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**DAY 186**

**FINAL**

20

**PROCEEDINGS RESUME ON 31 OCTOBER 2019**

**CHAIRPERSON:** Good morning Ms Hofmeyr, good morning everybody.

**ADV HOFMEYR:** Good morning Chair.

**CHAIRPERSON:** Are you ready?

**ADV HOFMEYR:** We are indeed.

**CHAIRPERSON:** Yes.

**ADV HOFMEYR:** Chair our first witness this morning is Mr Pamensky. He is legally represented so if I may just ask for an opportunity for his legal representative to introduce himself?

10 **CHAIRPERSON:** Yes thank you. Yes.

**ADV BLOU:** Thank you. Good morning Chair Jonathan ...(intervenes).

**CHAIRPERSON:** Just come forward.

**ADV BLOU:** Oh. ...(indistinct) not speaking into the microphone.

**CHAIRPERSON:** Yes thank you. You did of course introduce yourself yesterday it is just to place yourselves on record.

**ADV BLOU:** Yes. Morning Chair my name is Jonathan.

**CHAIRPERSON:** Good morning.

**ADV BLOU:** Blou.

**CHAIRPERSON:** Yes.

20 **ADV BLOU:** I am counsel from Johannesburg Bar briefed by Attorney Adam Mitchell representing Mr Pamensky.

**CHAIRPERSON:** Thank you. Thank you very much.

**ADV BLOU:** Thank you.

**CHAIRPERSON:** Thank you.

**ADV HOFMEYR:** And Chair no other lawyers have introduced

themselves to me this morning but I know from correspondence.

**CHAIRPERSON**: Yes.

**ADV HOFMEYR**: That one or two of the implicated persons indicated that they might have lawyers present.

**CHAIRPERSON**: Yes.

**ADV HOFMEYR**: So maybe we should just give an opportunity if there is anyone.

**CHAIRPERSON**: Well nobody is rising.

**ADV HOFMEYR**: No.

10 **CHAIRPERSON**: So I am sure they are not in the room.

**ADV HOFMEYR**: It is fine.

**CHAIRPERSON**: *Ja* okay.

**ADV HOFMEYR**: Thank you. Chairperson if we may then just proceed.

**CHAIRPERSON**: Yes.

**ADV HOFMEYR**: To swear the witness in. We are ready to commence.

**CHAIRPERSON**: *Ja* okay please do that.

**REGISTRAR**: Please state your full names for the record?

**MR PAMENSKY**: Mark Vivian Pamensky.

**REGISTRAR**: Do you have any objection to taking the prescribed oath?

20 **MR PAMENSKY**: No.

**REGISTRAR**: Do you consider the oath to be binding on your conscience?

**MR PAMENSKY**: Yes I do.

**REGISTRAR**: Do you swear that the evidence you will give will be the truth; the whole truth and nothing but the truth, if so please raise your

right hand and say, so help me God.

**MR PAMENSKY**: So help me God.

**CHAIRPERSON**: Thank you. You may start.

**ADV HOFMEYR**: Thank you Chair.

**CHAIRPERSON**: Yes.

**ADV HOFMEYR**: Mr Pamensky just to give you some assistance as to the piles and everything that is around you. You have a file in front of you. Chair if we can enter Mr Pamensky's affidavit and annexures into the record as Exhibit MM3?

10 **CHAIRPERSON**: The lever arch file containing Mr Pamensky's affidavit and annexures will be marked as Exhibit MM3.

**ADV HOFMEYR**: Thank you. We will work predominantly in that file Mr Pamensky but there will be a few occasions where I will need to take you to other files and those are contained in the black box next to you on your left. And then also just to orientate you the page numbering in the top right hand corner of the bundle in front of you and all other bundles will be what I am referring to when I ask you to go to a particular page. And other than that just to make sure that the microphone stays on and is fairly close to you for the purposes of the  
20 evidence. Mr Pamensky if we turn up page 1 of the Exhibit MM3 in front of you. That I understand is an affidavit you provided to the Commission and was deposed to on the 16<sup>th</sup> of October, is that correct?

**MR PAMENSKY**: That is correct.

**ADV HOFMEYR**: Thank you. And as I indicated we will work predominantly in your affidavit and on occasion I will need to take you

to other documents both in this file and in other files. Mr Pamensky can you tell us when you joined Eskom?

**MR PAMENSKY:** I joined Eskom Board on the 11<sup>th</sup> of December 2014.

**ADV HOFMEYR:** And until when were you a Board Member of Eskom?

**MR PAMENSKY:** Up until the 25<sup>th</sup> or the 26<sup>th</sup> November 2016.

**ADV HOFMEYR:** Thank you. And during your time at Eskom did you serve on any committees?

**MR PAMENSKY:** Yes ma'am my first committee was the Investment and Finance Committee whereby I moved in June/July 2016 to the Audit and  
10 Risk Committee.

**ADV HOFMEYR:** And you were there until your resignation in November 2016, is that correct?

**MR PAMENSKY:** That is correct.

**ADV HOFMEYR:** Thank you. And could you please tell us what qualifications you hold?

**MR PAMENSKY:** Yes I am a Chartered Accountant.

**ADV HOFMEYR:** And other than serving on the Board of Eskom during that period have you served on other Boards of companies?

**MR PAMENSKY:** Yes roughly at that point in time about 25 Boards of  
20 Directors.

**ADV HOFMEYR:** And were any of those companies State Owned Enterprises?

**MR PAMENSKY:** No.

**ADV HOFMEYR:** And have there been any State Owned Enterprise Boards on which you have sat since your departure from Eskom?

**MR PAMENSKY:** No.

**ADV HOFMEYR:** Can you tell us a little bit about how you got to be appointed to the Eskom Board in December of 2014?

**MR PAMENSKY:** Yes. In mid-2014 I was planning to move on from Blue Label Telecoms within about a year or two. Roughly about the 28<sup>th</sup> of September there was an advert in the Sunday Times newspaper I duly printed it, scanned it and filled in the opportunity to apply to become a Director on Eskom. I felt that my skills in relation to turnaround MNA and restructuring would be ideal for this environment  
10 specially the position that Eskom was in at that point in time.

**ADV HOFMEYR:** What was that position?

**MR PAMENSKY:** They were load shedding, there was financial problems, there was cash flow problems in all of their – so those were the high levels that the market was aware of roughly about those dates.

**ADV HOFMEYR:** I think at one point in your affidavit you describe Eskom as being in a state of financial disarray. Is that in your view an accurate description of it at that time?

**MR PAMENSKY:** That is correct.

**ADV HOFMEYR:** And – so I have it that you put in the application for  
20 the position at Eskom, what happened thereafter?

**MR PAMENSKY:** Subsequent to that application I received confirmation on the 11<sup>th</sup> of December that my position to the Board of Eskom had been accepted.

**ADV HOFMEYR:** And who was that communication from? To assist you it is under tab 4 of your affidavit which you will find at page 44.

**MR PAMENSKY**: It was Miriam Maroga from the DPE Department.

**ADV HOFMEYR**: And as I understand that e-mail she is attaching a letter from the Minister, is that correct?

**MR PAMENSKY**: Yes.

**ADV HOFMEYR**: And it is the Minister informing you that you have been chosen for appointment to the Board of Eskom, is that right?

**MR PAMENSKY**: Correct.

**ADV HOFMEYR**: And what happened thereafter?

**MR PAMENSKY**: Thereafter I sent a few days later an e-mail to inform  
10 them that I am honoured to take this position but I wanted to inform  
them of a potential conflict between Blue Label Telecoms and its  
subsidiary CG Cell which had an electricity prepaid vending contract  
that was awarded in 2007 and to inform them that if this is going to  
jeopardise any business or relationship with CG Cell I would have to  
consider my options.

**ADV HOFMEYR**: And what was the response to that?

**MR PAMENSKY**: There was a series of responses. They wanted to  
find out more information from me and I duly replied with some more  
information.

20 **ADV HOFMEYR**: Let us go there if we may? If you go into your  
affidavit at page 5. You will see at paragraph 15.2 on that page. You  
say on the same day that is a reference to the 18<sup>th</sup> December Ms  
Shelley Pather the Director of Governance within the Department of  
Public Enterprises called you to discuss your Directorships and  
potential conflicts of interests. She followed that call up with an e-mail

in which she requested that I provide the department with detailed information of the companies in which I held Directors' positions.

Do you see that? I would like to go to that particular response that you provided if I may? And you will find that at page 61 under tab 7.

**MR PAMENSKY**: Yes ma'am.

**ADV HOFMEYR**: Can you explain what this page discloses?

**MR PAMENSKY**: This page discloses that the Department of DPE wanted to find out more information in connection with my telephone call and my disclosures and potential perceived conflicts of interest.

10 **ADV HOFMEYR**: So it is headed with your name and then it says Current Directorships. And then there is a list of 25. Are those companies of which you were a Director at the time?

**MR PAMENSKY**: Yes or Alternative Director at the time. They were both local and international companies.

**ADV HOFMEYR**: Right. I see the last two are indicated as position of Alternative Director, correct?

**MR PAMENSKY**: Correct.

**ADV HOFMEYR**: So all the others are non-alternate – full time Directors?

20 **MR PAMENSKY**: That is correct.

**ADV HOFMEYR**: Can we go to number 16 on that page? Which company is that?

**MR PAMENSKY**: Oakbay Resources and Energy Limited.

**ADV HOFMEYR**: And then you have in brackets there (not reflecting on CPIC) why was that?



**MR PAMENSKY:** As I understand CPIC were backlogged so it took them time to obviously put your records within the CPIC.

**ADV HOFMEYR:** When did you become a Director of Oakbay?

**MR PAMENSKY:** 20 – I think I will stand to correct but I think it is the 25<sup>th</sup> September 2014.

**ADV HOFMEYR:** Thank you. Mr Pamensky you were very accurate with your dates and we appreciate that. If you are not certain September 2014 would be sufficient for our purposes. I will probe further if I need a particular date.

10 **MR PAMENSKY:** Understood.

**ADV HOFMEYR:** But thank you for that. So that was September 2014 that is the same time that the Sunday Times advertisement appeared for applications to State Owned Enterprises, is that right?

**MR PAMENSKY:** That is correct.

**ADV HOFMEYR:** And tell us about how you became a Director of Oakbay?

**MR PAMENSKY:** Well I was called to a meeting by Mr Atul Gupta who explained to me that they are listing a subsidiary of theirs called Oakbay Resources and Energy which it had a subsidiary called Shiva  
20 Uranium that was involved in the Uranium and the gold industry and they were looking for independent non-executive Directors to join their Boards.

**ADV HOFMEYR:** Had you had any engagements with Mr Gupta prior to that?

**MR PAMENSKY:** Not Mr Atul Gupta no.

**ADV HOFMEYR:** Any of the other Gupta brothers or associates?

**MR PAMENSKY:** Yes roughly in June I met Mr Tony Gupta.

**ADV HOFMEYR:** Where?

**MR PAMENSKY:** At his house in Saxonwold.

**ADV HOFMEYR:** For what purpose?

**MR PAMENSKY:** Just a general discussion. It was an introduction.

**ADV HOFMEYR:** Oh did he – did you contact him or did he contact you?

**MR PAMENSKY:** No he contacted me.

10 **ADV HOFMEYR:** Did he explain to you why?

**MR PAMENSKY:** No he said would you like to come over and have a cup of tea and have a discussion.

**ADV HOFMEYR:** Did you know anything about the purpose of the interaction?

**MR PAMENSKY:** No.

**CHAIRPERSON:** Did you know each other prior to that?

**MR PAMENSKY:** No I did not.

**CHAIRPERSON:** He just called you out of the blue and then said would you like to come and have a discussion with me?

20 **MR PAMENSKY:** Chair I think it was an – it could have been a telephone call or it could have been a sms to say would you like to come and have a cup of tea? Would you like just to come have a meeting? Like a normal business you know people phone people up and said come have a meeting.

**CHAIRPERSON:** Yes. And your response was to come?

**MR PAMENSKY:** Yes Sir.

**CHAIRPERSON:** Yes. Okay.

**ADV HOFMEYR:** And what was the subject matter of that discussion?

**MR PAMENSKY:** It was a general discussion. I explained who I am. I explained what Blue Label does. He explained a little bit of the Sahara Group, a little bit of Shive Uranium and just a general chat of the group.

**ADV HOFMEYR:** Did he discuss TNA at all?

**MR PAMENSKY:** No he did not.

10 **ADV HOFMEYR:** You recall that specifically?

**MR PAMENSKY:** Yes because he focussed specifically more on the mining and Sahara Computers.

**ADV HOFMEYR:** And then as I understand your evidence there is a follow up then in September but this time not by Mr Tony Gupta by Mr Atul Gupta, is that correct?

**MR PAMENSKY:** I would assume I think it was in roughly August ma'am where he explained the potential listing of Oakbay Resources and Energy Limited.

**ADV HOFMEYR:** And what was your response to that proposition?

20 **MR PAMENSKY:** I needed to think about it. I needed to also discuss with my employer. I needed to consider if there is any conflicts and if I am in an Independent Non-Executive within relation to that position.

**ADV HOFMEYR:** And in either of these discussions was your interest in or prospects of becoming an Eskom Board Member discussed?

**MR PAMENSKY:** No.

**ADV HOFMEYR:** Not at all?

**MR PAMENSKY:** Not at all.

**ADV HOFMEYR:** Thank you. If we can then go back to your affidavit at page 5. There we were at paragraph 15.2 and following that in your affidavit you talk about how your disclosure of these Directorships was then resolved with the Department of Public Enterprises? Can you explain that to us please?

**MR PAMENSKY:** My understanding is that I explained the potential perceived conflict together with disclosures and at the same time  
10 updating my Directorships.

**ADV HOFMEYR:** And how did it all resolve itself?

**MR PAMENSKY:** It resolved itself where I received another e-mail whereby – excuse me – first I wrote back after that date from the 19<sup>th</sup> I wrote back on the 4<sup>th</sup> December I had not heard anything to Ms Pather because I had received an e-mail for the Board meetings and the dates for the Board meetings. So I did not want to let anyone down so I wanted to get confirmation that the DP and Eskom were comfortable with my disclosures as well as perceived conflicts.

**ADV HOFMEYR:** Just tell me about those dates for the Board meetings  
20 were you given a schedule for the year?

**MR PAMENSKY:** I cannot remember at that point in time that normally and I think it could have happened post that where you get – I remember in 2016 we got a schedule of all the Board meetings and all the committee meetings for the year.

**ADV HOFMEYR:** But your urgency I suspect would at least have

related to knowing when the first Board meeting was going to be held?  
Would you have known that?

**MR PAMENSKY**: Yes I knew that but I – your question sorry if I am wrong was to say was there the whole schedule for the year? No I knew there was a Board meeting on the 16<sup>th</sup>.

**ADV HOFMEYR**: 16<sup>th</sup> of January 2015?

**MR PAMENSKY**: That is correct.

**ADV HOFMEYR**: But you cannot recall whether you knew when the remainder in the year were scheduled?

10 **MR PAMENSKY**: Correct.

**ADV HOFMEYR**: If we can then go to page 7 of your affidavit? I have it there that at paragraph 16 there was an acceptance in essence that your existing Directorships did not interfere with your ability to serve on the Board and that there was no impediment to joining the Board. Is that correct?

**MR PAMENSKY**: Yes.

**ADV HOFMEYR**: Can I just understand the particular conflict that you raise and you were concerned about was the CG Celll one, is that correct

20 **MR PAMENSKY**: That is correct.

**ADV HOFMEYR**: Was there any interaction at all between you and the department or the Minister about your Directorship on the Oakbay Board?

**MR PAMENSKY**: No there was not at that point in time Oakbay Resources and Energy Limited was purely in Uranium and gold mining

and it had the normal standard contract for electricity so there was no conflict at all within that environment.

**ADV HOFMEYR:** Thank you. I note that in the parliamentary – the Portfolio Committees hearings that preceded their report of 2018. Minister Brown gave evidence at the time that your Oakbay Directorship only occurred after you became a member of the Board of Eskom. That would have been incorrect would it not?

**MR PAMENSKY:** Correct.

**ADV HOFMEYR:** Thank you. Let us then move to paragraph 17 on  
10 page 7 if we may because you there start to talk about the preparations you undertook because as I have it you have now confirmed your appointment to the Board. Can you take us through what preparations you engaged on?

**MR PAMENSKY:** Yes. After acceptance of that appointment post I started taking steps to understand the business. I went through the audits and financial statements for March. The integrated report for March. I also looked up the requirements while I was reading that for the audits because I am an accountant for the PFMA perspective. It explained a few elements. I also looked at the interim results and just  
20 generally trying to search the internet to find more information on the business and the role that we are going to take.

**ADV HOFMEYR:** Those interim results were the November results, is that right?

**MR PAMENSKY:** They were presented in November but they were for the 30<sup>th</sup> of September 2014.

**ADV HOFMEYR:** Indeed. And we have touched on it a bit but I understand part of your rationale for making this – making yourself available for appointment was your understanding of the precarious financial position Eskom was in and your sense that you may be able to contribute to turning it around. Is that a fair summary?

**MR PAMENSKY:** I would say that is a fair summary.

**ADV HOFMEYR:** Thank you. Were you aware that in October 2014 Eskom had received a R20 billion financial support package from government?

10 **MR PAMENSKY:** I was aware that they were going to give a R23 billion I was not aware whether it had been paid or not.

**ADV HOFMEYR:** Thank you. And if we go over the page to page 8 you will see there at the top of the page, paragraph 18. You say there:

“I did not at that stage read or consider the Public Finance Management Act other than the reporting requirements and was not familiar with it.”

Do you see that?

**MR PAMENSKY:** I do.

20 **ADV HOFMEYR:** But you go on to explain that you did gain some insight. Can you tell us about that?

**MR PAMENSKY:** Yes. So as we progressed in Eskom I started to obtain more understanding of the PFMA and the – what the requirements are from a high level. And as you got into the business and you started to understand more down the line did you get to understand more about the business regime, the PFMA regime and

those items.

**ADV HOFMEYR:** Do you think it is important for Board Members of State Owned Enterprises to be familiar with the PFMA?

**MR PAMENSKY:** I do.

**ADV HOFMEYR:** Would you agree that the PFMA places heightened obligations on the Directors of Boards of State Owned Enterprises as compared with any ordinary private company?

**MR PAMENSKY:** At what point in time would I have understood that are you asking me?

10 **ADV HOFMEYR:** Do you agree that it does do that?

**MR PAMENSKY:** I do agree it does.

**ADV HOFMEYR:** And do you accept that the reason for that might be that State Owned Enterprises are spending public money?

**MR PAMENSKY:** I do agree with that.

**ADV HOFMEYR:** I would like to go to the Public Finance Management Act with you if I may? Because there are particular provisions of it that are relevant to the conduct of the Board that we are interested in in these proceedings. You will find a file next to you called Legislation Bundle. And we will start if we may at Section 50. You will find that at  
20 paginated page 23. So just to be clear you would not have read the text of this Act by about January or February of 2015, would you?

**MR PAMENSKY:** I cannot specifically recall but I did read this specific Acts and I did get to understand it within the first six months of my Directorship.

**ADV HOFMEYR:** Okay. So the sections I am going to take you to then



should be relatively familiar to you. If we start at Section 50 that sets out fiduciary duties of accounting authorities. In the context of Eskom what is the accounting authority of Eskom?

**MR PAMENSKY:** That would be the Board.

**ADV HOFMEYR:** And do you see there under 1a and 1b amongst those duties are a duty to exercise the duty – sorry – to exercise the duty of utmost care to ensure reasonable protection of the assets and records of the Public Entity and (b) to act with fidelity, honest, integrity and in the best interests of the Public Entity in managing the financial affairs  
10 of the Public Entity. So you were aware of those obligations, were you?

**MR PAMENSKY:** I was aware of those obligations.

**ADV HOFMEYR:** If we go down to Section 51. The accounting authority again the Board of which you were member for a Public Entity must do a series of things and then there are sub-paragraphs. The ones I would like to highlight are over the page at 24. So if we start at (b). The Board of Eskom. Let us just read that in for present purposes.

“Must take effective and appropriate steps”

20 Roman ii is the one I am interested in.

“To prevent irregular expenditure, fruitless and wasteful expenditure.”

Do you see that?

**MR PAMENSKY:** I see that.

**MR PAMENSKY:** Did you have an understanding of what those terms

meant?

**MR PAMENSKY**: I did have an understanding what those terms meant. As I said to you when I was preparing for this element I understood an accounting element that you had to report irregular and wasteful expenditure.

**ADV HOFMEYR**: So would you accept wasteful expenditure is expenditure undertaken by a State Owned Enterprise for which it does not receive adequate value?

**MR PAMENSKY**: Adequate value or value in vain?

10 **ADV HOFMEYR**: H'mm indeed.

**MR PAMENSKY**: Yes.

**ADV HOFMEYR**: I think that is a fair description. And what did you understand by irregular expenditure?

**MR PAMENSKY**: Irregular expenditure is expenditure that is not unauthorised expenditure but however expenditure that is in contravention of any laws and regulations that pertain to the whole Eskom organisation.

**ADV HOFMEYR**: Or I suspect a specific area in which the decision is being taken.

20 **MR PAMENSKY**: Sorry I am not understanding.

**ADV HOFMEYR**: You made – you – in your answer you gave some emphasis to the rules and regulations that govern the whole of Eskom. I was just saying I suspect it would also be any rules or regulations that applied to a particular division or area within Eskom. Do you accept that?

**MR PAMENSKY:** I accept that.

**ADV HOFMEYR:** Thank you. And then if we go to (e) further down the page you will see:

“The Board of Eskom must take effective and appropriate disciplinary steps against any employee of the Public Entity who i. Contravenes or fails to comply with the provision of this Act.”

And the other one I am interested in is iii.

10 “Makes or permits an irregular expenditure or fruitless and wasteful expenditure.”

Do you see that?

**MR PAMENSKY:** I see that ma’am.

**ADV HOFMEYR:** And were you aware of that obligation on the Board at the time?

**MR PAMENSKY:** Not at the time. Over time within the first six months I believe I was aware of these elements within the six month period.

**ADV HOFMEYR:** Do you accept that this is on the face of the section quite clearly an obligation placed on the Board to discipline employees who are found to have contravened or otherwise made or permitted  
20 irregular or fruitless or wasteful expenditure?

**MR PAMENSKY:** I accept that.

**ADV HOFMEYR:** The next Section I would like us to go to is Section 83 and you will find that on page 31. And now Section 83 deals with financial misconduct by accounting authorities and officials of Public Entities. Is this a section you were aware of?

**MR PAMENSKY:** No.

**ADV HOFMEYR:** Let us just look at it. Did you come to be aware of it?

**MR PAMENSKY:** Not specifically according to my memory can I recall specifically this specific one. I remember the general ones that you have mentioned before and the accounting as well.

**ADV HOFMEYR:** Right. Let us look at 83 then.

**MR PAMENSKY:** Sorry ma'am may I jump in? Sorry Chair.

**CHAIRPERSON:** Yes.

**MR PAMENSKY:** Also at this point in time you know we have expertise  
10 at Eskom.

**CHAIRPERSON:** H'mm.

**MR PAMENSKY:** We have the CEO, CFO.

**CHAIRPERSON:** Yes.

**MR PAMENSKY:** Who should know these items. We have the company  
secretary.

**CHAIRPERSON:** Yes.

**MR PAMENSKY:** Who is an attorney.

**CHAIRPERSON:** Yes.

**MR PAMENSKY:** Who know these things and you can always call on  
20 management and the legal team to assist with any of these as and  
when they arrive.

**CHAIRPERSON:** Ja. Yes. Ja.

**ADV HOFMEYR:** Let us look at Section 83. It provides that the  
accounting authority for a Public Entity commits an act of financial  
misconduct if that accounting authority wilfully or negligently:

a. Fails to comply with a requirement of Sections 50 to 55.

