

COMMISSION OF INQUIRY INTO STATE CAPTURE
HELD AT
CITY OF JOHANNESBURG OLD COUNCIL CHAMBER
158 CIVIC BOULEVARD, BRAAMFONTEIN

28 AUGUST 2020

DAY 257



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Recording & Transcriptions

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TRANSCRIBERS:

B KLINE; Y KLIEM; V FAASEN; D STANIFORTH



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PROCEEDINGS RESUME ON 28 AUGUST 2020

CHAIRPERSON: Good morning Mr Pretorius, good morning everybody.

ADV PRETORIUS SC: Morning Chair.

CHAIRPERSON: Yes are we ready?

ADV PRETORIUS SC: Yes there are two matters Chair on the role today.

CHAIRPERSON: Hm.

ADV PRETORIUS SC: The first is an appearance on
10 behalf of Nedbank Mr McCarthy and the Transnet
Mohamadi matter.

CHAIRPERSON: Yes.

ADV PRETORIUS SC: And then the second is the
evidence of Mr Mokhesi.

CHAIRPERSON: Yes.

ADV PRETORIUS SC: In the Free State matter.

CHAIRPERSON: Yes. Okay.

ADV GOODMAN: Morning Chair.

CHAIRPERSON: Somebody should sanitise before you ...

20 **ADV GOODMAN:** Oh I am sorry Chair.

CHAIRPERSON: Yes. I think they did not pay attention.

ADV GOODMAN: Thank you Chair.

CHAIRPERSON: Yes.

ADV GOODMAN: Chair my name is Isabel Goodman I am
here on behalf of Nedbank. I am instructed by Allan Overy

and my attorney Ms Khan is in the audience.

CHAIRPERSON: Hm.

ADV GOODMAN: Chair Nedbank had applied – had brought an application on the 10 May to adduce evidence and to be permitted to cross-examine Mr Mohamadi in relation to the Transnet interest spots. It submitted an affidavit on the 14 June and in January of this year that application was granted and it was grant leave to adduce evidence and to cross-examine. Nedbank however no
10 longer seeks leave to cross-examine and it seeks leave to have its affidavit stand as evidence before the commission without the need to lead oral evidence.

CHAIRPERSON: Well I am quite happy to grant Nedbank leave. It must be leave not to proceed with cross-examination or to give oral evidence but subject to one qualification that the commission retains the right at any time to call upon somebody at Nedbank to appear and avail themselves for questioning with regard to any aspects. So on that understanding I am quite happy to grant that leave.

20 **ADV GOODMAN:** Indeed Chair thank you.

CHAIRPERSON: Yes.

ADV GOODMAN: The – Nedbank has tendered both oral submissions and written submissions should the commission require it.

CHAIRPERSON: Yes.

ADV GOODMAN: But it is a power of course you have anyway.

CHAIRPERSON: Yes. Okay.

ADV GOODMAN: Thank you Chair. May we then be excused?

CHAIRPERSON: You are excused ja.

ADV GOODMAN: Thank you.

CHAIRPERSON: Thank you. Yes Mr Pretorius.

ADV PRETORIUS SC: Yes Chair may Mr Mpofu address
10 you?

CHAIRPERSON: Yes. Thank you.

ADV MPOFU SC: Good morning Chairperson.

CHAIRPERSON: Good morning Mr Mpofu.

ADV MPOFU SC: Thank you. Chair I am here to address an application I believe the Chair has had sight of a copy of our application.

CHAIRPERSON: Yes I have had a chance to read the application.

ADV MPOFU SC: Ja. We did – we also prepared some
20 heads but it is a – I am told they were not properly transmitted but we will rely on the application papers.

CHAIRPERSON: Ja. Okay.

ADV MPOFU SC: It is quite a simple application.

CHAIRPERSON: Okay.

ADV MPOFU SC: Thank you Chair. Chair if I may just

clarify very quickly well firstly, I am – my name is Mpofo I appear with my juniors Ms Pillay and Mr Sibotho [?] for Mr Mokhesi. Now the real reason we are here Chair is – is at a simplistic level it is really just a postponement application. And in fact, it is – as I will explain now it is two postponement applications as it were rolled into one. Because as the Chair will have seen in the Notice of Application, we have two prayers in the alternative.

The one...

10 **CHAIRPERSON:** Well I do not know if I saw the notice.

ADV MPOFU SC: The notice oh.

CHAIRPERSON: But I saw the affidavit. I do not know if I saw the...

ADV MPOFU SC: Notice okay. I will just – I will read it out Chair.

CHAIRPERSON: Yes okay.

ADV MPOFU SC: It – we are for two prayers.

1. That the application – applicant's obligation to testify at the commission he and is hereby suspended until
20 the finalisation of any criminal charges against the applicant pertaining to the asbestos audit conducted in the Free State.

So that is the main prayer so to speak.

CHAIRPERSON: Yes.

ADV MPOFU SC: Then we say alternatively and that is

why I will explain that now.

CHAIRPERSON: Yes.

ADV MPOFU SC: Alternatively, that applicant's obligation to testify before the commission is hereby staid pending the finalisation of a court application for review declaratory and other appropriate just and equitable relief.

In other words Chair the – the second prayer only arises if the first prayer is not ...[intervenes]

CHAIRPERSON: Aphased?

10 **ADV MPOFU SC:** Yes.

CHAIRPERSON: Ja. Okay.

ADV MPOFU SC: And – so in theory we could have done the first application and then with the ruling.

CHAIRPERSON: Yes.

ADV MPOFU SC: Then we come back.

CHAIRPERSON: Ja.

ADV MPOFU SC: But for – to save time.

CHAIRPERSON: Yes.

ADV MPOFU SC: We do both of them.

20 **CHAIRPERSON:** Okay.

ADV MPOFU SC: Back to back.

CHAIRPERSON: Hm.

ADV MPOFU SC: In anticipation. Now – so the – that is really what we want to clarify upfront. All these other interesting issues about Section 35 and what have you are

not directly before you so to speak. We only raise them in order to justify the application for a postponement.

So what is really before the Chair is whether we have – we have sufficient ground for – to ask for a postponement.

Now Chair the – in our heads we had outlined the principles but though they are trite the – about you know there must be good cause, it must be a bona fide application and so on asking for a postponement.

10 And we are in a way fortified by the fact that the Chair has already granted a postponement in this matter before which we are very grateful about and that postponement was particularly because by the time Mr Mokhesi had come here at that stage he had just consulted with his lawyers and he had not really had a proper consultation. So he wanted an opportunity which the Chair kindly granted him.

CHAIRPERSON: Was there not also an issue about his senior counsel not being well?

20 **ADV MPOFU SC:** That was correct yes.

CHAIRPERSON: Ja.

ADV MPOFU SC: Yes. So –

CHAIRPERSON: That is the one I remember quite well.

ADV MPOFU SC: Yes that is correct.

CHAIRPERSON: That is the grounds..

ADV MPOFU SC: So roughly Chair the point I am really going towards is that that postponement was relative to affording a chance to get proper representation which is related as the Chair knows in – these are all routed – I mean Section 35 issues. The legal representation, the right to remain silent, the right not to incriminate yourself they are all – they belong to the same family of rights so to speak.

Now the – so what has actually happened therefore
10 is that he – he now has obtained such legal advice which is why we are here. And Chair in a nutshell we assert the right to – you know the rights that I spoke about particularly the right to remain silent and the right to not to incriminate yourself in the following manner specifically.

Put it this way the – our quarrel is not with the commission because the commission does not appoint itself and it does not draw its own Terms of Reference so to speak. But unfortunately, the road to the other quarrel has to go past here so to speak.

20 So – the – in a nutshell Chair and I am not going to go into the legal cases and so on. In a nutshell what we are saying is that in – in asserting his right to remain silent and his right not to incriminate himself in these particular circumstances we concede upfront that those rights if you read the constitution literally they are accorded to what is

called an arrested person or an accused person and we concede that there is some greyness about that. Because all the – we cannot take it further – higher than saying that he has been told that the – an arrest is imminent so to speak but in reality he is not...

CHAIRPERSON: It has not happened.

ADV MPOFU SC: Yes it has not happened that we concede. But I suppose we counter that concession very quickly by as the Chair knows very well that we – the – in
10 terms of Section 38 of the constitution you may assert your rights even if they are merely threatened. In other words even if the violation has not actually – actually occurred.

CHAIRPERSON: Hm.

ADV MPOFU SC: Secondly the right to – the right against self-incrimination also extends to the risk.

CHAIRPERSON: Hm.

ADV MPOFU SC: The risk of our prosecution. So the – one does not really have to be literally in shackles.

CHAIRPERSON: Hm.

20 **ADV MPOFU SC:** To assert those rights.

CHAIRPERSON: Hm.

ADV MPOFU SC: The American case of [00:10:49] that says something where there – the emphasis on the risk of a prosecution is – is asserted.

CHAIRPERSON: Hm.

ADV MPOFU SC: Now if that – if you put then that to bed what we then have is a situation where somebody is saying to the Chair bona fide I am – if I want to put it crudely – I am refusing to answer your questions but I am not refusing because I want to refuse I am refusing simply because I want

- a. To understand what is happening with this criminal charges or
- b. At worst to go to court to assert my right not to answer those questions. In other words to assert whether I do have a right to refuse or not.

Yes we humbly then ask the Chair to – to look at it with those eyes that it really – it is a Section 34 type of enquiry because the Chair does not have to believe that if you go to court for example we will succeed. Whether we succeed or not is another question. We are simply asserting the right to go to court and clarify if we are compelled or not compelled.

And then of course just out of common sense Chair it would be futile to say oh well okay you can go to court Mr Mpofu with your client but in the meantime I want to hear him on this and this and that because then it will defeat the very purpose of going – of asserting those rights and thereby denying of Section 34 rights so to speak.

Now the – the only point I really want to make Chair

is the following. The ambiguity arises from the – the recent amendment to the terms. The – I am prepared to say that ...

CHAIRPERSON: To the regulations?

ADV MPOFU SC: To the regulations rather.

CHAIRPERSON: Okay.

ADV MPOFU SC: Regulation 11 in particular yes. The – the – I am prepared to say without committing myself that before that amendment this situation would not have
10 arisen. Because at that stage it was very clear that answers that you give here are – were completely protected.

Now we know in reality I am sure the police watch the commission precedence as well but let us put that aside. So in theory your answers were protected.

What has since happened and for other good policy reasons is that Regulation 11 was introduced so that the commission may assist other law enforcement agencies and that it is in that context that the risk that we perceive
20 arises.

And it might be that we perceive a risk that is not existent or not whatever but that will be determined by – by a court of law in due course. But at the very least the Chair just has to be convinced that we in good faith we perceive that risk and due to the perception of that risk we

therefore humbly request that the – the compulsion to testify be suspended or staid until such that such time that we – we are able to – to allay the risk.

So that is in a nutshell the situation Chair. If the Chair has any questions that is the anchor of the application as I said of the two applications.

The first one being that we suspend until the criminal charges are finalised but – or the Chair could say no and only suspend it until you clarify your rights and we
10 have said in the heads which is not in the application we also said that obviously the Chair would have a discretion on saying for example you must assert your rights within – we cannot wait for ten years for you to assert your rights it must be done reasonably within a reasonable time or report back to the commission as to progress.

Or even – well I suppose the commission would still be cited anyway in the – in those proceedings as an interested party. Thank you Chair.

CHAIRPERSON: Well the – the one issue is of course that
20 Mr Mokhesi has if I recall correctly has submitted his version ...

ADV MPOFU SC: To two affidavits.

CHAIRPERSON: Two affidavits.

ADV MPOFU SC: That is correct.

CHAIRPERSON: Ja. Already to the commission.

Assuming that in doing so he has fully disclosed to the commission all that he knows that is relevant. That means that his version is already before the commission. Now that being the case it does not seem to me that he ought to be concerned that he might incriminate himself in any way. He has already disclosed his version so even assuming that those Section 35 rights were applicable in his situation there would be – it seems to me they would be that difficulty. The only thing that as I see it he might be
10 saying is well when I am in – on the witness stand I could be – I am going to be asked questions.

ADV MPOFU SC: Yes.

CHAIRPERSON: Where I might have to elaborate and so on and so on. But I am not sure – I am not sure how weighty that would be particularly before you know what the questions are.

ADV MPOFU SC: Yes.

CHAIRPERSON: You know. It may be that it is a situation where when you have taken the stand – witness stand you
20 are asked questions – there will be questions that you feel you can answer there is no problem. Then there may be questions where you feel that you are not comfortable answering. That may be the situation. It might not be a situation where you refuse to take the witness stand.

ADV MPOFU SC: Correct.

CHAIRPERSON: You see. Because there – it is important to draw the distinction.

ADV MPOFU SC: Yes.

CHAIRPERSON: Refusing to take the witness stand and taking the witness stand but refusing to answer certain questions.

ADV MPOFU SC: Certain questions.

CHAIRPERSON: Because of certain reasons and being able – being willing to answer other questions you know.
10 So – so there is that. I know that I may be mistaken but I think there is a witness who came who had a concern like that then said okay we will see as we go but felt quite free to answer. I think there was no problem.

ADV MPOFU SC: Yes.

CHAIRPERSON: So – so there is that. And then of course as you know there is the problem that the lifespan of the commission is limited and we are really trying to – to finish. Of course the – if anybody goes to court that gets out of our control. We have no control as to how long that
20 takes. We can make submissions and the court would decide but it could be that we end up not having the benefit of his evidence in circumstances where one would really have preferred to have the benefit of his evidence because of the important position in government he occupied as the Accounting Officer. So – so

1. There is the problem about the lifespan.
2. There is – of the commission. I mean we – we are trying to finish the hearing of oral evidence by end of this year. So that the three months of our lifespan next year January to March is used for the writing of the report.

ADV MPOFU SC: The report.

CHAIRPERSON: We have a lot of witnesses who must still come. So there is that problem. We have already lost one
10 day with regard to him and now if we postpone the hearing of his evidence, we lose another day. That is two days we have lost relating to him alone. So there are those concerns.

ADV MPOFU SC: Okay yes.

CHAIRPERSON: And of course once one accepts that the Section 35 rights do not apply then it seems that the only basis and you must tell me if I misunderstood your submissions. The only basis on which the postponement application is made is really that he was to clarify in the
20 court what the position is in the light of the amendments to the regulations. Is my understanding correct?

ADV MPOFU SC: Chair let us put it this way. His position is that he should not be compelled.

CHAIRPERSON: Yes

ADV MPOFU SC: But obviously that is his position.

CHAIRPERSON: yes, yes.

ADV MPOFU SC: Someone else might have a different position.

CHAIRPERSON: Yes, yes.

ADV MPOFU SC: And therefore that – that dispute...

CHAIRPERSON: But what is the ground for that position?

ADV MPOFU SC: Yes.

CHAIRPERSON: The legal ground for it?

ADV MPOFU SC: Yes thank you Chair. Yes. Well the
10 legal ground and that – that is – I wanted to respond to
that first. We do not accept Chair that the Section 35.

CHAIRPERSON: Rights do not apply.

ADV MPOFU SC: Rights do not apply yes.

CHAIRPERSON: Okay.

ADV MPOFU SC: And that is for the following reason.
Firstly, as we said on the basis of the arrest on an arrest
he is in.

CHAIRPERSON: Ja.

ADV MPOFU SC: So to speak but on the basis that the
20 Chair raises which is quite an important consideration
namely that what has he got to lose because he has
already made two statements.

CHAIRPERSON: Ja.

ADV MPOFU SC: We – with respect do not – our
submission is that that is not something would exclude

Section 35.

CHAIRPERSON: Hm.

ADV MPOFU SC: For the following reason Chair.

CHAIRPERSON: Hm.

