/44-57.

¹⁵³⁶ *Id* p18/46.

1863. Mr Koko testified that he was not facing “allegations of serious corruption and other acts of impropriety” and that he had been vindicated in allegations of conflict of interest relating to his stepdaughter’s shareholding in Impulse.

1864. On 25 January 2018 Mr Koko had a meeting with Mr Phakamani Hadebe, then newly appointed Acting Group Chief Executive of Eskom. Mr Koko said that in that meeting Mr Hadebe instructed him to resign by 10h00 the following day on the basis that his presence at Eskom was undesirable and the Eskom lenders viewed him as a stumbling block to Eskom’s efforts to clean up acts of maladministration and corruption.

1865. Mr Koko testified that he was not willing to resign and, in anticipation of being dismissed on 26 January 2018, he approached the Labour Court on an urgent basis to interdict his intended dismissal by Eskom which he viewed as unlawful. On the day of the hearing of the application, Eskom had not filed an answering affidavit and the interdict was granted by agreement between the parties, pending a full hearing on 6 February 2018. The hearing on 6 February 2018 resulted in a judgment on 21 February 2018, with *inter alia* the following order in so far as it is relevant:

“[60] In the result I make the following order:

Order

1. The matter is heard as one of urgency.
2. The respondent is interdicted and restrained forthwith from terminating the applicant’s contract of employment and or services in an unlawful breach of the terms and conditions of his employment contract and or on the basis of a directive issued to it by the Government of the Republic of South Africa in terms of the statement that the Government put out on Sunday, 21 January 2018 to the effect that: “The board is directed to immediately remove all Eskom executives who are facing allegations of serious corruption and other acts of impropriety, including Matshela Koko...”
3. It is hereby declared that the ultimatum issued by Mr Phakamani Hadebe requiring the applicant to resign by Friday 26 January 2018, failing which his employment shall terminate by 10h00 am is unlawful.”

1866. Mr Koko instituted an urgent application in the Labour Court the basis of which was that Eskom was about to dismiss him unlawfully in the sense that his intended dismissal would be a breach of his contract of employment and he sought an interdict to restrain Eskom from dismissing him unlawfully. Mr Koko's application followed upon a meeting that he had had with Mr Hadebe, the then Acting Group Chief Executive Officer, on the 25th January 2018 during which meeting Mr Hadebe had called upon Mr Koko to resign from Eskom by 10h00 the following day (i.e. 26 January 2018) failing which Eskom would dismiss him. Mr Hadebe had told Mr Koko that Eskom's lenders had identified Mr Koko as one of the people whom Eskom needed to remove because, as long as they remained within Eskom, the impression was that Eskom was not doing enough to fight corruption. Of course, the meeting between Mr Hadebe and Mr Koko took place after the Government had issued the media statement referred to above to the effect that the new Board of Eskom should remove people facing serious allegations of corruption including Mr Koko.

1867. Mr Koko's urgent application was set down for hearing on the morning of the 26th January 2018 before 10h00 because the deadline he had been given by which to have resigned was 10h00. By that morning Eskom had not delivered any answering affidavits but it was represented by Counsel. The parties agreed that the Court should issue an order the effect of which was to interdict Eskom from unlawfully terminating [Mr Koko's] contract of employment and/or

1867.1. in breach of the terms and conditions of his employment and/or

1867.2. on the basis of a directive issued to it by the Government of the Republic of South Africa ("the Government") in terms of a statement that the government put out on Sunday, 21 January 2018 to the effect that:

“The Board is directed to immediately remove all Eskom executives who are facing allegations of serious corruption and other acts of impropriety, including Mr Matshela Koko...”

1868. The order granted by consent was also to the effect that the order would operate as an interim interdict pending the final determination of the matter. The matter was postponed for a hearing on 6 February 2018. Eskom delivered an answering affidavit in due course and the applicant delivered a replying affidavit. The matter was argued on 6 February 2018 and judgment reserved and subsequently handed down on 21 February 2018.

1869. The final order granted effectively interdicted Eskom “from terminating Mr Koko’s contract of employment and/or services in an unlawful breach of the terms and conditions of his employment contract or on the basis of the directive referred to above that required the new Board of Eskom to dismiss Mr Koko. The order only interdicted Eskom from terminating Mr Koko’s contract or services unlawfully. In so far as the order seems to have interdicted Eskom from dismissing Mr Koko on the basis of the Government directive, it seems to have done so on the basis of the conclusion it reached that that directive did not contemplate that Mr Koko would be given a hearing or that there would be compliance with the *audi alteram partem* rule.

1870. After the Labour Court had granted Mr Koko the interdict that it granted against Eskom and before the 6th February 2018 when the matter would return to the Labour Court, Eskom suspended Mr Koko from work and brought misconduct charges against him. The disciplinary hearing was allocated a date and an independent chairperson of the disciplinary inquiry was appointed by Eskom. The Chairperson of the disciplinary inquiry was Adv Nazeer Cassim SC of the Johannesburg Bar – an eminent Counsel with vast experience in labour law and employment law matters. Instead of defending himself in that disciplinary inquiry Mr Koko elected to simply resign from Eskom before any

witnesses could be called to testify and he walked away from the charges and Eskom. It appears that, in the light of the resignation, the inquiry did not proceed.