Now you will recall the Section we were in previously was Section 51. So there is a link between those two sections. There is financial misconduct if an accounting authority fails to comply with the obligations placing it under Section 51. Do you understand that?

**MR PAMENSKY:** I understand that.

**ADV HOFMEYR:** And:

b. Is that accounting authority will engage in financial misconduct if it wilfully or negligently makes or permits an irregular expenditure or a fruitless and wasteful expenditure.

Do you see that?

**MR PAMENSKY:** I see that.

**ADV HOFMEYR:** So let us just probe your understanding of that. If an accounting authority took a decision that constituted wasteful expenditure do you understand Section 83 to then make that financial misconduct?

**MR PAMENSKY:** I do.

**ADV HOFMEYR:** And sub-section 2 says:

“If the accounting authority is a Board or other Board consisting of – body consisting of members every member is individually and severally liable for any financial misconduct of the accounting authority.”

Do you see that?

**MR PAMENSKY:** I see that.

**ADV HOFMEYR:** I want to pause there for a moment because when you

indicated to the Chair you wanted to say something a bit further a moment or so ago you made reference to the resources within Eskom that could be relied upon insofar as the obligations of Board Members is concerned. Is that a fair summary?

**MR PAMENSKY:** That is a fair summary.

**ADV HOFMEYR:** Do you accept however that if you are a member of a Board of a State Owned Entity you should yourself know about the Provisions of Financial Misconduct in the PFMA?

**MR PAMENSKY:** Ma'am I do not know about PFMA misconduct but I  
10 believe our general principles and those high level principles that you can read and understand as a Board Member you should understand that and take steps to understand that.

**ADV HOFMEYR:** H'mm. Why any reluctance about financial misconduct? It is a provision of the Act that says:

“The accounting authority must not in any way breach the Act or engage itself in irregular wasteful or fruitless expenditure and every member of the Board has that obligation.”

Why is that in any way different to the other provisions?

20 **MR PAMENSKY:** I am saying the difference is I remember reading the other provisions I do not recall going into this financial misconduct.

**ADV HOFMEYR:** I fully understand that. I am asking at the level of principle.

**MR PAMENSKY:** Yes you correct on the level of principle.

**ADV HOFMEYR:** You should – any member of an accounting authority

of an SOE should know about what is required of them in order not to engage in financial misconduct.

**MR PAMENSKY**: Correct.

**ADV HOFMEYR**: And 83.4 provides that:

“Financial misconduct is a ground for dismissal or suspension of or other sanction against a member or person referred to in two or three despite any other legislation.”

Just to be clear I take it that you will say at the time you were  
10 not aware of this provision. Is that correct?

**MR PAMENSKY**: That is correct.

**ADV HOFMEYR**: Is this the first time you aware of that provision?

**MR PAMENSKY**: No. This is not the first time I am aware of that provision.

**ADV HOFMEYR**: You became aware of it in the course of your position on the Board of Eskom. Is that correct?

**MR PAMENSKY**: Yes. From a high level that financial misconduct is irregular.

**ADV HOFMEYR**: Thank you and I think the important point about 4 is  
20 that it can result in sanctions taken against those who are engaged in it.

**MR PAMENSKY**: Correct.

**ADV HOFMEYR**: Do you accept that?

**MR PAMENSKY**: I accept that.

**ADV HOFMEYR**: Thank you and then if we go over to the next page,

page 32. There is a section that creates offences and penalties. Were you aware of this section at the time you took up the Directorship at Eskom?

**MR PAMENSKY**: No. I was not.

**ADV HOFMEYR**: Did you subsequently become aware of it?

**MR PAMENSKY**: I do not know. I cannot recall.

**ADV HOFMEYR**: Okay. Let us look at sub-section 2, because sub-section 2 says:

10            “An accounting authority is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding five years. If that accounting authority wilfully or in a grossly negligent way fails to comply with the provision of Sections 50, 51 or 55.”

So that again is a reference back to those fundamental duties that we looked at in 51 and creates an offence if any accounting authority wilfully or grossly negligently fails to comply with its requirements. Do you see that?

**MR PAMENSKY**: I see that.

20            **ADV HOFMEYR**: Thank you. If we can then return to your affidavit and we will pick it up at page 8 of the affidavit.

**MR PAMENSKY**: Sorry. Ma'am can I remove – can I put the file back or leave it on the side?

**ADV HOFMEYR**: Yes. You can put the file back. We may need to go to it later, but not imminently.

**MR PAMENSKY**: Sorry. Can you repeat what page it is on?



**ADV HOFMEYR:** Page 8 and at page 8 I would like to pick it up at paragraph 19, because there you say you attended your for – first Board meeting shortly thereafter on the 16<sup>th</sup> of January 2015.

**MR PAMENSKY:** Correct?

**ADV HOFMEYR:** Do you recall that?

**MR PAMENSKY:** I recall that.

**ADV HOFMEYR:** Do you recall whether there were any discussions at that meeting about the TNA Contract that had been entered into? Signed by Mr Matjila for R43.2 million.

10 **MR PAMENSKY:** No.

**ADV HOFMEYR:** I asked a composite question there which was not fair. I said can you recall whether it was discussed.

**MR PAMENSKY:** There was nothing discussed.

**ADV HOFMEYR:** Nothing discussed. Thank you. At the meeting on the 16<sup>th</sup> of January were you then alerted to when the next meetings of the Board would be?

**MR PAMENSKY:** I cannot recall.

**ADV HOFMEYR:** Do you have a sense of how regularly the Board was meeting in 2015?

20 **MR PAMENSKY:** At the beginning of the stage it was common cause that Eskom was in its financial disarray. There was the War Room. There was load shedding. There was a variety of elements. So they were quite active at that point in time. The subcommittees started getting active from that period.

So you would spend quite a bit of time at – you will spend

quite a bit of time involved in those committees specifically the finance committee that I was in.

**ADV HOFMEYR:** We have looked at the minutes of the Board meetings and it seems to us that they occurred at least monthly for most of the year of 2015. Does that accord with your recollection?

**MR PAMENSKY:** My recollection was that there was meant to be a Board meeting on the 26<sup>th</sup> of February and that meeting got cancelled at the last moment.

**ADV HOFMEYR:** Okay but let us talk first of all about the spread of the  
10 year. Was there generally a meeting every month?

**MR PAMENSKY:** Of the Board?

**ADV HOFMEYR:** Yes.

**MR PAMENSKY:** No. The Board meetings are set in periods every quarter and then any ad-hoc or any other meetings that need to be adhered to will then be called accordingly.

**ADV HOFMEYR:** Okay and you have a particular recollection about the 26<sup>th</sup> of February meeting being postponed. Is that right?

**MR PAMENSKY:** That is correct.

**ADV HOFMEYR:** So as you sit now are you aware of a meeting on the  
20 16<sup>th</sup> of February that took place?

**MR PAMENSKY:** I cannot recall exactly.

**ADV HOFMEYR:** When it is relevant we will take you to the ... (intervenes).

**MR PAMENSKY:** Thank you.

**ADV HOFMEYR:** Particular minutes. Okay. So you have this first

Board meeting on 16 January and I understand you to say there was no discussion at all in that Board meeting about the TNA Contract that we are interested in at the Commission at the moment. Is that right?

**MR PAMENSKY:** That is correct.

**ADV HOFMEYR:** Were the handover reports made available to you at that first meeting?

**MR PAMENSKY:** According to my – best of my recollection I do not remember getting any handover reports.

**ADV HOFMEYR:** Okay. I want to take you to what we have been able  
10 to source as the Board pack that was provided for that first meeting. It does appear to have handover reports, but Mr Pamensky I am fully appreciate we are going back many years now. So what I would like to do is ask you to look at the document and then you can tell us whether it jogs a memory.

So you will find that handover – at least the Board pack - let me just find it here. Oh. Yes. That is where we need to go into another file. If we can please – if you can take out the file of Mr Tsotsi's evidence. That is marked on its spine MM6 and in that file I would like us to turn up page 317 towards the back. Okay.

20 Okay so that seems to be an agenda for the Eskom Board of Directors Meeting to be held on the 16<sup>th</sup> of January 2015 at Megawatt Park. Mr Pamensky to the extent that I take you to documents that you have not seen for a while and you want an opportunity to consider. You must please indicate to us that you would like that opportunity ...(intervenes).

**MR PAMENSKY:** Yes ma'am.

**ADV HOFMEYR:** At any point. So this appears to be the agenda and then what is over the page and successive pages thereafter are various documents that we understand have been included in the Board pack that was provided for that meeting and it is a series of in a sense handover reports.

The first document at 318 is "Preparation for Board Transition - IFC". That is the committee – had you been appointed to that committee yet or ...(intervenes)?

10 **MR PAMENSKY:** No. I had not been appointed to that committee yet.

**ADV HOFMEYR:** Okay, but that would have been the one that you subsequently come to sit on. Is that right?

**MR PAMENSKY:** Yes.

**ADV HOFMEYR:** Having seen these documents now does it jog a memory that these had been provided?

**MR PAMENSKY:** No Chair. It does not.

**ADV HOFMEYR:** The – there is one report here that I am interested in and it appears at page 361.

**MR PAMENSKY:** Yes ma'am.

20 **ADV HOFMEYR:** The relevant text I want to take you to is 361. You do not need to flip back two pages, but just to tell you two pages back is the start of this report and this is the report of the Audit and Risk Sub-Committee of Eskom, but at 361 you will see there is a series of bullets on the far left hand side under a heading "Outstanding Issues." Do you see that?

**MR PAMENSKY**: I see that ma'am.

**ADV HOFMEYR**: And the third bullet on the far-left hand side reads:

“Reportable irregularity identified by the external auditors during the review of 30 September 2014 interim results. This matter was reported to and dealt with by the Board.”

Do you see that?

**MR PAMENSKY**: I see that.

**ADV HOFMEYR**: Do you remember seeing this at the time?

10 **MR PAMENSKY**: Not at all ma'am.

**ADV HOFMEYR**: If you had read it at the time what would it have conveyed to you?

**MR PAMENSKY**: It would have informed me that the reportable – sorry. May I just jump back? My understanding of a reportable irregularity.

**ADV HOFMEYR**: Please.

**MR PAMENSKY**: A reportable irregularity is when there is an unlawful act or omission by management that the auditors feel will cause financial harm to the business or if someone is in breach of their financial – I mean their fiduciary duties. Once the auditors' report this  
20 they have to report it directly to IRBA.

Their Independent Regularity Body of Auditors and they have 30 days – sorry the Board and the company has 30 days to respond to that reportable irregularity. My reading of this would say the matter was reported to and it was dealt with by that Board. So it was not coming across to me, but I have not seen this. I was not aware.

**ADV HOFMEYR:** Thank you. If we can then go back into your affidavit.

**MR PAMENSKY:** May I put this back?

**ADV HOFMEYR:** Indeed.

**MR PAMENSKY:** Thank you.

**ADV HOFMEYR:** Mr Pamensky I am now going to take you to a series of minutes of Board meetings at which you were not present. So I want to state it up front I am not suggesting that you would have had any knowledge of what was going on in those Board meetings. They are the three Board – at the time. They are the three Board meetings that  
10 occurred in Eskom prior to the appointment of the new Board on the 11<sup>th</sup> of December.

It is important though that you now at least get some insight into what was happening in the Board prior to becoming a new member of it and for that purpose we are going to focus on what was happening in relation to the TNA Contract. Okay. So let us start with the meeting that occurred on the 24<sup>th</sup> of November 2014. Again prior to you being a member of the Board. That is taken as given and you will find that in your file at page 336.

**MR PAMENSKY:** Yes ma'am.

20 **ADV HOFMEYR:** You will see there this document is headed “Minutes of the Eskom Board Meeting held on 24 November 2014 at Megawatt Park” and just to confirm you are not present. You are not a member of the Board at that time. I do not suggest you read it in detail. What I would like to take you through though is if you go over the page to page 337.

You will see under item 5 which is headed “Approval of the Agenda” that it was noted that there was only one agenda item being the approval of the modifications to the condensed group interim financial statements for Eskom Holdings for the six months ended 30 September 2014. Those are the IFCs that you considered?

**MR PAMENSKY:** That is correct.

**ADV HOFMEYR:** Albeit it later?

**MR PAMENSKY:** I considered it later. They were released on the 28<sup>th</sup> of November.

10 **ADV HOFMEYR:** Correct.

**MR PAMENSKY:** The report of irregularity was defined on the 21<sup>st</sup> of November.

**ADV HOFMEYR:** Correct and what then continues in this set of minutes and I do not suggest we read them. I will summarise for present purposes is a detailed engagement about this reportable irregularity. What the Board was going to do about it and by reportable irregularity it is the TNA Contract that was entered into by Mr Matjila. The fact that the Independent Auditors had identified it.

20 The fact that they needed to report on it. So much of what you have said about reportable irregularities was being discussed by the Board.

**MR PAMENSKY:** Sorry ma’am. May I just say something Chair? In the interim results on the reportable irregularity it never mentioned the name TNA. Otherwise I would have picked it up. It said there was a R43 million sponsorship that was irregular and that the Board was

dealing with these issues which you duly have to do.

**ADV HOFMEYR:** So let us just be clear about what you did pick up.

Did you pick up the fact of the reportable irregularity for a contract in the value of 43 million?

**MR PAMENSKY:** That is correct.

**ADV HOFMEYR:** You did not however relate it to TNA?

**MR PAMENSKY:** That is correct.

**ADV HOFMEYR:** Thank you. So as I say 24 November meeting. This is being discussed extensively. There is a debate between the Audit  
10 and Risk Committee and the Chairperson thereof about what the obligations of Eskom are. I am just drawing to your attention it was heavily debated in November prior to you being on the Board. Right.

It was made clear at page 339, if you would like to just move to that and it is under clause 6 – paragraph 6 on that page. That the Board was really being informed about the nature of reportable irregularities and how auditors are legally obliged to report them when they are found and then that there is an opportunity for management to respond within 30 days. Are you aware of those obligations? Are you not?

20 **MR PAMENSKY:** Yes. As chartered accountants we should be aware of those ...(intervenes).

**ADV HOFMEYR:** Indeed.

**MR PAMENSKY:** Provisions.

**ADV HOFMEYR:** And then Mr Pamensky if we can go to the meeting – the next meeting that was held at the Board. You will find that at page



343. Now that is a meeting of the 3<sup>rd</sup> of December 2014. Just more than a week before you were appointed as a member of the Eskom Board. Again you were not present, but a prominent item on that agenda you will see over the page at 344 under paragraph 7 is the TNA Sponsorship Legal Report, because at this stage – and I take it you subsequently came to be aware that a legal review was done of this contract. Is that correct?

**MR PAMENSKY**: Correct.

**ADV HOFMEYR**: So just to situate you in time. The Board is now on  
10 the 3<sup>rd</sup> of December. They have received the forensic report that the auditors had done, SNG. That report recommended that lawyers be engaged ...(intervenes).

**MR PAMENSKY**: Correct.

**ADV HOFMEYR**: In order to review it. That is your recollection of the report?

**MR PAMENSKY**: That is my recollection.

**ADV HOFMEYR**: Lawyers had been engaged and at this 3 December meeting a representative of Ledwaba Mazwai Attorneys who had been engaged with the report is in fact invited and makes presentations to  
20 the Board. I would like to pick up just on one or two aspects of what was discussed there. You will find that at 345. I would just like your comment on something that is in the penultimate paragraph. The penultimate paragraph says:

“It was summarised that the complaint was that  
Mr Matjila exceeded his authority to approve and sign

the TNA Contract and that Mr Choeu removed the termination clause against legal advice. It appeared that Mr Matjila was not aware that the termination clause had been removed. It was agreed that it was not the Board's responsibility to take action against Mr Choeu as he did not report to the Board and was an employee of Eskom."

Do you see that?

**MR PAMENSKY:** I see that.

**ADV HOFMEYR:** Do you remember a little while ago we looked at the  
10 provisions of the PFMA?

**MR PAMENSKY:** I do.

**ADV HOFMEYR:** And there was one provision that said that the Board must act against any employee ...(intervenes).

**MR PAMENSKY:** That is correct.

**ADV HOFMEYR:** Engaged in irregular, fruitless or wasteful expenditure. If you had been present at this meeting do you think you might have taken issue with that?

**MR PAMENSKY:** If I had been at Eskom for three/four years and understood the PFMA and with the expertise there. You were clearly  
20 duty bound ...(intervenes).

**ADV HOFMEYR:** H'mm.

**MR PAMENSKY:** To issue disciplinary.

**ADV HOFMEYR:** Mr Pamensky why do you preface it with three or four years? Should not Non-Executive Members of the Boards of State-Owned Entities know about their obligations from the first day they

start?

**MR PAMENSKY**: Yes. You learn and take steps to get – it is a very detailed document. We are not attorneys. So you read the information that is within your expert or experience or expertise such as your general duties. I as accountant looked at the report requirement but you also can rely on the expertise within the organisation.

Such as your Company Secretary and Head of Legal who normally had attendance in meetings. If I see here you have the General Manager of legal there.

10 **ADV HOFMEYR**: Huh-uh.

**MR PAMENSKY**: I was not sure Mr Venter was qualified as an attorney. I knew that mister – the Company Secretary – ah. That is Board Secretary. Sorry. The Company Secretary was not in attendance and he should know these items. He is also an attorney by practice and he should have known these elements and advised the Board accordingly.

**ADV HOFMEYR**: Thank you, but if you had been on the Board for three or four years you might have picked it up?

**MR PAMENSKY**: I might have picked it up.

**ADV HOFMEYR**: Let us then go over if we may to page 347. I would  
20 like to look at the paragraph sort of after the middle of the page that begins:

“It was agreed ...”

Do you see that?

**MR PAMENSKY**: Yes.

**ADV HOFMEYR**: So there the following is recorded.

“It was agreed that the matter had to be finalised ...”

Just to orientate you. It is the TNA matter that they are still discussing.

“...had to be finalised at a meeting to be held on 8 December 2014. In response to a discussion as to whether the contract would be regarded as good or bad. It was agreed that from the standpoint of the financial status of Eskom the contract could not be regarded as a good contract. However this could only be resolved once Mr Matjila had made a representation to the Board and explained why he, Mr Matjila, was of the opinion that it was a good contract.”

And then there is advice about the procedure that should be followed. Do you see that?

**MR PAMENSKY:** I do.

**ADV HOFMEYR:** I want to check with you whether you have the same understanding as I do of that paragraph. It seems to me that what was agreed is that it was necessary for the Board to make a determination as to the value of the contract. Do you agree with that?

20 **MR PAMENSKY:** Just one minute. Can I just reread it?

**ADV HOFMEYR:** Of course.

**MR PAMENSKY:** Sorry. Can you repeat your question please?

**ADV HOFMEYR:** Certainly. When I read that I understand it to mean that the Board understood it needed to make a determination itself as to whether there was value in the contract for Eskom.

**MR PAMENSKY:** Yes.

**ADV HOFMEYR:** And do you also agree with me that what the Board resolved to do is let Matjila come and give us his account of whether there was good value in the contract or not and then we would meet again to make a decision?

**MR PAMENSKY:** I do agree with the element ma'am where Mr Matjila, the Acting CEO, would have to come and explain what a good contract is. That is correct. The second part of your sentence there. It is in point one, two, three, four. Correct.

10 **ADV HOFMEYR:** Thank you.

**MR PAMENSKY:** He would make representations of why there was a good or bad contract – why he felt it was a good contract. The Board would deliberate and determine from there.

**ADV HOFMEYR:** Indeed and it is identified that that meeting is going to take place on the 8<sup>th</sup> of December. Do you see that? At the beginning of that paragraph:

“It was agreed that the matter had to be finalised at a meeting to be held on 8 December.”

**MR PAMENSKY:** That is correct.

20 **ADV HOFMEYR:** Well let us move to that meeting if we may. It starts at page 349. There is a lot of discussion. Just for reference purposes we will go through it in a moment. Mr Matjila's representations were dated the 5<sup>th</sup> of December. So between these two Board meetings they had clearly followed the process.

Mr Matjila's response had been received on the 5<sup>th</sup>

of December and then the Board meets on the 8<sup>th</sup> of December, right?

**MR PAMENSKY**: May I ask a question?

**ADV HOFMEYR**: H'mm.

**MR PAMENSKY**: Ma'am in the submission of the round robin resolution that was submitted to us that date of mister – or the – I cannot pronounce the name. Sorry. I am terrible. The Acting CEO gave a representation based on the SNG Report. That is how I interrupted his representations on that date.

**ADV HOFMEYR**: We will look at it when we go to it, because I know it  
10 is a particular set of representations you considered carefully.

**MR PAMENSKY**: Yes.

**ADV HOFMEYR**: For present purposes the date is what is relevant. It is the 5<sup>th</sup> of December. So it comes between the meeting of the 3<sup>rd</sup> and the meeting of the 8<sup>th</sup>. You will accept that?

**MR PAMENSKY**: I will accept that. Sorry ma'am. Sorry Chair. I am just saying that I am unaware of that date or any documentation ... (indistinct) that has come to our attention.

**ADV HOFMEYR**: Okay. Well let us just not leave this hanging. If we go to Mr Matjila's response which was provided to you with the round  
20 robin resolution. Let me just find it. It is in your file. It appears in two places unfortunately. I am going to take you to the one I think that you provided. It is at page 174 under tab 19.

**MR PAMENSKY**: Yes ma'am.

**ADV HOFMEYR**: This is the representations of Mr Matjila that you considered. Is that correct?

**MR PAMENSKY:** That is correct.

**ADV HOFMEYR:** The only point for present purposes is in that long title in capitals. It is “Measures must be implemented by the Corporate Affairs Department to ensure that these objectives are achieved for the company’s benefit. Representations of the Acting Chief Executive Officer to the Draft Report Compiled by SNG entitled Review of the Process Undertaken and Awarding the Sponsorship Contract to TNA dated 5 November 2014.” You do not take issue with the fact that this was a document produced on the 5<sup>th</sup> of December 2014. Do you?

10 **MR PAMENSKY:** Ma’am it was dated the 5<sup>th</sup>, but there was another date at the back on the 27<sup>th</sup> ...(intervenes).

**ADV HOFMEYR:** Yes.

**MR PAMENSKY:** But my interpretation of that this was in response to the SNG Report.

**ADV HOFMEYR:** Yes.

**MR PAMENSKY:** So I am not sure which are the dates, but I will agree that this is dated the 5<sup>th</sup>. It must be the – this was either completed on – sorry, this was either in relation to the SNG Report dated the 5<sup>th</sup> which was given – dated and signed on 27 November.

20 **ADV HOFMEYR:** Mr Pamensky ...(intervenes).

**MR PAMENSKY:** H’mmm.

**ADV HOFMEYR:** I have made an error for which I must apologise. This actually even preceded the 3<sup>rd</sup> of December meeting. This is all happening in November. So I do apologise. It is dated the 5<sup>th</sup> of November 2014, but you are absolutely right. It is in a sense signed

off on the 27<sup>th</sup> of November 2014 which is even before the 3<sup>rd</sup> of December meeting. You will accept that?

**MR PAMENSKY**: I will accept that.

**ADV HOFMEYR**: Right. So his representations were available prior to the meeting of the 8<sup>th</sup> of December and even so prior to the meeting of the 3<sup>rd</sup> of December. Correct?

**MR PAMENSKY**: Correct.

**ADV HOFMEYR**: Right. Let us go back then to page 352 if we may. Those are the minutes of the 8<sup>th</sup> December meeting. Again it is a  
10 meeting at which the representatives of Ledwaba Mazwai Attorneys attended and there was a great deal of further discussion about the TNA Contract and what the responsibilities of the Board were.