ADV MPOFU SC: The – in fact the Chair has given half of the answer I was going to give namely that the risk – remember we are dealing with a risk here? The risk of self-incrimination still exists because obviously the – the obligation to give evidence goes hand in hand with the duty
10 to answer questions or to be cross-examined for that matter.

CHAIRPERSON: Hm.

ADV MPOFU SC: Yes and then you are in a different zone altogether as we know to a statement that you made than when you are confronted.

CHAIRPERSON: Ja.

ADV MPOFU SC: With this, that and the other.

CHAIRPERSON: Ja.

ADV MPOFU SC: Because that is exactly where the
20 incrimination actually comes. Not so much in what you say than what may be extracted.

CHAIRPERSON: Hm.

ADV MPOFU SC: Which goes again I am agreeing with the Chair particularly on the second issue which is that the – this is not – we are not asserting a right not to testify.

CHAIRPERSON: Hm.

ADV MPOFU SC: As such and the Chair will know that there is a long line of cases about exactly what the Chair was saying that that for example the way it is put in the cases is that it does not prevent you from taking the oath for argument sake ja.

CHAIRPERSON: Hm.

ADV MPOFU SC: So you cannot say no I am not taking the oath.

10 **CHAIRPERSON:** Ja.

ADV MPOFU SC: Because of the right to self-incrimination. So literally speaking that right is asserted question by question by question by question but we all know that – you may just then not – just stand there and take the oath and say nothing to which is the same thing as not testifying as it were.

CHAIRPERSON: Ja.

ADV MPOFU SC: So I am with the Chair there but where we part ways with respect Chair is the fact that the – the
20 fact that he has made statements in my respectful submission does not nullify the entire right.

CHAIRPERSON: Hm.

ADV MPOFU SC: Or it is not so much – it is not like a waiver of the right because he might have waived part of it by giving the affidavit but there is still the residual right of

– against cross-examination so to speak. That is the first thing.

The second thing Chair is that actually that – even the fact that he has given evidence is actually a point in our favour.

CHAIRPERSON: Hm.

ADV MPOFU SC: Because

a. It shows that he is – this is not someone who is trying to be difficult.

10 Where he had a duty to cooperate he did. But where he has now obtained legal advice which by the way the Chair gave him a postponement so that he can get the legal advice. So the Chair cannot now say well the legal advice you got I do not like it.

CHAIRPERSON: I do not...

ADV MPOFU SC: And I do not think – I am not saying the Chair is saying that. I am just saying.

CHAIRPERSON: I say nothing about legal advises.

ADV MPOFU SC: Yes. But I am simply saying the legal
20 advice is what it is. He genuinely has received legal advice that says this is a grey area it might need to be clarified. So this is not somebody who is you know trying to dodge the commission. He was here every time even now when the dates were changed he made amendments to his schedule to be here. So that is the first issue.

The second issue which is probably more important Chair is that the – the – and this is about prejudice.

CHAIRPERSON: Hm.

ADV MPOFU SC: The commission is not really prejudiced in the sense that it is left with nothing. The commission has got his two statements.

CHAIRPERSON: Hm.

ADV MPOFU SC: And therefore, it would mitigate at best the – any prejudice that the commission would suffer
10 because they already have his version. What the – the only thing the commission will be deprived of is the opportunity to confront him with this and that and the other. So it is not so as if the commission will be left with nothing. And apropos he only points that really I cannot – where I full sympathies with the commission knowing the history is the fact that you know we all know that the – there is pressure.

CHAIRPERSON: Ja

ADV MPOFU SC: To finish. But that in my respectful
20 submission if we accept the rights – the existence of the rights one can find – we can find each other with the evidence leaders or with the Chair and to make it practical that this is not a never, never thing. Either we have to report here within a particular period as to the progress or if it looks like that case is going to take forever, we may

come back and the Chair might say, well I am changing my ruling or whatever. But I am just speaking off the cuff.

CHAIRPERSON: Ja.

ADV MPOFU SC: So – but I am just saying that is – the risk of losing him completely is one that – that probably can be mitigated.

CHAIRPERSON: Hm.

ADV MPOFU SC: But the real issue is whether I am correct Chair in that the Section 35 rights are still
10 applicable or not. Because if they are then the rest is about finding ways around our problem. As it pleases.

CHAIRPERSON: Okay so just to make sure I understand. So the – the entire basis of the application is that the Section 35 rights are applicable.

ADV MPOFU SC: That is correct that is the anchor.

CHAIRPERSON: That is the – ja that is where they are – the argument is anchored.

ADV MPOFU SC: Is anchored yes.

CHAIRPERSON: Ja.

20 **ADV MPOFU SC:** And that the second leg of the anchor is the fact that the latest amendment to the regulations at best create an ambiguity.

CHAIRPERSON: Yes.

ADV MPOFU SC: Which might need to be clarified by their day in court.

CHAIRPERSON: Yes okay. Okay. Okay. No, no that is fine. Let me hear Mr Pretorius.

ADV MPOFU SC: Thank you – thank you Chair.

CHAIRPERSON: Thank you.

ADV MPOFU SC: Thank you.

ADV PRETORIUS SC: Thank you Chair.

CHAIRPERSON: Yes Mr Pretorius.

ADV PRETORIUS SC: We have prepared heads of argument.

10 **CHAIRPERSON:** Hm.

ADV PRETORIUS SC: It should be included in your bundle Chair, page 37.

CHAIRPERSON: Yes, I see that.

ADV PRETORIUS SC: Chair, because this is a matter that may create a president or will create a president, either way, because it may well affect other witnesses who are going to appear before you. We have taken the trouble to prepare comprehensive heads, which are now before you, but I will attempt to summarise them.

20 **CHAIRPERSON:** Ja.

ADV PRETORIUS SC: For the purposes of the present.

CHAIRPERSON: H'm.

ADV PRETORIUS SC: By way of introduction. This Commission is setup to investigate criminal activity, state capture corruption and fraud.

It is imperative therefore, and contemplated by the president, when setting up the Commission by the court when confirming that the Commission should proceed full bench and by the scheme of the act and regulations, that people implicated in criminal activity will come to testify.

So it is not anything exception. It is the rule. And this Commission is obliged, it is not a matter of choice, this Commission is obliged in Terms of Reference to investigate those matters, to call those witnesses particularly implicated
10 persons.

Because if it did not call implicated persons to explain conduct alleged to have been undertaken by them, it would be acting unfairly.

So the first point is that it is nothing unusual, in fact, it is the rule that implicated persons come to testify before the Commission and it is the duty of the Commission to fully ventilate all versions including those of implicated persons.

But the law caters for that situation and so the application at present is opposed, not only in the
20 circumstances of this case but as a matter of general principle, both the main prayer and the alternative prayer.

The first factual point that must be made is that Mr Mokhesi has not been arrested, nor has he been charged with any offence. First point.

Secondly, he is a compellable witness and does not have

a right to remain silent. Now, there is a distinction between the right to remain silent on the one hand and the privilege against self-incrimination on the other.

There is no right to remain silent. If Mr Mokhesi had been arrested, he could in the criminal proceedings say: I am not saying anything at all. Whether it incriminates me or not, I have a constitutional right to remain silent. That is inherent in my right to a fair criminal trial and I am exercising it.

10 What we are really dealing with here is the privilege against self-incrimination. And the Commissions Act, although it is clearly outdated, and the regulations as amended deal with that.

I might just mention at this stage that the section quoted in the application of Mr Mokhesi is the old, un-amended section. The section that deals with the right not to answer incriminating questions is in the Act 3(4) and the use immunity – and I will come to that technical term direct use immunity is in the regulations.

20 So there are two protections. The first is the privilege in Section 3(4) of the act and the regulations deal with the fact that any incriminating answer may not be used in any criminal proceedings against an accused person.

So in paragraph 4.5 we deal with Section 3(4) of the Commissions Act and in paragraph 4.4 we deal with

Regulation 8(2).

In paragraph 5 and following, we deal with the point I made initially Chair and that is simple that this Commission has a mandate to do what it is doing.

In this case, it has a mandate to summon or call Mr Mokhesi to the witness stand and to get his version in relation to allegations made concerning the Free State Asbestos Project matter.

Again I stress Chair. It is not a matter of discretion. It is not something that the Commission would like or not like to do. The Commission has to do it in order to be fair, amongst others, to Mr Mokhesi.

So Chair, the heads deal with that at paragraphs 5 to 10 on pages 2 and 3. In essence Chair, the applicant, Mr Mokhesi, has been implicated in evidence relating to the Free State Asbestos Audit.

I am instructed that he has not been summoned to testify, so that should be correct, even though, Mr Mokhesi says so in his founding affidavit but I may be wrong there. I have not been involved in the matter from the beginning.

CHAIRPERSON: Yes, I seem to think it would be unlikely that he was summonsed but I ...[intervenes]

ADV PRETORIUS SC: Yes.

CHAIRPERSON: Ja. Because, as I understand it, he has been cooperating.

ADV PRETORIUS SC: Yes, Chair.

CHAIRPERSON: H'm.

ADV PRETORIUS SC: But what he does seek is a postponement of an appearance here Chair. I have made the point Chair – I am moving to page 4 of the heads – that the right to remain silent is only available to an arrested or accused person in criminal proceedings.

What is important about it is, is that it relates to criminal proceedings, and what is important about it, it is entire
10 distinguishable from the case – and you have referred to the case of Mr Manye – you came where you ruled he had to answer questions but could assert a protection under the regulations in relation to a particular question, not questions in general.

So in a criminal trial, an accused can say: I am not saying anything at all. You do not have to bother whether it is incriminating or not. I have the right to remain silent. It is a constitutional right. It is essential to a fair trial.

Certainly, Mr Mokhesi does not have that right. The
20 question is, what other protections does he have given the overall mandate of the Commission?

The legislator had decided that implicated persons must appear when summonsed to do so because they may appear on a consensual arrangement.

But it says because certain questions put to you may

incriminate you, you may either, in terms of 3(4) of the act, exercise your right not to answer, a privilege, against answering self-incriminating questions, or in terms of the regulations, Regulation 8(2), if you do answer deliberately or not deliberately, the question, which involves self-incrimination, that then cannot be used against you. You are protected.

And that is the scheme of the law. And if Chair, you refuse the application, we would be doing no more than
10 applying the law. No question of a misdirection which is subject to review but I will come to the review point later.

Chair, what the scheme of the legislation that applies here read with the regulation seeks to achieve is a balance on the one hand between the duty of a commissioner of inquiry to enquiry into in this case, criminal activity, fully into here all those involved and implicated in order to fulfil a stator.

In fact, a constitution mandate on the one hand and the protection of accused or potentially accused persons on the
20 other, and the manner in which the legislator and the regulations have dealt with that, is to provide protection in 3(4) and protection in Regulation 8(2) and I have dealt with that.

Of course, as the learned author Jason Beer says on the Work on Public Inquiries when may remove in privilege.

That is one option for a law-maker to say, you are not going to have any privilege in a commission of inquiry.

The other way, and this is in 19.2 of the heads, is to maintain the privilege against self-incrimination but also, as the regulation do here, to grant some form of immunity against the subsequent use of the evidence.

And if I may just place on record the Constitutional Court decision in *Ferreira v Levin*:

10 “Legislators (says the Constitutional Court) has sought a legislative solution to the tension between the privilege against self-incrimination and the interest of the state in investigative procedures of various kinds.

 This has been achieved by compelling examining to answer question even though their answers thereto might tend to incriminate them and at the same time protecting the interest of those whose examinees by granting them either an indemnity against prosecution or conferring some form of use-immunity
20 in respect of the compelled testimony.”

That is the position of *Ferreira v Levin*. However, in this case, there is the added protection under 3(4) of the act which says that you have a privilege and you do not have to answer questions even though they are incriminating.

So in the scheme that governs this Commission goes

further and grants more protection than that granted in *Ferreira v Levin*.

And Chair, in paragraph 21, we quote the correct and amended version of Regulation 8(2) that was amended at the commencement of the Commission's activities in 2018, you will recall Chair.

It reads:

10 “A self-incriminating answer or a statement given by a witness before the Commission shall not be admissible as evidence against that person in any criminal proceedings brought against that person, instituted in any court, except in criminal proceedings where the person concerned is charged with an offence of Section 6 of the Commissions Act.. That is perjury.”

So apart from perjury, anything that Mr Mokhesi says here before you Chair, even if he answers a self-incriminating question and that answer incriminates him, may not be used against him in criminal proceedings.

20 It is as if he exercise their right to remain silent at any respect of that question. But there is a further remedy that Mr Mokhesi can use, as I have said perhaps too often now Chair, Section 3(4) of the act which says you can refuse to answer the question and rely on it.

Now Chair, there is some debate about what Section

3(4) means and its apparent inconsistency with Regulation 8(2) but as I understand, the approach that you have taken Chair up to now, it is that both apply together.

So in summary Chair, what the position is, is that if Mr Mokhesi is asked a question, the answer is self-incriminating, any answers, he is protected under the regulation.

He may also, but in respect of a particular question only, not in respect of evidence as a whole, even a category of
10 evidence, in respect of a particular question say to you Chair: I do not want to answer this because I reserve my right in terms of Section 3(4) against self-incrimination.

So Chair, the principles then that we submit, respectfully, will guide you in your decision contained in the heads up to paragraph 27.

The only further point that needs to be made before I deal with the alternative order, is the issue of how the right not to answer a self-incriminating question under Section 3(4) of the act is exercised, and there is clear authority that
20 a witness cannot attempt to deal with that right or exercise that right on a blanket or category basis. It must be done in relation to a particular question.

So in paragraph 33, we submit, privilege cannot be relied upon by a competent and compellable witness to resist appearing as a witness or to refuse to answer at all, that is

to remain silent, rather, the privilege must be tamed in respect of each question – and we cite the authority – and the judicial officer, that would be yourself Chair, before allowing the claim of privilege, must satisfy himself that there is “reasonable ground to apprehend danger to the witness from him being compelled to answer”.

And further authorities is quoted there. This danger must be real and appreciable and not of an imaginary or unsubstantial character.

10 The privilege may thus not be tamed where the possibility of criminal liability has removed, such as where a witness has been indemnified in terms Section 204 of the Criminal Procedure Act.

So we say in paragraph 34 that Mr Mokhesi may indeed evoke his privilege against self-incrimination to avoid dealing with the accusations put to him but must do explicitly in relation to a particular question and by saying that his answer would tend to incriminate him.

I f I could deal briefly Chair with the alternative prayer.
20 Ending any clarification of the law, the witness in this case Mr Mokhesi retains his right as I have outlined them, both in terms of the act and regulations.

There is no basis upon which he can rely on the right to remain silent and your finding that Chair is certainly not a reviewable finding because the right to remain silent is a

Section 35 right in criminal proceedings.

He clearly does not and cannot have a right to remain silent given the statutory framework within which this Commission, which is investigating criminal activity, operates.

If, however, you Chair – and I deal with this in an entirely erratically basis – were to say to Mr Mokhesi: No, you must answer that question even though it is self-incriminating. Then there would be a right to take your
10 decision on review because that would be a clear violation here.

But there is just simple no prospects of reviewing this case. The reliance on the recent amendment to Regulation 11 is, with respect in our view, incorrect.

Once Mr Mokhesi has given evidence – and I am talking about the recent amendment to Regulation 11 which allows disclosure – once Mr Mokhesi has given evidence, the evidence is in the public domain. One does not need Regulation 11 of the law enforcement agencies to the
20 evidence on a website and to access the documents that are part of it.

So if Mr Mokhesi gives evidence and answers whatever questions he answers, subject to the protection he has, all that the law enforcement agencies then do is, they go evidence in the public domain which they can then use.

But they will not be able to transgress the provisions of Regulation 8(2) and use against Mr Mokhesi any answer that he gives. They may use it in other cases but not theirs.