1871. By that time, Mr Koko had resigned from Eskom with immediate effect based on a resignation he tendered at his disciplinary hearing on 16 February 2018. He stated that he did so because the new Board was determined to act in accordance with the Government's directive to dismiss him.

1872. Although the statement that was issued by the Cabinet that Mr Koko, among others, should be dismissed by the Eskom Board was issued by the Cabinet, in his oral evidence Mr Koko seemed to single out President Ramaphosa as the person to whom he directed his anger arising from the statement. During his oral evidence before the Commission on 3 December 2020, Mr Koko testified that it was President Ramaphosa who had interfered in the affairs of Eskom by directing the new Board to find reasons to dismiss him. According to him, he had been alerted of his "impending dismissal by the then Deputy President Ramaphosa and the new board" by the then Deputy Minister Ben Martins by telephone call on 20 January 2018, allegedly about 30 minutes before the Presidency issued the statement referred to above.

1873. Mr Koko said that President Ramaphosa was acting on the instructions of third parties outside of Government, such as Business Leadership South Africa (BLSA), the World Bank, African Bank, European Investment Bank and KFW, to dismiss the Eskom Board and appoint individuals who did not have a conflict of interest.¹⁵³⁷ He stated that President Ramaphosa was acting on this instruction when he directed the new Eskom Board to find reasons to dismiss him, and that this was an incident of state capture.

¹⁵³⁷ *Id* p4/14-15 & 17.

President Ramaphosa's response

1874. President Ramaphosa admitted that the Government issued the media statement referred to above in which the new Board of Eskom in 2018 was urged to remove certain employees facing serious allegations of corruption or irregularities including Mr Koko. He explained this Government intervention by referring to the fact that Eskom had received a qualified audit and had an amount of R3 billion in irregular expenditure. He said that Eskom's domestic and international lenders such as the Development Bank of Southern Africa and Citibank were considering recalling their loans. President Ramaphosa pointed out that Cabinet had received a presentation on the IMF/World Bank reiterating the importance of appointing a credible Board for Eskom, and there was an imminent threat of the JSE suspending Eskom's bonds. President Ramaphosa said that the situation was urgent and desperate and required urgent intervention at the highest levels of government, as Eskom's failure would have affected the country's sovereign debt.

1875. President Ramaphosa also referred to the decision acquitting Mr Koko of the misconduct allegations against him involving his stepdaughter, resulting in his return to work on 8 January 2018. President Ramaphosa stated that this decision was not well received and was criticised as a relapse of governance, with several complaints received from organised labour and business, e.g. National Union of Metalworkers of South Africa (NUMSA) and Business Leadership South Africa (BLSA). President Ramaphosa also referred to a memorandum received from members of Eskom's Senior Management complaining of governance, ethical, leadership and financial issues facing Eskom, and requesting the appointment of a credible Board, as well as the reconstitution of the Eskom Executive Management with credible leaders, including the

appointment of a Group Chief Executive Officer and Chief Financial Officer who would be received positively by investors and citizens of the country.¹⁵³⁸

1876. President Ramaphosa stated that in the light of these concerns, an urgent meeting was convened on 19 January 2018 at Mahlamba Ndlopfu, the President's official residence. He said that the meeting was attended by President Zuma, Minister Brown (then Minister of Public Enterprises), Minister Gigaba (then Minister of Finance) and by himself as Deputy President at the time. He said that in that meeting he and Minister Gigaba raised the above concerns. He said that this meeting resolved that urgent action was necessary to avert a national disaster, restore Eskom's credibility and instil confidence in Eskom. President Ramaphosa explained that this required changes to Eskom's Board and leadership, which changes were proposed by him and Minister Brown. He said that those changes were subsequently discussed and agreed upon at a Cabinet meeting on 31 January 2018.¹⁵³⁹ These changes included the appointment of a new Board for Eskom, the appointment of an Acting Group Chief Executive for three months and a direction "to remove all Eskom Executives facing allegations of corruption and other acts of impropriety, including Mr Koko".¹⁵⁴⁰ He also said that these changes or interventions were set out in a media statement released by the Presidency on 20 January 2018,¹⁵⁴¹ prior to the Cabinet meeting on 31 January 2018.

1877. President Ramaphosa disputed Mr Koko's evidence that these interventions, especially the directive to have Mr Koko removed from Eskom, constituted unlawful interference in Eskom's affairs. In support of his denial, he had this to say:¹⁵⁴²

¹⁵³⁸ Annexure MCR39, p 502-503.

¹⁵³⁹ Annexure MCR41, p524-523.

¹⁵⁴⁰ CRB3, p129/235.

¹⁵⁴¹ Annexure MCR40, p520-522.

¹⁵⁴² CRB3, p130/237 to p132.

1877.1. for reasons already stated above regarding Eskom's governance issues, poor financial performance, liquidity challenges and investor concerns, it behoved Government to take control of the impending crisis and not adopt a "business as usual" approach.