In fairness to the Board they were faced with something of a predicament here because they knew that their term was ending very imminently. Right. It was going to end on the 10<sup>th</sup> of December and they were deciding how to deal with this reportable irregularity, the SNG Report, the legal review and one of the things I just want to pick up on if I may at page 352 is in the second paragraph there.

The question of this value. Was it a good or a bad contract  
20 was taken up and what Ms Luthuli stated – it is recorded at the bottom of that paragraph? Is that the handover report had to reflect that the Board had considered whether or not the contract was a bad one and had concluded that the contract was not good at this time. Do you see that?

**MR PAMENSKY**: I see that.



**ADV HOFMEYR:** Now we did look at the Audit and Risk Committee Report a moment ago. One that you do not recall having received, but we looked at what it said about this reportable irregularity. As I read it. It did not say anything about the Board having concluded that it was not a good contract. Do you agree with my reading?

**MR PAMENSKY:** I agree with your reading. This was not disclosed in that handover report that you may – that you read out.

**ADV HOFMEYR:** As a member of the new Board would you have wanted to know this?

10 **MR PAMENSKY:** Of course. Excuse me ma'am, excuse me Chair, I think they – I think we are duty-bound to know it, the Chief Executive the CFO, Company Secretary and the remaining Directors are duty-bound to inform us of this information and what transpired.

**ADV HOFMEYR:** It is even included at 353 as part of the resolutions coming from that meeting. You will see under paragraph 2 there Ladwaba Mzwai Attorneys and the Company Secretary would prepare a summary and final resolution on the discussions and decisions around the New Age sponsorship contract for signing by the Chairman of the Board, and the Chairman of the Audit & Risk Committee for inclusion in  
20 the handover report to the new Board, do you see that?

**MR PAMENSKY:** I do.

**ADV HOFMEYR:** As it so happened, at least on the basis of the documents we have been able to source it doesn't appear that, that happened, does it?

**MR PAMENSKY:** No, not at all.

**ADV HOFMEYR:** Thank you. Let's return to your affidavit then if we may. We were at page 8 of your affidavit, paragraph 20, it is from paragraph 20 that you talk about your disclosure of interest at the 16 January meeting, but we have already had your evidence that the one thing that certainly wasn't discussed at that meeting was the TNA contract, correct?

**MR PAMENSKY:** Correct.

**ADV HOFMEYR:** And then if you go over to page 9, you deal there at paragraph 22 with an aspect that you have already addressed, but I  
10 would like to give you an opportunity to do so again. You indicate at paragraph 22 that when you met with the Commission you were asked in particular whether you had sought nomination to the Eskom Board at the instance of or discussed your appointment with any member of the Gupta family, and what was your answer to that?

**MR PAMENSKY:** No.

**ADV HOFMEYR:** Thank you. And then over the page at page 10 is where you start to deal with this contract, and your involvement in it. So I would like to start at paragraph 23 there if we may, you say at paragraph 23:

20 "When I joined the Eskom Board I was aware that the  
New Age, or TNA was a newspaper in circulation..."

You say, "I was not myself a reader." did you ever read it?

**MR PAMENSKY:** Yes, they were on all the aeroplanes so you know occasionally on the plane you would pick it up, maybe a dozen, maybe two dozen at best, but I mean it was all in the aeroplanes when you

used to travel.

**ADV HOFMEYR:** They were also dropped off at Eskom, did you ever pick up one there?

**MR PAMENSKY:** No.

**ADV HOFMEYR:** Okay, what newspapers did you read?

**MR PAMENSKY:** More the Business Day.

**ADV HOFMEYR:** Were you a reader of the Mail & Guardian at all?

**MR PAMENSKY:** No.

**ADV HOFMEYR:** There were two Mail & Guardian reports in October  
10 and November of 2014, I accept that you may not have read them but I  
would like to take you to them if I may. They are in your bundle at  
page 234. So the first one was published on the 24<sup>th</sup> of October 2014,  
it talks about the R43 million New Age deal raises eyebrows over the  
former Chief Executive's alleged role, and the second paragraph says:

“Eskom is in an uproar after recently department interim  
Chief Executive Colin Matjela allegedly disregarded  
internal legal advice and approved a budget-busting R43  
million New Age Business Breakfast sponsorship.”

It goes on and gives details about how there had been no  
20 whistleblower report and the clauses had been removed against  
Eskom's commercial interests and there was no exit clause as a  
consequence for Eskom. Is this reporting in the public domain  
something you were aware of when you took up the position on the  
Board?

**MR PAMENSKY:** No.

**ADV HOFMEYR:** There was a further article a month later, you will find that at page 237, and it's really a ...(intervenes).

**CHAIRPERSON:** Did you say 237?

**ADV HOFMEYR:** 237, indeed Chair.

**CHAIRPERSON:** Thank you.

**ADV HOFMEYR:** This is a follow up, it's talking about the allegations of the interim Chief Executive Matjila, having disregarded internal legal advice and allegedly approved the budget busting sponsorship. It talks about Board Members who have been pushing for Mr Matjila's  
10 censure but they have resisted a last-ditch attempt, this is in the week of the 28<sup>th</sup> of November, by other Board Members to prevent the irregularity being disclosed in the interim financial statements. Over the page there is reporting on the fact that Sizwe & Ntsaluba Gobodo, SNG as we are referring to it, had reported the irregularity but as I understand your evidence you were not aware of any of this?

**MR PAMENSKY:** No I was not.

**ADV HOFMEYR:** Now we can then go back to page 10, if we may, of our affidavit. Paragraph 24 there you say you had heard about the TNA  
20 business, the breakfast briefings which you understood to be a forum on the SABC through which stakeholders could be engaged or companies could procure a public platform. Did you ever watch the Business Briefings?

**MR PAMENSKY:** Pre that time no I did not but it was well publicised.

**ADV HOFMEYR:** What was well publicised?

**MR PAMENSKY:** That you knew there was this TNA breakfast and it

was on 702 and it was a platform to engage.

**ADV HOFMEYR:** Did you know that it was mired in controversy as well?

**MR PAMENSKY:** No, not at all.

**ADV HOFMEYR:** Not at all?

**MR PAMENSKY:** Not at all.

**ADV HOFMEYR:** So you just were aware that these briefings were going on?

**MR PAMENSKY:** There were these 10A breakfast briefings, you used  
10 to know that they were once a month and they were on the breakfast time, where it was on SABC 2, and most people like myself were either driving to work or at work.

**ADV HOFMEYR:** Yes, we have had evidence about the target market of the 49M campaign and whether these business breakfasts were reaching that target market. What is – what was the 49M campaign.

**MR PAMENSKY:** That was a campaign according to my understanding was an energy efficiency campaign which was to inform the public and the general to save electricity and how to utilise electricity more effectively within the environment, that was my understanding.

20 **ADV HOFMEYR:** Did you have any understanding of its target group?

**MR PAMENSKY:** No I did not.

**ADV HOFMEYR:** You say that you didn't watch the breakfasts prior to your appointment to the Board, does that mean you watched them afterwards?

**MR PAMENSKY:** I watched snippets afterwards maybe five/ten

minutes to actually see what was this all about?

**ADV HOFMEYR:** When abouts was that? Mr Pamensky I know you are very keen to find specific dates, so let me help you, what I am interested in is had you watched one by the time you gave your decision on the round robin resolution?

**MR PAMENSKY:** No.

**ADV HOFMEYR:** And how long after February 2015 might you have looked at one?

**MR PAMENSKY:** Within six months or so.

10 **ADV HOFMEYR:** Was it one where Eskom was a sponsor or not?

**MR PAMENSKY:** I cannot recall.

**ADV HOFMEYR:** So ...(intervenes).

**MR PAMENSKY:** But what I do recall, sorry Chair, what I do recall is I didn't see any banners, I saw the TNA like it was behind where you had a like a stage and you had the SABC presenter and then you had various people talking and then the public interacting.

**ADV HOFMEYR:** So you didn't see Eskom banners?

**MR PAMENSKY:** I didn't see any Eskom advertising.

**ADV HOFMEYR:** And did you make any enquiries at any point about  
20 how Eskom's branding was to be advanced at these breakfasts?

**MR PAMENSKY:** No I did not.

**ADV HOFMEYR:** So let me tell you a little bit about what that involved. It involved a 49M logo being placed on that screen that you referred to having been dominated by the TNA and beyond that not much else, is this the first time you're hearing that?

**MR PAMENSKY:** That is correct and very surprising.

**ADV HOFMEYR:** There was also an address by the sponsor at the breakfast, sort of five minutes at the beginning, but that was an address that was not going to be aired, it was just to the people in the room. Do you think that would have been a useful mechanism for promoting the Eskom 49M brand?

**MR PAMENSKY:** Ma'am I am not an expert in that area but common sense just tells me no, it's just people within that area, and I would have assumed that it was the whole of the SABC viewership would have  
10 seen that element.

**ADV HOFMEYR:** That was never part of the contract, that that would be aired. Did you watch any of Mr Pretorius' evidence earlier this week, before the Commission?

**MR PAMENSKY:** Yes I did.

**ADV HOFMEYR:** And Mr Choeu's evidence of yesterday and before?

**MR PAMENSKY:** Yes and when I mean I did I listened to certain snippets but that's about it.

**ADV HOFMEYR:** You might then be aware particularly from Mr Pretorius' evidence that his ultimate take on the value of these  
20 business breakfasts was that they made no financial sense. Do you have any basis on which to dispute that conclusion?

**MR PAMENSKY:** No I don't.

**ADV HOFMEYR:** He queried whether the placing of the 49M logo on the screen was actually having any impact for the campaign. He made a few points there, he said the colours aren't even Eskom colours, the

49M brand was black and yellow, Eskom is blue and white, he also made the point that their research show that a lot of people thought 49M was a radio station. If you had known all of those facts would you have been sceptical about the utility of this medium to promote the 49M campaign?

**MR PAMENSKY:** Certainly would.

**ADV HOFMEYR:** The other point that Mr Pretorius made in his evidence was that it got increasingly difficult even to fill the tables of the attendees at the breakfast. I need to give you a little bit of insight  
10 there, part of the deal that Eskom got by paying R1.2 million per breakfast was that they got two free tables of the attendees at the breakfast, but Mr Pretorius' evidence was it got increasingly difficult to get people to come as attendees because of the controversy surrounding the business breakfasts. If you had known that would you have been concerned about the value to Eskom?

**MR PAMENSKY:** Yes I would obviously be concerned.

**ADV HOFMEYR:** H'mm, he said they were eventually populated by staff members. In Mr Choeu's evidence yesterday he made the point that the SABC was actually involved in another aspect of the 49M  
20 campaign, what he explained to us was that there were sessions where the Minister of Public Enterprises would go out on a Saturday and collect a group of people together, make representations to them about the 49M campaign, why it was necessary to conserve electricity and then SABC would be there covering it, and then would track him into the houses of people in the nearby vicinity and watch him change a



light bulb to an energy saving light bulb and Mr Choeu gave us evidence that that was at no cost to Eskom, to have that footage by SABC. Again Mr Pamensky if you had known that that was available to Eskom as a method to get out its 49M message would you have regarded the R1.2 million in the business breakfasts as commercial sense for Eskom to engage in?

**MR PAMENSKY:** Ma'am I would like to put a pause in that and when you hear my evidence of my reasoning, I can't determine the value, I am not an expert in that element, so I can't tell you what I determine  
10 the value, I can tell you why I made my decision, because I believed we needed to get commercial value, what that commercial value is I can't comment but when we get to that I will explain more, sorry.

**ADV HOFMEYR:** Thank you. No I accept that, I guess what I am asking you to just expose is a detailed engagement with the Minister of Public Enterprises talking about the 49M campaign and encouraging people to take energy saving steps is one method to get the message out, as compared with a business breakfast where the most exposure Eskom gets is a 49M on a screen behind the presenters. If that is what you choose in between and you are spending public money which do  
20 you think you would choose to spend the money on?

**MR PAMENSKY:** Ma'am it is a hard question to answer, I am not an expert in that element, I have no idea how many people are going to look at the Minister with those people changing light bulbs and I have no idea of the size of the 49M, I am truly an accountant, so I haven't got creativity, my apologies, so I am not sure I can give you a definitive

answer.

**ADV HOFMEYR:** Okay, we may have to probe that further when it was the Board's obligation to assess the commercial value of entering into the contract.

**MR PAMENSKY:** Yes.

**ADV HOFMEYR:** Chair I note that it is teatime, if it is convenient to take the break?

**CHAIRPERSON:** Yes, let's take the tea adjournment and we will resume at 11:30. We adjourn.

10 **REGISTRAR:** All rise.

**INQUIRY ADJOURNS**

**INQUIRY RESUMES**

**CHAIRPERSON:** Let us proceed.

**ADV HOFMEYR:** Thank you Chair. Chair over the tea adjournment my learned friend who is the legal representative of Mr Pamensky drew something to my attention which in fairness I do want to clarify with ...(intervenes).

**CHAIRPERSON:** Yes.

**ADV HOFMEYR:** Mr Pamensky.

20 **CHAIRPERSON:** Okay.

**ADV HOFMEYR:** Mr Pamensky when we were dealing with the Provisions of the PFMA you will have that in the Legislation Bundle which you had put away and I said we might need to take out again. We were looking at the Section involving financial misconduct. You will recall that?

**MR PAMENSKY:** Yes ma'am.

**ADV HOFMEYR:** Inadvertently I must say as I was dealing with Section 83 and reading it out to you I indicated that the accounting authority for a public entity commits an act of financial misconduct if and then I understand from my learned friend I might have jumped straight into sub a, and b. The import of me having done that is I did not identify that there is a fault requirement attached to that provision. It is that the accounting authority commits an act of financial misconduct if it wilfully or negligently fails in the respects we discussed. And I just  
10 want you to be clear on that so that there is no unfairness to you. There is a fault requirement for financial misconduct and there is also a fault requirement under the offences created in Section 86. Do you understand that?

**MR PAMENSKY:** I understand what you saying.

**ADV HOFMEYR:** Thank you. I would then like to move back into your affidavit at page 10. You will recall this is the part of your affidavit where you start to get into the details of the New Age contract and we had been talking about your background to the New Age and the business briefings. And what you go on to discuss at page 25 was the  
20 point about the irregular expenditure. Sorry 25. Paragraph 25 on page 10. And you make the point there I think you testified about earlier which is that you would have noticed if the irregular expenditure amount of R43 million had been disclosed in the November 2014 financials insofar as it was linked to TNA. Is that correct?

**MR PAMENSKY:** That is correct. The report said R43 million

sponsorship contract.

**ADV HOFMEYR:** Right. So we go on at paragraph 26 to your statement there that you first learned that Eskom had concluded its contract with TNA in respect of the breakfast briefings on 3 February when you received a round robin resolution. Is that correct?

**MR PAMENSKY:** That is correct.

**ADV HOFMEYR:** At that point did you make the link between the reportable irregularity you had seen and the fact that this was the contract?

10 **MR PAMENSKY:** Yes I did.

**ADV HOFMEYR:** Right. Let us then – we will go to the resolution in a moment but I would like to pick up at paragraph 27. Will you read for us the first sentence of that paragraph?

**MR PAMENSKY:** “It is understood that the matter is urgent.”

**ADV HOFMEYR:** Well it was understood that the matter was urgent.

**MR PAMENSKY:** Correct.

**ADV HOFMEYR:** Who was that understood by?

**MR PAMENSKY:** By myself.

20 **ADV HOFMEYR:** So it could have read, I understood that the matter was urgent.

**MR PAMENSKY:** Sorry I understood the matter was urgent based on the reportable irregularity and the reporting requirements to ...(indistinct).

**ADV HOFMEYR:** Now would that have been the case? Because the 30 days within which management has to respond had passed by February

2015?

**MR PAMENSKY:** My assumption at that point in time when I received this resolution was that the prior Board did not deal with it. I assumed they would have got an extension or they did not get an extension therefore we had to deal with it.

**ADV HOFMEYR:** Well why did you make that assumption?

**MR PAMENSKY:** Because our reports were raggedy and definitely needs to deal with.

**ADV HOFMEYR:** Did you ...(intervenes).

10 **MR PAMENSKY:** You have to sorry ma'am. With the report irregularity you need to reply and you need to determine what the Board is doing and what its decision was.

**ADV HOFMEYR:** Let us go to the resolution that was circulated to you if we may? It is at page 144 of Exhibit MM3.

**MR PAMENSKY:** Yes.

**ADV HOFMEYR:** Do you accept that this round robin resolution nowhere refers to the matter being urgent?

**MR PAMENSKY:** Yes I do.

20 **ADV HOFMEYR:** But despite that you would come to some conclusion that it was urgent?

**MR PAMENSKY:** No ma'am. When I read the SNG report and realised – sorry the SNG report together with the legal report it was in relation to that reportable irregularity that had to be dealt with in my mind.

**ADV HOFMEYR:** You did not see clarification as to whether it had been dealt with in accordance with the 30 day response requirement?

**MR PAMENSKY:** No I did not but I believe it was self-explanatory is why we got this information from SNG and the lawyers.

**ADV HOFMEYR:** Well the reasons given do not actually highlight the reportable irregularity do they?

**MR PAMENSKY:** No they do not.

**ADV HOFMEYR:** So let us look at what was disclosed to you as a summary of the facts. We are at page 144. You first told that there is a contract that has been concluded, do you see that in paragraph 1?

**MR PAMENSKY:** Yes.

10 **ADV HOFMEYR:** You then are told that there was an Audit and Risk Committee query and there was a review by the external auditors.

**MR PAMENSKY:** That is correct.

**ADV HOFMEYR:** You then told that SNG conducted a review and compiled a report and that is presented to ARC and attached?

**MR PAMENSKY:** Yes correct.

**ADV HOFMEYR:** And that ARC tabled the report at the 8 December Board meeting, do you see that?

**MR PAMENSKY:** I see that ma'am.

20 **ADV HOFMEYR:** We have looked at the prior minutes which you would not have been privy to at the time. That report was in fact tabled earlier than the 8<sup>th</sup> of December but I am just indicating that to you. You would not I take it have known at the time that that was erroneous?

**MR PAMENSKY:** Correct.

**ADV HOFMEYR:** And there is an electronic mail message you were told about sent to the Chairman raising a number of allegations against two

Board Members at the time. You then told that the interim Chief Executive had submitted representations to the Board clarifying and explaining his rationale for concluding the contract. And then you told that the Board has the opportunity to review the representations together with all the documents which are attached to the round robin resolution regarding the contract. And then this is going to be in a sense the text of the resolution what follows. Is that as you understand this document?

**MR PAMENSKY**: Yes ma'am.

10 **ADV HOFMEYR**: Okay can you help me with what that first bullet is saying?

**MR PAMENSKY**: "The parties that were involved in the matter  
are no longer within the sphere of Eskom.'

**ADV HOFMEYR**: Let us stop there.

**MR PAMENSKY**: "In other words..."

**ADV HOFMEYR**: Yes.

**MR PAMENSKY**: "Both Mr Choeu and the acting CEO are no  
longer within Eskom."

**ADV HOFMEYR**: That was false at the time, did you know that?

20 **MR PAMENSKY**: No I did not.

**ADV HOFMEYR**: But you understand it to mean Mr Choeu and Mr  
Matjila are no longer with Eskom?

**MR PAMENSKY**: Correct.

**ADV HOFMEYR**: Right let us go on.

**MR PAMENSKY**: Sorry ma'am do you want me to read?

**ADV HOFMEYR:** Yes please the second sentence.

**MR PAMENSKY:** Oh.

“This emulates from the rotation of a former Board which took effect on 11 December 2014 and the appointment of a permanent Chief Executive.”

**ADV HOFMEYR:** Okay let us stop there.

**MR PAMENSKY:** H'mm.

**ADV HOFMEYR:** You see I struggle with the first sentence because the second sentence says that the reason why the parties are not involved  
10 is because of a rotation of the former Board. Now that can only reply – apply to Mr Matjila, can it not?

**MR PAMENSKY:** That is correct.

**ADV HOFMEYR:** So what does the first sentence mean then in the light of the second sentence?

**MR PAMENSKY:** The parties – I broke the sentence up in my mind. The parties were the parties to the SNG Report. You heard all about the acting CEO and Mr Choeu. So those were the parties involved in this transaction.

**ADV HOFMEYR:** And they had left the sphere because of a rotation of  
20 the Board?

**MR PAMENSKY:** I did not read it in that way. I read it that the parties had left the sphere of Eskom the reason why the acting CEO was no longer there is because of the rotation of the Board. That is how I read it ma'am.

**ADV HOFMEYR:** So when you were deciding on this resolution you



though Mr Choeu was no longer in the employ of Eskom?

**MR PAMENSKY:** That is correct.

**ADV HOFMEYR:** And the last sentence.

**MR PAMENSKY:** “The parties involved have divergent views on the specific aspects of the matter and as such scarce resources would have to be deployed to bring these contentious matches to finality.”

**ADV HOFMEYR:** What does that mean Mr Pamensky?

**MR PAMENSKY:** In my mind that means that the acting CEO in his  
10 representations interpreted the delegation of authority to fall under an investment as opposed to what the auditors and the legal opinion confirmed that it was not – it was a sponsorship.

**ADV HOFMEYR:** So is this the same parties Mr Matjila and Mr Choeu?

**MR PAMENSKY:** No this would purely be the acting CEO.

**ADV HOFMEYR:** So then it should have been in the singular.

**MR PAMENSKY:** Ma’am I am not good at English but if you say it should be in the ...(intervenues).

**ADV HOFMEYR:** Well we are talking about one person.

**MR PAMENSKY:** I am talking about one person.

20 **ADV HOFMEYR:** Yes. I have great difficulty with this paragraph and that is why I am seeking your guidance on it. Because what appears to maybe be Mr Matjila and Mr Choeu in the first sentence then it is not both of them in the second sentence because that can only relate to Mr Matjila and then we back to both of them in the third sentence in a context which just does not make sense if you replying – you were

speaking to both of them.

**MR PAMENSKY:** Ma'am when I read the opinion what it shows me is that the parties with the divergent view was the difference between the auditors and the acting CEO on his interpretation of the investment or sponsorship.

**ADV HOFMEYR:** Right.

**CHAIRPERSON:** Were those the parties that you thought they were talking about when they said the parties involved are not with Eskom?

**MR PAMENSKY:** The – when they said ...(intervenes).

10 **CHAIRPERSON:** Or are no longer with Eskom.

**MR PAMENSKY:** Yes the parties are not with Eskom it was my understanding Mr Choeu and the acting CEO were no longer within the sphere of Eskokm.

**CHAIRPERSON:** Oh okay.

**MR PAMENSKY:** The two gentleman.

**CHAIRPERSON:** Ja which was not 100% correct.

**MR PAMENSKY:** Yes but my understanding there was the parties were always the two people who were in the report.

**CHAIRPERSON:** Yes.

20 **MR PAMENSKY:** So the two parties are gone they both were not there anymore Sir.

**CHAIRPERSON:** Okay. Okay.

**ADV HOFMEYR:** But the parties by the last sentence become the auditors and Mr Matjila?

**MR PAMENSKY:** That is correct.

**ADV HOFMEYR:** The second bullet.

**MR PAMENSKY:** “Considering the representations made by the then interim CE there exists a difference of interpretation regarding the provisions of the company delegation of authority that needs to be reviewed and clarified further in order to close any gaps which may be present.”

**ADV HOFMEYR:** What was your understanding of that bullet?

**MR PAMENSKY:** My understanding was that Mr Collin Matjila thought it  
10 was an investment committee decision and failed within the delegation under the investment criteria and the auditors then said it was a sponsorship therefore they must correct it and clarify and fix it up that it actually is a sponsorship.

**ADV HOFMEYR:** Well can we unpack that a little bit? Do you know what the external lawyers thought of Mr Matjila’s justification for entering into this contract as an investment?