So the reference to the amendment to Regulation 11 really does not apply in this case. If he does not give evidence, his statement insofar as aspects that have been put to other witnesses and that is also on public record, may be used.

If they are self-incriminating, they may also be used
10 because he did not give that evidence. So the situation is not affected by a recourse to... there is nothing that needs to be clarified. It does not pertain to the facts of this case. Those are our submissions, Chair.

CHAIRPERSON: Thank you. Mr Mpofu.

ADV MPOFU: Thank you, Chair. Chair, I agree with most of what Mr Pretorius is saying and so I will only really deal with those areas where I disagree with him.

Let us start with the last point that he made. It cannot be Chair that Regulation 11 has no impact on, at least the
20 perception of the risk that we are talking about here.

Mr Pretorius, with respect, cannot have it both ways. Remember that the old Regulation 11 afforded certain protections. It is an obvious reading of the current Regulation 11, that it removes those protections. There is no doubt about that.

So to the extent that those protections are removed and information may now be accessed by the so-called state law enforcement agencies, that must count for something.

CHAIRPERSON: Well, maybe we should look at the actual regulation.

ADV MPOFU: Yes.

CHAIRPERSON: Because it may well be that the fact that they may access certain information does not detract from the fact that that information may not be used against the
10 person who gave evidence at the Commission but may be, that information may be used against somebody else.

ADV MPOFU: No, I accept that Chair.

CHAIRPERSON: Ja.

ADV MPOFU: But all I am saying just as a general theoretical statement.

CHAIRPERSON: Ja.

ADV MPOFU: Surely those protections were there to protect somebody like Mr Mokhesi from risk – taking the risk in answering questions here that those questions might be
20 used against him in related criminal proceedings.

CHAIRPERSON: Ja.

ADV MPOFU: That must be so. So the removal, *ipso facto* the removal of those protections must expose him to some risks. I mean, I am not even prepared to quantify it.

CHAIRPERSON: Yes, okay.

ADV MPOFU: Of what is, yes.

CHAIRPERSON: H'm.

ADV MPOFU: Secondly, let us take an example Chair. Let us assume the Chair were to say: Okay, look I want to put it to... And this is just off the cuff. So I am going to ensure that you give evidence *in camera*. What do you say? So that the law enforcement agencies who may be watching television not hear what you say.

CHAIRPERSON: [laughs]

10 **ADV MPOFU:** The impact of this regulation is that, even that, that might have protected him before the amendment to the regulation. Now, in any event, he might have that evidence *in camera* but the Commission still has to share that information.

So it would be called comfort, the fact that they do not get it on television but they get it a week later. So it is a very impact for development.

And as we say, we all know why that was done because it is to try and, you know, accelerate broadly accountability
20 and so on.

But as it affects a particular person, we will have to sensitive to the risks that – maybe unintended risks – but it...

CHAIRPERSON: Tell me. The clarification that you would be seeking to obtain from the court, would relate to what

exactly?

If one were to except, as I think both you and Mr Pretorius seem to accept, that once he takes the witness stand, if he is asked a question whose answer he thinks would incriminate him, he will have a right in terms of the Commissions Act, Section 3(4) to refuse to answer the specific question but otherwise, questions that do not incriminate him, then he can answer.

10 So if one works on the basis that that is what would happen, what is the clarification that he would be seeking in court? What would it be directed at clarifying?

ADV MPOFU: Right. Chair, again I agree with Mr Pretorius's analyses of that issues to the following extent, that the... if the Chair, you were to say, after he has taken the oath and then he says: I will not answer that particular question. And Chair says: No, you will have to.

Then the Chair would then be exercising its discretion, as it were, which must be reviewable as required by the court of law.

20 **CHAIRPERSON:** Ja, ja.

ADV MPOFU: Yes. So I accept... let me take one step back, if I may Chair?

CHAIRPERSON: H'm.

ADV MPOFU: We accept that – and I said that when I was addressing the Chair in-chief – we accept that theoretically

the right attaches to questions ...[intervenes]

CHAIRPERSON: To specific questions, ja.

ADV MPOFU: Yes. That we accept.

CHAIRPERSON: Yes, yes.

ADV MPOFU: We accept the right to remain silent is not the right that we are seeking directly.

CHAIRPERSON: Ja.

ADV MPOFU: We are simply saying that right is a cousin, as it were, of the right against self-incrimination.

10 **CHAIRPERSON:** Ja.

ADV MPOFU: So is the right to have legal representation and so on. That is a cluster of rights under 35(9) which are related.

CHAIRPERSON: H'm. H'm.

ADV MPOFU: However, let us... we appeal to practicality and realism in the following way. The only issue that this Commission has an interest in, in relation to Mr Mokhesi, is specified at Annexure M6 to our application. I am sorry it is not paginated.

20 **CHAIRPERSON:** H'm.

ADV MPOFU: All the... oh, I am sorry. Let us start at Annexure M3.2.

CHAIRPERSON: M3.2.?

ADV MPOFU: Yes. That is the letter from Mr Paper of my instructing attorney.

CHAIRPERSON: Yes.

ADV MPOFU: There it says that, at paragraph 2:

“The Commission of Inquiry requires our client to present evidence pertaining to the Asbestos Audit conducted in the Free State being the very same issue being investigated by yourself.”

So that is the crux. There is one issue. He has been told that the police are interested in the Asbestos Audit issue.

10 **CHAIRPERSON:** Ja.

ADV MPOFU: He has been told that the Commission is similarly interested in the same issues. So there can be no doubt about the coincidence of the issue. So the Commission... well, literally, he might be asked to come here and say: What is your name? He answers his name. How many children do you have? He answers that and so on.

And then you say: Okay now let us come to the real issue why you are here which is the Asbestos Audit. And he says: I am not going to answer anything. And what is the
20 point of that?

I mean, at a practical level, we must accept that this is a similar issue on sides. The police are interested in exactly the same issue but the Commission is interested there.

So if he has a right not to deal with the Asbestos Audit issues, I am putting it at its broadest, then that is the right

that he will be asserting. And if the Chair found that: No, he does not have such a right. That will be the issue that will be taken to court, as it were.

And the court may say: The Chair is right. Or Mr Pretorius is right or me are right. But he should be insulated from the risk, the very risk, of even dealing with that issue at any level, so to speak. Ja, because as I said earlier.

So this is not a case where... I mean, we can go through that exercise but it will be a waste of the Commission's time
10 because he will simply ...[intervenes]

CHAIRPERSON: Well, I think what you are saying now, does seem to me to differ from how I understood you, what I understood you to be saying earlier.

It seems to me that if he says: I do not want to answer any questions relating to the Asbestos Project, that is not an exercise of the right in relation to question-by-question. He is simply saying:

On the topic of the Asbestos Project, I do not want to answer any questions at all. Which it seems may include
20 questions that do not incriminate him, you know. So that is how I understand your argument to be now.

ADV MPOFU: No, Chair, I understand the distinction. Just remember now I am responding to Mr Pretorius' assertion.

CHAIRPERSON: Yes, yes.

ADV MPOFU: So all I am saying Chair, that is why I was saying I am appealing more to practicality than legal technicalities.

CHAIRPERSON: Yes.

ADV MPOFU: Because, technically, we all agree.

CHAIRPERSON: Ja.

ADV MPOFU: He can be brought into the chair, he can take the oath.

CHAIRPERSON: Yes, ja.

10 **ADV MPOFU:** He can tell us all about his life and all that.

CHAIRPERSON: Ja.

ADV MPOFU: Ja, but when it comes to real issue which he is hear, which is the asbestos audit. Remember, Chair, unfortunately in this case the – it might well be that if he actually had already been charged, you would be in a better position or the Chair would be in a better position to say yes, but you have only been charged money laundering, for argument's sake, but not this or that or that.

20 But here he is in a situation where the risk to him is still ill-defined, so to speak, in the sense that he might answer a question which, as the Chair, says might look innocuous at face value about, you know, whether he attended this meeting or that meeting which, at face value, is not self-incriminating but depending on the nature of the

actual risk and the charges, that might turn out to be – to have been a self-incriminating answer.

So it is not your typical situation where the Chair could say no, but these two charges have been withdrawn so therefore you can answer this but this one remains, we understand, it is a – unfortunately a fuzzy situation.

The other point, Chair, which I wanted to make but Mr Pretorius address is that – yes, no, I have made the point about regulation 11, removal of – the amendment
10 allows for – the fact that the amendment allows for the disclosure of the information is the new – what Mr Pretorius is saying, would have applied before that amendment.

Our submission, respectfully, is that the introduction of the amendment is the one that brings some ambiguity and something for a court to clarify.

Chair, as I say, we approached this practically. If the Chair says well, let us go through the motions, let us just take the stand and say his name and so on, well, so be
20 it, but we can – I can tell the Chair now that he is not going to answer any questions to do with what he has really been brought here for, namely the asbestos audit and it would – so it would be a futile exercise indeed to compel him to do so and the case that Mr Pretorius referred to, which is the case of Connison(?) about that the

danger must be real and appreciable and not an imaginary and unsubstantiated in character is correct but I addressed that when I was addressing you in chief, Chair, namely that allow he has not charged, the threat to his Section 35 rights is real in the circumstances.

And just for completion, in the same vein Corbett CJ in the case of Magmoed v Janse van Rensburg 1993 in the old - 1991 SACR67 in the old AD called this:

10 “It is a personal right to refuse to disclose admissible evidence.”

In other words, one accept that the evidence is relevant and admissible in the normal law of evidence sense but you have a right to refuse to give it for the reasons that we have already explained and it is in that context that the right (a) that you assert must be understood and the right that we seek to be clarified if given an opportunity must be understood. Just check if I am leaving anything out, Chair.

20 Yes, the Commission’s Act again, before the amendment, theoretically protects one against any criminal consequences apart from lying under oath. That, we accept, but again we put that into the pre-regulation – new regulation level position. Thank you.

CHAIRPERSON: Okay. It may well be, Mr Mpfu, that – whether it might prove to be a futile exercise or not, it may well be that Mr Mokhesi might have to take the witness

stand, be asked questions and if he refuses and asserts his privilege, he does so – if he seeks to assert his privilege in relation to the entire topic of asbestos project, let us know that that is the position to the witness stand and that is what he gives so we know what the facts are.

ADV MPOFU: Yes.

CHAIRPERSON: And he may well, I do not know, but you are his adviser, you have indicated it may well be that he might say look, yes, there are questions that I can answer
10 but they are questions I will refuse to answer and let us see how it goes.

If he says I refuse to answer any question then let us have that as an established fact that he took the witness stand, this is what he said, so that if he goes to court, that fact is established.

ADV MPOFU: As a factual basis, no, I have no problem with that.

CHAIRPERSON: That fact is established, you know?

ADV MPOFU: Yes.

20 **CHAIRPERSON:** To say is he entitled to refuse to answer any question on a certain topic or is he only entitled to refuse to answer specific questions on the topic?

ADV MPOFU: Yes.

CHAIRPERSON: Ja.

ADV MPOFU: Chair, firstly, no problem whatsoever with

that.

CHAIRPERSON: Ja, yes.

ADV MPOFU: It is actually – if there are going to be court proceedings ...[intervenes]

CHAIRPERSON: To clarify things.

ADV MPOFU: Yes. If there are going to be court proceedings it actually makes it easier.

CHAIRPERSON: Ja.

ADV MPOFU: Because then we will not have this debate
10 about does he have a right to take the oath and so on.

CHAIRPERSON: Yes, yes, yes.

ADV MPOFU: Because will have been done, ja.

CHAIRPERSON: Yes, yes, yes.

ADV MPOFU: Secondly, Chair, let me maybe make – I will make an appeal to the Chair.

CHAIRPERSON: Ja.

ADV MPOFU: To, when he does take the stand, to maybe in a say assist him in clarifying exactly that point with him.

CHAIRPERSON: Ja, ja, yes.

20 **ADV MPOFU:** Are you prepared to go this far and this far.

CHAIRPERSON: Yes, yes.

ADV MPOFU: Beforehand.

CHAIRPERSON: Yes.

ADV MPOFU: Because we do not want the risk to materialise inadvertently, so to speak.

CHAIRPERSON: Ja, ja.

ADV MPOFU: But the last submission I want to make, Chair, is that my submission is simply this, that on these facts, the distinction between question to question and the topic is artificial because there is really one topic and one issue and it is – this is not as if he going to be asked about how the - you know, the state of housing in the Free State and so on.

CHAIRPERSON: Ja.

10 **ADV MPOFU:** But I have no quarrel with the Chair's approach of, as it were, narrowing the issue and knowing where he is preparedness to answer the stats and where it ends. We have no issue.

CHAIRPERSON: Okay, alright. No, thank you.

ADV MPOFU: Subject to – if that is the route that we are going to go, Chair, we just ask for five minutes so that we can consult with him.

CHAIRPERSON: Yes. Okay, alright.

20 **ADV PRETORIUS SC:** Chair, if I may, it will assist, I am sure, if we just clarify.

CHAIRPERSON: Ja.

ADV PRETORIUS SC: What this regulation 11 which seems to be at stake in this application is all about.

CHAIRPERSON: Yes.

ADV PRETORIUS SC: The regulation must be read with

the Act. The regulation in essence – and we are dealing with the 11.2 and 11.3 says that the work of the Commission particularly its investigative work and matters submitted to the Commission are covered by those regulations and may not be released to any party. Alright.

Now that goes both to the investigative work of the Commission and submissions made to the Commission. So those are under wraps, as it were, under 11.2 and under 11.3. What the regulation says is that does not apply to
10 law enforcement agency. So the real issue here is that these files behind me can go if you – the protocol is obeyed, it has got nothing to do with his given evidence.

The Section 4 of the Act says, however, that sittings must be in public. So once the evidence is given, right, and this is not related to Regulation 11.3 or the amendment to Regulations 11.2 and .3. Once that is in the public domain, that is there for anybody to use even against the witness concerned but for Regulation 11.2, it cannot be used in any criminal proceedings against the witness.

20 So, really, the amendment to Regulation 11 is clear in its import and it does not impact upon what the witness does or says.

There would have to be another ground and there is no other ground and if I may, in fairness to Mr Mokhesi, just emphasise that the extent of the privilege according to

the internal authorities at least is wide, it covers evidence directly incriminating against the person who gives it, evidence which might be used to inform the case indirectly incriminating against the person who gives it and evidence which might be used for the purposes of deciding whether to bring proceedings against the person who gives it.

So, widely interpreted, there is an enormous amount of protection for it to witness under the rubric of self-incriminating privilege.

10 **CHAIRPERSON:** I do not think you want to say anything further, Mr Mpofu, or do you?

ADV MPOFU: Chair, I suppose I must exercise my right to respond. Again, we are not far apart with Mr Pretorius, the right, in South Africa, at least, and he is right that it is widely defined in other jurisdictions, but here it is anchored in Section 203 which simply says:

20 “No witness in criminal proceedings shall, except as provided by the sector any other law be compelled to answer any question which would not otherwise have been answered to on the 30 May 1961..”

That is of such importance

“...have been compelled to answer by reason that the answer may expose him to a criminal charge.”

So it is watered down twice. May simply expose it which it might not even materialise and that is why I summarised it

by saying it is the risk, it simply the risk that is at stake and that risk on these facts manifests itself, as we say, by the added risk. It might not be a big addition but by the added risk caused by the amendment to the regulation. That is the only relevance of the Regulation 11 point. Thank you, Chair.

CHAIRPERSON: Thank you, Mr Mpofu.

The application for the postponement of the hearing of Mr Mokhesi's evidence today is **DISMISSED**.

10 Reasons can be given in due course, if they are requested. Mr Mokhesi will need to take the witness stand but he will be able to exercise his right with regard to specific questions not to incriminate himself, his right to refuse to answer certain questions. Okay, thank you.