1877.2. Government, as Eskom's sole shareholder, was entitled in terms of the Memorandum of Incorporation to intervene in Eskom's affairs to avert a crisis. Any suggestion to the contrary would be incorrect. He referred to paragraph 3.8.1 of Eskom's Memorandum of Incorporation. That paragraph reads:

"The Shareholder may direct the Company to take any action specified by the shareholder if the Company:

is in financial difficulty or is being mismanaged;

fails to perform its functions effectively or efficiently;

has acted unfairly or in a discriminatory or inequitable way towards a person to whom it owes a duty under the Legislative or Policy Framework;

has failed to comply with any law or any policy envisaged in the Legislative or Policy Framework."¹⁵⁴³

1877.3. pursuant thereto, the Shareholder may issue a directive in writing setting out the reasons for the directive, remedial steps Eskom is required to take and the time period within which to do so.¹⁵⁴⁴ If Eskom fails to comply, the Shareholder may, after giving Eskom a hearing, initiate an investigation and/or place Eskom under administration;¹⁵⁴⁵

1877.4. restoring credibility in Eskom required removing persons alleged to have been involved in corruption, including Mr Koko and Mr Anoj Singh. Even though some of the allegations against Mr Koko had been tested in a disciplinary enquiry, the

¹⁵⁴³ Annexure MCR42, p538, para 3.8.1

¹⁵⁴⁴ *Id* p538, para 3.9.

¹⁵⁴⁵ *Id* p538, para 3.10.

findings of that enquiry were subjected to doubts by Eskom's stakeholders, organised labour and Eskom employees; and

1877.5. there is no link between the directive to remove Mr Koko and state capture. The mere fact that he was removed does not mean that his removal was intended to achieve corrupt ends or to capture Eskom. The opposite is true; Mr Koko's removal was part of a package of reforms to avert a crisis.

1878. It is indeed correct that Eskom's MOI entitles the Shareholder to intervene in Eskom's affairs under certain circumstances, which include when Eskom-

1878.1. is in financial difficulty or being mismanaged;

1878.2. fails to perform its functions effectively or efficiently, and

1878.3. has failed to comply with any law or any policy envisaged in the legislative or policy framework.

1879. In any of these circumstances, the Shareholder may issue a directive as explained above, calling upon Eskom to take remedial steps within a given period, failing which an investigation may be initiated and/or Eskom placed under administration. However, the MOI does not entitle the Shareholder to issue directives that trump employees' labour rights or disregard labour laws. The directive herein concerned troubled the Labour Court in that it had simply directed for the immediate removal of all Eskom executives, including Mr Koko, without directing that they be subjected to a disciplinary hearing. The Court said:

“[30] According to the directive, the applicant is to be removed, and not that he be subjected to a disciplinary hearing to determine whether there are grounds in law for his employment to be terminated. The applicant has rights guaranteed by his

contract of employment. The respondent is constrained to act in line with the rule of law. Unlawful actions are inimical to the rule of law.”

1880. It would appear that the statement that Eskom executives who were facing allegations of serious corruption and other acts of impropriety including Mr Koko should be removed or dismissed was a Cabinet statement although President Ramaphosa, as Deputy President then, also articulated it. Whether that directive to the new Board of Eskom was lawful or not depends upon whether or not the new Board could comply with it without acting in breach of the law. While sitting in the Labour Appeal Court as Judge President in *TSI Holdings (Pty) Ltd & others v National Union of Metalworkers of SA & others* (2006) 27 ILJ 1483 (LAC) many years ago I held that a demand by a trade union or a group of employees that the employer dismiss a certain manager or supervisor in circumstances where there was no evidence that the supervisor or manager had committed misconduct was an unlawful demand because it required the employer to dismiss that supervisor or manager when there was no fair reason to dismiss him. A demand that an employer dismiss an employee would also be unlawful if compliance with it would require the employer to dismiss the employee in breach of the employee's right to a hearing or to procedural fairness.

1881. In this case I cannot see how the new Board of Eskom could have complied with the Cabinet's directive without acting in breach of the provisions of the Labour Relations Act that obliged an employer to afford an employee procedural fairness or the right to be heard before he or she may be dismissed for alleged misconduct. However, a directive or demand that an employer dismiss an employee facing allegations of misconduct even before that employee is given an opportunity to be heard or to answer the allegations of misconduct is a directive that necessarily requires the employer to dismiss without affording the employee procedural fairness because an employer cannot approach the hearing of an employee on the basis that the employee must be dismissed irrespective of the evidence that gets heard at the hearing. Accordingly, the

Cabinet's directive necessarily required the new Board to act contrary to the Labour Relations Act and, as such, was unlawful and the Cabinet should not have issued it in such terms. It would have been different if the directive was simply that the new Board should take disciplinary action or institute its disciplinary process or that it should take action. This would have been different because taking disciplinary action does not exclude initiating a disciplinary process.

1882. Fortunately, the new Board decided to initiate a disciplinary process against Mr Koko and appointed an independent chairperson to chair the disciplinary hearing – a Senior Counsel with vast labour and employment law experience and it was then Mr Koko who decided to resign rather than face a disciplinary hearing. Cabinet was wrong to issue the directive it issued in the terms in which it did because the provisions of the Memorandum of Incorporation of Eskom did not authorise the Shareholder to issue a directive that required the Board of Eskom to act in breach of the law. Nevertheless, at a substantive level if Cabinet believed that Mr Koko was engaged in acts of serious misconduct including working with the Guptas against the interests of his then employer – Eskom, the findings made in this Report about Mr Koko vindicate that belief.

1883. Thus, although the intervention may have been justified and permissible under the MOI, the steps the Shareholder could direct the Board to take had to be within the law.