**MR PAMENSKY:** Yes.

**ADV HOFMEYR:** What did they think of that?

**MR PAMENSKY:** They disagreed with it. They agreed with the same  
20 interpretation as SNG.

**ADV HOFMEYR:** And the internal lawyers of Eskom what view did they take of the justification offered by Mr Matjila?

**MR PAMENSKY:** They also did not accept that undertaking as I understand. That was the one from Mr Adams.

**ADV HOFMEYR:** Correct.

**MR PAMENSKY:** Yes.

**ADV HOFMEYR:** So what ambiguity was there?

**MR PAMENSKY:** In Mr Matjila's mind he must have an ambiguity but the rest of Eskom and everyone else clarified it.

**ADV HOFMEYR:** Exactly. So Mr Matjila who is now out of Eskom is the only person who holds the view that this is an investment?

**MR PAMENSKY:** That is correct.

**ADV HOFMEYR:** The internal Eskom lawyers say there is no justification for that view, correct?

10 **MR PAMENSKY:** Correct.

**ADV HOFMEYR:** The external lawyers say there is no justification for that view, correct?

**MR PAMENSKY:** That is correct.

**ADV HOFMEYR:** And SNG says there is no justification for that view?

**MR PAMENSKY:** That is correct.

**ADV HOFMEYR:** Why was there any ambiguity that then needed to be cleared up with revisions being made to the delegations of authority?

20 **MR PAMENSKY:** To make it more specific and clearer and put it in writing in there to say this does not fall within an investment environment or something to that effect ma'am. Clarity is maybe making it more clear in the DOA of the document itself.

**ADV HOFMEYR:** Mr Pamensky.

**CHAIRPERSON:** I am sorry can I ask you to repeat that answer? I did not fully understand it.

**MR PAMENSKY:** Yes. Yes Chair sorry. May I just ask her to repeat

the question so I get my train of thought again? Sorry.

**CHAIRPERSON**: Okay.

**ADV HOFMEYR**: Certainly. That will require me to remember the questions.

**CHAIRPERSON**: I will help you if you need help.

**ADV HOFMEYR**: No, no, thank you Chair I am indebted. The question was, if all the lawyers around the table agreed that there was no ambiguity in the delegation of authority and that Mr Matjila was simply wrong. Why did anything have to be done to clear this up?

10 **MR PAMENSKY**: Oh so in future these problems do not arise. So in other words his – if it is not an investment decision you need to write it in the delegational flow to these issues do not arise again. My interpretation of that is you know he may not be a lawyer, he may not be an accountant so you need to make it clear for the incoming or the new CEO and the delegations going for that clearly defines that a sponsorship does not fall within an investment criteria. and the delegations going for that clearly defines that a sponsorship does not fall within an investment criteria.

**CHAIRPERSON**: But to justify – clarifying that for the future the Board  
20 would have had to take the view that although the lawyers and SNG disagreed with Mr Matjila's interpretation his interpretation could be right or was understandable. It was not just completely out. If you know what I mean. The – otherwise if you have a look and you say, look it is quite clear we do not know why he thinks there is justification. Then there is no need to put in anything for the future.

**MR PAMENSKY:** No Chair he – his representations were very convincing on how he interpreted.

**CHAIRPERSON:** Yes.

**MR PAMENSKY:** The Investment Committee.

**CHAIRPERSON:** Yes.

**MR PAMENSKY:** So I felt that that needed to be cleared up.

**CHAIRPERSON:** Yes.

**MR PAMENSKY:** And actually written in the DOA so no-one come back and misinterpret what a corporate social responsibility sponsorship is  
10 about.

**CHAIRPERSON:** Okay I think that is important because it speaks to what I am saying. In other words speaking for yourself you say even though you may have disagreed with his interpretation you understood where he was coming from with his interpretation and you could understand maybe how might have adopted that interpretation. You just did not want then somebody else to adopt the same interpretation for the future?

**MR PAMENSKY:** That is correct Chair.

**CHAIRPERSON:** So you are not dismissing it completely as madness?

20 **MR PAMENSKY:** No not at all. It was a very compelling ... (intervenes).

**CHAIRPERSON:** Yes.

**MR PAMENSKY:** It was a very compelling – when I read it it was very compelling discussion why he interpreted of investment. I did not agree with it.

**CHAIRPERSON:** Yes.

**MR PAMENSKY:** And therefore I wanted to make sure as it was in the resolution that this problem does not arise again so it is clearly defined.

**CHAIRPERSON:** H'mm okay. Was that – do you know whether some members of the Board had the same understanding towards his interpretation as yourself or is that something you do not know?

**MR PAMENSKY:** Chair I never spoke to any of the Board Members so I do not know.

10 **CHAIRPERSON:** Yes okay. Okay.

**ADV HOFMEYR:** Mr Pamensky I understand from your affidavit that you never actually got a copy of the third contract that was entered into that you were being asked to ratify, is that correct?

**MR PAMENSKY:** That is correct.

**ADV HOFMEYR:** My learned friend is going to find us a copy of it. It is in the Pretorius bundle and that is MM1A. It is the first of his bundles.

**MR PAMENSKY:** Sorry what page ma'am?

**ADV HOFMEYR:** At page 193.

**MR PAMENSKY:** Sorry again?

20 **ADV HOFMEYR:** 193. Do you think you should have seen the agreement that you were being asked to ratify before ratifying it?

**MR PAMENSKY:** No ma'am I do not.

**ADV HOFMEYR:** Why not?

**MR PAMENSKY:** Ma'am the annexures were not attached to the documentation and the evidence was in the SNG Report which came to

the conclusion clearly that Mr Matjila – the acting CEO was in breach of the – it was in contravention of the delegation of authority. The lawyers too did not read this TNA Contract and they were happy to give their opinion to us so I had the same comfort from that ma'am.

**ADV HOFMEYR:** Well they were put under extreme demands of urgency in producing their report. And as I understand their report that is part of the explanation given for not having had a chance to look at the agreement. Do you accept that?

**MR PAMENSKY:** I accept that but they still came to a – they still gave  
10 a conclusion and an opinion they were comfortable to give that opinion without represent – without seeing these contracts.

**ADV HOFMEYR:** Yes. Mr Pamensky they were not the Board of Eskom though who had various duties under the PFMA and otherwise and was asked to decide whether to ratify a contract for R43 million. Is it your evidence that you do not think it was necessary for the Board to see the agreement they were being asked to ratify before they took that decision?

**MR PAMENSKY:** Yes it is ma'am.

**CHAIRPERSON:** Well that is very surprising to me Mr Pamensky.

**MR PAMENSKY:** Chair when I explain my mind set when we get to how  
20 I came to this decision.

**CHAIRPERSON:** Yes.

**MR PAMENSKY:** I think it will overcome that ...(intervenes).

**CHAIRPERSON:** Whatever ...(intervenes).

**MR PAMENSKY:** Question.



**CHAIRPERSON:** Yes.

**MR PAMENSKY:** Number 1 and number 2 I am not a lawyer Chair so for me to read something with breached clauses and all of that.

**CHAIRPERSON:** *Ja.*

**MR PAMENSKY:** You know would be more to the lawyers than myself Chair.

**CHAIRPERSON:** Yes. No, no that is fine. Maybe we will deal – we will talk further when we come to that point. But I would think that if you are asked to ratify a contract you must have the contract in front of  
10 you. I am happy to say maybe there may be exceptional circumstances where maybe somebody might be justified in ratifying without seeing provided certain conditions are met. I am not sure. But I would have thought that if somebody – if a Board was asked to ratify anything every member would say, I need to see what I am ratifying. But maybe we can deal with it at a later time but Ms Hofmeyr might be wishing to deal with it now.

**ADV HOFMEYR:** Thank you Chair.

**MR PAMENSKY:** Okay.

**ADV HOFMEYR:** Well let us just go to the contract if – because I think  
20 it would have been useful to have seen at the time. It starts at page 193 as I said of Exhibit MM1A. And if you go over the page to page 194 it seems to me it might have been useful for the Members of the Board to have read clauses 2 and 3 of this contract. Because clause 2 says:

“Eskom wishes to participate in the aims and objectives

of the TNA Media Limited through the sponsorship of the business briefings”

Clause 3.

“The parties have agreed on the terms and conditions applicable to such sponsorship which agreement the parties wish to record in writing.”

Mr Pamensky do you think this contract is about sponsorships when you read those two clauses?

**MR PAMENSKY:** Yes I do ma'am.

10 **ADV HOFMEYR:** And Mr Matjila was the signatory to this contract, was he not?

**MR PAMENSKY:** The legal – the SNG opinion said he was the signatory yes.

**ADV HOFMEYR:** Correct. And the reason I raise this is because of the earlier point. Was there any substance at all in Mr Matjila's contention that this was an investment if the opening two clauses of this agreement say it is a sponsorship?

**MR PAMENSKY:** The conclusion was drawn by the attorneys and by the auditors that this was not a sponsorship agreement. It was quite  
20 clear.

**ADV HOFMEYR:** Indeed.

**MR PAMENSKY:** It also said they mentioned the contract if I recall in the SNG where they say this is a sponsorship not an investment.

**ADV HOFMEYR:** Mr Pamensky let me explain why I place some significance on this.

**CHAIRPERSON:** Well Ms Hofmeyr I think Mr Pamensky might not have understood your question. I think her question Mr Pamensky is whether given the fact that this is what these clauses say and it is clear it is a sponsorship. And given the fact that Mr Matjila signed this agreement would there be any basis for anybody to say his interpretation that this was an investment makes sense? You had not seen the contract.

**MR PAMENSKY:** No Chair.

**CHAIRPERSON:** Yes.

**MR PAMENSKY:** I never also ever said – sorry, I never ever said that  
10 his interpretation made sense but he made a compelling argument why he found that an investment and why I felt that you need to make sure going forward that this problem does not occur again. I did not say I agreed with this opinion Chair sorry.

**CHAIRPERSON:** Well Mr Pamensky I thought what you said was you did not agree with his interpretation but when you read what he had to say about his interpretation he made a compelling case. Now I am not sure whether a compelling case is not a case where you say it makes some sense.

**MR PAMENSKY:** Sorry Chair his argument were it compelling his  
20 argument made sense to me how he interpreted as an investment in his mind but I did not buy it. Therefore his argument was compelling how his mind was thinking what the investment is and how he made the – how he interpreted it as an investment but I did not agree with it nor did the auditors and that. So all I am trying to say was we needed to make sure that the future people do not go and have a similar

interpretation to what he had.

**CHAIRPERSON**: H'mm. I think what Ms Hofmeyr sought to establish from you was whether you would say there was sense in Mr Matjila's interpretation given the two facts that are referred to earlier given the clauses that make it clear it is a sponsorship and the fact that he was a signatory to the agreement. Whether you say there was sense in his interpretation.

**MR PAMENSKY**: Yes I do think there was sense in his interpretation because he said the contract did say sponsorship but it is his  
10 interpretation if I remember had to do with an investment and it was getting value out of that contract.

**CHAIRPERSON**: H'mm.

**MR PAMENSKY**: So he took a different word and he said yes it said sponsorship but he interpreted it the other way Chair.

**CHAIRPERSON**: H'mm. Okay I do not know if I helped?

**ADV HOFMEYR**: You did indeed Chair thank you so much.

**MR PAMENSKY**: Sorry Chair, sorry ma'am.

**ADV HOFMEYR**: No not at all. Let me just clarify your evidence because a moment ago you said I did not buy it.

20 **MR PAMENSKY**: Yes. I did not buy his interpretation that it was – falls under investment because in – that was a sponsorship element that was applicable for a sponsorship.

**ADV HOFMEYR**: So is it fair to say you were sceptical about his justification?

**MR PAMENSKY**: Yes I would say I was sceptical about his justification.

**ADV HOFMEYR:** If you did not buy it?

**MR PAMENSKY:** Yes I was sceptical about it but ...(intervenes).

**ADV HOFMEYR:** You were sceptical.

**MR PAMENSKY:** But it may – it was reasonable in my mind how he made that interpretation. But I did not buy it.

**ADV HOFMEYR:** Mr Pamensky let us go back to page 145 if we may?

**CHAIRPERSON:** Of which bundle?

**ADV HOFMEYR:** Apologies Chair. We back in Mr Pamensky's bundle MM3.

10 **MR PAMENSKY:** Can I close this ma'am?

**ADV HOFMEYR:** For now yes. There is a last bullet on page 145 and again I would like you to take me through what that bullet means?

**MR PAMENSKY:** Ma'am is that the cost in time?

**ADV HOFMEYR:** Yes correct.

20 **MR PAMENSKY:** "The cost and time required to pursue this matter in contract – in contrast with matters facing Eskom and the Board. The company finds itself in a highly challenging phase of its existence. In light of this the company resources need to be dedicated to issues which have immediate and fundamental bearing on the reputation of business risks which may accrue to Eskom in the event of the matter continuing unresolved."

**ADV HOFMEYR:** Okay let us stop there. What did you understand that to be saying?

**MR PAMENSKY:** The cost in time to pursue this matter in terms of the

legal element would not justify the cost in time right now on the position that Eskom was within that environment at that point in time.

**ADV HOFMEYR:** So would it be fair to say it is trying to get across that Eskom is in a difficult financial position?

**MR PAMENSKY:** That is what it is saying ma'am.

**ADV HOFMEYR:** And in the context of that position it needs to resolve this matter, is that right?

**MR PAMENSKY:** ma'am not just in the financial but within the business as a whole. The operations, the maintenance, the load shedding, with  
10 all of that in contrast and it was facing the company at that point in time not just financial.

**ADV HOFMEYR:** I would like to pick up on the reference to reputational risk. Do you see that? It says:

“The company’s resources need to be dedicated to issues which have an immediate and fundamental bearing on the reputational and business risk which may accrue to Eskom in the event of the matter continuing unresolved.”

So that reference to reputational risk there did you give any  
20 consideration to the reputational risk to Eskom of ratifying this contract?

**MR PAMENSKY:** Yes that was the rep – no excuse me ma'am. In my interpretation here of the reputational risk was that if you did not ratify this type of contract you can land into a position where you going to have a fight with the CEO, you going to have a fight with TNA when

there is a binding contract so people will look at you and say, well hold on you know you guys do not abide by contracts. There is also the reputational risk of the audits and if you do not resolve this issue how you going to raise money. So that is how I interpreted it in my head.

**ADV HOFMEYR:** So you were not concerned about further entrenching the relationship between Eskom and TNA as a consequence of the Board ratifying this contract?

**MR PAMENSKY:** Sorry ma'am. Can you just maybe rephrase that?

**ADV HOFMEYR:** Sure.

10 **MR PAMENSKY:** Sorry.

**ADV HOFMEYR:** You have identified the types of reputational risks that you were concerned about. I am just seeking clarity that it was not a concern of yours that by ratifying this contract Eskom might have damaged its reputation, because by that stage the engagements between State Owned Enterprises and TNA for these business breakfasts was being criticised in the public domain. Did that not worry you?

**MR PAMENSKY:** Ma'am I was not aware that it was being criticised in the public domain. Therefore it did not apply to my mind and the  
20 question that you are asking me. Sorry.

**ADV HOFMEYR:** Can I clarify? You were not aware that by this stage Eskom had been required to respond to a number of Parliamentary questions over its involvement with TNA and the business breakfasts.

**MR PAMENSKY:** No. I was not.

**ADV HOFMEYR:** Can I take it also that you were not aware that at this

stage the Public Protector had been investigating the matter and had raised serious concerns about the relationship between all State-Owned Enterprises and TNA?

**MR PAMENSKY**: No. I was not ma'am.

**ADV HOFMEYR**: Had you known those would you have given this more thought?

**MR PAMENSKY**: I – definitely ma'am if I had known those elements.

**CHAIRPERSON**: Well this was in 2015. Is that right?

**MR PAMENSKY**: Sorry Chair. The end of 20 – yes, beginning of 2015.

10 Correct.

**CHAIRPERSON**: The beginning of 2015. This was two years or let me say. You knew at the time that TNA was owned by the Gupta family or their companies?

**MR PAMENSKY**: Yes that is correct.

**CHAIRPERSON**: You did know. You and the Board at the time would have been aware – would you not have been – of the Waterkloof Landing which happened in 2013?

**MR PAMENSKY**: Yes. I was aware at that time.

20 **CHAIRPERSON**: And you and the Board and other Board Members would have been aware of the big noise that Waterkloof Landing created in the country and that it was related to the Gupta family?

**MR PAMENSKY**: Yes. I did Chair.

**CHAIRPERSON**: Were you not concerned about entering or ratifying a contract relating to a Gupta entity in 2015 at a time when all of these things have happened – had happened and already there was a huge



concern about the role of the Gupta family in SOE's and the running of the country?

**MR PAMENSKY:** No Chair. It did not cross my mind at that point.

**CHAIRPERSON:** Yes.

**MR PAMENSKY:** It did not cross my mind at that point and also at that point in time the Guptas were not so toxic as they are now Chair. So it did not cross my mind – that element.

**CHAIRPERSON:** Well you might wish just to reflect a bit whether you are correct in your assessment of what the situation with the Guptas was in 2015. Of course it maybe that from a certain time after 2015 the awareness of people in the country heightened about the Guptas, but 2015 you might have a different impression, but I think that somebody like you would be familiar with that is happening in the country in terms of the newspapers and the media.

I am under the impression that already at that time there was quite a serious concern in the whole country about the role of the Guptas. Particularly after the Waterkloof Landing. Is your recollection different?

**MR PAMENSKY:** Chair my recollection is very different to that. You now took the Waterkloof for a basis and I did not see it in that sense. I really do not see it as toxic that they are today what they were that point in time.

**CHAIRPERSON:** Okay. Thank you.

**ADV HOFMEYR:** And then if we can look at the paragraph under the bullet that we have just been dealing with at page 145. It reads:

“The Board recognises that there is value in platforms that enable Eskom to interact with the public to communicate and garner support for the work that it is doing to ensure that South Africa has sufficient energy. In this regard the contract provides an opportunity for Eskom to achieve the aforesaid objectives.”

What did you make of that paragraph?

**MR PAMENSKY:** I made of that paragraph that the author of this resolution together with management believed that there was value in  
10 the platform that Eskom was going to interact on.

**ADV HOFMEYR:** Why did you form that impression from that paragraph? I will explain why I ask that question. It does not say anything in this paragraph about well we are going to be spending 43 million and there is a commensurate value that we receive for that 43 million. It does no cost benefit analysis. Do you agree?

**MR PAMENSKY:** I agree. Ma'am my thing is the value of the platforms I could not say financially but there is value within that environment. The Board recognises there is value within the TNA breakfast arena. What that value is something different.

20 **ADV HOFMEYR:** Yes, because in order for you to sign onto this resolution you would have had to have been persuaded by that. Would you not?

**MR PAMENSKY:** To do with value?

**ADV HOFMEYR:** Yes.

**MR PAMENSKY:** It would have been an element of my consideration

ma'am.

**ADV HOFMEYR**: But at this point in time you have not seen a business briefing. Have you?

**MR PAMENSKY**: No. I have not.

**ADV HOFMEYR**: So why would you regard this analysis of value as reflected in these four lines as being adequate?

**MR PAMENSKY**: No. I never said it was adequate ma'am at all.

**ADV HOFMEYR**: Oh.

**MR PAMENSKY**: I just said that the author came across here and said  
10 there are value within these platforms to engage stakeholders.

**ADV HOFMEYR**: So did you form an independent assessment of value?

**MR PAMENSKY**: Yes. I did ma'am.

**ADV HOFMEYR**: Right. I take it from your affidavit that was based on what Mr Matjila said?

**MR PAMENSKY**: That was one element of Mr Matjila said ma'am.

**ADV HOFMEYR**: Then let us go to that shortly. I just want to look at the resolutions recorded on that page. The one I am interested in is the third one, because amongst the things that were decided to be resolved was that the Corporate Affairs Department is hereby instructed  
20 to ensure that maximum value is realised from the contract and must report to the Board on measures it will implement to achieve this objective. Do you see that?

**MR PAMENSKY**: I see that ma'am.

**ADV HOFMEYR**: Did you ever receive those reports?

**MR PAMENSKY**: No, I did not.

**ADV HOFMEYR:** Did you ask for them?

**MR PAMENSKY:** No. I did not.

**ADV HOFMEYR:** Why not?

**MR PAMENSKY:** It must have slipped my mind. I do not think at that point in time my concentration was on this. There was a lot going on within Eskom, but it did not cross my mind. It would have – no. It did not cross my mind.

**ADV HOFMEYR:** Do you think it should have?

**MR PAMENSKY:** Certainly.

10 **ADV HOFMEYR:** Thank you.

**CHAIRPERSON:** Well let us talk about this value issue. Is the position that when asked to ratify this contract one of the things you would have looked at is what are the cost implications for Eskom if we ratify this contract and are those cost implications justified by what Eskom is going to get out of this contract. Am I right to say that would – that should have been and would have been an important factor?

**MR PAMENSKY:** It would have been a very important factor ... (intervenes).

**CHAIRPERSON:** Yes.

20 **MR PAMENSKY:** To see what you get out of this contract.

**CHAIRPERSON:** Yes.

**MR PAMENSKY:** Most definitely Chair.

**CHAIRPERSON:** Yes. Now the point that Ms Hofmeyr raised about there being no reference I think to the 14 – 43 million in that paragraph. Is something that also I was concerned about because just

to talk about value in general does not seem to me to be helpful. You have got to say in the context of what you were asked to here you have got to say value in relation to what and for me a value in relation to R43 million.

**MR PAMENSKY**: Sir ...(intervenes).

**CHAIRPERSON**: And I have got to arrive at a conclusion that the value that Eskom is going to get out of this contract justifies is Eskom spending R43 million. That is what my thinking would be. Do you want to say something about it?

10 **MR PAMENSKY**: Yes Chair and I maybe transgressing on a little bit further, but ...(intervenes).

**CHAIRPERSON**: Yes.

**MR PAMENSKY**: My interpretation of the ratification was that if we – and we will go into more detail, but ...(intervenes).

**CHAIRPERSON**: Yes.

**MR PAMENSKY**: If we did not ratify and we cancelled ...(intervenes).

**CHAIRPERSON**: H'mm.

**MR PAMENSKY**: So we did not ratify. It will be a repudiation ...(intervenes).

20 **CHAIRPERSON**: H'mm.

**MR PAMENSKY**: And TNA would cancel the agreement based on the repudiation ...(intervenes).

**CHAIRPERSON**: Huh-uh.

**MR PAMENSKY**: And claim damages ...(intervenes).

**CHAIRPERSON**: H'mm.

**MR PAMENSKY**: For 43 million.

**CHAIRPERSON**: Huh-uh.

**MR PAMENSKY**: Instead of us getting one cent of value.

**CHAIRPERSON**: H'mm.

**MR PAMENSKY**: The attorneys went even further ...(intervenes).

**CHAIRPERSON**: H'mm.

**MR PAMENSKY**: And let me just quickly read it to you sir.

**CHAIRPERSON**: Yes. That is fine.

**MR PAMENSKY**: So to explain to you my mind set ...(intervenes).

10 **CHAIRPERSON**: Yes.

**MR PAMENSKY**: Because my mind set was to clawback ...(intervenes).

**CHAIRPERSON**: *Ja*.

**MR PAMENSKY**: As much as possible.

**CHAIRPERSON**: *Ja*. That is fine.

**MR PAMENSKY**: Sorry. Sorry ma'am. May I go there?

**CHAIRPERSON**: Yes. You may go there.

**ADV HOFMEYR**: Indeed.

**CHAIRPERSON**: You may go there.

20 **MR PAMENSKY**: So sir in the legal opinion on the two choices that  
Ledwaba Mazwai said you are faced with two choices. Either ratify or  
not ratify. In the terms of not ratifying it said two different clauses:

“The Board determines a decision not to ratify will  
tantamount to cancellation.”

And there was no lawful basis to cancel because that  
termination clause had been out and TNA could cancel on that contract

and it went onto another clause. Clause 4.2.1 and it was quite clear in my head.