ADV PRETORIUS SC: Chair, may we take the short adjournment now?

CHAIRPERSON: Yes, are five minutes past the tea break, we are at twenty past. I will give a little bit more time, we will resume at twenty to.

20 **ADV PRETORIUS SC:** Thank you, Chair.

CHAIRPERSON: Okay, we adjourn.

INQUIRY ADJOURNS

INQUIRY RESUMES

CHAIRPERSON: Thank you, continuation.

REGISTRAR: Please state your full names for the record.

MR NTHIMOTSE MOKHESI: My name is Nthimotse Mokhesi.

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

MR MOKHESI: No, I do not.

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

MR MOKHESI: Yes, I do.

REGISTRAR: Do you swear that the evidence you will give
10 will be the truth, the whole truth and nothing else but the truth? If so, please raise your right hand and say so help me God.

MR MOKHESI: So help me God.

CHAIRPERSON: Yes, Mr Pretorius?

ADV PRETORIUS SC: Thank you, Chair.

CHAIRPERSON: Yes, Mr Mokhesi, I am sure you were
listening to the discussion and argument earlier on and I
am sure you have been given certain advice but Mr
Pretorius will put certain questions to you, questions which
20 may incriminate you. You may refuse to answer but Mr
Pretorius will ask you questions and I would think that they
are questions that would not incriminate you and I would
think that there would be questions which, as accounting
officer, you would feel that you need to answer and tell the
nation that part and only in regard to the questions which

you think incriminate you would you exercise that right but you have been given advice that you have been given, Mr Pretorius will ask questions and we will take it from there. Okay? You understand?

MR MOKHESI: Okay, should I talk about the advice that I have been given or not yet?

CHAIRPERSON: Well, I do not necessarily – your counsel is shaking his head.

MR MOKHESI: Okay.

10 **CHAIRPERSON:** So I think you will listen to questions and...

MR MOKHESI: Okay.

CHAIRPERSON: Ja, okay. Mr Pretorius?

ADV PRETORIUS SC: Mr Mokhesi, you have in front of you a bundle which is FS1. Would you go please to page 28 and when we refer to page numbers, we are referring to the black numbers in the top left-hand corner of each page, not the red numbers. You can ignore the red numbers in the top right hand corner but we are looking at the
20 numbers at the top left of each page. If you could go to FS1 page 28 please? Do you recognise that document?

MR MOKHESI: Yes I do. Page – the first one, 28?

CHAIRPERSON: The bundle is called FS1, that is the home file, it is called, bundle FS1, but you have been referred to a specific page and what is the page, Mr

Pretorius again?

ADV PRETORIUS SC: Page 28.

MR MOKHESI: Page 28.

ADV PRETORIUS SC: And if you would just have regard to the document from page 28 to page 54 of FS1 please? Do you recognise that document?

MR MOKHESI: Yes. Yes, I do.

ADV PRETORIUS SC: If you go to page 54 please, is that your signature there above the name N Mokhesi?

10 **CHAIRPERSON:** Remember to look at the black numbers on the top left all the time.

MR MOKHESI: Yes.

ADV PRETORIUS SC: Is this an affidavit then attested to by you on the 31 January 2020?

MR MOKHESI: That is my affidavit, yes.

ADV PRETORIUS SC: Yes, you would have to speak up please, Mr Mokhesi.

MR MOKHESI: Yes, that is my affidavit.

20 **ADV PRETORIUS SC:** And as far as you're concerned are the contents of this affidavit true and correct?

MR MOKHESI: Yes, that is my affidavit.

ADV PRETORIUS SC: If you would look at another document please at FS58 to FS60, there are certain annexures to that document.

MR MOKHESI: Yes.

ADV PRETORIUS SC: So perhaps you should go right through to FS91.

MR MOKHESI: FS58, you said.

ADV PRETORIUS SC: Yes.

MR MOKHESI: Yes.

CHAIRPERSON: I am sorry, Mr Mokhesi, for purposes of identifying page numbers you can ignore FS and Free State. When you look at those black numbers on the top left corner of each page just look at the last two or three
10 digits. So when Mr Pretorius says page 58 he is talking about that page. It says Free State 01-058, that is page 58, that we will not be saying FS what, FS what because the whole file is FS1, so we do not want there to be confusion. Okay, so but he has asked you to look at page 58 and go up to page, Mr Pretorius?

ADV PRETORIUS SC: Well, including annexures to page 91.

MR MOKHESI: Page 91?

ADV PRETORIUS SC: Yes please. It will be just before
20 that blue tab. Just before the blue tab.

MR MOKHESI: It is page 92.

ADV PRETORIUS SC: Yes, so we are going to page 91.

CHAIRPERSON: The black numbers top left.

ADV PRETORIUS SC: Do you have that page?

MR MOKHESI: 91.

ADV PRETORIUS SC: Yes. And if you could look at the signature please on page 60.

MR MOKHESI: Page 60?

ADV PRETORIUS SC: Six zero, 60.

MR MOKHESI: Yes.

ADV PRETORIUS SC: Whose signature is that on that page, in the middle of the page?

MR MOKHESI: Yes, it is my signature.

ADV PRETORIUS SC: Your signature. This document at
10 page 58 to page 60, is that your second affidavit?

MR MOKHESI: Yes.

ADV PRETORIUS SC: As far as you are concerned, are you satisfied that the contents of that affidavit are true and correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: May those two documents be admitted as EXHIBIT TT2.1 and TT2.2?

CHAIRPERSON: It is the one starting at page 28, hey?

ADV PRETORIUS SC: Yes, Chair, and together with
20 annexures – well, it goes through to page 55, it has no numbers.

CHAIRPERSON: Yes, the affidavit of Mr Nthimotse Mokhesi appearing at page 28 together with its annexures will be admitted and will be marked as EXHIBIT – what is the exhibit number?

ADV PRETORIUS SC: TT2.1.

CHAIRPERSON: TT2.1, okay.

ADV PRETORIUS SC: The second one at page 58
...[intervenes]

CHAIRPERSON: The affidavit of Nthimotse Mokhesi appearing at page 58 will be admitted and will be marked as EXHIBIT TT...

ADV PRETORIUS SC: 2.2.

CHAIRPERSON: T.2 together with its annexures.

10 **PAGE 28 OF THE AFFIDAVIT PLUS ANNEXURES OF NTHIMOTSE MOKHESI HANDED IN AS EXHIBIT TT2.1**
PAGE 58 OF THE AFFIDAVIT PLUS ANNEXURES OF NTHIMOTSE MOKHESI HANDED IN AS EXHIBIT TT2.2

ADV PRETORIUS SC: Thank you, Chair

CHAIRPERSON: Yes.

ADV PRETORIUS SC: We understand from your affidavit, Mr Mokhesi, that you were appointed as the head of department, Free State Department of Human Settlements with effect from 1 January 2012.

20 **ADV PRETORIUS SC:** When did you actually occupy that position? I see that your appointment was with effect from – did you actually take office on 1 January 2012 or another date?

MR MOKHESI: Ja, my appointment was with effect from the 1 January but assumed office I think two weeks later.

ADV PRETORIUS SC: Thank you.

CHAIRPERSON: Okay, I am going to ask you to raise your voice, Mr Mokhesi.

MR MOKHESI: Oh, sorry, Chair. I am saying my appointment – my appointment letter was with effect from the 1st of

CHAIRPERSON: January.

MR MOKHESI: January but the actual taking of office was two weeks later.

10 **CHAIRPERSON:** Two weeks later?

MR MOKHESI: Ja. [indistinct – dropping voice] the report.

ADV PRETORIUS SC: Yes, thank you, Mr Mokhesi.

CHAIRPERSON: Keep the mic on, your mic on. You can keep it on, with the red light, ja.

ADV PRETORIUS SC: Mr Mokhesi, a matter that will be of some interest to the Chair generally and both in – and in relation to the particular circumstances of the Free State project on asbestos is the role of the head of department.

20 The head of department is also in terms of the Public Finance Management Act the accounting officer, I understand, is that correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: When you occupied the position as head of department and accounting officer, the Free State

Department of Human Settlements, did you undergo any training for that position?

MR MOKHESI: I do not understand when you say training.

ADV PRETORIUS SC: Well ...[intervenes]

MR MOKHESI: It is about – I think it is about going to an interview.

ADV PRETORIUS SC: Yes.

MR MOKHESI: And presenting yourself.

ADV PRETORIUS SC: Well, what we are going to deal
10 with in the first part of your evidence today is the various financial controls that exist within a particular government department and the prescripts of the regulatory framework that applies in terms of regulations, practice notes – and I am talking about Treasury regulations, Treasury practice notes, the Public Finance Management Act and the like. In regard to that network or collection of regulatory prescripts dealing with the finances of the department, did you receive any training?

MR MOKHESI: Well, I do not know about the issue of
20 formal training but it is as a matter of course in your work you come across those particular [indistinct – dropping voice]

ADV PRETORIUS SC: Well, may I ask then, when you took office did you acquaint yourself with the various regulatory prescripts governing the finances?

MR MOKHESI: Yes, I did.

ADV PRETORIUS SC: And can you recall what in particular you would have had regard to?

MR MOKHESI: Well, the city framework being – the main one being the PFMA, of course, which is the key legislative framework that governed the ...[intervenes]

ADV PRETORIUS SC: Mr Mokhesi, may I – I am sorry to interrupt you, would you remove your mask please? Apparently, the stenographers are having difficulty hearing
10 what you are saying and please also speak closer to the mic and loudly, if you would.

MR MOKHESI: Okay, No, I am saying, the key legislative framework that you have to acquaint yourself and that also include all government employees, not only myself is your PFMA.

ADV PRETORIUS SC: That is the Public Finance Management Act.

MR MOKHESI: The Public Finance Management Act and its accompanying regulations and so on. So that is
20 basically the key legislative framework that we have to acquaint yourself with.

ADV PRETORIUS SC: So that is the Public Finance Management Act and that would be the Treasury Regulations published under the auspices of that Act?

MR MOKHESI: Yes.

ADV PRETORIUS SC: But we will deal with those in a moment, but may I ask did you at the time of your appointment become aware of a supply chain management policy applicable within the department? Was there such a supply chain management policy in the department?

MR MOKHESI: Okay, Chairperson I have been advised by my counsel because I can see now in terms of where we are going. That I should not take questions that relates to the asbestos meetings and that is the advice that I got.

10 **CHAIRPERSON:** To supply chain management policy.

MR MOKHESI: No, no I am just highlighting that particular issue to say I have been advised by my counsel ...[intervene]

CHAIRPERSON: Yes.

MR MOKHESI: And I take legal advice as I should.

CHAIRPERSON: Ja, no, no I understand that ja.

MR MOKHESI: That I should not – because in certain instances I will need from particularly where I am not certain I will have from time to time to consult with them.

20 So that is basically the advice that I have – so just to indicate that particular issue into the record.

CHAIRPERSON: Mr Pretorius do you want to say something before?

ADV PRETORIUS SC: Well except to say the obvious that it is difficult to understand how the answer to that question

can be incriminating. But on the wide definition it is in our submission – I am trying to think how it could be self-incriminating in fairness to the witness. But I doubt that the mere existence of otherwise of a policy can be incriminating as opposed to irregular.

CHAIRPERSON: The question is directed in establishing whether when he assumed office as the HOD there was in place a supply chain management policy.

MR MOKHESI: Okay

10 **CHAIRPERSON:** That is all the question is directed.

ADV PRETORIUS SC: All the questions is aimed at establishing for the moment.

CHAIRPERSON: For now do you have a problem a consulting...[intervene]

MR MOKHESI: No I am just...[intervene]

CHAIRPERSON: At that stage – at this stage you are not concerned but you are saying as we go on you may have to...[intervene]

MR MOKHESI: Yes.

20 **CHAIRPERSON:** Ja okay no we understand that...[intervene]

MR MOKHESI: I think my counsel will also indicate it.

CHAIRPERSON: Ja your counsel is here as well, ja okay. So I do not think that there is any discomfort about you answering the question whether when you assumed office

as HOD. There was in the department as a matter of fact a supply chain management policy.

MR MOKHESI: Okay.

CHAIRPERSON: That do you want to answer that?

ADV PRETORIUS SC: Do you say there was one?

MR MOKHESI: There was one.

ADV PRETORIUS SC: You see the one that the investigators have obtained is dated May 2015 you assumed office in 2012 so that would have been a different
10 supply chain management policy or more or less the same?

MR MOKHESI: On the – there is a requirement that you should on an ongoing basis review your supply chain policy because you know from time to time, we have this practice you know the changes etcetera and some of the regulation.

So it is a requirement, it is actually a good thing to review at least on an annual basis even if you do not change the policy. But the fact that you reviewed it and just to make sure that it is still applicable and it is still relevant. So the 2015 there would have been previous
20 policies before.

ADV PRETORIUS SC: Right and it would have been amended you say to some degree in 2015 to produce the one that we have. We will deal with later but you say – all I wanted to establish at the moment that at the time you took office there would have been a policy in place in the

department supply chain management policy.

MR MOKHESI: Yes.

ADV PRETORIUS SC: Thank you. If I could just go to your affidavit please at FS1 page 28 and if it go through please to page 30. There you talk about a written proposal being delivered to your office by a Mr Mpambani. Perhaps we should identify that policy and that in another bundle which you have seen it is bundle FS8.

MR MOKHESI: Page, sorry?

10 **ADV PRETORIUS SC:** Page 162 which is the file behind you if you would go to bundle FS8.

MR MOKHESI: Sorry you referred to page 30.

CHAIRPERSON: Oh yes he referred to...[intervene]

ADV PRETORIUS SC: Yes, I referred to page 31.

MR MOKHESI: 31.

ADV PRETORIUS SC: In paragraph 9.1 you say the written proposal was delivered to my office of Mr Mpambani I would just like to identify the proposal that we are talking about.

20 **CHAIRPERSON:** I am sorry Mr Pretorius did you say page 31?

ADV PRETORIUS SC: Yes, Chair of FS1.

CHAIRPERSON: Yes.

ADV PRETORIUS SC: At paragraph 9.1. The affidavit reads the written proposal was delivered to my office by Mr

Mpambani.

CHAIRPERSON: Oh I think the problem...[intervene]

ADV PRETORIUS SC: Now before dealing with that fact I need to identify the proposal.

CHAIRPERSON: I heard you to say what Mr Mokhesi says here is that no proposal was delivered and I was wondering because I could not see anything saying that but I maybe I misheard you.

ADV PRETORIUS SC: That is entirely my fault.

10 **CHAIRPERSON:** Ja.

ADV PRETORIUS SC: Chair not speaking clearly and all that.

CHAIRPERSON: Okay.

ADV PRETORIUS SC: The proposal was delivered and we have substantial evidence in that regard already before the Chair. But if you would go to FS8 please at page 162.

MR MOKHESI: 162?

ADV PRETORIUS SC: Do you recognise this document Mr Mokhesi?

20 **MR MOKHESI:** Yes, I do.

ADV PRETORIUS SC: What is it?

MR MOKHESI: The proposal?

ADV PRETORIUS SC: This is the proposal for the audit handling of hazardous material removal and disposal of asbestos roof houses submitted to the Department of

Human Settlements, Free State Province attention Mr Mokhesi and it is dated 28 May 2014. Do you see that?

MR MOKHESI: Yes.

ADV PRETORIUS SC: And it is submitted by and underneath that submitted by you see Blackhead Consulting and Diamond Hill Trading, 71.

MR MOKHESI: Yes, I see it.

ADV PRETORIUS SC: Now that proposal has been dealt with in evidence before the Chair by other witnesses and
10 we will return to it due course. But for the present I understand your affidavit to be to the effect that that proposal was delivered to your office by Mr Mpambani but you continued to say however at the time of such delivery I did not personally meet Mr Mpambani.