1884. Mr Koko's evidence that the Cabinet directive was an act of state capture falls to be rejected. As shown above, the Government sought to use its powers as the sole shareholders of Eskom and sought to protect Eskom and, therefore, the country from the disastrous consequences for the country that would follow if Eskom collapsed. To the extent that it can, with justifications, be said that the Cabinet's directive to the Eskom Board to remove Mr Koko from Eskom was an instruction for the Board to act illegally or unlawfully, that was unacceptable and should not have been done. However, to the

extent that there were concerns that Mr Koko may have engaged in acts of corruption which harmed Eskom, the evidence which has been unearthed by the Commission has revealed that Cabinet's concerns about Mr Koko were fully justified. The Commission has found that Mr Koko was working with the Guptas or their associates including Mr Salim Essa in pursuit of their agenda of state capture and in seeking to loot the coffers of Eskom.

The role of Mr Anoj Singh

1885. Mr Anoj Singh appears to have travelled overseas, in each case to Dubai, UAE and often with his partner, now his wife Ms Naik, on no fewer than seven occasions in the period 2014 to 2017. One of these trips, he said, was on official business for Transnet and must have been paid for by Transnet. The others were private trips, all booked through Travel Excellence. In each case, Travel Excellence charged the ticket to the account of Mr Salim Essa and the fee due was thereafter paid in cash.

1886. For purposes of this report, it will be assumed, without deciding, in Mr Singh's favour that his evidence that was one of those trips was an official trip was made in connection with his work at Transnet is true. Therefore, what this Commission will focus on is whether these other trips which even Mr Singh accepted were private trips were not paid for by the Guptas or their associates or entities including Mr Salim Essa.

1887. According to the evidence of Ms Sameera Sooliman of Travel Excellence, Mr Singh was introduced to Travel Excellence by Mr Salim Essa during 2014.¹⁵⁴⁶ From then onwards, Travel Excellence received requests from either Mr Essa or from Mr Singh for flight bookings for them. For Mr Singh the flight bookings were made for 8 June 2014, from Dubai to Johannesburg, for 6 to 23 August 2014 (including his partner, Ms Naik)

¹⁵⁴⁶ Transcript 13 April 2021, p 98 and Eskom Reference Bundle 18 p Exhibit U34 1562.4 para 20.

from Johannesburg to Dubai and back, for 6 to 9 November 2014 from Johannesburg to Dubai and back, for 23 to 26 February 2015 from Johannesburg to Dubai and back, for 11 to 15 June 2015 from Johannesburg to Dubai and back, for 15 to 24 December 2015 (with his partner) from Johannesburg to Dubai and back, for 24 to 27 February 2017 (along with Mr Rajesh Gupta), from Johannesburg, Dubai and India.¹⁵⁴⁷

1888. The charges for all these flight bookings, except for the last one with Mr Rajesh Gupta, were always allocated to Mr Essa's account number C000365, as he was considered the "guarantor" for flight bookings of those he introduced to Travel Excellence. According to Ms Sooliman, the flight bookings, although all allocated to Mr Essa's account, were paid for by Mr Singh, except in two instances.

1888.1. The one instance relates to a booking requested by Mr Singh's partner, Ms Naik, for Mr Singh and her to fly from Johannesburg on 6 August 2014, to Dubai and back to Johannesburg on 12 August 2014. The total cost for the flight tickets was R60 000.00, which was charged to Mr Essa's account and settled via EFT by a company or entity associated with Mr Essa.¹⁵⁴⁸ Mr Singh could not explain how his partner, Ms Naik, came to request a flight booking with Travel Excellence for the 6 to 12 August 2014 to Dubai. He sought to deny that Ms Naik had made the request, but then said the request was in August 2015, which was cancelled and not used. Ultimately, Mr Singh confirmed that he and his partner did take the flight.¹⁵⁴⁹

1888.2. The other instance relates to flight bookings for Mr Singh and Mr Rajesh Gupta for travel on 24 to 27 February 2017 from Johannesburg to Dubai, from Dubai to India, from India to Dubai, and from Dubai back to Johannesburg. The total

¹⁵⁴⁷ Exhibit U34 1562.4 p 22.

¹⁵⁴⁸ Transcript 18 May 2021, pp 49-50, and Ms Sooliman's 3rd supplementary affidavit, dated 13 August 2021, pp 3-5.

¹⁵⁴⁹ Transcript 13 April 2021, pp 154-155.

amount invoiced was R134 560.00, which included the costs of visas for Mr Varun Gupta and Mr Suryakant Singhala. The invoice was addressed to Mr Rajesh Gupta and charged to the account of Sahara Computers, a Gupta-owned entity, which made a cash payment to Travel Excellence.¹⁵⁵⁰

1889. It is significant that on these Dubai trips, the Guptas and Mr Essa and others of their close associates were often shown to be in Dubai at the same time and, on occasion, even on the same flight as Mr Singh. Moreover, records show numerous other persons implicated in 'State Capture' in Dubai at the same time.

1890. Mr Anoj Singh admitted that he (and, on occasion, Ms Naik) were the beneficiaries of the other tickets but said that he did not know why they were charged to Mr Salim Essa's account. He said that he always paid for these tickets in cash or in some other electronic form. He could not produce any records to substantiate his version. He stated that he no longer had access to his accounts because of the South African Revenue Service (SARS) interventions.