“Except for repudiation leading to termination of the TNA Contract which would entitle TNA to recover damages it would lose as a result of the repudiation which is likely to equal (or close to equalling) the unpaid balance of the 43 million contract value. Thereby placing Eskom in the same financial position as if it had ratified the TNA Contract but without any sponsorship associated benefits  
10 it would have received from that contract had it not been interpreted – had it not been terminated.”

So in other words we were faced as a Board with the decision that was taken by a prior Board. It came to us and my mind set was you needed to ratify this to get the most value out of that contract. What was that value Chair I am not a – I am an accountant. I do not know those things, but I knew that I would rather get 20, 30, 40 million value as opposed to losing 43 million and not getting anything.

So my mind set was to clawback as much value as you can possibly get. So that was my interpretation. Sorry.

20 **CHAIRPERSON:** Okay.

**ADV HOFMEYR:** Thank you Mr Pamensky. We will go into that in some greater detail in due course. Just to complete on – we have completed the resolution on its face. So let us go back to your affidavit if we may and pick it up at page – bottom of page 11. We are in Exhibit MM3.

**MR PAMENSKY:** Yes ma'am. Sorry. Yes ma'am.

**ADV HOFMEYR:** So at the bottom of page 11 you say there at paragraph 29 that you got a series of documents. Those are listed above in paragraph 28 and they are documents that I will take you to now, but just for the record to be clear. There was the draft round robin resolution. That is the document we have just been looking at. Correct?

**MR PAMENSKY:** Correct ma'am.

**ADV HOFMEYR:** And then you also got the report prepared by SNG dated 6 November. That was the review of the process undertaken and  
10 awarding the sponsorship contract to TNA Media.

**MR PAMENSKY:** That is correct.

**ADV HOFMEYR:** You got a legal opinion prepared by Ledwaba Mazwai setting out their recommendations on the TNA Review Report dated 4 December and you received representations prepared by the then Acting CEO Mr Matjila in response to SNG's draft report dated 5 November 2014.

**MR PAMENSKY:** Correct.

**ADV HOFMEYR:** And then you go on at 29 and you say:

20 "The documents speak for themselves. I do not set out their content fully here. I carefully considered the contents of each of them at the time."

Is that so?

**MR PAMENSKY:** That is correct ma'am.

**ADV HOFMEYR:** And then we go over the page to 12. I would like to jump to paragraph 30.3, because in this paragraph you describing what



you understood from the documents. 30.3 reads:

“Pursuant to the recommendations in the SNG Report Eskom had procured urgent legal advice from Ledwaba Mazwai.”

I want to take the next sentence and break it up if we may. The first thing that you record that they had found is that there was no impropriety in the conclusion of the TNA Agreement. Do you see that?

**MR PAMENSKY**: I see that.

**ADV HOFMEYR**: What did you mean when you said no impropriety?

10 **MR PAMENSKY**: There was no criminal intent. There was no fraud. There was no bribery. That is how I interpreted it in that sense.

**ADV HOFMEYR**: Do you accept that they had found that he had acted unlawfully?

**MR PAMENSKY**: Yes. He had.

**ADV HOFMEYR**: Do you accept that they had found that he had engaged in financial misconduct?

**MR PAMENSKY**: The report said so. Yes.

**ADV HOFMEYR**: But that was not relevant or was it?

20 **MR PAMENSKY**: No ma'am. In my mind no impropriety was the fraud, corruption or anything to that element.

**ADV HOFMEYR**: So was it relevant to you that the lawyers had concluded he had engaged in financial misconduct?

**MR PAMENSKY**: Yes. It was of concern to me.

**ADV HOFMEYR**: Did – was that another reason to be sceptical about Mr Matjila's representations?

**MR PAMENSKY:** Certainly.

**ADV HOFMEYR:** Let us then go to the second part of that sentence. You say the second thing that they did is advised that the Board had two alternatives available to it. Either to ratify the agreement and procure commercial value from it or not to ratify it. Do you see that?

**MR PAMENSKY:** Yes. I do.

**ADV HOFMEYR:** Can I say Mr Pamensky in fairness to you? That is very consistent with the testimony you have just given and I want to say that in the following respect. The Chairperson asked you questions  
10 about value. Right. How did you determine whether there was value in the spend of those R43 million by Eskom?

As I understood your answer you did not actually answer how Eskom would get value out of its 43 million spent with TNA as opposed to elsewhere. I understood your answer to be not the value equation was get something out of this agreement at all or get nothing because if we cancel it, it will be regarded as a repudiation and we will be on the line for the full total plus probably legal costs. Is that a fair summary of your mind set?

**MR PAMENSKY:** No. My – with an addition ma'am. With an addition  
20 that on the resolution they made it clear that you would try and maximise and get the maximum value.

**ADV HOFMEYR:** H'mm.

**MR PAMENSKY:** So that corporate department was there to get the maximum value out of that 43.

**ADV HOFMEYR:** Despite the fact that there was never any follow up

with them as to whether they had done that?

**MR PAMENSKY**: That is correct.

**CHAIRPERSON**: Of course I take it that you did not know what value may have been there to be maximised?

**MR PAMENSKY**: Yes. I was not there to believe ...(intervenes).

**CHAIRPERSON**: Yes.

**MR PAMENSKY**: But as I said to you Chair I really think we were in a hard place. You know.

**CHAIRPERSON**: Yes.

10 **MR PAMENSKY**: Try to get something out than losing 43 million.

**CHAIRPERSON**: Yes.

**MR PAMENSKY**: Was my whole concern in that element.

**CHAIRPERSON**: Yes.

**ADV HOFMEYR**: I want to probe a bit further your understanding of Ledwaba Mazwai's advice, because in this paragraph you are describing as I understand it what they advised. They advised that there were these two alternatives. Right?

**MR PAMENSKY**: Correct.

20 **ADV HOFMEYR**: And you actually at the bottom of that paragraph give us a reference to the particular paragraph where you say they gave this option in a sense to the Board. Is that right?

**MR PAMENSKY**: Yes ma'am.

**ADV HOFMEYR**: Okay. Let us go to that paragraph if we may. You will find it at page 190 of the same bundle, MM3.

**MR PAMENSKY**: Yes. Yes ma'am.

**ADV HOFMEYR:** So let us pick it up at clause - paragraph 4.1.3.2, because that is the lead into the paragraph that you referred us to a moment ago. Right. It says there:

“Any ratification of the TNA Contract by the Eskom Board of Directors would in our view be predicated on one or both of the following primary considerations. Namely ...”

I just want to pause there. You in your testimony a moment ago jumped to the second one. I would like us to pause on the first one. The first one says:

10           “... if the Board determines or considers from a commercial perspective that the TNA Contract represents good value for money proposition to Eskom as measured against the costs of the sponsorship on the one hand and the benefits to be derived therefrom by Eskom on the other and/or ...”

And then it goes into the second subparagraph that you were drawing our attention to a moment ago. I want to focus on that first one. As I read that first paragraph. It is saying to the Eskom Board when you make this decision whether to ratify this contract or not you  
20           need to determine whether there is commercial value in this contract. Do you have the same understanding of that paragraph?

**MR PAMENSKY:** Yes. There has to be value in the TNA sponsorship elements.

**ADV HOFMEYR:** Indeed and it is not just some value. They are quite specific. It is the cost benefit analysis that any prudent spender of R43

million of public funds would engage in. It is how much you are going to pay for what you are going to get. It is not done in a vacuum. Is it?

**MR PAMENSKY**: No. It is not. They are saying what you are saying.

**ADV HOFMEYR**: Indeed. They go on at 4.1.4 on that page to say:

“We are not able to offer any advice regarding the commercial value to Eskom of the TNA Contract.”

I read that to say you have to look elsewhere Board of Eskom to determine this commercial value which they regard as a prerequisite to any ratification decision by the Board. Do you have the same  
10 understanding?

**MR PAMENSKY**: Sorry. Can you just repeat that question again?

**ADV HOFMEYR**: What 4.1.4 conveys to me if I was the reader of this being asked to sign onto the round robin resolution is that Ledwaba Mazwai the authors of this report cannot offer advice as to the commercial value to Eskom of the TNA Contract. Do you understand  
...(intervenes)?

**MR PAMENSKY**: I agree with that.

**ADV HOFMEYR**: But earlier we have established that those same lawyers said it is relevant to your ratification decision Board of Eskom  
20 that you determine whether there is commercial in the TNA Contract. Correct?

**MR PAMENSKY**: Ma'am that is what they said and my interpretation is going back again. As I said we are in that position where we found ourselves with a contract that signed. My fear was in was to lose 43 million and not obtain one sponsor or corporate value as they explained

to us over here. So I felt it was in the best interests of Eskom to procure value.

There had to be some value because Colin Matjila explained his value and made sure your claw as much value possible as opposed to losing it. So you know it was a hard question at my point in that time to determine you know do we lose 43 or do we try and clawback as much as possible.

**ADV HOFMEYR:** Mr Pamensky I understand that was your interpretation.

10 **MR PAMENSKY:** H'mm.

**ADV HOFMEYR:** What I am seeking to do now is explore the reasonableness of that interpretation.

**MR PAMENSKY:** I got you ma'am.

**ADV HOFMEYR:** Do you agree that the lawyers were saying the Board of Eskom has to determine whether there is commercial value in this contract?

**ADV BLOU:** Sorry Chair. If I may interject for a moment?

**CHAIRPERSON:** *Ja.*

**ADV BLOU:** And maybe ...(intervenes).

20 **CHAIRPERSON:** Please come forward.

**ADV BLOU:** Sorry Chair.

**CHAIRPERSON:** *Ja.*

**ADV BLOU:** And perhaps it is better for the witness to just leave the room because I do not want to be ...(intervenes).

**CHAIRPERSON:** Oh. You ...(intervenes).

**ADV BLOU**: Accused later of my answer putting ...(intervenes).

**CHAIRPERSON**: Oh, okay.

**ADV BLOU**: Of my objection putting questions into ...(intervenes).

**CHAIRPERSON**: Yes.

**ADV BLOU**: His mind.

**CHAIRPERSON**: Yes. Okay. Mr Pamensky can we excuse you for a minute. Somebody will call you from outside.

**ADV BLOU**: We are dealing with on any version a lay person here who is not the author of the document. It is established law that the  
10 documents be an ordinary meaning in an objective sense. Their proper meaning is not what he thinks. It is not what Ms Hofmeyr thinks. It is not even with respect what you think.

Documents are to be construed purposively in context to have regard to their words. So although it is quite permissible of course for this Commission to interrogate Mr Pamensky's state of mind in ratifying the contract and what he understood something to be and also to the reasonableness of such a belief in the light of the words.

It is important I am afraid to have to point out that in this document at 4.1.3.2 the authors – the lawyers were saying it can be  
20 predicated on one or both and it says and/or. So either you can decide as I understand this that this represents good value just without any – any fear of the consequences of cancellation.

You may just define that despite the fact that it is irregular expenditure and financial misconduct that it is a contract that is worthwhile having independently of any consequences relating to

cancellation. It says and/or if the Board determines that a decision to ratify is tantamount to cancellation where there are no grounds.

Then it will result in a claim for damages. The only point I am trying to make is it was not meant to be necessarily a combined understanding. The witness' evidence was that he placed more weight rightly or wrongly on 4.1.3.2.2 because some value is better than none, but I do not think it is fair to put to him that the authors of this document meant there had to always be a positive answer to one before you could go into two and ratify the contract. I am just putting that on  
10 the record.

**CHAIRPERSON:** Yes.

**ADV BLOU:** That is my reading of the document and I think it is ultimately one ...(intervenes).

**CHAIRPERSON:** Yes.

**ADV BLOU:** Can argue and deal with it at the end ...(intervenes).

**CHAIRPERSON:** Yes, yes.

**ADV BLOU:** But I do not think it would be put categorially that it was a ...(indistinct) to the Board's decision ...(intervenes).

**CHAIRPERSON:** Yes.

20 **ADV BLOU:** Because it is not the way I read it.

**CHAIRPERSON:** Yes. Okay. No. I understand your point.  
Ms Hofmeyr.

**ADV HOFMEYR:** Thank you Chair.

**CHAIRPERSON:** H'mm.

**ADV HOFMEYR:** Mr Pamensky's affidavit before this Commission and



his evidence today says that he came to the decision to ratify the contract based on what was in these documents. It is my submission that it is therefore fair to probe with him what his understanding of the documents was. Mr Pamensky's answer in fairness to him about clause 4.1.3.2.1 was that it was necessary to establish whether there was commercial value.

Mr Blou acting for Mr Pamensky places greater emphasis on the second clause. Mr Pamensky is fully entitled to give that answer when I seek to probe with him whether it was his understanding that  
10 commercial value was an aspect that the Board itself had to determine. So it is my submission that we leave it to Mr Pamensky to answer that.

I am suggesting that his understanding of this document is absolutely key to the decision that he took and the question whether that decision was lawfully taken given the requirements of the PFMA that we have been through previously. It is in that context that I ask the questions.

**CHAIRPERSON**: Okay. I think ...(intervenes).

**ADV BLOU**: (Indistinct).

**CHAIRPERSON**: *Ja, ja.*

20 **ADV BLOU**: Thank you.

**CHAIRPERSON**: Okay. Maybe let me tell ...(intervenes).

**ADV BLOU**: Chair, I really ...(intervenes).

**CHAIRPERSON**: Let me tell you what I was ...(intervenes).

**ADV BLOU**: *Ja.*

**CHAIRPERSON**: Thinking of saying before you ...(intervenes).

**ADV BLOU:** Yes, yes. Thank you.

**CHAIRPERSON:** It seems to me that it is how the question is put to him that that is important ...(intervenes).

**ADV BLOU:** Yes.

**CHAIRPERSON:** And now that you have raised your concern I think Ms Hofmeyr is alive to it ...(intervenes).

**ADV BLOU:** Yes.

**CHAIRPERSON:** And there is good chance that going forward ...(intervenes).

10 **ADV BLOU:** Yes. Look ...(intervenes).

**CHAIRPERSON:** She will put it in such a way that ...(intervenes).

**ADV BLOU:** That it is more neutral.

**CHAIRPERSON:** *Ja.* Yes.

**ADV BLOU:** Can I just say that is the only thing I wanted to place on record. It is one thing to say to a witness read the clause and give me what your understanding was at the time.

**CHAIRPERSON:** *Ja.*

20 **ADV BLOU:** It is quite something else to say to the witness I read the clause as a senior lawyer in the following way would you agree. It is a bit difficult for him to say that he thinks it has a different meaning. If you want to know what his understanding was ask his understanding.

**CHAIRPERSON:** Well I am not sure about the latter part ...(intervenes).

**ADV BLOU:** But...(intervenes).

**CHAIRPERSON:** Particularly where we are dealing with somebody who

is a chartered accountant.

**ADV BLOU:** *Ja.* No. (Indistinct).

**CHAIRPERSON:** I think they would – they should be able to say no, no I – that is not how I read it.

**ADV BLOU:** I have no difficulty.

**CHAIRPERSON:** Yes.

**ADV BLOU:** But the point is I do not think the examiner can likely say it must be read in this way or as I read it in this way. That is all I am saying.

10 **CHAIRPERSON:** *Ja.* No, no, no. I think ...(intervenes).

**ADV BLOU:** I think the point has been made and I think it is just ...(intervenes).

**CHAIRPERSON:** *Ja.* No. I think Ms Hofmeyr ...(intervenes).

**ADV BLOU:** If the question is asked in a bit of a more neutral way ...(intervenes).

**CHAIRPERSON:** Yes.

**ADV BLOU:** It does – we will not have any further difficulty.

**CHAIRPERSON:** No, no. That is fine. I am sure ...(intervenes).

**ADV BLOU:** Thank you Chair.

20 **CHAIRPERSON:** It will be sorted out, *ja.*

**ADV BLOU:** Thank you.

**CHAIRPERSON:** Thank you. Mr Pamensky must be called back now. I think it is - *ja.* Thank you Mr Pamensky.

**MR PAMENSKY:** May ...(intervenes).

**CHAIRPERSON:** Yes.

**MR PAMENSKY:** May I also say also something here please. This resolution was – had the CEO and CFO on there. You know. They would have voiced and they are duty bound to voice their opinions if they also did not feel there was value in the specific contract.

**ADV HOFMEYR:** How were they going to do that?

**MR PAMENSKY:** They could have called us. They could have written on the e-mail. They have a variety of ways to communicate with us.

**ADV HOFMEYR:** Thank you. We will return to the question of this – this decision – oh goodness.

10 **MR PAMENSKY:** Sorry Chair. Sorry Chair.

**CHAIRPERSON:** Okay.

**ADV HOFMEYR:** Had an accident.

**CHAIRPERSON:** Somebody will assist you and they give you another glass.

**MR PAMENSKY:** Sorry Chair. Sorry.

**ADV HOFMEYR:** Thankfully it was not a mirror.

**MR PAMENSKY:** Sorry.

**CHAIRPERSON:** Yes. Thank you.

20 **ADV HOFMEYR:** Thank you Chair. Mr Pamensky if we can then go to paragraph – page 13 of the affidavit, because I think it is useful to use your own words from your affidavit in order to take further this debate we are having about the commercial value in the contract with TNA.

**MR PAMENSKY:** Yes ma'am.

**ADV HOFMEYR:** At paragraph 32 you say:

“My view that ratifying the contract as opposed to

repudiating it made good commercial sense was based *inter alia* on the following information set forth in Mr Matjila's representations, in response to the SNG report, which accompanied the draft round robin resolution."

Let's just pause there. Is it a fair reading of that paragraph to say you did understand that you needed to make an inquiry into the commercial sense of the contract?

**MR PAMENSKY:** (Indistinct).

**ADV HOFMEYR:** The commercial value.

10 **MR PAMENSKY:** Sorry, can you just repeat your question?

**ADV HOFMEYR:** I want to just establish whether you and I understand this paragraph of your affidavit in the same way. I understand it to be saying you understood that you needed to determine as a member of this Board ...(intervenes).

**MR PAMENSKY:** No, no, no.

**ADV HOFMEYR:** Can I finish my question because you may be anticipating a different one.

**MR PAMENSKY:** Sorry.

20 **ADV HOFMEYR:** You understood as a member of this Board that you needed to establish whether there was commercial value in the contract, is that what you're saying here?

**MR PAMENSKY:** No I am saying here that I believe based on his representations there would be value in this contract.

**ADV HOFMEYR:** It's not clear to me that that's different. You describing to me the source you went to, I am asking an earlier

question, do you agree that you needed to go to determine whether there was commercial value in the contract?

**MR PAMENSKY:** You had to apply your mind that there was some form of value in this contract.

**ADV HOFMEYR:** Indeed. So let's look at what you relied on.

**CHAIRPERSON:** Well, I am sorry, I just want to make sure I understand your evidence. Ms Hofmeyr asked you the question whether you were saying here in your affidavit that it would be necessary to establish that there was commercial value to the  
10 contracts. You gave a response which I understood to be affirmative.

**MR PAMENSKY:** Yes you had to apply your mind to see there is some value in this contract Chair.

**CHAIRPERSON:** Yes, now that to me seems to be different from what you were talking about earlier on when you said I thought we should ratify this contract because otherwise we may be facing litigation for damages. When you talk about commercial value to the contract it seems to me you are talking about if you look at this contract, you talk about, saying if you look at this contract is it worth us continuing with it on its own, leave out the threats of litigation, that's how I understood  
20 what you are saying. Am I correct?

**MR PAMENSKY:** No sir I'm applying both of them apologies. I'm saying one of my reasons was to ratify, because we don't want that loss, the second element is, what value is there going to be and Mr Matjila explained some of those values, which in my mind, were reasonable to get value from this contract. What the rand amount of

the value, I did not answer but it did seem there is value in this contract sir.

**CHAIRPERSON:** Okay.

**MR PAMENSKY:** I hope I answered that?

**CHAIRPERSON:** I understand your answer.

**ADV HOFMEYR:** Mr Pamensky let's look at what you drew from Mr Matjila's representations because you set that out in the sub paragraphs of paragraph 32 and just the lead in you say,

10            "In his representations Mr Matjila explained the value which Eskom had and would continue to derive from the contract."

And then you highlight the ones below, are these the ones you took into account?

**MR PAMENSKY:** (Indistinct) ma'am, I took into account that they had got this value which meant that there was existing value that they had been obtaining so it said they had been. As I said in my affidavit I found it as a renewal so they were obviously getting value from before and management and everybody were happy so I saw that as one element and the second element, yes I understood from his points is  
20 the value that you would have paid from the sponsorship.

**ADV HOFMEYR:** Thank you, let's take each of them 32.1 said that, Mr Matjila had recorded that similar contracts had been in place between Eskom and TNA regarding the same subject matter and that contract had come to an end. Mr Matjila did not disclose, in his representations that those previous, similar contracts had themselves been irregular,

did he?

**MR PAMENSKY:** No he did not.

**ADV HOFMEYR:** If he's done so, would you have been a bit more sceptical?

**MR PAMENSKY:** Very much so ma'am.

**ADV HOFMEYR:** At 32.2 you record that according to Mr Matjila the agreement offered a platform to Eskom to propagate its various campaigns including the publicised 49M campaign which reportedly was a phenomenal success, I think that's a direct quote actually from his  
10 representations. What did you understand that to convey?

**MR PAMENSKY:** Convey that this platform has been very successful to communicate out there with the public on the 49M campaign. He also said – I'll just go to is, he also said, sorry ma'am if I may go – may refer to it.

**ADV HOFMEYR:** Of course.

**MR PAMENSKY:** It's just come to my mind.

**ADV HOFMEYR:** You'll find his representation starting at page 174.

**MR PAMENSKY:** He said in clause 14 on page 4,

“This ...(intervenes).

20 **ADV HOFMEYR:** Sorry just for the record it's paginated page 176.

**MR PAMENSKY:** Oh sorry 176 which goes into 177 and I'll read the last paragraph,

“The CE believed this investment making having regard to the reported success of utilisations of these platforms in the past”.



**ADV HOFMEYR:** Right, Mr Pamensky again, what Mr Matjila did not disclose in those representations was that the Parliament had requested Eskom to respond on this very question, what value had you been able to extract from the business breakfasts and the advice that came back from the independent agency that Eskom used at the time was, that there was no way to establish a direct causal link between the 49M on the screen at the business breakfasts and the success of the 49M campaign, he didn't include that in his representations, did he?

**MR PAMENSKY:** No he did not ma'am.

10 **ADV HOFMEYR:** And if he had would you have been more sceptical?

**MR PAMENSKY:** Of course ma'am.

**ADV HOFMEYR:** And then you go on to list the rights that would be granted by TNA to Eskom, that also comes from Mr Matjila's representations, is that right?

**MR PAMENSKY:** Yes ma'am.

**ADV HOFMEYR:** Now Mr Pamensky we've already identified that at the time you make this decision you're not aware that the previous Board has actually determined that this contract did not have good value for Eskom, correct?

20 **MR PAMENSKY:** That is correct.

**ADV HOFMEYR:** And at this point, am I correct in understanding that the source of your comfort that there was commercial value in this contract lay in Mr Matjila's representations?

**MR PAMENSKY:** Not solely in his representations.

**ADV HOFMEYR:** In what else?

**MR PAMENSKY:** In what else that this came from management – Board and management that they were happy to continue with this so they must have believed there was value in the contract otherwise they wouldn't have submitted this round robin resolution to us.

**ADV HOFMEYR:** Well why would you draw that conclusion, you made the point earlier that amongst the people who were asked to approve were the Financial Director and the CEO, correct?

**MR PAMENSKY:** That is correct.

**ADV HOFMEYR:** The round robin resolution was circulated by the  
10 Chairman, is that correct?

**MR PAMENSKY:** That is correct.

**ADV HOFMEYR:** So why did you make any assumption as to management being behind it prior to anyone in that position having voted on it?