MR MOKHESI: Yes.

ADV PRETORIUS SC: Is that statement correct?

MR MOKHESI: Yes, it is correct.

ADV PRETORIUS SC: When did you find out that Mr Mpambani had delivered such a proposal, can you recall?

20 **MR MOKHESI:** No I cannot recall exactly the date.

ADV PRETORIUS SC: Did you make any enquiries from any person or entity as to who Mr Mpambani was and who he represented?

MR MOKHESI: No, I did not.

ADV PRETORIUS SC: You did not, right. You do say in

paragraph 9.2 that before the proposal was delivered to the department specifically my office I did not know or expect that either Mr Mpambani or Mr Sodi would deliver such a proposal. I cannot even recall the date on which it was delivered. Is that a correct statement or fact?

MR MOKHESI: That I did not know them before yes, I did not know them.

ADV PRETORIUS SC: You did not know them. You can feel free to remove your mask if you're comfortable with
10 that Mr Mokhesi. And as I understand the situation both from your statements generally and from other evidence that has been given to the Chair. The department did not ask for a proposal. It did not the technical word is solicit the proposal.

MR MOKHESI: No.

ADV PRETORIUS SC: It did not?

MR MOKHESI: Ja.

ADV PRETORIUS SC: Again, please if you will raise your voice.

20 **CHAIRPERSON:** I will I ask you to raise your voice Mr Mokhesi.

MR MOKHESI: Yes.

CHAIRPERSON: Ja the department did not ask for proposal?

MR MOKHESI: Yes.

CHAIRPERSON: Ja, okay.

ADV PRETORIUS SC: I also understand from your affidavit that when you received the proposal right you then forwarded it to Mr Matlakala.

MR MOKHESI: Yes, I did.

ADV PRETORIUS SC: You say that in paragraph 11.1 of your affidavit that we are now dealing with at page 32. If you would just go there please. In paragraph 11.2 you say by referring the proposal to him I was expecting him to
10 make a determination on the appropriate method of procurement that could be utilised to implement the project.

MR MOKHESI: Yes.

ADV PRETORIUS SC: You see that?

MR MOKHESI: Yes, I see that.

ADV PRETORIUS SC: Now when you received the proposal did you study it?

MR MOKHESI: Yes, I went through it and obviously refer it to the supply chain director.

20 **ADV PRETORIUS SC:** Alright and this would have been in May 2014.

MR MOKHESI: Possibly yes it would have been around that time.

ADV PRETORIUS SC: On that date or around that date?

MR MOKHESI: Around that, yes sir.

ADV PRETORIUS SC: Did you understand that if the proposal had not been solicited by the department certain regulatory prescripts applied.

MR MOKHESI: Yes, and that is the reason ordinarily you will refer that to the practitioner. In this instance supply chain practitioner.

ADV PRETORIUS SC: Well we will come back to that issue in due course but if I may ask you to go to another file at FS6 page 371 that is the file that will be behind you
10 but someone will help you with that.

CHAIRPERSON: I think somebody will assist you to get the file.

ADV PRETORIUS SC: 371. This document is the transcript of the interview that you held Mr Mokhesi with the investigators of the Commission on the 30th of October 2019. You have been provided with this document

MR MOKHESI: Yes.

CHAIRPERSON: Your voice is very soft.

MR MOKHESI: Yes.

20 **CHAIRPERSON:** Ja, okay.

ADV PRETORIUS SC: At page 371 you will see a discussion between Mr Lampbrecht the investigator and yourself from line 10. The lines are marked on the left hand side of the document. Mr Lampbrecht says okay so when you received the proposal what did you do then?

MR MOKHESI: Is it 71, oh 371 no sorry.

CHAIRPERSON: Are you by the black numbers?

MR MOKHESI: The black numbers.

CHAIRPERSON: Oh, ja look for the black numbers.

ADV PRETORIUS SC: And again, you would have to say yes for the stenographer sake and the Chairs sake.

MR MOKHESI: Yes.

ADV PRETORIUS SC: Section 50 of the Public Finance Management Act deals with the fiduciary duties of
10 accounting authorities and amongst other things speaks to the exercise of the duty of utmost care to ensure reasonable protection of the assets and records of the public entity. Correct?

There is a high degree of responsibility placed summarising as we go through, we do not want to go through every word, you were aware of these provisions and we may deal with them in more detail later. But Section 51 deals with the general responsibilities of accounting authority and 511A says an accounting office,
20 sorry.

An accounting authority for a public entity must ensure that that public entity has and maintained an efficient - I correct myself an effective efficient and transparent systems of financial and risk management and internal control. Is that correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: You recall that provision?

MR MOKHESI: Yes.

ADV PRETORIUS SC: And then 511A [iii] says that the accounting authority must ensure that the public entity has and maintains and appropriate procurement and provisioning system which is fair equitable transparent competitive and cost effective. In other words, a system which complies with the constitutional provision of Section
10 217.

MR MOKHESI: Yes.

ADV PRETORIUS SC: It repeats Section 217. There are various other duties such as the duty to avoid irregular expenditure fruitless and wasteful expenditure and other matters. Correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: Sorry I did not mean to put words in your mouth I was just repeating what you said. Section 44 deals with the duties of accounting officers and the extent
20 to which an accounting officer may delicate.

Right now, you have said that as I understand it that you did not study the proposal but you sent it to the person in charge of procurement and that was Mr Matlakala as I understand it. Is that correct, for his consideration?

MR MOKHESI: I said I read the proposal and

...[intervene]

ADV PRETORIUS SC: You read it.

MR MOKHESI: Yes, I read the proposal and then referred it to the supply chain practitioner.

ADV PRETORIUS SC: Okay and then let us clarify that – did you as I understood it your evidence was that you did not study the proposal in terms of the various detailed prescripts that would have that would have [break in audio]

10 **MR MOKHESI:** It is not applicable but to say what is the most appropriate.

ADV PRETORIUS SC: Yes.

MR MOKHESI: To form a strategy.

ADV PRETORIUS SC: I am sorry I interrupted you did you finish? [break in audio] I might have blocked out your answer do you want to repeat that?

MR MOKHESI: I have clarified that.

ADV PRETORIUS SC: You have clarified that, alright Section 44 ...[intervene]

20 **CHAIRPERSON:** Okay, I just want to make sure the clarification you were making Mr Mokhesi is that after receiving the proposal you did read it to understand what it was about.

MR MOKHESI: Yes.

CHAIRPERSON: Then you referred it to Mr Matlakala.

MR MOKHESI: And the relevance of it to ask...[intervene]

CHAIRPERSON: Ja.

MR MOKHESI: And then refer it to a supply chain practitioner to see what is the most appropriate.

CHAIRPERSON: Yes, way forward.

MR MOKHESI: Way forward.

CHAIRPERSON: Okay.

MR MOKHESI: In terms of procurement strategy.

CHAIRPERSON: Okay.

ADV PRETORIUS SC: Right Section 44 of the PFMA says
10 or deals with rather the assignment of powers and duties
by accounting officers and it reads in sub-section 1. The
accounting officer for a department trading entity or
constitutional institution may A in writing delegate any of
the powers entrusted or delegated to the accounting officer
– that is yourself in terms of this act to an official in that
department trading entity or constitutional institution. You
are aware of that provision?

MR MOKHESI: Yes.

ADV PRETORIUS SC: It goes on to say in Sub-section B,
20 all – any official in that department trading entity or
constitutional institution to perform any of the duties
assigned to the accounting officer in terms of this act. You
understood that no doubt to be the case?

MR MOKHESI: Yes.

ADV PRETORIUS SC: Was there any written delegation to

Mr Matlakala in relation to any of the duties that would have rested on yourself?

MR MOKHESI: There are delegations for each of the staff.

ADV PRETORIUS SC: And would there have – sorry would there have been written delegations?

MR MOKHESI: There would be written delegations.

ADV PRETORIUS SC: And those would be available to the investigator should they require them.

10 **MR MOKHESI:** Should they require them.

ADV PRETORIUS SC: Right. Section 44 goes on to say in Section 44.2 a delegation or an instruction to an official in terms of sub-section 1 and then there are various sub-sections again and I am going to sub-section 21D does not divest the accounting officer of the responsibility concerning the exercise of the delegated power or the performance of the assigned duty. As I understand the position is that you may delegate but you remain accountable.

20 **MR MOKHESI:** Correct.

ADV PRETORIUS SC: Is that correct? Again, please sorry to nag you Mr Mokhesi but you, the stenographer needs to hear your voice.

MR MOKHESI: Correct.

ADV PRETORIUS SC: Let us then deal with your own

policy that is in FS7 if you would go there to that file please.

CHAIRPERSON: Somebody will assist you to identify the correct file.

ADV PRETORIUS SC: You will go there please to page 107 of FS7 and we again referring to the black numbers in the top left hand corner. Do you recognise the document at page 107?

MR MOKHESI: Yes.

10 **ADV PRETORIUS SC:** What is that document?

MR MOKHESI: The supply chain policy.

ADV PRETORIUS SC: Is that the internal departmental financial management policy?

MR MOKHESI: Yes.

ADV PRETORIUS SC: The supply chain management policy of which we spoke earlier?

MR MOKHESI: Yes.

ADV PRETORIUS SC: It is dated the 6th of May 2015. Is that your signature there?

20 **MR MOKHESI:** Yes.

ADV PRETORIUS SC: Now of course we are dealing with matters that took place in 2014 so if this policy to your recollection differed in any respect or to any extent with any earlier policy with the policy in place in 2014 you will please tell the Chair that.

CHAIRPERSON: Okay.

ADV PRETORIUS SC: We may go to FS7 at 110 you see under the heading objective paragraph 1. Paragraph 1.1 says since the department uses public funds to finance its procurement of goods and services ...[intervene]

MR MOKHESI: Sorry Mr Pretorius you said 110?

ADV PRETORIUS SC: 110, yes top left hand numbers in black.

MR MOKHESI: Okay, yes.

10 **ADV PRETORIUS SC:** Under the heading objective paragraph 1.1 reads since the department uses public funds to finance its procurement of goods and services it is obliged to ensure that the best interest of the public is served when these funds are spent. “Best interest” includes satisfying the requirements at the most favourable conditions including fairness, equitability, transparency, competitiveness and cost effectiveness.

20 Business and industry should be afforded the best possible opportunity to satisfy such requirements while adhering to the national government’s medium-term policy initiatives including broad based backing. Empowerment BBEE and the preferential procurement policy framework Act 1.2 reads the objectives of this policy are to [i] to ensure compliance with all applicable legislation and prescripts relating to supply chain management [ii] ensure

consistency and uniformity in supply chain management practises. I have read that correctly have I?

MR MOKHESI: Yes.

ADV PRETORIUS SC: And this would have been the objective of any prior policy?

MR MOKHESI: Yes, correct.

ADV PRETORIUS SC: And what is apparent is that right from the constitution through to national legislation treasury regulations which we will come to in a moment
10 and the policy that exists within the department itself that we are now referring to there are strict controls which govern procurement and expenditure of government departments. Is that a fair summary of the position?

MR MOKHESI: Yes.

ADV PRETORIUS SC: At page 112 we have a definition of fruitless and wasteful expenditure. Briefly what is fruitful and wasteful expenditure?

CHAIRPERSON: Fruitless Mr Pretorius.

ADV PRETORIUS SC: Sorry Chair.

20 **MR MOKHESI:** It is expenditure in vain in short, expenditure in vain.

ADV PRETORIUS SC: Right. And the definition continuous to be expenditure that could have been avoided at reasonable care been exercised. Am I correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: And it is not necessarily unlawful expenditure am I also correct in that?

CHAIRPERSON: Well if it is expenditure in vain it must be unlawful

ADV PRETORIUS SC: Well let me put it another way Chair.

CHAIRPERSON: Hm.

ADV PRETORIUS SC: It is to be distinguished from a regular expenditure. Fruitless and wasteful expenditure is something different from irregular expenditure. Do I
10 understand the position correctly?

MR MOKHESI: This is what?

ADV PRETORIUS SC: Well one has the concept.

MR MOKHESI: Ja.

ADV PRETORIUS SC: About fruitless and wasteful expenditure.

MR MOKHESI: Hm.

ADV PRETORIUS SC: That is expenditure made in vain.

MR MOKHESI: Yes.

ADV PRETORIUS SC: That could have been avoided had
20 reasonable care been exercised.

MR MOKHESI: Correct.

ADV PRETORIUS SC: And then there is a regular expenditure the definition is at the bottom of the same page. What is irregular expenditure?

MR MOKHESI: Hm yes.

ADV PRETORIUS SC: Do you know..

MR MOKHESI: You are asking me a question?

ADV PRETORIUS SC: Yes I am.

MR MOKHESI: Okay. It is either – it is either an expenditure that has – it was – I can just give you an example to say this is an expenditure that is against the policy framework that could be – that could.

CHAIRPERSON: Face this side Mr Mokhesi first.

MR MOKHESI: Okay. Expenditure – expenditure – I am just
10 making a few examples Chair.

CHAIRPERSON: Ja.

MR MOKHESI: Just one or two examples.

CHAIRPERSON: Hm.

MR MOKHESI: Against policy. You violated your own policy for example. That is – that could also be part of irregular expenditure.

CHAIRPERSON: Hm.

MR MOKHESI: Or you – you did not

CHAIRPERSON: Follow processes.

20 **MR MOKHESI:** Follow – yes that is one of the issues or when it is put on the [00:46:45] those were transparent and so on. One of those are missing then that will then qualify as an irregular expenditure. Not necessarily also.

CHAIRPERSON: So irregular expenditure may be expenditure which was made or incurred or made for a – for

a valid reason – for a valid and acceptable objective but the manner in which it was made.

MR MOKHESI: Made.

CHAIRPERSON: Makes it irregular.

MR MOKHESI: Irregular.

CHAIRPERSON: Ja. And it would include would it not unauthorised expenditure? In other words, if before you spend that money you are supposed to get authorisation from the HOD and you do not get that authorisation that
10 would still be irregular would it not?

MR MOKHESI: Ja it does not necessarily mean that all unauthorised expenditure is irregular.

CHAIRPERSON: Yes. It may be.

MR MOKHESI: It may be.

CHAIRPERSON: Ja okay.

ADV PRETORIUS SC: If we go on to page 115 please. The document entitled Terms of Reference will become relevant later particularly in relation to what happened in Gauteng but I understand Terms of Reference to have a technical or a
20 specific meaning. What are Terms of Reference in the context of this policy?

MR MOKHESI: Terms of Reference one perhaps could be meaning your specifications you know for lack of a...

CHAIRPERSON: I am sorry could mean?

MR MOKHESI: Your specifications for lack of a better word.

CHAIRPERSON: Oh okay.

MR MOKHESI: Now is Terms of Reference.

CHAIRPERSON: Ja okay.

MR MOKHESI: Could actually in the broader sense could actually mean that.

CHAIRPERSON: Yes okay.

ADV PRETORIUS SC: So if services and I am going back to the definition are required in terms of any procurement engagement between the department and a service provider
10 one would look to the Terms of Reference to find specifications of those services that are required. Do I understand the position correctly?

MR MOKHESI: Ja it depends on what procurement prodigy we are using.

ADV PRETORIUS SC: Right. So we will come to that in due course.

MR MOKHESI: Yes in due course.

ADV PRETORIUS SC: And then the praise unsolicited bid is defined there on page 115. Let me ask you before we get
20 there. Do you understand there to be any difference between an unsolicited bid and unsolicited proposal or are they the same thing?

MR MOKHESI: They in practice they might be the same.

ADV PRETORIUS SC: In any event unsolicited bid is defined here as an offer bid submitted by any person on

his/her or its own initiative without having been invited by the department to do so. The proposal then that was received by you which we have discussed at the commencement of your evidence was in terms of this definition I understand unsolicited. We established that I think.