1891. I consider that this excuse for not producing proof was inadequate. Mr Singh could easily have brought the records to the Commission under subpoena but did not do so.

1892. One wonders how Mr Anoj Singh was able to afford these private trips and, if so, where he got the cash which it must be accepted, in the absence of any evidence of other forms of payment, he used to pay for the tickets.

1893. One wonders too how in each case Mr Anoj Singh's tickets were charged to the account of Mr Salim Essa unless Mr Salim Essa was to be responsible for the payments.

¹⁵⁵⁰ Exhibit U34 p 1562.6-1562.7.

1894. I think that there is enough evidence to conclude, on a balance of probabilities, that the tickets were funded by Mr Salim Essa. If that is so, then the tickets must have featured as rewards for services rendered, i.e. for promoting the Guptas' interests in relation to Transnet and Eskom.

1895. In relation to the events of December 2015 relating to the R1.68 billion pre-payment, it cannot be said that the board committee was misled by the submission signed by Mr Anoj Singh on which it took action. The submission stated in effect that the pre-payment would be for the benefit of Tegeta and not Glencore.

1896. However, in relation to the events of December 2015, a number of false and misleading aspects of Mr Koko and Mr Anoj Singh's submission may be summarised, inter alia, as follows:

1896.1. The submission¹⁵⁵¹ was not for a pre-purchase of coal from OCM, as stated in paragraph 1 thereof. No pre-purchase of coal was ever made from OCM nor even from Tegeta, pursuant to a resolution taken in terms of this submission;

1896.2. Eskom did not face a risk of coal supply to the Hendrina (of 5.5Mtpa by OCM as a result of business rescue proceedings), as stated in paragraph 2.2.1 of the submission. OCM/Glencore had just committed itself to honouring the Coal Supply Agreement;

1896.3. In accordance with Mr Marsden's evidence, during the period December 2015 to April 2016 there was no material threat that OCH and/or OCM would be

1551 Round Robin submission to the Eskom Board, dated 08 December 2015. EB-18-281.

placed in liquidation or that coal would not be supplied to Eskom in terms of the Coal Supply Agreement;

1896.4. In his affidavit Mr Rishaban Moodley, an attorney from Eskom's lawyers, CDH, stated that the interim arrangement between Eskom and the BRPs for continued coal supply to Eskom endured for the duration of the business rescue proceedings, from about August 2015 to July 2016; and

1896.5. It is not true that the proceeds of R1.68 billion prepayment of coal were to be used by OCM to extinguish existing liabilities to ensure that the business continues as a going concern, as stated in paragraph 3.6.2 of the submission. OCM did not know about this prepayment request. It was not engaged by either Eskom, Tegeta or the Department of Mineral Resources in regard to this request, nor did it receive any such prepayment for coal from Eskom.

1897. Therefore, the only sensible conclusion is that the prepayment submission by Mr Anoj Singh and Mr Koko had nothing to do with addressing the risk of coal supply to Eskom, but everything to do with providing financial assistance to Tegeta or providing the appearance that Tegeta had the requisite financial capacity to acquire OCH.

1898. The payments of April 2016 are in a different category. I cannot accept that the payments of some R700 million were prepayments for coal to be delivered. Once it is accepted that Messrs Molefe, Koko and Singh were Gupta agents who were prepared to do the Guptas' bidding when required to do so, then on a balance of probabilities they all knew that the money was required to complete the purchase of the shares transaction.

The role of Mr Zwane

1899. As mentioned in the separate section in respect of Mr Zwane above, he was sworn in as a Member of the National Assembly on 2 September 2015. Although he had virtually no experience in national government and none at all in mining affairs, on 23 September 2015 Mr Zwane was appointed Minister of Mineral Resources by President Zuma.

1900. The appointment of Mr Zwane as Minister of Mineral Resources was preceded by the meeting between the then Minister of Mineral Resources, Mr Ramatlhodi, with Dr Ngubane and Mr Brian Molefe. Adv. Ramatlhodi's recollection of what transpired at the meeting has been outlined in great detail in the section relating to Adv. Ramatlhodi's "promotion". However, there is a sharp dispute of fact as to what the purpose of the meeting was. Mr Ramatlhodi said that the meeting was an unsuccessful attempt by Dr Ngubane and Mr Brian Molefe to persuade him to suspend Glencore's coal mining licences. Dr Ngubane and Mr Brian Molefe said that the purpose of the meeting was quite the opposite: to persuade Minister Ramatlhodi to uplift certain restrictions placed on Glencore's capacity to mine coal as this would have a severe negative impact on Eskom's capacity to supply power.

1901. On the evidence before the Commission Mr Ramatlhodi's version is accepted as the version that is, on the probabilities, true. Dr Ngubane's and Mr Brian Molefe's version is rejected as probably false and a fabrication. On Mr Ramatlhodi's version that Dr Ngubane and Mr Brian Molefe sought to put pressure on him to act in a manner that would have favoured the Guptas and against Glencore. That accords with what could be expected from people who were working with the Guptas to advance the Gupta's agenda of state capture and corruption. The evidence heard by the Commission has revealed conclusively that Dr Ngubane and Mr Brian Molefe were working with the Guptas and their associates to advance the agenda of looting state coffers. The conduct

attributed to both Dr Ngubane and Mr Brian Molefe in terms of Mr Ramatlhodi's version accords with the type of conduct that Dr Ngubane and Mr Molefe would engage in as people working with the Guptas to advance the business interests of the Guptas.