**MR PAMENSKY:** Because management would submit these type of round robins, it's management's job, together to inform us of this information.

**ADV HOFMEYR:** But it wasn't circulated by management it was circulated by the Chairman of the Board.

20 **MR PAMENSKY:** I believed at that point in time that – we hadn't had one before but the Chairman – the company's secretary sends them on behalf of the Chairman and the round robin to do with management at that point in time.

**ADV HOFMEYR:** On what basis did you hold that belief?

**MR PAMENSKY:** On the belief, when I used to do round robin

resolutions in our entity, we as management were happy to submit a round robin resolution provided there was sufficient information to make an informed decision.

**ADV HOFMEYR:** It's now the 3<sup>rd</sup> of February 2015, why did you think that, that would apply in Eskom?

**MR PAMENSKY:** Because it's just reasonable that they came across this element and I assumed that's how it worked. In our organisation it would work in that organisation as well.

**ADV HOFMEYR:** But you do accept that they were asked for their own  
10 approval, it wasn't as though this came as a resolution as some resolutions do that say, supported by management or this is management's round robin resolution that's coming to the Non-Execs on the Board.

**MR PAMENSKY:** I accept that ma'am.

**ADV HOFMEYR:** Let's go back to the part of the reliance that you placed on Mr Matjila and his representations. I fully understand that it's not the sole source of your comfort, that there was commercial value but I'd like to focus on the reliance placed on Mr Matjila's representations.

20 **MR PAMENSKY:** Yes ma'am.

**ADV HOFMEYR:** You've already testified that you didn't buy Mr Matjila's interpretation of the contract, correct?

**MR PAMENSKY:** That is correct.

**ADV HOFMEYR:** You've also testified...(intervenues).

**MR PAMENSKY:** Sorry ma'am I didn't find it impropriety I said myself,

I didn't buy into it I didn't find anything sinister or anything, Rhuan with his interpretation but I did not buy it in my mind.

**ADV HOFMEYR:** Understood, you also clarified for us that you were aware that the lawyers had advised that he had been involved in financial misconduct, correct?

**MR PAMENSKY:** That is correct.

**ADV HOFMEYR:** You also have testified that you were aware that both the SNG report and the legal review indicated that Mr Matjila and Choeu played a part in removing the termination clause from the  
10 contract, is that correct?

**MR PAMENSKY:** I found that Mr Choeu had removed the clause I didn't find the element that the acting CEO removed the clause.

**ADV HOFMEYR:** Well he signed the contract with the clause removed at least that is clearly established, do you accept that?

**MR PAMENSKY:** No I definitely accept that ma'am I'm just saying what the opinion said was Mr Choeu removed that clause.

**ADV HOFMEYR:** Let's be clear about that significance of that removal of the clause. Would you agree with me that it's precisely because that clause was removed that this issue was arising at all, for the Board's  
20 consideration.

**MR PAMENSKY:** 100% correct.

**ADV HOFMEYR:** Because if that clause had remained on 30 day's written notice, Eskom could have got out of the contract.

**MR PAMENSKY:** Correct.

**ADV HOFMEYR:** I want to ask you in the context of those features of

Mr Matjila's role in this contract and its conclusion, it was reasonable for you to rely on his estimation of its commercial value.

**MR PAMENSKY:** Yes I was comfortable on that basis, first of all there was no impropriety second of all he had a different interpretation that I didn't buy into but it wasn't sinister or anything to that extent and I didn't see anything sinister into that extent. So I took it on face value what was there.

**ADV HOFMEYR:** Did you make any enquiries about other contracts of Eskom's in which such termination clauses either appeared or didn't  
10 appear?

**MR PAMENSKY:** No I did not.

**ADV HOFMEYR:** Did you not – do you not, now think it might have been relevant to ask that?

**MR PAMENSKY:** I do think now it would have been potentially relevant to ask that but it depends on the situation or the circumstances we find ourselves in when that comes. Remember we're an independent Non-Exec day-to-day with an oversight so we would have to oversight to see that one coming.

**ADV HOFMEYR:** If you had asked you would likely have been given  
20 the answer that Mr Pretorius gave this Commission which is that there – these were always standard clauses in sponsorship agreements and I suspect his answer might have resonated with you because he explained why that was so, he said,

“At this time in Eskom's existence it's in a financially precarious position. Media spend is a nice to have in

such an organisation. So you don't commit to R43 million worth of media spend unless there's some way for Eskom to get out of it if it's not a priority at a point in time".

Would you have found that compelling?

**MR PAMENSKY:** Yes I would have found that compelling.

**ADV HOFMEYR:** Mr Pamensky if we can then go to page 15 of your affidavit and – so I can be clear on your evidence notwithstanding Mr Matjila's role in removing that – well in being party to a contract in  
10 which that termination clause was removed as well as the findings that he had engaged in irregular expenditure and financial misconduct, you found it reasonable to rely on him as the source for commercial value in the contract?

**MR PAMENSKY:** Ma'am as I said before I didn't find anything sinister, these misconducts and these elements you talk are in relation to PFMA and that he breached his – he contravened his delegation of authority by entering into this contract which he interpreted as an investment. So I didn't find anything sinister in relying on his representations here.

**ADV HOFMEYR:** Mr Pamensky I put it to you that that is an  
20 unreasonable position to have adopted and I say that so that you can give any response you wish.

**MR PAMENSKY:** I don't agree with it but we'll leave it there.

**ADV HOFMEYR:** Thank you, at 34 on page –sorry 33 on page 15 you say there,

"I therefore concluded that the contract was effectively a

renewal except on more favourable terms.”

How did you come to that conclusion?

**MR PAMENSKY:** There were two elements, first of all in the SNG report it explained that they were saving 17% and I just want to stand to correction it could have been in mister – sorry I call him the acting CEO’s representation, I just want to check it...(intervenes).

**ADV HOFMEYR:** Yes he did make that point.

**MR PAMENSKY:** Oh he did, so that’s where I came and it was quite specific they were saving 17% or roughly about 6 or 7 million Rand.

10 **ADV HOFMEYR:** Thank you for that, what I was actually interested in but I should have been specific is why you regarded it as a renewal?

**MR PAMENSKY:** Because if you go to his element and how they explain it, that they had a media agency it was from the past and therefore it was a renewal in that sense. So it was from past and he indicated it was a renewal by saving that money and obviously from a sense they had prior contracts with the media company the Mediashop sorry if the Mediashop was no longer doing it, TNA approached, as I understand him here, probably directly I don’t recall that, but you were saving that money. So I concluded it was a renewal but I also read it  
20 and that’s how I interpreted the representation from the acting CE.

**ADV HOFMEYR:** Mr Pamensky it may well be that I have missed it so I’m going to ask for your assistance on that, no doubt my learned friend will assist if neither you or I can find it but where does Mr Matjila talk about this contract being a renewal?

**MR PAMENSKY:** He first of all says that – I’ll tell you now, clause 9.1

was the first one,

“Previously there were contracts in place between Eskom and TNA regarding the same subject matter and that the contract had come to an end.”

That’s how I interpreted it ma’am.

**ADV HOFMEYR:** Oh so ...(intervenes).

**MR PAMENSKY:** The second one, sorry:

10 “The latitude engaged directly at TNA as opposed to going through the Mediashop who Eskom appointed agency for the placing of the advertisement related spend, offered Eskom the opportunity to save 17% in the agency fee.”

So it was a renewal of the prior contracts that they had run before.

**ADV HOFMEYR:** I understand, you and I are agreed he doesn’t use the word, renewal?

**MR PAMENSKY:** No he doesn’t use the word renewal.

20 **ADV HOFMEYR:** And the reason why I probe it further Mr Pamensky is that the last contract, in fact, came to an end back in 2012, you didn’t have that information, I accept that but it’s interesting to me that you read 9.1 nonetheless to suggest that this is just more of what happened previously.

**MR PAMENSKY:** Yes, they’re extending their contracts and extending the sponsorship and it had been a success to them.

**ADV HOFMEYR:** The evidence before the Commission has explained



quite clearly why there was that gap prior to this contract, I accept that you weren't aware of this at the time. Had you been told that the reason why there was that gap is because it was having a bad reputational impact on Eskom, can I take it you might have approached what Mr Matjila said differently?

**MR PAMENSKY:** Yes correct.

**ADV HOFMEYR:** Thank you, if we then go back to page 15.

**MR PAMENSKY:** Yes ma'am.

**ADV HOFMEYR:** I want to pick up at paragraph 34 on that page. It  
10 seems in some sense to be your summary paragraph of our ultimate decision to ratify this contract. Could you give us, in your own words, what the fundamental justification was for you in ratifying the contract.

**MR PAMENSKY:** Sorry ma'am I took all the points into consideration when I ratified this, this is just one of the points that explain more my mind set to ratify the contract because management time and attention and the Board for that matter, needed to be focused on these matters and I interpreted the legal opinion to say there was not a high probability of a success of a litigation at that point in time and we as a country were finding ourselves with the load shedding etcetera, I  
20 believe that the Board and management time is better focused on those issues ma'am.

**ADV HOFMEYR:** I accept that the legal review presented two options to Eskom, it was either cancel the contract or ratify it and proceed with it. As I read the review, that's the product of the two questions that were put to the lawyers. Do you have the same understanding of it?

**MR PAMENSKY:** I need to re-read it and check it again I can't say. What I understood from mind set was, that the lawyers had indicated that there were two options to take in terms of the TNA contract.

**ADV HOFMEYR:** Let me, in fairness to you, take you to where I derive that from. It's at page 181 of MM3 and if you pick it up there at paragraph 1.2 you'll see there that what Ledwaba Mazwai is doing in this paragraph is identifying the view that they've been asked to express on the questions posed, do you see that?

**MR PAMENSKY:** I see that ma'am.

10 **ADV HOFMEYR:** And what are those three questions that they were asked to answer?

**MR PAMENSKY:** You are correct on the last question, they were asked what corrective action to be available to be taken pursuant in respect of the acting CEO on the one hand and Mr Choeu on the other, whether ratification of the contract as an option available to Eskom and if so, what are the implications of ratifying the TNA contract would be and would cancellation of the TNA contract is available to Eskom and if so what are the implications of cancellation of the TNA contract.

20 **ADV HOFMEYR:** Mr Pamensky I readily accept that you're not a lawyer but it's relevant to know what was or was not put to the lawyers for their determination and what might have been relevant to the Board when it was making this decision had been these options been disclosed to it. If you had been told that there was actually another option available to Eskom, a legal option, not to cancel or to ratify but to review the conduct that had precipitated this contract so that it

wouldn't be required to be bound by it, is that something you would have wanted to take into account?

**MR PAMENSKY:** If that was there, one of the options, I definitely would have taken it into account if they had included that element.

**ADV HOFMEYR:** Thank you, and then if we go back to page 15 you say at the bottom of that page you did not discuss the TNA agreement or my decision to ratify it with other members of the Board before doing so, you say,

10 "I was satisfied to take the decision on the documents  
made available to me."

Do you see that?

**MR PAMENSKY:** I see that.

**ADV HOFMEYR:** You go over on the next page ...(intervenes).

**MR PAMENSKY:** Sorry ma'am also why I was comfortable, there was sufficient information we received a legal opinion, we received an audit report, in my mind at that point in time there was sufficient information to take a decision. I had no reason not to believe the lawyers, the auditors, our Chairman and any of the other Board Members in that point in time ma'am.

20 **ADV HOFMEYR:** Chair what I want to go to now is really the concluding aspects of Mr Pamensky's affidavit.

**CHAIRPERSON:** Yes.

**ADV HOFMEYR:** And the point that he picks up over the page at 16 about the way in which this decision was taken by round robin resolution. I don't anticipate a great deal longer in his evidence but

we're in your hands insofar as taking the break now, returning afterwards ...(intervenes).

**CHAIRPERSON:** Yes, how much time do you think you need?

**ADV HOFMEYR:** I suspect 30 to 40 minutes.

**CHAIRPERSON:** Okay maybe we should take the lunch break in that event and then we'll return at 14:00 and then we can try and wrap up.

**ADV HOFMEYR:** Thank you Chair, I also understand my learned friend may want to ask some clarificatory questions in re-examination so that will also facilitate us returning.

10 **CHAIRPERSON:** Yes okay, alright.

**ADV HOFMEYR:** But sorry there is one matter that my learned friend keeps reminding me about today and I forget. One of the witnesses, Mr Jackson, was summoned to appear today and has been present, there's no chance that we would get to his evidence today and so may I request that he be released?

**CHAIRPERSON:** Yes, no, no I think he can be released but I must just mention for the benefit of counsel for Mr Pamensky that I indicated earlier to the Commission's Legal Team that we might not be able to sit the whole day because I'm not too well but I will assess the situation as  
20 we go along. So we will see when we come back after lunch and it would depend whether Ms Hofmeyr is able to finish within a certain time and whether whatever re-examination you might wish to have, how much time it might require.

**ADV BLOU:** I'm not a believer in lengthy re-examination, it's for clarification only so I imagine if Ms Hofmeyr is within the 30 to 40-

minute period concerned, I'll be something like 10 to 15 minutes at the most.

**CHAIRPERSON:** That's a good indication thank you. Okay let's take the lunch adjournment we'll return at 14:00, we adjourn.

**REGISTRAR:** All rise.

**INQUIRY ADJOURNS**

**INQUIRY RESUMES**

**CHAIRPERSON:** Okay let us proceed.

**ADV HOFMEYR:** Thank you Chair. Mr Pamensky I indicated before the  
10 lunchbreak we would move to the feature of this decision as a round  
robin resolution. But before we do that I do want to pick up on one  
aspect of the earlier evidence. I spent some time traversing with you  
what I suggested was the Board's responsibility to determine whether  
there was commercial value in the TNA contract. And in fairness to you  
I would like to explain to you why I placed such importance on that.  
And it relates to a provision of the PFMA that we looked at previously.  
You can get it in front of you if you would like to it is in the Legislation  
Bundle and it is at page 31. It is the section on financial misconduct.  
That section you will recall say that accounting authority for a public  
20 entity commits an act of financial misconduct. If that accounting  
authority wilfully or negligently and then I am interested in sub (b)  
makes or permits an irregular expenditure or a fruitless and wasteful  
expenditure. You will remember in your evidence this morning we  
discussed for a moment what your understanding of wasteful  
expenditure was. The decision that was put before the Board for

ratification was a decision whether to continue with the contract with TNA. Do you accept that?

**MR PAMENSKY**: Yes.

**ADV HOFMEYR**: And Section 83.1(b) of the PFMA requires accounting authorities not to commit acts of financial misconduct. Do you accept that?

**MR PAMENSKY**: I accept that.

**ADV HOFMEYR**: And one of the ways in which they do commit financial misconduct is if they wilfully or negligently make or permit wasteful expenditure from taking place. Do you accept that?

**MR PAMENSKY**: I accept that.

**ADV HOFMEYR**: Do you then accept that in order not to breach that provision of the PFMA it is necessary for the Boards of SOE's and their members when they make their decisions to determine whether a decision is going to constitute wasteful expenditure or not.

**MR PAMENSKY**: That is correct.

**ADV HOFMEYR**: And then I would like to ask you. As you sit here today knowing everything that you now know about this TNA contract what preceded it, what was not revealed to you at the time you made the decision whether you think the contract and the Boards ratification of it constituted wasteful expenditure?

**MR PAMENSKY**: Ma'am let me ask that – answer that question in a few ways. First of all when I said value I thought I explained it to the Chair that my mind set was in the place not to lose that money but I did apply my mind to the value. What that value was; was given in mister – or

this acting CEO's element – what I am saying to you I do not know if that is 10, 20, 30, 40, 50 million rand. But not knowing this information that it was not come to our attention I am sure the Board would have, well I, certainly would have asked much more questions and wanted to understand much more.

**ADV HOFMEYR:** If the Board had known everything you now know and still ratified the decision do you think that would have amounted to wasteful expenditure?

**MR PAMENSKY:** Yes for sure.

10 **ADV HOFMEYR:** Thank you. Let us then move to the round robin resolution if we may and I pick it up at page 16 of your affidavit. That is in MM3. At paragraph 37 on that page you say:

“I did not think it was strange or untoward that ratification of the TNA agreement was being sought by way of round robin resolution rather than a formal Board meeting.”

Why was that Mr Pamensky?

**MR PAMENSKY:** In my past history round robin resolutions are very common. As I said earlier if management believe there is sufficient  
20 information in front of them to provide a document for you to make a decision and it is an urgent decision then a round robin would come. So it was not strange or peculiar to me.

**ADV HOFMEYR:** You have given evidence previously that you did regard this decision as urgent, correct?

**MR PAMENSKY:** That is correct.

**ADV HOFMEYR:** And you linked that to the reportable irregularity timeframe, is that right?

**MR PAMENSKY:** That is correct ma'am.

**ADV HOFMEYR:** But you accept that there was no reference made to the reportable irregularity at all in the actual resolution that was circulated?

**MR PAMENSKY:** Correct.

**ADV HOFMEYR:** Now if it was so urgent Mr Pamensky why was it not raised at the 16 January meeting?

10 **MR PAMENSKY:** I cannot answer you ma'am.

**ADV HOFMEYR:** Did it not give you pause for thought?

**MR PAMENSKY:** Not at that point in time at all ma'am. I mean things were moving very fast, very fluid there. You know the situation we found ourselves in and you just got caught into understanding the business, getting involved and rectifying some of the problems that you were faced with.

**ADV HOFMEYR:** It is just I suggest to you that if there was urgency in it then by the 3<sup>rd</sup> of February you had already lost two and a half weeks from your last meeting. Should it not – should that not have raised a  
20 flag for you?

**MR PAMENSKY:** No ma'am I did not actually consider that you know. It came a round robin. I interpreted it as being urgent for the reportable irregularity that I thought had been dealt with but obviously it had not been dealt with and that is what I was faced with at that point in time.



**MR PAMENSKY:** Well your evidence earlier was that you actually did not know that it had been dealt with.

**MR PAMENSKY:** Yes that is what I am saying. I did not that the report irregularity had not been dealt with.

**ADV HOFMEYR:** And despite the fact that the resolution does not refer to the reportable irregularity or to urgency you determined it was urgent?

**MR PAMENSKY:** Yes ma'am.

**ADV HOFMEYR:** And what about the next meeting of the Board? Do  
10 you recall when that was?

**MR PAMENSKY:** No ma'am.

**ADV HOFMEYR:** It was on the 16<sup>th</sup> of February. You got this round robin ...(intervenes).

**MR PAMENSKY:** Oh yes, yes.

**ADV HOFMEYR:** On the 3<sup>rd</sup> of February. Do you not think it could have waited?

**MR PAMENSKY:** Ma'am I was comfortable with the documents in front  
of me. I applied my mind and on the strength of the legal opinion and  
where we were in that position I was comfortable to make the decision  
20 on that round robin. I had no reason not to believe anyone at that point  
in time. You know I believed everyone would be transparent and  
explain all these elements to us which they duty bound to as well.

**ADV HOFMEYR:** H'mm. Do you think Non-Executive Members of Board should approach round robin resolutions with any scepticism?

**MR PAMENSKY:** In general ma'am?

**ADV HOFMEYR:** Yes.

**MR PAMENSKY:** After this experience definitely.

**ADV HOFMEYR:** I think that is a fair answer Mr Pamensky. If we then move to paragraph 38 on page 16. You talk there about the comfort that you took from the fact that the CEO and the CFO had been copied on the e-mail and that their approval for the resolution was also sought. Do you see that?

**MR PAMENSKY:** I do see that ma'am.

**ADV HOFMEYR:** Are you aware that both of those executives were  
10 removed in March – well placed on suspension in March of 2015?

**MR PAMENSKY:** I am aware.

**ADV HOFMEYR:** Did you not at that point reflect again on the reliance that you had placed on their silence in relation to this matter?

**MR PAMENSKY:** No I did not.

**ADV HOFMEYR:** Do you think you should have?

**MR PAMENSKY:** Ma'am it is hard to say I did not know who approved that round robin at that point in time. You know I replied, I was transparent. You know the round robin came. I applied my mind and then I replied back to everyone that was on that e-mail with was  
20 everyone who was copied on it. So I was transparent, open and signed it. If anyone had problems potentially they could have responded by them saying did you know a, did you know b?

**ADV HOFMEYR:** I think the point Mr Pamensky though is that your affidavit indicates that you took comfort from the fact that the CEO and the CFO were amongst those individual required to indicate their

approval or not. Is that right?

**MR PAMENSKY:** That is correct.

**ADV HOFMEYR:** And a month later they were suspended. Do you not think that that should have raised for you some concern about the reliance you had placed on them?

**MR PAMENSKY:** Ma'am I did not consider it then.

**ADV HOFMEYR:** H'mm. Were you involved in that decision to suspend them?

**MR PAMENSKY:** Yes I was.

10 **ADV HOFMEYR:** Chair this is one of those areas that I flagged in the opening where there are aspects of the evidence of some of the witnesses that are not particular to the TNA enquiry but may well form part of other aspects of the Commission's work.

**CHAIRPERSON:** Work streams.

**ADV HOFMEYR:** Indeed.

**CHAIRPERSON:** Yes. Okay.

**ADV HOFMEYR:** So I just do want to flag that now for our purposes.

**CHAIRPERSON:** Okay.

20 **ADV HOFMEYR:** It was simply to relate that event in March with the comfort that you placed on their involvement in February.

**MR PAMENSKY:** Yes.

**ADV HOFMEYR:** Alright paragraph 39 you make the point that you have just made which is that you did not know what the outcome of the round robin resolution was at the time, is that correct?

**MR PAMENSKY:** That is correct.

**ADV HOFMEYR:** Mr Pamensky I am going to need your help now because we as the Commission as – and the Legal Team of the Commission standing here today do not actually know either what the outcome of that round robin resolution was. So I am going to ask for your assistance. I understand your affidavit to say you gave your response but you did not see anyone else's, is that right?

**MR PAMENSKY:** Correct.

**ADV HOFMEYR:** You also indicate that there was a meeting that took place on the 19<sup>th</sup> of March but the part of the meeting that dealt with  
10 TNA you were not in attendance for, is that correct?

**MR PAMENSKY:** That is correct. As the minutes show on the 19<sup>th</sup> it does not have me there present but as I stated before I clearly remember the Section 8.3 below being in attendance at that meeting.

**ADV HOFMEYR:** Right. But let me just ask this? That 19 March meeting was a number of weeks after the 3 February resolution, correct?

**MR PAMENSKY:** Correct.

**ADV HOFMEYR:** Would you not have expected that some result of the round robin resolution would be made known to the Board in that  
20 interim period?

**MR PAMENSKY:** No ma'am my understanding and I assumed that the process followed by Eskom was the same as what we follow normally in other companies that at the next formal Board meeting that is set up all round robin resolutions were documented down. In my understanding of that reason is so you can see if it has been approved or if it has not

and which members have been approved or approved it. So that is how it works within all the other organisations that I have operated in and it is actually common practice as I understand.

**ADV HOFMEYR:** So did you ask about that at the 19 March meeting?

**MR PAMENSKY:** I certainly do not recall asking.

**ADV HOFMEYR:** But that would have been when you needed to ask?

**MR PAMENSKY:** Yes but on that 19<sup>th</sup> – I mean – oh sorry on that meeting of the 28<sup>th</sup> of May the auditors wrote a report that the reportable irregularity had been addressed.

10 **ADV HOFMEYR:** Sorry we are not in May yet.

**MR PAMENSKY:** Oh sorry.

**ADV HOFMEYR:** As I understand your evidence you understood it as common practice that after a round robin resolution has been circulated to a Board at the next formal meeting of the Board it is tabled, right?

**MR PAMENSKY:** That is correct. Those are the formal meetings that are documented at the beginning of the year. You got 1 of X date, Y date and the next date. Not ad-hoc or in between meetings as I understand.