MR MOKHESI: It might well be.

ADV PRETORIUS SC: It might well be? Are you saying it was – it could have been solicited? I understood it to be a
10 matter that did not raise much controversy certainly in evidence thus far that the proposal submitted to you which we discussed earlier.

MR MOKHESI: Yes.

ADV PRETORIUS SC: Had not been solicited by the department.

MR MOKHESI: Yes.

ADV PRETORIUS SC: That is correct, is it?

MR MOKHESI: Yes.

ADV PRETORIUS SC: Then if we go over the page please
20 to page 116.

MR MOKHESI: 116.

ADV PRETORIUS SC: Under paragraph 4 Employees to whom the policy applies. Basically, it applies to everyone in the department as I understand it.

MR MOKHESI: Yes.

ADV PRETORIUS SC: And everybody must obey it? Is that correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: And then paragraph 5 refers to various governing prescripts including the Public Finance Management Act. And over the page on page 117 there are a number of other prescripts which are referred to and expressly which apply to Supply Chain Management within the department. Do you see that at page 117?

10 **MR MOKHESI:** 117 yes.

ADV PRETORIUS SC: And if I may refer you to subparagraph B it is 5.2b on top of page 117. It reads:

“To meet the requirements as set in Section 38 of the PFMA the department will observe fully the five pillars of procurement set out in the General Procurement guidelines and they appear in brackets after that: [Value for money, Open and effective competition, Ethics and Fair dealing, Accountability and Reporting and Equity]”

20

Did those five pillars apply or did you regard them as applying in your department?

MR MOKHESI: Yes they do apply.

ADV PRETORIUS SC: And if we could go through please to paragraph 8.2 on page 119 under the head Value for Money.

Are you at page 119?

MR MOKHESI: Yes I am.

ADV PRETORIUS SC: If I may read it and then you can confirm whether I have read it correctly and whether it applied.

10 “Value for money remains the essential test against which procurement outcomes in the department must be justified. While not a criteria in itself it has nonetheless the basis for comparing procurement alternatives and offers from suppliers in order to identify the one that meets the needs in the most cost effective manner when all costs and benefits are taken into account especially the quality of the product that will be delivered and previous experience with the supplier.”

20 The general point as I understand is that value for money is if not the most important criterion certainly a very important one in any procurement process. Do I understand that correctly?

MR MOKHESI: Yes.

ADV PRETORIUS SC: Then if we look at the core principles under 8.3 they emphasise a number of principles that are reflective of the various constitutional and statutory principles that we have dealt with.

MR MOKHESI: Hm.

ADV PRETORIUS SC: Correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: Including 8.3[a][i]

“That the department has committed to ensuring transactions achieve the best net value for money outcome for the state.”

Again emphasising the value for money principle.

MR MOKHESI: Yes.

10 **ADV PRETORIUS SC:** The – and this may become relevant later as well Mr Mokhesi 8.3 sub-paragraph c[i]

“Obliges the department to observe the requirements of the preferential Procurement Policy Framework Act of 2000.”

And there are a number of provisions there – at least one or two provisions that we may deal with later. You understand that to be the position? Again you nod Mr Mokhesi.

MR MOKHESI: Yes okay sorry.

20 **ADV PRETORIUS SC:** Then in paragraph 8.6 on page 120 refers to the AO that is the Accounting Officer that was yourself as I understand your evidence.

“The Accounting Officer reserves the right to maintain oversight over the implementation of this policy in order to

a.Ensure that the director SCM executes this

policy in accordance with the relevant legislative requirements.”

In other words, the right of supervision over Mr Matlakala as I understand it was retained by the Accounting Officer yourself.

MR MOKHESI: Yes.

ADV PRETORIUS SC: And the right to maintain oversight was also in place if one goes over the page to page 121 sub-paragraph c

10 “To ensure compliance by all departmental officials through the SCM Policy.”

And then in 8.7 the various duties that rested upon the director of Supply Chain Management are set out. That was Mr Matlakala as I understand it?

MR MOKHESI: Yes.

ADV PRETORIUS SC: Is that correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: If we could go through to page 139 please.

20 **CHAIRPERSON:** 139?

ADV PRETORIUS SC: 139 FS7 paragraphs 12.13. Are you there?

MR MOKHESI: Yes I am – I am ...

ADV PRETORIUS SC: That paragraph deals with unsolicited bids and sub-paragraph a reads:

“The department is not obliged to consider an unsolicited proposal but may consider such a proposal only if it meets the following requirements.

- i. A comprehensive and relevant project feasibility study as established a clear business case.
- ii. The product or service involves an innovative design.
- 10 iii. The product or service involves an innovative approach to project development and management or
- iv. The product or service presents a new and cost-effective method of service delivery.”

And the paragraph continues under sub-paragraph B to talk of the unsolicited proposal it seems that you are correct when you say that the terms may be used interchangeably. There is not much substantial difference between a bid and a
20 proposal.

Now we are investigating that with the experts but if necessary, we will come back to you on that Mr Mokhesi. But for present purposes bids and proposals the phrases are used interchangeably in this provision here at 12.13.

Now when you read the unsolicited proposal that we

have referred to in evidence did you consider whether it met the requirements in 12.13 [A]?

MR MOKHESI: What we or what we normally do when you receive a proposal and that is precisely the reason why you have a specialist in the department and why you will refer a specific issue of procurement to the practitioner to determine whether what is the most appropriate way of – of procuring that specific need.

ADV PRETORIUS SC: Alright. You will recall the passages
10 in the transcript which were put to you earlier today Mr Mokhesi. As I understood the position there was an in-principle decision made by yourself to proceed with the procurement process and for that purpose you having made that decision referred it to Mr Matlakala to advise you or to decide what processes must be followed to conclude the process. Do I understand your previous evidence correctly?

MR MOKHESI: Yes. Yes.

ADV PRETORIUS SC: Yes. Alright. Now...

CHAIRPERSON: I am sorry. Is the answer yes?

20 **MR MOKHESI:** Yes.

CHAIRPERSON: Oh okay.

ADV PRETORIUS SC: And if you look at 12.13[a] it is quite strict as I read it in any event and you can comment if you like. It says:

“The department is not obliged to consider

an unsolicited proposal.”

So it was open to you having received the proposal simply to put it aside and take it no further. Do I understand the position correctly?

MR MOKHESI: Yes.

ADV PRETORIUS SC: But the provision goes on it says:

“You only – you may only consider the proposal or you may consider the proposal only if it meets certain requirements.”

10 In other words, unless the requirements in 12.13[a][i-iv] have been met you may not even consider the proposal. Do I understand the position correctly?

MR MOKHESI: Ja let me – let me try and perhaps put a perspective. The application of – or the use of I will call it an instrument that was used for this particular one. I admit that it was not the correct one. In terms of what does the Supply Chair practitioner advise in respect of the procurement for that I will say he applied an incorrect principle and not the unsolicited? So to me there is no point
20 in us debating around the issues of the unsolicited bid while I understand what it says. What the application of – was a problem. The application of when that proposal came how it was applied, I would say yes indeed it was an issue.

ADV PRETORIUS SC: Well let us if we may just try and summarise the position from your answer. I understood you

to concede that Mr Matlakala applied the wrong prescripts in this procurement process or advised incorrectly. Could you just explain that to the Chair please?

MR MOKHESI: I am saying when we choose – look the 16.6A that we are talking about and the various others unsolicited bids etcetera, etcetera we must not create an impression that they are – they do not have an underlying competitive bid in [01:05:09] all those particular issues.

CHAIRPERSON: Please look this side Mr Mokhesi.

10 **MR MOKHESI:** Oh sorry.

CHAIRPERSON: Yes.

MR MOKHESI: Sorry I must address the Chair.

CHAIRPERSON: We must not think they do not have an underlying?

MR MOKHESI: I am saying we must not create an impression that the only way to satisfy the constitutional requirements is your conventional tender as we know it. All those particular issues like your – your unsolicited bid and so on and so on all of them underlie – underlying – the
20 underlying issues there is all of them – they comply with the constitutional requirements transparency etcetera, etcetera.

CHAIRPERSON: Is what you mean that the application of is it regulation 6 or the application ...

MR MOKHESI: Precisely now...

CHAIRPERSON: Of that is part of the law?

MR MOKHESI: It is part of...

CHAIRPERSON: Is part of the procurement law and if I am making another example. If you – if you use a deviation that is still part of procurement law that you are supposed to apply and if you applied correctly there is no problem.

MR MOKHESI: There is no problem. It is how you apply it. Now I do not want to get into the debate about the unsolicited bids and so on and so on.

CHAIRPERSON: Yes.

10 **MR MOKHESI:** I am [01:06:36] I am saying.

CHAIRPERSON: Yes.

MR MOKHESI: The applicant – the role – let me put it there. And incorrect application or the law was used when it comes to this particular issue.

CHAIRPERSON: Yes.

MR MOKHESI: This is what I am trying to say.

CHAIRPERSON: Yes ja. You say the law was applied wrongly.

MR MOKHESI: Incorrectly.

20 **CHAIRPERSON:** Incorrectly. Ja okay.

ADV PRETORIUS SC: Well let us deal with that because I am not sure what you mean by the law was applied incorrectly. As a first step would you concede because it is pretty clear from the evidence that we have been given that the department could not have applied the provisions in

regard to an unsolicited bid in respect of what was proposed to you on the 28 May 2014 by Blackhead Consulting and Diamond Hill.

MR MOKHESI: If let me –

ADV PRETORIUS SC: Alright it seems if...

CHAIRPERSON: Or maybe – maybe Mr Pretorius can we start this way?

MR MOKHESI: Ja

CHAIRPERSON: Because you said what you are prepared
10 to say the law was applied incorrectly. I think that is what you said.

MR MOKHESI: Yes. I am saying...

CHAIRPERSON: Now maybe we should start by saying would you elaborate on why you say the law was applied incorrectly? Maybe if you – we come from that angle you give your own explanation that is going to be easier?

MR MOKHESI: Ja in – perhaps we should try and simplify it.

CHAIRPERSON: Ja.

MR MOKHESI: You apply 16.6[a] where you should be
20 applying ...

CHAIRPERSON: Something else?

MR MOKHESI: Something else.

CHAIRPERSON: Okay. No that is fine. I think that – that may clarify.

ADV PRETORIUS SC: Well not entirely Chair.

CHAIRPERSON: Ja. No, no that is fine.

ADV PRETORIUS SC: So I might have to go the long route.

CHAIRPERSON: No, no that is fine.

ADV PRETORIUS SC: And I do not know whether this is an appropriate time.

CHAIRPERSON: Oh ja I think we will have to take the lunch adjournment. We will take the lunch adjournment now and we will return at two o'clock. We adjourn.

REGISTRAR: All rise.

10 **INQUIRY ADJOURNS**

INQUIRY RESUMES

CHAIRPERSON: Let us continue.

ADV PRETORIUS SC: Thank you, Chair. Mr Mokhesi, before the long adjournment, we were speaking of the motion of an unsolicited bid and you offered a statement to the Chair that an incorrect approach or application of the law had been occasioned by Mr Matlakala, the Supply Chain Management official in your department. Would you explain that, please?

20 **MR MOKHESI:** Okay. I will say in this instance for example, the wrong prescript of the regulation was to have an unsolicited bid which I think was also what the PP found. And instead of using the unsolicited bid approach, the 16(6)(a) was applied. And that is in short what I am trying to answer, yes.

ADV PRETORIUS SC: And you say the 16(a)... 6.6 approach was incorrectly used?

MR MOKHESI: Incorrectly used or applied.

CHAIRPERSON: Or maybe that was still... are you saying that was not applicable in this case, another provision should have been applied?

MR MOKHESI: I think... let us ...[intervenes]

CHAIRPERSON: In other words ...[intervenes]

MR MOKHESI: Let us for a change assume that everything
10 was fine in terms of, you know, it has been

CHAIRPERSON: An open tender?

MR MOKHESI: Ja. Let us assume that everything was okay in terms of the 16th... ag, in terms Gauteng contract and so and so on and so on.

ADV PRETORIUS SC: Yes, yes. Ja. H'm.

MR MOKHESI: Now even if, I think that is also what... even if the 16(6)(a) was applied and it was correct and everything was okay, it would have still been the problem because it will have applied an incorrect regulation, so to speak. I think
20 that was the finding.

CHAIRPERSON: Are you basing what you say on what the public protector said? I heard you referring to PP.

MR MOKHESI: Yes.

CHAIRPERSON: Yes. So in other words, the public protector has made a certain pronouncement and you agree

with that pronouncement. Is that correct?

MR MOKHESI: In terms of the wrong application.

CHAIRPERSON: Wrong... wrong application?

MR MOKHESI: Ja, the choosing of the wrong...[intervenes]

CHAIRPERSON: Provision.

MR MOKHESI: ...provision of the law and applied in these instances.

CHAIRPERSON: Yes.

MR MOKHESI: So there is disjunction in that respect.

10 **CHAIRPERSON:** Yes, and you would say the correct one would have been which one?

MR MOKHESI: Well, on hindsight I would say, the correct one would probably would have been unsolicited.

CHAIRPERSON: Unsolicited?

MR MOKHESI: The unsolicited.

CHAIRPERSON: Ja, okay. Yes, Mr Pretorius.

ADV PRETORIUS SC: Well, let us go back then to the Department Supply Chain Management, the policy, which in fact, and I do not think there is much controversy on this
20 point, mirrors the PFMA and Treasury Regulations insofar they deal with unsolicited bid.

Let me put that to you. The provisions of your Supply Chain Management police would always mirrored the legislation and the Treasury regulations. Would that not be the case?

MR MOKHESI: Yes, the provisions of?

ADV PRETORIUS SC: The provisions of your Supply Chain Management police in the Department of Human Settlements ...[intervenes]

MR MOKHESI: Okay?

ADV PRETORIUS SC: ...would always have mirrored the provisions of the Public Finance Management Act and the Treasury Regulations ...[intervenes]

MR MOKHESI: Treasury Regulations.

10 **ADV PRETORIUS SC:** ...dealing with unsolicited bids.

MR MOKHESI: Okay. Yes.

ADV PRETORIUS SC: That is correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: Right. So let us just deal quickly then because it does not appear to be too controversial from what you said. If you go to FS7 page 139, please?

CHAIRPERSON: That is where we were before lunch.

MR MOKHESI: Yes, that is where we were?

20 **ADV PRETORIUS SC:** Yes, that is where we were before lunch.

ADV PRETORIUS SC: If you go to 12(13)(a), that is the provision we were discussing before lunch, which says that you can only consider unsolicited proposal if that proposal meets certain requirements and those requirements are set out in Roman 1 (i) to Roman 4 (iv) of paragraph 12.13(a) on

page 193. Do you see those requirements?

MR MOKHESI: Yes, I see.

ADV PRETORIUS SC: Now as I understand the proposal and if you want to take me there or take the Chair there, we can go there but they did not comply. That proposal did not comply with those requirements or certainly did not comply with all of them. We can go into the detail if you want.

MR MOKHESI: Maybe with not all of them but with some of them.

10 **ADV PRETORIUS SC:** You say some but not all?

MR MOKHESI: Ja.

ADV PRETORIUS SC: Which ones did it not comply with?

MR MOKHESI: Well, if you say around the issue of a business case, there was certainly a need. The product or service involves an innovative design. There is no element of that innovative ...[intervenes]

ADV PRETORIUS SC: There was no innovative design in that bid?

MR MOKHESI: Yes.

20 **ADV PRETORIUS SC:** Yes.

MR MOKHESI: But it was necessary.

ADV PRETORIUS SC: Similarly, I would understand that there was no innovative approach, apparent from the bid at least.

MR MOKHESI: What?