1902. Dr Ngubane sought to mislead the Commission that he did not know when he received correspondence from and sent correspondence to "Businessman" at the infoportal address dealt with in this Report that he was dealing with Mr Salim Essa. He said that he thought that he was corresponding with Mr Richard Seleke who he said was the Director-General of the Department of Public Enterprises. However, when it was pointed out to him that it was in September 2015 when he received correspondence from the infoportal email address and that at that time Mr Richard Seleke had not as yet become Director-General of the Department of Public Enterprises, he was caught out and he could not explain who he was getting these emails from. That was because he was not going to admit that they were from Mr Salim Essa. Dr Ngubane dishonestly pretended that he did not know where the emails were coming from when he knew very well. Mr Ramatlhodi was a good witness who testified honestly before the Commission.

1903. Dr Ngubane's and Mr Brian Molefe's version of the purpose of the meeting is particularly implausible when one considers the fact that Mr Brian Molefe, less than two months earlier, risked the security of coal supply by OCM to Hendrina by not only resisting negotiating a higher price requested by OCM, but also slapped OCM with a R2.17 billion penalties claim. Now, the assertion that Mr Brian Molefe wanted the suspension of the OCM license lifted due to concerns on security of supply by OCM flies in the face of his earlier actions, or even lack thereof. It is further surprising why the Chairman of Eskom, Dr Ngubane, would involve himself with a contractual issue on coal supply between Eskom and its supplier.

1904. An issue was identified regarding the purpose of Mr Zwane's trip to Zurich, Switzerland in December 2015. Mr Zwane said that the sole purpose of his trip, made in an official capacity and paid for by the DMR, was to protect the jobs of some 3 000 mineworkers whose jobs would be jeopardised if the Optimum coal mine went into liquidation.
1905. The evidence was that Glencore conveyed its decision to finance the mine, and thus remove liquidation as a risk to Eskom on 1 December 2015. By then, Mr Zwane had already travelled to Zurich, Switzerland to meet with Mr Glasenberg on the same day, 1 December 2015 at which meeting he was also told by Mr Glasenberg of Glencore's decision to finance OCM and take it out of business rescue and to continue supplying coal to Eskom.
1906. It is proved that the Guptas were seeking to implement a scheme to take over the Glencore coal interests and that they had enlisted officials within Eskom and the DMR to help them achieve their goal. The Guptas had used their influence to install a Minister in the DMR who could be trusted to do their bidding. It seems strange that the Minister would travel to Zurich for the sole purpose of assuring Mr Glasenberg that the South African government would do what it could to prevent the liquidation of the Optimum coal mine and would therefore support the sale of the Glencore coal interests to the Guptas. A telephone call or a letter would have achieved the same result.
1907. Moreover, one must bear in mind in this context that it was a proven technique of the Guptas to have highly placed officials of the South African government on hand, when seeking to enlist the help of some or other person to their schemes, as a demonstration of their power and reach. In support of this it can be remembered that Mr Tony Gupta often brought Mr D Zuma to meetings with third parties even though by all accounts Mr D Zuma would be very quiet in those meetings and would not contribute anything of value to the discussions. Mr Tony Gupta was with Mr D Zuma (and Mr Fana

Hlongwane) in the meeting between himself and Mr Mcebisi Jonas on 23 October 2015 and Mr Jonas said that Mr D Zuma was very quiet in that meeting. Mr Tony Gupta also brought Mr Duduzane Zuma to a meeting that he had with Mr Mxolisi Dukoana at the Gupta residence and Mr Dukoana said that Mr D Zuma was quiet in that meeting. Mr Tony Gupta or Mr Salim Essa brought Minister Malusi Gigaba to a meeting with Mr Riaz Saloojee at the Gupta residence and introduced Mr Saloojee to Mr Gigaba in circumstances which made it clear that the idea was to show Mr Saloojee that he (i.e. Salim Essa) had connections with his political bosses. Major-General Booysen was taken by Mr D Zuma to a meeting with Mr Tony Gupta at the Gupta residence and Mr D Zuma also attended that meeting but Major-General Booysen also testified that Mr D Zuma hardly said a word in the meeting. Mr Vusiyle Kona also attended a meeting with Mr Tony Gupta and Mr D Zuma at the Gupta residence and Mr Kona testified that Mr D Zuma was very quiet at that meeting and did not contribute anything of substance to the discussions. Mr Mafika Mkhwanazi who was Chairperson of the Transnet Board of Directors also had a meeting with Mr Tony Gupta and Mr D Zuma at the Gupta residence and he, too, said that Mr D Zuma did not make any contribution to the discussion. All of these instances are referred to in support of the proposition that it was the Guptas' way of dealing with Government and SOE officials to show their connection with President Zuma or his Ministers in order to advance their business interests.

1908. Mr Zwane must have undertaken the trip to Switzerland at the instance of the Guptas for the same purpose for which they often brought Mr D Zuma to their meeting with other people; namely to show their proximity to and connection with the political leaders of the country. When one looks at what Mr Zwane did or said in the meeting with Mr Glasenberg, one realises that there was nothing meaningful Mr Zwane did. In fact, on his own version, he left Mr Glasenberg and Mr Essa or Mr Tony Gupta to "reach a deal". He was simply playing exactly the same role that Mr Tony Gupta made Duduzane Zuma to play. After all, the Guptas must have got President Zuma to appoint Mr Zwane as

Minister of Mineral Resources mainly for this purpose, namely to help them get OCM from Glencore.