20 **ADV HOFMEYR:** Well you met on the 16 February and there was no update. Did you ask about it?

**MR PAMENSKY:** No I did not.

**ADV HOFMEYR:** You met on the 19<sup>th</sup> of March and there was no update. Did you ask about it?

**MR PAMENSKY:** No I did not but that 19<sup>th</sup> of March was an ad-hoc meeting so I do not believe it would have been on the agenda.

**ADV HOFMEYR:** Why do you say it was an ad-hoc meeting?

**MR PAMENSKY:** Because it was a meeting that went into in committee and my understanding of that meeting was to deal with certain issues that had arisen with the chairman at that point in time.

**ADV HOFMEYR:** Mr Pamensky there were two meetings on the 19<sup>th</sup>. And in committee and a full board meeting.

**MR PAMENSKY:** Yes ma'am.

**ADV HOFMEYR:** So at least in the full meeting it could have been raised?

10 **MR PAMENSKY:** It could have been raised, correct.

**ADV HOFMEYR:** And following your common practice should have been raised?

**MR PAMENSKY:** I do not know if that was a formal set meeting date but if it was it should have been put onto that round robin ma'am.

**ADV HOFMEYR:** Yes. But you get no feedback actually until a meeting on the 28<sup>th</sup> of May, is that correct?

**MR PAMENSKY:** That is correct.

**ADV HOFMEYR:** And tell us about what happened on the 28<sup>th</sup> of May?

20 **MR PAMENSKY:** Well on the 28<sup>th</sup> of May that was the formal board meeting. It was the approval of the audited accounts and the integrated report and in there the auditors explained – they – we asked them is there any irregular expenditure or anything to that extent. I am going by memory I can relook again and the auditors said the TNA and another individual – I am just – sorry I am terrible with names. Mr Baloyi I think it was was the report – was irregular or something to that

effect but the TNA matter had been resolved to and had been addressed to the satisfaction of the auditors. And then also at the end there there was a note to say that the round robin resolution for noting but I understand the wording said reconsideration but it there for noting so the round robin was noted at that meeting for all the Board Members to have a look and see at that point in time.

**ADV HOFMEYR:** I want to go to the language in a moment of that – the minutes of that meeting. But just help us with your – do you have a clear memory of that meeting and the discussion of the TNA aspect?

10 **MR PAMENSKY:** No ma'am.

**ADV HOFMEYR:** So when you say it was there just for noting and not for an actual decision to be taken are you sure about that?

**MR PAMENSKY:** Yes I am sure that the process works that all formal stuff is – you have your round robin resolution for noting to tell you whether it has been approved or not.

**ADV HOFMEYR:** But at that stage you did not actually know yet whether it had been approved, did you?

**MR PAMENSKY:** No I had no idea.

20 **ADV HOFMEYR:** In fairness to you let me explain our difficulty. In the records of Eskom we have only been able to track down 9 affirmative responses to the round robin resolution. A 9 is just short of the 75% that was required to carry that round robin resolution. Is this the first time you are hearing these ...(indistinct)?

**MR PAMENSKY:** Yes it is the first time the MRI is very clear that a round robin resolution needs 75% approval.

**ADV HOFMEYR:** Which on my maths is 10 out of 13 members. I am sure you can do it mentally being a Chartered Accountant. Our records as we currently have them Chair only show 9 responses. It may be that as persons who received Rule 3.3 Notices and were members of the Board at the time we will be able to get greater clarity. But the company secretary's records show 9 approvals not 10. Okay. With that background in mind can you go back to the meeting of the 28<sup>th</sup> of May and tell me again whether you are absolutely sure it was merely noted and not decided at that meeting?

10 **MR PAMENSKY:** I almost sure it was for noting and not deciding at that ...(intervenes).

**ADV HOFMEYR:** Okay.

**MR PAMENSKY:** Because there was no conversation according to the best of my memory at this point in time.

**ADV HOFMEYR:** That is not consistent with the language used. So let us go to the language of that resolution if we may? It is at page 413 of your bundle which is Exhibit MM3.

**MR PAMENSKY:** Ma'am just before we go back there you really need to link on the same minute page 9 of 22 if I may?

20 **ADV HOFMEYR:** Yes it is paginated page 405.

**MR PAMENSKY:** Yes.

“It was reported the TNA contract had been ratified by the Board and therefore no longer regarded as irregular.”

So that would have been ...(intervenes).

**ADV HOFMEYR:** Sorry where are you reading from?



**MR PAMENSKY:** Oh sorry 1,2,3,4,5 – the fifth line on the third paragraph ma'am.

**ADV HOFMEYR:** Right.

**CHAIRPERSON:** I am sorry at 405 or 413?

**MR PAMENSKY:** 405 sorry Chair.

**CHAIRPERSON:** 405 okay.

**MR PAMENSKY:** Sorry Chair.

**CHAIRPERSON:** You may continue.

**MR PAMENSKY:** “It was reported that the TNA contract had  
10           been ratified by the Board and therefore no longer  
              regarded as irregular.”

              So that would then imply that it was for noting this wording over  
here.

**ADV HOFMEYR:** Right let us go to the wording. You will find that  
Chair at page 413.

**CHAIRPERSON:** Just hang on one second. Did you say Mr Pamensky  
you were reading from paragraph 3 of 405?

**MR PAMENSKY:** Yes – yes Chair it was paragraph 3.

**CHAIRPERSON:** Oh okay now I can see it.

20 **MR PAMENSKY:** And I would say 1,2,3.

**CHAIRPERSON:** No I can see it is in the middle of the paragraph. I  
was looking at the begging of the paragraph. Okay where do we go  
from there?

**MR PAMENSKY:** Sorry Chair.

**ADV HOFMEYR:** Then to page 413 Chair.

**CHAIRPERSON:** Okay thank you. Go ahead.

**ADV HOFMEYR:** And you have already flagged the challenge with the language here. Because it does not actually talk about noting. It talks about the round robin resolution for the approval of the TNA contract was tabled for ratification. Do you accept that sounds like there was some meaningful decision that needed to be taken?

**MR PAMENSKY:** At that point in time I did not recognise it in that perspective and you know and as we went on in Eskom most of the elements said round robin resolution for noting.

10 **ADV HOFMEYR:** H'mm.

**MR PAMENSKY:** There was a specific element in Eskom months later where an element was – came to the Board for noting so that why I cannot answer you maybe the company secretary who was drafting these could answer you. I am sorry ma'am.

**ADV HOFMEYR:** H'mm. And the resolution is the round robin resolution for the approval of the New Age contract is ratified. Again it sounds if you read it and you will tell me if you have a different view that it was being ratified in that meeting.

**MR PAMENSKY:** No I would not interpret it as that.

20 **ADV HOFMEYR:** I accept that.

**MR PAMENSKY:** Sorry.

**ADV HOFMEYR:** And that is I understand your evidence to be because of what is recorded at page 405?

**MR PAMENSKY:** Yes ma'am.

**ADV HOFMEYR:** Thank you. Mr Pamensky if we can then go back into

your affidavit and if we can go to page 18.

**MR PAMENSKY**: Yes ma'am.

**ADV HOFMEYR**: Were you aware by that 28 May meeting whether there had been any payments yet in accordance with the TNA contract?

**MR PAMENSKY**: No I was unaware of any payments ma'am.

**ADV HOFMEYR**: At paragraph 44 on that page you say:

10 "I was not aware that Eskom had been asked to respond to parliamentary questions in relation to the TNA contract or that the Public Protector had engaged Eskom in relation to it."

I think that is consistent with the testimony you have given this morning.

**MR PAMENSKY**: Correct ma'am.

**ADV HOFMEYR**: I would like to take you to what the Public Protector said to Eskom at the end of 2014 so just before you came in as a new Board Member. You will find that in the file containing Mr Tsotsi's evidence. That is MM6. We are in MM6 and we need to go to page 364. So this is a letter addressed to the Chairperson of the Board of Eskom at the time and it is dated the 29<sup>th</sup> of October 2014. It is a letter from  
20 the Public Protector and what it indicates at paragraph 1 is that the Public Protector indicates

"Further to the letter from Willie Du Plessis to me dated 19 November 2013 copy attached kindly be informed that I am finalising the above investigation and I am in the process of drafting of a provisional report."

Right can I just pause there? We have had evidence already  
Chair on this letter. It is the letter that Mr Pretorius in fairness  
indicated had been false in respect related to the independent analysis  
that had been done on the value of the TNA contract. Notwithstanding  
that that was not known to the Public Protector at the time she was no  
doubt relying on State Owned Entities to respond honestly to her when  
she asked questions. But nonetheless at paragraph 2. The Public  
Protector records that it has since come to her attention through the  
media that notwithstanding her ongoing investigation of the matter  
10 Eskom's former interim Chief Executive Officer Mr Matjila had  
subsequently entered into a new and similar breakfast sponsorship deal  
worth R43 million with the New Age.

And then if you go over the place – page she says:

“It has been disclosed further that the new deal was  
concluded against the advice of the Board and in total  
disregard of internal legal advice and the deal is alleged  
to be an audit risk as it exceeded the sponsorship  
budget.”

The important paragraph is actually paragraph 5 because what  
20 the Public Protector does there in October – the end of October 2014 is  
she says:

“In the interest of cooperative governance, transparency  
and accountability I implore that Eskom's new  
sponsorship deal with the New Age newspaper should be  
held in abeyance pending the release of her provisional

report.”

Mr Pamensky I take it you have not seen this letter before?

**MR PAMENSKY:** Correct.

**ADV HOFMEYR:** If it had been brought to your attention at the time would you have at least wanted a meeting, a board meeting at which the TNA contract could have been debated?

**MR PAMENSKY:** Straight away together with the fact that they have asked you and the Public Protector’s office have asked you to hold this. This is a serious request from a serious body.

10 **ADV HOFMEYR:** Indeed. I would then like to deal with one or two final matters. You can close up the affidavit of Mr Tsotsi and accompanying annexures. The aspect of the Choeu and any disciplinary proceedings taken against him. Were you aware that the legal review recorded that Mr Choeu was still an employee of Eskom?

**MR PAMENSKY:** Yes I did.

**ADV HOFMEYR:** But despite that I understand your evidence earlier to be that you read – for me one of the indecipherable paragraphs of the resolution to indicate that he was no longer with Eskom, is that correct?

20 **MR PAMENSKY:** That is correct. That report from the audit – from the lawyers as you said earlier was the 4<sup>th</sup> of December this was now on the 3<sup>rd</sup> of January – sorry the 3<sup>rd</sup> of February.

**ADV HOFMEYR:** 3<sup>rd</sup> of February correct. And when I took you to that resolution earlier just in fairness to you, you can pick it up in your bundle MM3 at page 144.

**MR PAMENSKY:** Yes ma'am.

**ADV HOFMEYR:** You will recall that we dealt with the different ways in which parties are referred to in this paragraph, correct?

**MR PAMENSKY:** Yes ma'am.

**ADV HOFMEYR:** In the same paragraph on your understanding of it the parties are changing throughout, correct?

**MR PAMENSKY:** Yes ma'am.

**ADV HOFMEYR:** And you read this round robin resolution text together with the legal review that said that Mr Choeu was still in the employ of Eskom albeit dated December 2014, correct?

**MR PAMENSKY:** That is correct.

**ADV HOFMEYR:** Did you not think you might want to make some further enquiries as to whether Mr Choeu had actually been released or dismissed?

**MR PAMENSKY:** No ma'am in my mind it was quite clear. The parties that were involved in this matter are no longer in the sphere of Eskom operations. It is quite clear to me in my mind otherwise I would – at that point in time I am not sure whether I knew the PFMA's specific acts but common knowledge would have put to me, listen Mr Choeu is there let him come and answer what these questions are to take a termination clause away against the lawyer he needs to answer and come explain.

**ADV HOFMEYR:** Do you not think it is an odd way to say an employee is no longer in the employ of Eskom

**MR PAMENSKY:** No ma'am.

**ADV HOFMEYR:** Okay. And I understand your evidence to be you were

not at the 19 March meeting when the issue of the TNA contract was discussed, is that right?

**MR PAMENSKY:** That is correct.

**ADV HOFMEYR:** Ms Klein Chairperson who was one of your Co-Board Members has indicated in a statement before the Portfolio Committee which she sought to have placed before this Commission that at that particular meeting she raised her concern about no disciplinary action having been taken against Mr Choeu but I understand you were not there for that?

10 **MR PAMENSKY:** That is correct ma'am.

**ADV HOFMEYR:** If you had been what do you think you would have done?

**MR PAMENSKY:** No definitely I would asked for an investigation – not investigation to find out the actions that he did and put him through a disciplinary hearing in the sense of why did he remove the termination clause. Was it a commercial decision? What was his mind set and let the disciplinary work out what was the outcome of that.

**ADV HOFMEYR:** Because the provisions we went through on the PFMA.

20 **MR PAMENSKY:** Require you.

**ADV HOFMEYR:** Require it.

**MR PAMENSKY:** Requite it correct.

**ADV HOFMEYR:** And create an offence if it is not.

**MR PAMENSKY:** Correct.

**ADV HOFMEYR:** Done by an accounting authority.

**MR PAMENSKY:** That is correct.

**ADV HOFMEYR:** Mr Pamensky then just in conclusion if I may what I would like to do is get your final comment on certain aspects which I suggest sum up the essence of your testimony today and I want to do that in two parts. I want to get your comment on aspects that I understand your testimony today to have made clear were not known to you at the time.

That is the first category and then the second category is what was known or I am going to suggest ought to have been known.

10 Okay. So let us start with what was not known to you. Is it correct that it was not known to you that the previous Board of Eskom had found that there was no value in this contract?

**MR PAMENSKY:** That is correct.

**ADV HOFMEYR:** It was not known to you that the Public Protector had asked for the decision of the Board to be delayed until her report on this very matter was produced?

**MR PAMENSKY:** Correct.

**ADV HOFMEYR:** It was not known to you that the two previous contracts with TNA were concluded without a budget and without the  
20 involvement of the Sponsorship Committee?

**MR PAMENSKY:** I did not know. Sorry.

**ADV HOFMEYR:** You also did not know that those two previous contracts were in their own terms then irregular?

**MR PAMENSKY:** No. I did not.

**ADV HOFMEYR:** You also – I understand your testimony to have



indicated that you did not know that there was another legal option available to Eskom. That was the option when we were dealing with the two questions that were put to the lawyers. I said actually there was a third option. Eskom could have taken steps itself to review the decision and thereby not be liable under the contract.

**MR PAMENSKY**: Correct.

**ADV HOFMEYR**: And can I then ask you if you had known all of that do you think you would have ratified this ...(intervenes)?

**MR PAMENSKY**: Never. I would have not – I would have definitely  
10 called for more investigation. Never ratified it.

**ADV HOFMEYR**: Right. Then let us move to what you did know or I am going to suggest to you, you ought to have known. So that you have an opportunity to comment. The first Board meeting of the 16<sup>th</sup> of January had made no mention of the TNA Contract. Correct?

**MR PAMENSKY**: Correct.

**ADV HOFMEYR**: On the 3<sup>rd</sup> of February nonetheless you got a round robin resolution and accompanying documents asking you as a member of the Board to ratify a R43 million contract for business breakfasts. Correct?

20 **MR PAMENSKY**: Correct.

**ADV HOFMEYR**: At that time you linked urgency to the reportable irregularity. Correct?

**MR PAMENSKY**: Correct.

**ADV HOFMEYR**: And it did not occur to you at the time that if it was so urgent it should have been brought up at 16 January meeting?

**MR PAMENSKY:** No. I was there to – we dealt with at that point in time. It did not occur to me at that introductory – on that 16<sup>th</sup> of January meeting. No. It did not.

**ADV HOFMEYR:** You were aware at the time that Eskom was in a precarious financial position?

**MR PAMENSKY:** I was ma'am.

**ADV HOFMEYR:** And is it fair to say that at the time that you took the decision you were of a mind that Eskom should not lightly into a R43 million contract for business breakfasts?

10 **MR PAMENSKY:** Ma'am I cannot comment on that element. I was not involved in sponsorships. I do not understand how they determine what the game is – what the aim is. So I do not know specifically but the situation I was caught in was an issue that came from the prior Board that came to us to that point in time where a decision had to be made.

**ADV HOFMEYR:** Should an SOE always be cautious when it spends public funds?

**MR PAMENSKY:** Of course.

**ADV HOFMEYR:** And should it be cautious when it is spending R43 million on breakfasts?

20 **MR PAMENSKY:** Definitely. Any amount ma'am.

**ADV HOFMEYR:** You were also aware that the auditors and the lawyers had concluded that Mr Matjila was guilty of financial misconduct. Correct?

**MR PAMENSKY:** From a PFMA perspective. Yes.

**ADV HOFMEYR:** And that they had rejected his attempt at justification

that it was an investment?

**MR PAMENSKY**: That is correct.

**ADV HOFMEYR**: And that the contract had been concluded without the termination clause despite legal advice to the contrary?

**MR PAMENSKY**: Ma'am I am not a lawyer to the contrary, but it was concluded without a termination clause.

**ADV HOFMEYR**: Yes but let me get clear on this. The SNG Report and the Ledwaba Mazwai Review did record that there had been internal advice from Eskom's lawyers that the termination clause should be  
10 retained. Are you aware of that?

**MR PAMENSKY**: Yes.

**ADV HOFMEYR**: So it was in fact concluded without it contrary to the advice of Eskom's internal lawyers. You knew that?

**MR PAMENSKY**: That is correct which then equates – sorry ma'am. That it equates to your misconduct ...(intervenes).

**ADV HOFMEYR**: Indeed.

**MR PAMENSKY**: And then it goes back to your exact PFMA Act where you have a duty to act.

**ADV HOFMEYR**: Mr Pamensky I also want your comment on the  
20 proposition that it was not reasonable to rely on Mr Matjila's assessment of the value of this contract given all of that backdrop.

**MR PAMENSKY**: Ma'am I had no reason to disbelieve him. I felt his representations were comprehensive in the sense of explaining himself and I did not at that point have any reason not to take it on the face value that he gave at all.

**ADV HOFMEYR:** But for the fact that he had been found guilty of financial misconduct and but for the fact that he had concluded the agreement that took the termination clause out of the contract?

**MR PAMENSKY:** No ma'am. Also when I am looking at that – sorry to comment to you.

**ADV BLOU:** Sorry Chair.

**CHAIRPERSON:** Yes.

**ADV BLOU:** I am sorry. I heard a statement that he had been found guilty of financial misconduct as opposed to ...(intervenes).

10 **CHAIRPERSON:** Yes. I heard that.

**ADV BLOU:** It was referenced in the Ledwaba Mazwai Report.

**ADV HOFMEYR:** Yes. Indeed.

**CHAIRPERSON:** H'mm.

**ADV HOFMEYR:** Let us just find it. So that we are absolutely clear about the language that they used.

**CHAIRPERSON:** Oh. You wanted to say they – they took the view that he was guilty of financial misconduct?

**ADV HOFMEYR:** I think my learned friend Mr Blou's concern is with my use of guilty.

20 **CHAIRPERSON:** Yes.

**ADV HOFMEYR:** So let us ...(intervenes).

**CHAIRPERSON:** And the finding.

**ADV HOFMEYR:** Yes. Indeed.

**CHAIRPERSON:** H'mm.

**ADV HOFMEYR:** So let us go to page 194. It is in your bundle MM3.

**CHAIRPERSON:** What is the page?

**ADV HOFMEYR:** 194.

**CHAIRPERSON:** Thank you.

**ADV HOFMEYR:** Chair we are at paragraph 5.4.2 on that page. This is in the section headed “Financial Misconduct” and what Ledwaba Mazwai record there ...(intervenes).

**CHAIRPERSON:** I am sorry. I am sorry.

**ADV HOFMEYR:** Apologies Chair.

**CHAIRPERSON:** I went to 194. Do you say 154?

10 **ADV HOFMEYR:** Sorry. It is 194 ...(intervenes).

**CHAIRPERSON:** *Ja.*

**ADV HOFMEYR:** But it is paragraph 5.4.2 on that page.

**CHAIRPERSON:** Oh. I must be looking at ...(intervenes).

**ADV HOFMEYR:** We ...(intervenes).

**CHAIRPERSON:** The wrong bundle.

**ADV HOFMEYR:** You may be in the wrong bundle.

**CHAIRPERSON:** *Ja.*

**ADV HOFMEYR:** Chair we are in Exhibit MM3 and page 194 ...(intervenes).

20 **CHAIRPERSON:** Yes. I think I have got it. Yes.

**ADV HOFMEYR:** And it is at paragraph 5.4.2 on that page where the authors of the legal review says:

“It appears to us that taking into account the factual findings of the report and Section 57 of the PFMA as mentioned in paragraph above that the conduct of

Mr Matjila in relation to the conclusion of the TNA

Contract also constitutes a financial misconduct.”

Do you see that?

**MR PAMENSKY:** I see that ma’am.

**ADV HOFMEYR:** I accept that they do not use the word “guilty.” but they do conclude that his conduct is financial misconduct under the PFMA. Correct?

**MR PAMENSKY:** In relation to contravention of the delegation of authority by breaching the delegation of authority by not having the  
10 budget approved ...(intervenes).

**ADV HOFMEYR:** Huh-uh.

**MR PAMENSKY:** And not consulting with his Exco.

**ADV HOFMEYR:** Yes.

**MR PAMENSKY:** Yes.

**ADV HOFMEYR:** And that was not reason for you to be sceptical about relying on what he said about the value?

**MR PAMENSKY:** I did not look at that point at that time.

**ADV HOFMEYR:** And finally Mr Pamensky do you accept that as a member of the Board of Eskom you were duty bound to make a proper  
20 inquiry into the commercial value of the contract because you are duty bound not to commit Eskom to wasteful expenditure?

**MR PAMENSKY:** Ma’am can you maybe word that a different way to me, because ...(intervenes).

**ADV HOFMEYR:** So as an Eskom Board Member.

**MR PAMENSKY:** Yes.

**ADV HOFMEYR:** You remember the Section 83 that we looked at. It says the accounting authorities of State-Owned Enterprises must not wilfully or negligently make or permit wasteful expenditure by the State-Owned Enterprise. Do you accept that that is an obligation on you?

**MR PAMENSKY:** I accept that.

**ADV HOFMEYR:** And that in order to discharge that obligation all the Board Members of Eskom including you needed to determine whether there was commercial value in this contract before you ratified it?

10 **MR PAMENSKY:** Ma'am you need to put into the situation the circumstances we were in again. As I stated up front my reasons were very simple. If we terminated that contract they will claim R43 million without getting any sponsorship. On the value side I determined and I looked at the value that was there, but I did not know the value if it was worth 10, 20, R30 million.

So at the end of the day we were caught in the position where – in my opinion and how I thought about was to get the best and maximum value out of that contract. Hence one of the resolution points was to say get the maximum out of that contract.

20 **ADV HOFMEYR:** Mr Pamensky just so that I am clear, because that was quite a long answer. Do you accept that amongst your duties as a Member of the Board was to determine whether there was commercial value in the contract because your failure to do so may have resulted in wasteful expenditure for Eskom?

**MR PAMENSKY:** In this situation?

**ADV HOFMEYR:** Yes.

**CHAIRPERSON:** Or maybe let us start at a general level.

**MR PAMENSKY:** Oh yes. At a general most definitely.

**CHAIRPERSON:** Yes. Now in this situation.

**MR PAMENSKY:** Most definitely.

**CHAIRPERSON:** Yes and then in this situation do you accept that there was such an obligation?

**MR PAMENSKY:** It is hard to say, but you know it is hard to say in the circumstances where you found even if Chair there was for argument  
10 sake R1 million value. You know first of all if you did not ratify that contract then according to the attorney and the advice that we received here we could be paying R43 million without even getting that one million value.