ADV PRETORIUS SC: There was no innovative approach as required by (iii) in the bid, would you agree with that?

MR MOKHESI: Yes.

ADV PRETORIUS SC: Yes. And then (iv), I do not understand the bid to have shown a new and cost-effective method of service delivery.

CHAIRPERSON: Well, is it not ...[intervenes]

MR MOKHESI: Well, it does not... sorry.

CHAIRPERSON: I am sorry. Mr Pretorius, is it not 3, 4 and
10 5 – are they not optional? I see that or after (ii) and/or after
(iii)? In other words, is the position not that the first two, (i)
and (ii) are compulsory but if you... maybe if you do not meet
(ii), at least you must meet (iii) or (iv) but you do not have to
meet all five... all four of them.

CHAIRPERSON: Yes, that is why I need to put them all.

ADV PRETORIUS SC: Yes. No, no, no. I understood you
to be... your question to be based on an understanding that
they all have to be complied with. That is why I wanted to
clarify that.

20 **ADV PRETORIUS SC:** Yes. Well...[intervenes]

CHAIRPERSON: Is your understanding the same as mine?

ADV PRETORIUS SC: Yes, Chair. Subject to...[intervenes]

CHAIRPERSON: But they need to be put to him, maybe one
by one to make sure.

CHAIRPERSON: By one. One by one. Well, let

us...[intervenes]

CHAIRPERSON: To make sure that is your understanding.

ADV PRETORIUS SC: It is maybe a different approach that I was adopting but I think it has the same effect.

CHAIRPERSON: Yes. No, that is fine.

ADV PRETORIUS SC: Because if there is no innovative design and no innovative approach and it is not new and cost-effective, then none of the alternatives would apply. And I understand, we are almost there Mr Mokhesi that it
10 was not innovative in design or approach and it was not new and cost-effective. Can we agree on that?

MR MOKHESI: Well, I do not know about the cost-effectiveness of your ...[intervenes]

ADV PRETORIUS SC: I am sorry. I cannot hear you.

MR MOKHESI: I am saying, I am not so sure about the cost-effectiveness. I will agree in certain instances, 2 and 3 perhaps, but certainly 1, there was a need for that.

ADV PRETORIUS SC: Well, let us put it to you. Was the design, was there an innovative design apparent from the
20 proposal?

MR MOKHESI: The project was about assessment and ultimately Phase 1 and assessment and auditing. And secondly, Phase 1, the removal. So that what it was about.

ADV PRETORIUS SC: Yes, but was there anything innovative about it, anything new about identifying houses

and assessing their condition?

CHAIRPERSON: I must ...[intervenes]

ADV PRETORIUS SC: It was apparent from the bid.

CHAIRPERSON: I understood you earlier and maybe I misunderstood you and you must tell me if I misunderstood you. I understood you earlier to accept that (ii) was not complied with. Am I right?

MR MOKHESI: Yes, I said so.

CHAIRPERSON: Yes, okay alright. I think that is the
10 answer Mr Pretorius.

ADV PRETORIUS SC: Yes, but the same applied to (iii), an innovative approach that was not complied with.

MR MOKHESI: Yes.

ADV PRETORIUS SC: I understood you to say that but I may be wrong. Correct?

MR MOKHESI: Correct.

ADV PRETORIUS SC: And (iv), the service presented a new and cost-effective method. Let us leave aside cost-effective for the moment. That is for later discussion. But
20 was it a new method that was being proposed?

MR MOKHESI: Certainly... maybe to ask, as the province it was new because we used largely or in the main, we followed the Gauteng route.

ADV PRETORIUS SC: Well, it was quite ...[intervenes]

MR MOKHESI: ...because we did not know anything else.

ADV PRETORIUS SC: Let us go then to the proposal.

CHAIRPERSON: But before you do that Mr Pretorius, I just want to make sure. (i), what did you say about it?

MR MOKHESI: Well, I indicated that there was a need.

CHAIRPERSON: There was or there was no feasibility study? (i) says, there must be a comprehensive and relevant project feasibility study that has established a clear business case. Was there a comprehensive project feasibility study that established a clear business case?

10 **MR MOKHESI:** Well, that... as I have indicated earlier, we relied mostly on... you know, somebody else had done it already.

CHAIRPERSON: Yes.

MR MOKHESI: And in this instance and that is why I am specifically referring to Gauteng because they have done it and we knew that being the member of the same unit settlement family, we knew that they have done it. And indeed, it was also part of the discussions at the main, this issue of the removal of eradication of asbestos. So we
20 merely followed up in terms of what Gauteng had done.

CHAIRPERSON: H'm. I take it that when the policy refers to a comprehensive and relevant project feasibility study, it contemplates a document which contains that study. Would that be the same understanding that you have as well about that requirement?

MR MOKHESI: Can you perhaps repeat?

CHAIRPERSON: Let me... okay, let me repeat. When (i) says there must be a comprehensive and relevant project feasibility study that has established a clear business case, I assume that what it contemplates, is that there will be a document which constitutes that feasibility study. Would your understanding be the same?

MR MOKHESI: Yes.

CHAIRPERSON: Or would you be your understanding be
10 that there not need be a document?

MR MOKHESI: The studies around asbestos are there.

CHAIRPERSON: Are there?

MR MOKHESI: Ja, there, you know. And in terms... also the dangers and so, I do not think that is an issue at this stage around the affects and the dangers of asbestos and that they needed to be eradicated.

CHAIRPERSON: Yes.

MR MOKHESI: And that is not... they are there. They are widely available. Yes.

20 **CHAIRPERSON:** So you would say that there was such a comprehensive study?

MR MOKHESI: Yes, there is.

CHAIRPERSON: It may not have been provided by the entity that put in a proposal but the study was there?

MR MOKHESI: The studies are there.

CHAIRPERSON: Yes, okay.

MR MOKHESI: The information is widely available.

CHAIRPERSON: Okay alright.

MR MOKHESI: And as I have indicated as well, this has been one... these discussions were continuing on at minimum(?) level as well.

CHAIRPERSON: Yes, okay.

MR MOKHESI: So that information is widely available.

CHAIRPERSON: Okay. I just wanted to make sure that
10 before we proceed further down the page, we know what the answer is in regards to (i).

ADV PRETORIUS SC: Alright. But perhaps... understand one thing you have said. You said you relied on what had been done in Gauteng.

MR MOKHESI: What I am saying is. The removal... I mean, the assessment, the work in Gauteng had already been done. So Gauteng, I will say was a... they had already established a principle in terms of the work that they have already done around ...[intervenies]

20 **ADV PRETORIUS SC:** There was a president?

MR MOKHESI: There was a president already.

ADV PRETORIUS SC: Yes. Well, then what was new about the message of service delivery in the Free State?

MR MOKHESI: Sorry?

ADV PRETORIUS SC: What was new then in the Free

State?

MR MOKHESI: We... every township in the Free State has got asbestos.

CHAIRPERSON: I am sorry. Every township in the Free State has what?

MR MOKHESI: Every township in the Free State has got asbestos roofs.

CHAIRPERSON: Roofs.

MR MOKHESI: Asbestos roofs.

10 **CHAIRPERSON:** Okay. And coupled with the fact that in the... in one of the State of the Province Address, an issue was also discussed around the eradication of the two-roomed houses which in essence also, those two-room houses also have asbestos roofing in the main.

Now as we speak, the province is incrementally also... because... incrementally also removing... *ag*, eradicating those two-room houses because of the historical facts. In terms of those two-room houses, they were also meant for a specific operation.

20 And coupled with that, because all those two-room houses have got asbestos roofs as well. So we sort of tapped on what Gauteng has done because... to have a holistic approach in terms of, one, getting rid of the two-room houses and, in the process, also look at removing the asbestos, both on the two-rooms and on the four-rooms and

then all the depilated houses.

ADV PRETORIUS SC: The questions remains Mr Mokhesi, what was new about the service proposed in this document, the unsolicited bid? What was new about it, about the service? You yourself said you had Gauteng as president.

MR MOKHESI: Well, Mr Pretorius I suppose you... what you are trying to push me on is on the issue of the unsolicited deed and whether we did anything new or not. And I think I responded to that question.

10 **ADV PRETORIUS SC:** Well ...[intervenes]

CHAIRPERSON: Well, I wanted to ask that... I was wonder to say... well, maybe first the question should be, whether you say there was anything new because I had understood you before, and I may have been wrong, that you were not saying that there was anything new but I may have misunderstood you.

MR MOKHESI: I do not understand. Perhaps, maybe the question of what was new. Safe to say this is within our mandate ...[intervenes]

20 **ADV PRETORIUS SC:** Ja.

MR MOKHESI: ...as a department.

ADV PRETORIUS SC: Ja.

MR MOKHESI: It is part of the housing quote. So it is part of our ongoing like in any event.

ADV PRETORIUS SC: But I understand that it might be part

of your mandate. I think that is well-established on the papers ...[indistinct] [coughing]. But let me ask you then. If you go to 12.13.

MR MOKHESI: Twelve point...?

ADV PRETORIUS SC: Thirteen. On FS7-193. That is where we are.

MR MOKHESI: Okay.

ADV PRETORIUS SC: Do you have that?

MR MOKHESI: Ja.

10 **ADV PRETORIUS SC:** Do you see (iv) as being a requirement, not of any other document but of the proposal? Do you see that?

MR MOKHESI: [No audible reply]

ADV PRETORIUS SC:

“The proposal may only be considered if it meets the following requirements.”

And then we go to 4. Now this is your document and your department Mr Mokhesi.

20 “The product or service presents a new and cost-effective method of service delivery.”

Perhaps you could explain to the Chair what news means in that context, it being your document?

MR MOKHESI: Well, I suppose the new will refer to the methods and certainly the removal of asbestos is within our mandate.

ADV PRETORIUS SC: Yes, we are not doubting it was within your mandate ...[intervenes]

MR MOKHESI: It is within our mandate.

ADV PRETORIUS SC: Mr Mokhesi, we want to understand, or at least, we would like to understand, this side of the room, what you mean by it must be new. A new method of service delivery.

CHAIRPERSON: Just your understanding, your own understanding of what this means. In other words, Mr
10 Pretorius is asking for your own understanding of what this part of your policy means.

MR MOKHESI: Well, you know, it might mean that it has never been done before.

CHAIRPERSON: Yes.

MR MOKHESI: That is a... that is also new.

CHAIRPERSON: H'm.

MR MOKHESI: Or it is, they are differently than conventional way but it is... but it was done before.

CHAIRPERSON: Ja.

20 **MR MOKHESI:** Yes, it might be that. It might mean that it is a completely, completely new thing. It has never been done before but, obviously, as we apply that it must be within your own mandate. It is not something that is outside your mandate. Or it might be a different method.

CHAIRPERSON: Of doing things.

MR MOKHESI: Of doing things.

ADV PRETORIUS SC: If we were to accept for the moment that it is was within your mandate, that is not a matter of dispute. The description that you have given of a new method of service delivery, I would understand is in accordance with the ordinary meaning of those words.

There is, and you can correct me if I am wrong, there is in this proposal at Free State 8164 nothing new or nothing different about what was done in Gauteng or what had been
10 before anyway. Would you like to have a look at Free State 8164?

MR MOKHESI: Nothing... nothing, in fact, nothing new.

ADV PRETORIUS SC: It is nothing new. Nothing unprecedented. Nothing that had not been done before. Nothing new as described by yourself.

CHAIRPERSON: If I can assist? You have said that (iv) at 12.3(13) means that the proposal comes up with a new method of doing things. Now Mr Pretorius is putting to you for your comment that in this proposal that was submitted,
20 there was no method of doing things that was apparent from the proposal. What do you say to that?

MR MOKHESI: Yes.

CHAIRPERSON: You accept?

MR MOKHESI: Ja.

CHAIRPERSON: Okay.

ADV PRETORIUS SC: So we do not need to go to the document then for the moment at least. But let us go further. Let us go with the National Treasury Circular. And to assist you here, we also have that document. It is at page 193 of the bundle that is in front of you. Maybe I am misleading you. FS7-196. This is a Treasury Circular.

MR MOKHESI: 193?

ADV PRETORIUS SC: No, 196. I am sorry. This is a Treasury Circular which is dated 28 October 2004. That is
10 apparent from the stamp at the bottom of page 196 and its heading is: Implementation of Supply Chain Management.

At page 197, it deals with unsolicited bids and I stress unsolicited bid and if we... what we are dealing here with in unsolicited bid, the Treasury Circular places some duties on an accounting officer in paragraph 2.2 on page 197. Do you have that?

MR MOKHESI: H'm.

ADV PRETORIUS SC: And if it reads:

20 “If you as an accounting officer, authority decides to consider an unsolicited bid, he or she may only do so if the product or service offered in terms of the bid is a unique innovative concept that would be exceptionally beneficial to or have exceptional cost advantages with the institution.”

Let us leave aside exceptional benefit and exceptional

cost advantages. We can deal with that later. But I understand that the product or service offered in terms of that unsolicited bid or proposal is conceded by you to be not unique and innovative.

Firstly, others have done it and secondly, it was not new. Would you accept that?

MR MOKHESI: Yes, yes.

ADV PRETORIUS SC: Yes?

MR MOKHESI: Yes.

10 **ADV PRETORIUS SC**: Sorry, you cannot nod with...

MR MOKHESI: Oh. [laughs]

ADV PRETORIUS SC: I mean, you can nod but you should also say yes.

CHAIRPERSON: Ja, when you nod, the microphone does not capture the nod. [laughs]

MR MOKHESI: Yes.

ADV PRETORIUS SC: But your answer to that question was: Yes, I understood.

MR MOKHESI: Yes.

20 **ADV PRETORIUS SC**: And then B:

“The person who made the bid is the sole provider of the product or service.”

Now given the experience of Gauteng, we know that not to be the case. Would you accept that?

MR MOKHESI: Ja. Yes.

ADV PRETORIUS SC: And C what applied because we understand that there have been some strategic planning around removal of asbestos.

MR MOKHESI: H'm.

ADV PRETORIUS SC: You know that/

MR MOKHESI: Yes.

ADV PRETORIUS SC: Alright. But then let us go to the National Treasury Practice Note 11 of 2008/09. Now that appears that at Free State 7-202.

10 **MR MOKHESI:** What page are we on Mr Pretorius?

ADV PRETORIUS SC: Free State 7-2...[intervenes]

CHAIRPERSON: Let us just say file ...[intervenes]

ADV PRETORIUS SC: Free State 7-202.

MR MOKHESI: 202?

ADV PRETORIUS SC: Yes. This is a document which appears on page 212 to have been issued on the 16th of March 2009 and issued in terms of Section 76 of the PFMA, Public Finance Management Act. You see that on page 212?

20 **MR MOKHESI:** 212?

ADV PRETORIUS SC: Yes.

MR MOKHESI: Yes.

ADV PRETORIUS SC: And this is a practice note dealing expressly with unsolicited proposals.

MR MOKHESI: Sorry, 212?

ADV PRETORIUS SC: We go back to 202 but the proposition I just put to you is at page 212, that this practice note was issued under the authority Section 76 of the PFMA and was issued on the 16th of March 2009. Do you have that?

MR MOKHESI: Yes, I have it.

ADV PRETORIUS SC: This document deals expressly and particularly with unsolicited proposals and it appears as such on page 202. Do you have that?

10 **MR MOKHESI:** H'm.

ADV PRETORIUS SC: Under the heading purpose, paragraph 1.1. reads:

“This practise note provides precise guidelines for institutions dealing with unsolicited proposals/concepts.

An unsolicited proposal/concept means any proposal/concept received by an institution outside its normal procurement process that is not an unsolicited bid that is a submission that must be innovative, unique and provided by a sole supplier.”