1909. In introducing Mr Salim Essa as his advisor, Mr Zwane knew that the statement was false and must have made it solely to advance the business interests of the Guptas. Making such a false statement could not have in any way been in the interests of the Government or in the interests of protecting jobs. It was not necessary to make that statement in order to protect jobs or to promote Government's interests. There is only one party that could benefit from that statement; it was the Guptas and their associates. In my assessment, Mr Zwane's statement shows conclusively that his whole trip to Switzerland was not about saving jobs, but about advancing the business interests of the Guptas.

1910. Mr Zwane did not stop promoting the sale transaction even after he had been told by Mr Glasenberg on 1 December 2015 that the risk of liquidation had been eliminated and that Glencore was negotiating towards a sale transaction with the Guptas. Although in poor health and in need of an operation on his throat to alleviate the symptoms of his throat cancer, Mr Zwane attended the meeting on 2 December 2015, at which he simply played a ceremonial role. I do not think that this was the conduct of an honest broker who simply wanted to bring the parties together. There was no reason for Mr Zwane not to fly home once he knew that liquidation was no longer an option. He stayed in Zurich, in my view, because the Guptas liked to present those with whom they sought to do business with a high government figure as proof of their reach and power.

1911. This is reinforced by Mr Zwane's conduct after the meeting on 2 December 2015. He did not travel home. He travelled with the Guptas to India and, if he is to be believed, queued at a public hospital until he could get his throat operation there. Then he stayed in India until the Guptas were ready to travel to Dubai, UAE and accompanied them on

their private jet. The Gupta email records show that in Dubai, UAE, Mr Zwane was put up at a hotel and provided with a car to use within Dubai until he was ready to go home.

1912. The evidence proves that Mr Zwane improperly promoted Gupta interests while he was an MEC in the Free State and as Minister of Mineral Resources. He was a willing and conscious participant in the Guptas' scheme to gain control of the Glencore coal interests.

Implicated parties - Acquisition of OCH/OCM

1913. The 2014 Board (Dr Ben Ngubane (now late), Ms Klein, Mr Pamensky, Mr Romeo Kumalo, Ms Mabude, Ms Viroshini Naidoo, Dr Pat Naidoo, Ms Mariam Cassim, Ms Carrim, Mr Khoza), who improperly delegated their duty of decision-making on the renegotiated OCM/Glencore contract to Mr Brian Molefe, failed to exercise proper oversight over Mr Brian Molefe's further actions with regard to the contract.

1914. Mr Brian Molefe and Mr Koko who used their positions within Eskom to collude with the Guptas and Mr Salim Essa in a scheme to pressurise Glencore into the sale of OCH to the Guptas through a series of cumulative actions that made it impossible for Glencore to have any prospect of running the OCM mine sustainably as they continued to supply coal to Eskom. This was against all advice from technical and legal staff, and ultimately the interest of Eskom as it endangered its own coal supply for its power stations.

1915. Mr Brian Molefe, Dr Ngubane, Mr Raphela, Mr Zwane and his advisors, viz. Mr Mabaso and Mr Kuben Moodley, who placed additional pressure on Glencore by threatening its other mining operations with orders for work stoppages; and manipulated events such that the Guptas were positioned as the only possible buyer. Mr Zwane further used his ministerial position to essentially put pressure on Glencore in a meeting in Switzerland for the sale to the Guptas.

1916. Mr Pamensky who used his position and inside knowledge as Eskom Board member to advise the Guptas on the purchase of OCM, and especially how to avoid assuming liability for Eskom's R2.17 billion penalties claim, thereby acting in direct conflict of Eskom's interests.

1917. The 2014 Board, who in approving the ceding of the Optimum coal supply agreement and releasing OCH from the guarantee they had provided Eskom, which had a large penalty claim against it, without ensuring that due diligence had been done and that Tegeta had put a replacement guarantee in place, put Eskom at a financial risk.

Implicated parties - R1.68 billion submission and the guarantee

1918. Mr Koko, Mr Anoj Singh, Mr Raphela (DMR), Ms Daniels and the 2014 Board who ensured that the Guptas had sufficient funds to purchase OCH/OCM by preparing a submission that recommended, on false grounds, a resolution for a prepayment of R1.68bn to Tegeta which they almost immediately utilised to arrange an unauthorised guarantee in favour of Tegeta.

1919. In the process, Mr Koko and Mr Anoj Singh conspired with Mr Salim Essa and Regiments employees, particularly Mr Wood and Mr Bobat, in formulating these arrangements. The 2014 Eskom Board failed in their fiduciary duties in irresponsibly approving the prepayment.

1920. Bank of Baroda who not only failed to report the highly suspicious activities on the Guptas and their associates' bank accounts, but enabled the Guptas to perpetuate their unlawful activities of money laundering.

Implicated parties - R659 million prepayment

1921. Dr Nteta, Mr Mabelane, Ms Daniels, Mr Koko, Mr Anoj Singh, Mr Mboweni and the Eskom Board Tender Committee, who collaborated in a scheme to ensure that the Guptas had the balance of the purchase price to pay for the acquisition of OCH/OCM by arranging irregular short-term contracts and a large prepayment to Tegeta.