So in my mind that value was what it is. So in this specific situation it is very hard for me to answer you. In a general situation I do agree with the Chair.

**ADV HOFMEYR:** Thank you Mr Pamensky.

**MR PAMENSKY:** Thank you ma'am.

**ADV HOFMEYR:** Chair those are our questions.

20 **CHAIRPERSON:** Thank you very much. Any re-examination?

**ADV BLOU:** Thank you Chair.

**CHAIRPERSON:** Thank you.

**ADV BLOU:** Chair my binoculars are back there. So I might have to just try and look ...(indistinct).

**CHAIRPERSON:** You can – do you want to bring them closer?



**ADV BLOU**: Sorry.

**CHAIRPERSON**: You can - do you want to bring them closer? If there is space to bring them closer you can bring them closer. So that it is easier.

**ADV BLOU**: I think I will start with ...(indistinct).

**CHAIRPERSON**: *Ja*. He can come and sit. *Ja*.

**MR PAMENSKY**: Sorry Chair.

**CHAIRPERSON**: Oh, yes.

**MR PAMENSKY**: Could you ask him to speak into the mic.

10 **ADV BLOU**: No, no. There ...(intervenes).

**CHAIRPERSON**: Yes.

**ADV BLOU**: It is my first hearing Mr Pamensky. Let me start with something that is within your field of expertise Mr Pamensky. Sort of comfortable ground for you. The question of reportable irregularity. It may or may not have been traversed with other witnesses.

It might not – it might be well known to the Commission, but could you just briefly explain what the characteristics of reportable irregularity are?

20 **MR PAMENSKY**: Reportable irregularity is when there is an unlawful act or an omission of an act or action by the management of an organisation whereby the auditors believe that it is likely to cause three issues. A, financial loss to the company. I cannot remember the other one and the last one is in breach of your fiduciary duties.

So the auditors have reason to believe it is going to cause you financial loss then they will raise the reportable irregularity and if

they believe it is in breach of your fiduciary duties.

**ADV BLOU:** And it is included – the reportable irregularities are included in the legislation that governs the auditing profession?

**MR PAMENSKY:** Oh, yes.

**ADV BLOU:** So it is a statutory obligation for them to report reportable irregularities and to (indistinct) potential management to address?

**MR PAMENSKY:** That is correct. Sorry sir. I am not sure. It is law. I do not know which part of the law it is, but it is law that they have to do that.

10 **ADV BLOU:** And the 30 day period I think comes from ...(intervenes).

**MR PAMENSKY:** From the legislation or the law ...(intervenes).

**ADV BLOU:** Okay.

**MR PAMENSKY:** Whatever regulation.

**ADV BLOU:** It just was not clear to me that you had said in your evidence that you were aware even before you joined the Board in your preparation even before the first meeting that there was a sponsorship contract that had been the subject of a reportable irregularity. Is that right?

**MR PAMENSKY:** That is correct.

20 **ADV BLOU:** But you said that it did not as far as you could recall identify that contract as being the TNA Contract that we are concerned with today?

**MR PAMENSKY:** That is correct. There was not mention of the word TNA.

**ADV BLOU:** So just with the assistance of the Commission. If you go

to – in your bundle Mr Pamensky ...(intervenes).

**CHAIRPERSON**: If you stand too far away from the mic.

**ADV BLOU**: Sorry. It has got this lip which makes it very difficult for –  
to work on files.

**CHAIRPERSON**: Is the mic – I think the mic is moveable.

**ADV BLOU**: I am going to move the mic.

**CHAIRPERSON**: *Ja, ja.*

**ADV BLOU**: Thank you. Chair if I am here a few more days I will  
become adapted.

10 **CHAIRPERSON**: Do not worry. It happens to us and we are here for a  
long time.

**ADV BLOU**: sorry. I do not know if it is at this. If this is the right  
document. Adam I am looking for the – it is – Ms Hofmeyr read into the  
record or referenced two news articles that Mr Pamensky said he had  
not seen that had preceded his tenure with the Board and I think the  
one I am talking about is at 237 in Mr Pamensky MM3 Exhibit.

**CHAIRPERSON**: 237?

**ADV BLOU**: Yes. Now this is ...(intervenes).

**CHAIRPERSON**: Okay.

20 **ADV BLOU**: Document we have not seen before and Mr Pamensky said  
he had not, but I had a quick look at it.

**CHAIRPERSON**: Huh-uh.

**ADV BLOU**: If I could just take you to what the report says and I am  
assuming – I know this is not what the source documents would have  
said but this is what is reported. If you – one, two, three, four about

six paragraphs down. It mentions:

“A reportable irregularity, an external auditor’s review statement accompanying Eskom’s interim financials confirms that we have reason to believe that certain alleged unlawful acts or omissions have been committed by a member of the accounting authority of Eskom which constitutes a reportable irregularity.”

Now that is very vague and it does not inform anyone of any detail. Right. It could be in any sphere at any member of the Board.

10 Right?

**MR PAMENSKY**: That is correct.

**ADV BLOU**: But then the next paragraph says:

“The Board Statement ...(intervenes).”

Presumably this is the Board statement that is in the interim results that you read. This is now management statement.

**MR PAMENSKY**: Let me just read it.

**ADV BLOU**: “Expand ...(intervenes).”

I am going to read it into the record.

20 “Expand on the auditor disclosure saying that the alleged irregularity relates to the conclusion of a sponsorship contract amounting to 43 million by a member of the accounting authority contrary to the group’s delegation of authority applicable to the contract.”

That is what it says the financials or the group statements. Is

that...(intervenes)?

**MR PAMENSKY**: Yes. The interim financial statements.

**ADV BLOU**: Yes.

**MR PAMENSKY**: Did not mention any name and said there had been  
...(intervenes).

**ADV BLOU**: In other words is this the disclosure that you were  
referring to this effect?

**MR PAMENSKY**: Yes. We had said that there was a sponsorship  
contract amounting to 43 million. It never mentioned TNA. It never  
10 mentioned the names whatsoever.

**ADV BLOU**: No, no. We have evidence. I am just saying  
...(intervenes).

**MR PAMENSKY**: Okay.

**ADV BLOU**: I am telling you what the actual statement was for the  
benefit of the Commission. I am sure it can be confirmed by going to  
the source document in the financials themselves. Okay. So that is the  
first point. Sorry. Where is my re-examination paper? Yes, very nice.  
Thank you.

The second question was and I think it was clarified by  
20 Ms Hofmeyr at the end. Prior to the round robin resolution being  
circulated on the 3<sup>rd</sup> of February 2015. Was that the first time that you  
now understood that the reportable irregularity in question related  
specifically to this TNA Sponsorship Contract or had you somehow  
found out before?

**MR PAMENSKY**: No. I found out at that date.

**ADV BLOU**: Because you were asked by Ms Hofmeyr a few times about why you did not deal with the reportable irregularity in the early as January meeting.

**MR PAMENSKY**: Until you are in my head.

**ADV BLOU**: Yes.

**MR PAMENSKY**: Sorry.

**ADV BLOU**: Yes.

**MR PAMENSKY**: In my head understanding why I thought it had been dealt with.

10 **ADV BLOU**: That is the ...(intervenes).

**MR PAMENSKY**: I thought management had dealt with – I mean the Board had dealt with the matter before we came onto the Board based on the timeline period.

**ADV BLOU**: Exactly. That is the point I wanted to make. You made it yourself. Is that January Board Minute or Board Meeting did not concern anything to do with reportable irregularities. This is the first time you could identify and link it to what you had read previously?

**MR PAMENSKY**: Correct.

20 **ADV BLOU**: Okay. Now in that context why do you think there is a 30 day period which is quite a short timeline placed on a reportable irregularity to be resolved between management and the auditor in such a short period of time. What you think accounts for that?

**MR PAMENSKY**: In my mind there it is an urgent matter to do deal with. You know. It has come urgently. The auditors want to know. It is an unlawful act and it needs to either be ratified or investigated.

**ADV BLOU:** But the point I am making is that it is not only this matter. It seems that by making a 30 day ...(intervenes).

**MR PAMENSKY:** Oh. It is to all matters sorry. All reportable irregularities has 30 days to respond.

**ADV BLOU:** So it is inherently to be dealt with within a short and urgent timeframe?

**MR PAMENSKY:** That is correct.

**ADV BLOU:** Because what is the implication for a company if a reportable irregularity is not resolved on the presentation of the  
10 financial statements.

**MR PAMENSKY:** Oh.

**ADV BLOU:** Depending on how material it is.

**MR PAMENSKY:** There is various elements. You know some of the reports what the outcome come can go to the Hawks, can go to SIU, can go to the police, can go to investors. You might not be able to raise money on the back of your financials because they have not been signed off by the auditors and when it also goes to raise the funding and the ability to raise funding is definitely hampered by reportable irregularity.

20 **ADV BLOU:** Can it result in the qualification to the audited financials?

**MR PAMENSKY:** It depends on ...(intervenes).

**ADV BLOU:** The materiality?

**MR PAMENSKY:** The materiality of the level ...(intervenes).

**ADV BLOU:** Okay.

**MR PAMENSKY:** And the internal controls linked to it.

**ADV BLOU**: By definition as I understand it is dealing with matters of high irregularity. Not every irregularity or problem found in an audit has to be reported?

**MR PAMENSKY**: No. It has to be a material irregularity.

**ADV BLOU**: Okay.

**MR PAMENSKY**: It cannot just be a normal or just a – it is a judgment call and has to be material from an audit perspective.

**ADV BLOU**: Can I then take you to the – sorry the round robin resolution itself? In your bundle it starts at 144. Well the content –  
10 sorry, it starts at 143 – MVP143.

**MR PAMENSKY**: Yes sir.

**ADV BLOU**: So if I could just – the page before 142. It was circulated under a cover of an e-mail which told you if you look at the page before Chair that it had been forwarded to all the other members of the Board. Right? Is that correct?

**MR PAMENSKY**: Yes. It has been – it is from the company secretary to the entire Board, Zola, Molefe, Montana, Naidoo, Khoza, Ngubane, Baloyi ...(intervenes).

**ADV BLOU**: And my understanding is that ...(intervenes).

20 **MR PAMENSKY**: And also Venter and – who is the Board – who is also the Board secretary.

**ADV BLOU**: Now of course this is to a large extent a fairly new Board in the sense of its membership – what comprised its membership in 2015 as opposed to 2014?

**MR PAMENSKY**: Yes. Correct.



**ADV BLOU:** And I am sure there has been evidence of this, but if you go to the MVP143 my understanding is the common members in other words Legacy Board Members from the old Board where Mr Tsotsi the Chairman. Correct?

**MR PAMENSKY:** That is correct.

**ADV BLOU:** Mr Montana I think was he the Chief Executive ...(intervenes).

**MR PAMENSKY:** That is correct Chief Executive Officer.

**ADV BLOU:** And then – and T Molefe was the Chief Financial Officer.

10 **MR PAMENSKY:** Chief Financial Officer ...(intervenes).

**ADV BLOU:** I think there might have been one ...(intervenes).

**MR PAMENSKY:** And there was one more.

**ADV BLOU:** Mr Mabude or Ms Mabude.

**MR PAMENSKY:** Chwayita Mabude.

**ADV BLOU:** Okay.

**MR PAMENSKY:** Sorry.

**ADV BLOU:** So those were the carry overs. The rest of the members either whether they were independent or executive were all new to the Board?

20 **MR PAMENSKY:** That is correct.

**ADV BLOU:** Okay. So now you receive this round robin resolution. It tells you what it does. Ms Hofmeyr has gone through it with you in some detail. You have given evidence of the reliance that you placed on the lawyer's report and obviously there will be submissions regarding that ultimately the extent of the reasonableness of that, but

you appointed to the one that was just looked at. The financial misconduct conclusion at the 194. You see there?

**MR PAMENSKY:** Clause 5.4 sir?

**ADV BLOU:** 5.4.2 which as you say related to the delegation of authority.

**MR PAMENSKY:** Yes.

**ADV BLOU:** And we know that financial misconduct either has to be wilful in the sense that the party knows that he is breaching the terms of the PFMA ...(intervenes).

10 **MR PAMENSKY:** Correct.

**ADV BLOU:** Or his internal delegating authority or it can be negligent if he reasonably ought to have known. There is no comment that I could see in this document about whether that knowledge is wilful or not.

**MR PAMENSKY:** That is correct.

**ADV BLOU:** But let us assume that someone should know what his own delegation is. All it just shows you is that he had knowledge of the irregularity that he committed in exceeding – assume he had knowledge in exceeding his authority.

20 **MR PAMENSKY:** Yes.

**ADV BLOU:** It tells you nothing about the merits of the contract and you have been asked in detail about it.

**MR PAMENSKY:** Yes.

**ADV BLOU:** Despite that you said that you had been – that there was nothing sinister that was conveyed to you in the report are you able to

point me to any paragraph or paragraphs which reinforced your impression in that regard that there was nothing sinister or improper about what had happened.

**MR PAMENSKY**: I did not find anything – which document. Sorry sir.

**ADV BLOU**: In the same document.

**MR PAMENSKY**: In ...(intervenes)?

**ADV BLOU**: In the same document by the lawyers.

**MR PAMENSKY**: Oh the lawyers. They did not mention anything that there was no impropriety.

10 **ADV BLOU**: Can I ...(intervenes).?

**MR PAMENSKY**: They made it clear.

**ADV BLOU**: Yes. It is at 317 at page 187.

**MR PAMENSKY**: Yes. They made it clear on both Mr Choeu and the Acting CEO ...(intervenes).

**ADV BLOU**: So if I could just take you to – if I can ask you to read into the record in ...(intervenes).

**MR PAMENSKY**: It could be clause 3.1.7 in connection with mister – or the Acting CEO.

**ADV BLOU**: So it says the fact

20 **CHAIRPERSON**: Hang on, hang on, hang on.

**ADV BLOU**: Sorry. Sorry Chair. We are talking past each other.

**CHAIRPERSON**: Yes. You are. What - what ...(intervenes)?

**ADV BLOU**: So if you just listen to the question.

**CHAIRPERSON**: What page must I go to?

**ADV BLOU**: It is at page 187.

**CHAIRPERSON:** 187.

**ADV BLOU:** MVP187.

**CHAIRPERSON:** Okay.

**ADV BLOU:** It – this is part of the Ledwaba Mazwai Report.

**CHAIRPERSON:** Okay.

**ADV BLOU:** Sorry Chair. I realise we were talking ...(intervenes).

**CHAIRPERSON:** H'mm.

**ADV BLOU:** Against each other. What is happening here  
...(intervenes).

10 **CHAIRPERSON:** 187 I have got.

**ADV BLOU:** Yes.

**CHAIRPERSON:** Yes.

**ADV BLOU:** What is happening at 317 is they are discussing or reporting to the Board on whether to take corrective action against Mr Matjila and Mr Choeu and I will just read it into the record because you have referred to it yourself. The relevant part is:

“The factors often taken into account for purpose of the summary note include without limitation and in no order or importance the following.”

20 Then the first factor mentioned is:

“Whether or not there has been impropriety on the part of the employee and if so whether the employee wilfully and knowingly took part therein or was perhaps innocent to the impropriety being perpetrated from which they derive no benefit. In our reading of the report

...(intervenes).”

And that is a reference to the SNG Report?

**MR PAMENSKY:** That is correct.

**ADV BLOU:** “...we did not find any reference to suggest or it is either reference to suggest or any suggestion of any impropriety on the part of any Eskom employee in the conclusion of the TNA Contract.”

**MR PAMENSKY:** That is correct.

**ADV BLOU:** And that is the statement they made in respect of both  
10 Mr Matjila and Mr Choeu?

**MR PAMENSKY:** On both of them there was no impropriety  
...(intervenes).

**ADV BLOU:** Okay.

**MR PAMENSKY:** In that element.

**ADV BLOU:** As far as the previous Board Members are concerned and there have been four that we have mentioned who we now know were party to previous Board decisions which had discussed whether this contract had value or not and what Mr Matjila was up to etcetera. We know that those documents were not furnished to you as part of the  
20 Board pack in relation to this round robin resolution, but those parties were copied in on this document.

Do you find it surprising now in retrospect that those parties did not make a disclosure to the new members of the Board that it had already been decided that this was not a valuable contract.

**MR PAMENSKY:** Most certainly. All those members were duty bound

to inform us so we can make an informed decision. You know if we do not know something we do not know. We rely on the legal report. On a report from the lawyers as well as institutional memory coming across.

It is a big reliance that we as new Directors have to place reliance on and at that point in time I had no reason to not trust or believe any of those parties.

**ADV BLOU**: Okay. Just one moment. Sorry Chair. If I can just have one moment please.

**CHAIRPERSON**: Okay.

10 **ADV BLOU**: So I just. We just want you to point out. It was a bit unclear in your evidence in chief at page 36 – where or not you had read the document at 361 of the bundle of Mr Tsotsi. I think you have answered it generally, but let us just confirm it please. *Ja*. So this document at 361 ...(intervenes).

**MR PAMENSKY**: Of which pack?

**CHAIRPERSON**: Is that 361 of ...(intervenes)?

**ADV BLOU**: Of Mr Tsotsi. Is it – sorry. Exhibit MM6.

**CHAIRPERSON**: MM6. Okay.

20 **ADV BLOU**: This is an extract from the Transition People in Governance Committee December 2014. It is a PowerPoint presentation for what I can see and there is a reference to the reportable irregularity at page 361, but it does not identify the TNA Contract. I just wanted to understand whether you had seen this document before the 2015 round robin?

**MR PAMENSKY**: No. I had not and this is a liar. Reporter will identify

...(indistinct) doing their review of 30 September interim results. This matter was reported to and dealt with by the Board.

**ADV BLOU**: Yes.

**MR PAMENSKY**: It had not been dealt with by the Board. The regulatory was still open.

**ADV BLOU**: But the question is whether you this – you had seen this ...(intervenes).

**MR PAMENSKY**: Oh, no. I had not seen this document.

**ADV BLOU**: Sorry.

10 **MR PAMENSKY**: Sorry. I had not seen this ...(intervenes).

**CHAIRPERSON**: *Ja*. Do not go to close to it.

**MR PAMENSKY**: I had not seen this document at all.

**ADV BLOU**: At the time of the round robin resolution?

**MR PAMENSKY**: It is the first time I have actually seen this document was here today.

**ADV BLOU**: And then the last question just for maybe assistance. There seems to be uncertainty about whether the requisite majority was obtained in respect of the round robin resolution. I am told that Ms Klein might be able to give a more definitive answer to that.

20 Ms Venete Klein. Would you agree with that?

**MR PAMENSKY**: In connection with what?

**ADV BLOU**: About whether the statutory – whether the majority of 75b percent for the round robin was in fact obtained or not. You say you do not know.

**MR PAMENSKY**: No. I have no idea how they – if the 75% was

obtained.

**ADV BLOU:** But would Ms Klein know or you are not in position to ... (intervenes)?

**MR PAMENSKY:** I have no idea who would know this. Sorry.

**ADV BLOU:** Okay. Those are the questions then Chair.

**CHAIRPERSON:** Thank you. Thank you. Do you have anything or whether ... (intervenes)?

**ADV HOFMEYR:** No Chair.

**CHAIRPERSON:** *Ja.*

10 **ADV HOFMEYR:** No further questions. Just some ... (intervenes).

**CHAIRPERSON:** Yes.

**ADV HOFMEYR:** Housekeeping and ... (intervenes).

**CHAIRPERSON:** Yes.

**ADV HOFMEYR:** Organisational aspects.

**CHAIRPERSON:** Yes.

**ADV HOFMEYR:** Chair from our side – I did neglect to do this earlier. I mention at the outset that there were likely to be some lawyers representing some of the implicated persons.

**CHAIRPERSON:** Yes.

20 **ADV HOFMEYR:** Over the lunch break the lawyer for Mr Ngubane introduced himself to me.

**CHAIRPERSON:** Yes.

**ADV HOFMEYR:** He has been in attendance today. I – he has indicated to me at lunch maybe it makes sense for him to place himself on record, but now that we are at the end of the day ... (intervenes).



**CHAIRPERSON:** *Ja.*

**ADV HOFMEYR:** It probably makes sense for him to do so when Mr Tsotsi returns for his evidence ...(intervenes).

**CHAIRPERSON:** Yes.

**ADV HOFMEYR:** Because it is in respect of Mr Tsotsi's evidence.

**CHAIRPERSON:** *Ja.*

**ADV HOFMEYR:** That Mr Ngubane received a Rule 3.3 Notice.

**CHAIRPERSON:** Yes. No that is right.

**ADV HOFMEYR:** And so the remaining thing is just the arrangements  
10 ...(intervenes).

**CHAIRPERSON:** Okay.

**ADV HOFMEYR:** From the hearing.

**CHAIRPERSON:** Okay. Let us ...(intervenes).

**ADV BLOU:** Sorry briefly Chair ...(intervenes).

**CHAIRPERSON:** Yes.

**ADV BLOU:** Sorry Chair apologies, I am just again not as *au fait* with the detailed procedures, when submissions are going to be made to you in connection with *inter alia* this witnesses evidence, is it intended that if he wants, his legal representatives will have an opportunity to make  
20 submissions to you or – I don't know if it's part of the programme or not?

**CHAIRPERSON:** Yes, no the intention is when all oral evidence has been completed, implicated persons and people representing witnesses would be given an opportunity to make representations. At this stage I'm not sure whether everybody would be given an opportunity to make

representations or present oral argument or it would just be written submissions but there would be an opportunity to make submissions in one way or another.

**ADV BLOU:** So I would just ask Ms Hofmeyr to keep us informed of the relevant process at the relevant time and are the documents in other bundles are these documents where copies can be requested or are they to remain here.

**CHAIRPERSON:** Yes I think any document that is relevant to your client, may be requested, the Legal Team can be contacted and  
10 arrangements can be made.

**ADV BLOU:** We don't need to detain you further with that, thank you then Chair, thank you Ms Hofmeyr.

**CHAIRPERSON:** Thank you. I think Mr Pamensky let me just say, thank you very much for coming to give evidence, if a need arises for us to ask you to come back we will ask you to come back but for now you are excused.

**MR PAMENSKY:** Thank you Chair, I hope I added some value to you guys and I'm always available to assist when you can, thank you very much, thank you ma'am thank you.

20 **CHAIRPERSON:** Thank you very much, thank you. We are going to adjourn for the day now, we could not continue to hear the next witness because I'm not well and we are not going to sit tomorrow to give me an opportunity to recover. On Monday we are going to start at 2pm, not in the morning to hear – to continue with the evidence relating to TNA so we won't start at 10:00 we'll start at 14:00 on Monday and then we'll

sit on Tuesday as well. We will not be sitting here next week because this venue is needed by the Lessor, we will be sitting in the Chamber of the Johannesburg Municipal Council details will be given about that and I think a media statement may be issued tomorrow to tell everybody exactly where that will be. So for the whole of next week we won't be sitting here we will be sitting in that venue then that other week we will be back here. Is there anything I'm leaving?

**ADV HOFMEYR:** Chair not *per se* I just wondered if I might indicate when the witnesses who've been moved to next week are appearing  
10 because it may well be relevant to implicated persons and their lawyers that they attend on those days.

**CHAIRPERSON:** Yes.

**ADV HOFMEYR:** So the current intention when we start at 14:00 on Monday is to receive the evidence of Mr Jackson and Mr Paklani and then on Tuesday the 5<sup>th</sup> of November to receive the evidence of Mr Nkonazi and Mr Tsotsi, thank you.

**CHAIRPERSON:** Okay, we are then done, we adjourn.

**REGISTRAR:** All rise.

**INQUIRY ADJOURNS TO 4 NOVEMBER 2019**

20

**TRANSCRIBER'S CERTIFICATE FOR COMMISSION OF INQUIRY INTO STATE  
CAPTURE  
HELD AT  
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DAY: : 186

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