1922. The Guptas, Regiments, Trillian, Mr Wood, Mr Moodley, Albatime, Centaur Mining: took part in money laundering activities and used funds derived from those activities towards the purchase of OCM mine for Tegeta.

Implicated parties - Settlement of R2.17 billion and Temporary Reliefs

1923. Mr Brian Molefe, Ms Daniels, Mr Mboweni, Dr Nteta, Mr Koko and Mr Anoj Singh, who ensured that favourable treatment was given to the Gupta's Tegeta after taking over OCM, and most certainly against Eskom's best interests.

1924. Mr Brian Molefe, Mr Anoj Singh, Mr Koko and Mr Zwane, who received benefits from the Guptas that included at least one of the following: cash benefits and trips abroad (paid for in whole or in part by the Guptas and/or Mr Salim Essa or their entities); an aspect dealt with in the McKinsey Evidence Analysis Report.

1925. Mr Zwane who lied to Parliament about his relationship with the Guptas.

1926. All of the above-mentioned individuals: colluded together to ensure that pressure was on Glencore to sell the OCM mine to the Gupta's Tegeta, that Tegeta had the funds to make the purchase and that thereafter there was favourable treatment of Tegeta by Eskom – all to the detriment of Eskom's interests. This amounts to evidence of a corrupt relationship between the Guptas, their associates and key state officials, which was

utilised to induce Eskom officials to unduly – if not fraudulently - award contracts, approvals and other financial benefits to the Guptas and their associates.

Relevant Terms of Reference

1927. The facts above implicate several of the Commission's terms of reference.

1928. ToR 1.0: "whether, and to what extent and by whom attempts were made through any form of inducement or for any gain of whatsoever nature to influence members of the National Executive (including Deputy Ministers), office bearers and/or functionaries employed by or office bearers of any state institution or organ of state or directors of the boards of SOE's".

Applicable in general.

1929. ToR 1.3: "Whether the appointment of any member of the National Executive, functionary and/or office bearer was disclosed to the Gupta family or any other unauthorised person before such appointments were formally made and/or announced, and if so, whether the President or any member of the National Executive is responsible for such conduct".

1929.1. The appointment of Mr Zwane as a member of the National Assembly was preceded by the exchange of his CV between, inter alia, Mr Tony Gupta and Mr Duduzane Zuma (the son of former President Jacob Zuma).

1930. ToR 1.4: "whether the President or any member of the present or previous members of his National Executive (including Deputy Ministers) or public official or employee of any state owned entities (SOEs) breached or violated the Constitution or any relevant ethical code or legislation by facilitating the unlawful awarding of tenders by SOE's or

any organ of state to benefit the Gupta family or any family, individual or corporate entity doing business with government or any organ of state”.

1930.1. Unlawful awarding of tenders or contracts by Eskom to the Gupta family, facilitated by at least one Minister (Mr Zwane), numerous Eskom officials, the Eskom Board and at least one DMR official (Mr Joel Raphela).

1931. ToR 1.5: “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.”

1931.1. The nature and extent of corruption in the awarding of coal contracts to the Gupta family as they took ownership of OCM, through their company Tegeta/Oakbay, is traversed above.

1932. ToR 1.6: “whether there were any irregularities, undue enrichment, corruption and undue influence in the awarding of contracts, mining licenses, government advertising in the New Age Newspaper and any other governmental services in the business dealings of the Gupta family with government departments and SOEs.”

1932.1. The facts above clearly show irregularities, undue enrichment and undue influence of the Gupta family and their associates (e.g. Mr Salim Essa and Dr Eric Wood) in the awarding of coal contracts, a R1.68 billion guarantee and prepayments to Tegeta at Eskom.

1933. ToR 1.7: “Whether any member of the National Executive and including Deputy Ministers, unlawfully or corruptly or improperly intervened in the matter of closing banking facilities for Gupta owned companies.”

- 1933.1. Mr Zwane is implicated herein due to his conduct when he was the chairperson of the Inter-Ministerial Committee established to investigate the closure of Gupta bank accounts.
1934. ToR 1.8: “Whether any advisers in the Ministry of Finance were appointed without proper procedures. In particular, and as alleged in the complaint to the Public Protector, whether two senior advisers who were appointed by Minister Des Van Rooyen to the National Treasury were so appointed without following proper procedures.”
- 1934.1. This term of reference appears to be restricted to appointment of advisers in the Ministry of Finance, but there is no reason why it should not extend to other Ministries, such as the Department of Mineral Resources, where Mr Zwane came with two advisors. However, evidence of their appointment is not a subject matter of this report.
1935. ToR 1.9: “The nature and extent of corruption, if any, in the awarding of contracts and tenders to companies, business entities or organizations by Government Departments, agencies and entities. In particular, whether any member of the National Executive (including the President), public official, functionary of any organ of state influenced the awarding of tenders to benefit themselves, their families or entities in which they held a personal interest.”
- 1935.1. This term of reference should also apply to employees of SOEs. Eskom executives mentioned in this report, and especially Mr Koko, Mr Anoj Singh and Mr Brian Molefe, would have acted as they did for their personal interests, in order to secure employment positions and receive financial rewards or benefits from the Guptas, e.g. flight bookings and hotel accommodations. Mr Zwane is also implicated herein.