20

What we know is that the proposal that you received was not an unsolicited... well, it was received by you outside of the normal procurement process. It was unsolicited. Correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: Yes. So we go on then to 2 on page 203. There are set out criteria for consideration of an unsolicited proposal. Again, the provisions of your supply chain management policy are mirrored here. 2.1:

“Institutions are not obliged to consider an unsolicited proposal. It may consider such a proposal only if it meets the following requirements.”

And then requirements we have just dealt with are set out.

10 Do you see that?

MR MOKHESI: H’m.

ADV PRETORIUS SC: Those are the same requirements as contained in your policy, your departmental supply chain management policy.

MR MOKHESI: Yes.

ADV PRETORIUS SC: And then, if one goes over the page to paragraph 2.3:

20 “The requirement is that the unsolicited proposal must set out the following information in terms of the product or services offered. Firstly, a concise title and abstract approximately 200 words of the proposed product or service.”

We can debate whether that is applicable or not but it is perhaps not necessary to do so.

MR MOKHESI: Ja, on 2.2.

ADV PRETORIUS SC: 2.3 on page 204.

MR MOKHESI: Oh.

CHAIRPERSON: I think, Mr Mokhesi, Mr Pretorius is leaving both of us behind. I was still on 2003 as well.

ADV PRETORIUS SC: Now we are on 204. Well, I am at least, Chair.

CHAIRPERSON: I am there now.

ADV PRETORIUS SC: Page 204. Are you there?

Paragraph 2.3:

10 “The unsolicited proposal must set out the following information in terms of the product or service offered.”

Firstly, a concise title and abstract approximately 200 words of the proposed product or service.”

Let us go immediately to subparagraph (c).

“A statement describing how the proposal is demonstratively innovative and supported by evidence that the proponent is the sole provider of the innovation.”

20 Can we accept that that was not contained in the proposal that we referred to?

MR MOKHESI: Yes.

ADV PRETORIUS SC: Yes. (d):

“A statement of the anticipated benefits or cost advantages to the institution including the proposed

price or total estimated cost for providing the product or service in sufficient detail to allow a meaningful evaluation by the institution.”

As I read it, at least, it should have the price of the product or the total estimated cost, total estimated cost for providing the service in sufficient detail to allow a meaningful evaluation by the institution. Would you accept that the proposal did not contain that information or that statement?

10 **MR MOKHESI**: Contain what? The costs?

ADV PRETORIUS SC: No, it did not contain the total estimated cost for providing the service? Well, let us go there, if you like you can show me where it is contained, if you like.

MR MOKHESI: Chair ...[intervenes]

ADV PRETORIUS SC: I am just putting to you that it does not contain that information to try and move on.

MR MOKHESI: The proposal did not have the costs.

ADV PRETORIUS SC: I am sorry.

20 **MR MOKHESI**: You say the proposal did not have a...?

ADV PRETORIUS SC: Did not have the total estimated cost for providing the service in sufficient detail to allow a meaningful evaluation by the institution.

MR MOKHESI: It certainly did have a unit cost.

ADV PRETORIUS SC: Well, let us have a look. If you go

to Free State 8, FS8 page 164 and to assist you we can go straight to page 166 under the heading rate per house. There is a cost per house.14.30.

MR MOKHESI: Yes.

ADV PRETORIUS SC: But there is not a total cost of the service. In other words, you did not know how much at the end of the day the department would have to pay for the whole service.

MR MOKHESI: At the beginning, yes.

10 **ADV PRETORIUS SC**: At the beginning, yes. That came later.

MR MOKHESI: Yes.

ADV PRETORIUS SC: But not at this stage. Are we agreed on that?

MR MOKHESI: Yes.

ADV PRETORIUS SC: Yes. Then paragraph 3 on page 204 says under head ...[intervenes]

MR MOKHESI: Paragraph 3 on a different, not on that one, hey?

20 **ADV PRETORIUS SC**: No, that is still the same – no, not that document, the one before you, FS7, 204.

“Unacceptable unsolicited proposals”

Is the heading in paragraph 3. It says:

“The accounting officer must reject the unsolicited proposal if certain conditions apply.”

Right? And let us just go to 3.1 (a). Okay?

“If that proposal relates to known institution requirements...”

Now we know that your department had a requirement, it was within your mandate to remove asbestos. Are we agreed thus far?

MR MOKHESI: Yes.

CHAIRPERSON: The answer is yes.

ADV PRETORIUS SC: If the stenographer complains
10 anymore, I am going to get into big trouble, Mr Mokhesi.

MR MOKHESI: I think this thing is a little bit far. Yes?

ADV PRETORIUS SC: So it related to known institutional requirements and would you say that it could within reasonable and practicable limits be acquired by conventional competitive bidding methods? You could have gone out tender reasonably and practically.

MR MOKHESI: Ja and this is what I was trying to say to you, Mr Pretorius, the other processes, whether it is unsolicited bid, regulation 16.6 A and so on, those are
20 recognised bidding instruments.

CHAIRPERSON: Please look this side.

MR MOKHESI: Sorry. Ja, those are recognised bidding instruments that also have an underlying constitutional imperatives. So let us not create an impression that the conventional tendering system is the only one because

things can go wrong even in that particular – in that conventional tendering process. Things can go wrong as well. So that is basically what I am trying to say, let us not create the impression that it is the only ...[intervenes]

CHAIRPERSON: I think Mr Pretorius' question was based on 3.1(a) at page 204 because that provision requires, at least it seems to me, the accounting officer to reject and unsolicited proposal if certain conditions exist.

The first one, that is (a), is:

10 "If the proposal relates to known institutional requirements that can, within reasonable and practicable limits be acquired by conventional competitive bidding methods."

And, as I understand what paragraph (a) means it seems to say do not accept, as an accounting officer, an unsolicited proposal if it would be reasonable and practicable to obtain the same thing through the conventional competitive bidding methods. That is my understanding of what it says. Is it the same as your understanding?

20 **MR MOKHESI:** Yes.

CHAIRPERSON: Of paragraph (a).

MR MOKHESI: Sorry?

CHAIRPERSON: Is my understanding of paragraph (a) the same as yours, namely an accounting officer must reject and unsolicited proposal if the proposal relates to known

institutional requirements that can within reasonable and practicable limits be acquired by conventional competitive bidding methods. In other words, as I understand it, the paragraph seems to say you must remember, accounting officer, that the preferred method, is the conventional competitive bidding methods, those are the preferred but it is acknowledged that there may be circumstances where you do not have to use those but it therefore says if, what is proposed, is known institutional requirements that you can, as a department within reasonable and practicable limits obtain by using conventional bidding methods, use conventional bidding methods, do not go for the unsolicited proposal. That is my understanding of what paragraph (a) says.

My question is, is my understanding the same as yours?

MR MOKHESI: Okay, I hear what you are saying, Chairperson.

CHAIRPERSON: H'm?

20 **MR MOKHESI:** All what I am – you see, the fact of the matter is, we did not use ...[intervenes]

CHAIRPERSON: The competitive conventional.

MR MOKHESI: Or the – we did not use...

CHAIRPERSON: Conventional.

MR MOKHESI: Or, even for that matter, at the time, apply

to - you know, to come to a decision that says this - you know, with the advice of the practitioner at the time. This we think will qualify as unsolicited bids because what was in the mind in that particular point was the most appropriate method will be the 16.6 A and that is where we are because right now Mr Pretorius is questioning me on the issues of the unsolicited – while I consider, this like unsolicited bid, I accept, I accept that, on hindsight, say this is what would have happened but the fact of the matter
10 is, it did not happen that way.

CHAIRPERSON: Yes.

MR MOKHESI: We apply, as I have indicated earlier on, that we apply a...

CHAIRPERSON: A wrong...

MR MOKHESI: Yes.

CHAIRPERSON: Law or vision(?).

MR MOKHESI: The wrong section.

CHAIRPERSON: Ja. Yes, but what Mr Pretorius is trying to do is to try and make sure that we all understand where
20 there is common ground including your own understanding of the situation so that we can see where there may be differences so that is why he was saying this requirement here contemplates that the accounting officer should reject an unsolicited proposal if it relates to known institutional requirements that can within reasonable and practical

limits be acquired by conventional and competitive bidding methods.

My understanding of what you are saying - and I am trying to make sure we make progress - my understanding of what you are saying is, you accept that this requirement – you accept that this proposal related to known institutional requirements and it is not your case that the department could not within reasonable and practicable limits acquire these services by conventional competitive bidding. My understanding is that you are not contesting that.

MR MOKHESI: I am contesting ...[intervenes]

CHAIRPERSON: Yes.

MR MOKHESI: I am not contesting this particular issue because it was never applied in the first place.

CHAIRPERSON: Yes, okay, okay. No, thank you.

ADV PRETORIUS SC: Alright. Similarly, ...[intervenes]

MR MOKHESI: I think it will save the Commission's time as well, not to dwell on things that we never applied them in the first place.

CHAIRPERSON: Yes, yes, no, no, that is helpful because it makes us to understand what issues you do not contest, you accept and then we can get to the ones which may be contested as early, as quickly as possible.

ADV PRETORIUS SC: Well, let us just try and summarise

the position, as I understand your answer, Mr Mokhesi. The provisions in relation to unsolicited bids or unsolicited proposals could not be applied in this case, they were simply not applicable. That is how I understood your answer.

CHAIRPERSON: Let me see if I can ...[intervenes]

MR MOKHESI: Okay, please assist, Chairperson.

CHAIRPERSON: My understanding of your position is that you accept that even the provisions relating to unsolicited proposals were not complied with in this case.

MR MOKHESI: Yes because we never ...[intervenes]

CHAIRPERSON: You answered that.

MR MOKHESI: We never applied ...[intervenes]

CHAIRPERSON: You never applied them, therefore ...[intervenes]

MR MOKHESI: We instead used a different method.

CHAIRPERSON: Yes, yes.

MR MOKHESI: Which turned out not to be the correct method.

CHAIRPERSON: Yes. But you have already said you accept that in hindsight – you say what should have been done is to see whether these provisions were – could be applied.

MR MOKHESI: Yes.

CHAIRPERSON: Yes.

MR MOKHESI: It will serve no purpose to discuss what we did not do.

CHAIRPERSON: Yes.

MR MOKHESI: When I have admitted that this is possibly on hindsight should have happened.

CHAIRPERSON: Yes, yes, yes. So maybe to take that one step further because I think that is where Mr Pretorius was going, looking at this provisions, at these requirements for applicable to unsolicited proposals, you
10 would accept that still it would have been difficult to apply them or to say the requirements were met ...[intervenes]

MR MOKHESI: Alright.

CHAIRPERSON: Because, for example, there was nothing innovative about this report(?).

MR MOKHESI: Correct.

CHAIRPERSON: You accept that? Yes?

MR MOKHESI: Yes, I am saying correct.

CHAIRPERSON: Yes, okay.

ADV PRETORIUS SC: So ...[intervenes]

20 **CHAIRPERSON:** I think that should...

ADV PRETORIUS SC: Yes, just to summarise them, Mr Mokhesi, not only did you not apply these provisions, you applied different provisions but you could not apply these provisions because the bid did not comply with the provisions that are set out in the prescript. Is that a far

summary?

MR MOKHESI: [indistinct – voice muffled]

ADV PRETORIUS SC: We know what you did and did not do, that is the subject matter of evidence, it is in your statement. You did not seek to apply the provisions relating to unsolicited bids or unsolicited proposals. That much I think you have said now, correct?

MR MOKHESI: Ja and I think ...[intervenes]

ADV PRETORIUS SC: Please take the mask off.

10 **MR MOKHESI:** Sorry, sorry. I think even in my statement because the issue of unsolicited bidding is a finding, to say this is what we should have done and [indistinct – dropping voice]. Nowhere do I make a reference on the issue of unsolicited bidding.

ADV PRETORIUS SC: Yes, no sure. The ...[intervenes]

MR MOKHESI: Emphasis has always been on the issue of the application of the 16.6 A.

ADV PRETORIUS SC: Yes. So we will get there, I promise. But, for the moment, not only did you not apply
20 but the proposition that is apparent from what we have – the work we have just done is that you could not do so in any event. You did not do so and you could not do so simply because the bid, the unsolicited bid did not comply with the requirements of the statute and the regulations and the practice note. Is that a fair summary.

MR MOKHESI: Yes, we – if at the time we ...[intervenes]

CHAIRPERSON: Tried to apply them.

MR MOKHESI: We it will – I, you know, it will not pass so...

CHAIRPERSON: Yes, ja.

ADV PRETORIUS SC: Good. Okay, then we are on the same page. Just for the sake of completeness although we know you did not do it and you did not consider doing it for other reasons, it is important to place on record that even
10 where an unsolicited bid results in an agreement, there is still a procurement process that must be gone through. In other words, the agreement must be advertised and other people must be given a chance to enter the competition, as it were.

MR MOKHESI: Ja, the solicited, unsolicited bid also is process.

ADV PRETORIUS SC: Yes, has its own process.

MR MOKHESI: It has its own process.

ADV PRETORIUS SC: And if I may just refer you to
20 paragraph 5 on page 208 that even if an unsolicited proposal or unsolicited bid is accepted, it must still be subject to a competitive process.

MR MOKHESI: So is all other ...

ADV PRETORIUS SC: Yes, but the answer is yes.

MR MOKHESI: all other processes.

ADV PRETORIUS SC: Yes.

MR MOKHESI: Whether it is 16.6 A, underlying to that it is a competitive bidding process.

ADV PRETORIUS SC: But the way it works in this case, as I understand it, and I am trying to summarise so we can move on.

MR MOKHESI: Okay.

ADV PRETORIUS SC: Is that once an agreement is reached with a person who has submitted an unsolicited
10 bid or unsolicited proposal, rather. Unsolicited proposal, let me stress that, you must still go out ...[intervenes]

MR MOKHESI: Yes.

ADV PRETORIUS SC: ...to the public and allow other people to make competing bids, correct?

MR MOKHESI: Correct.

ADV PRETORIUS SC: Thank you. Alright, then let us move on.

CHAIRPERSON: The answer was yes?

MR MOKHESI: Yes.

20 **CHAIRPERSON:** Ja, okay.

ADV PRETORIUS SC: And those provisions are contained in the circular at page 208 and following, Free State 7 to 108 and following under procurement, paragraph 5.

And what is also interesting about the procedures that follow the acceptance of an unsolicited bid is the

provisions in paragraph 6 on page 209, that external consultants may be approached for advice in relation to the bid that has been accepted. Do you see that in paragraph 6?

MR MOKHESI: 209?

ADV PRETORIUS SC: 6, page 209. Do you see that?

MR MOKHESI: H'm.

ADV PRETORIUS SC: Just very briefly, it makes provision for an accounting officer or institution to seek
10 advice from independent consultants or experts where there may be a need to do that.

MR MOKHESI: Yes.

ADV PRETORIUS SC: Correct?

MR MOKHESI: I see it.

ADV PRETORIUS SC: Right, if we may then go to the topic that you have mentioned a number of times and that is the regulation 16A 6.6, that is the provision that you have mentioned earlier.

CHAIRPERSON: Where do we find it?

20 **ADV PRETORIUS SC:** It is in FS7.

CHAIRPERSON: Same file that we have?

ADV PRETORIUS SC: Yes, same file. Just to identify the document it is page 4 of FS7. This is a document entitled:

“Treasury Regulations for departments, trading entities, constitutional institutions and public

entities issues in terms of the Public Finance Management Act of 1999.”

And the regulations are dated March 2005, that is apparent from page 4. Do you see that?

MR MOKHESI: Yes.

ADV PRETORIUS SC: Okay, now if we go to 8.1.1 and I am talking about paragraph 8.1.1.

MR MOKHESI: Oh, the same document.

ADV PRETORIUS SC: I will get there in a moment. It is
10 on page 33.

MR MOKHESI: 33?

ADV PRETORIUS SC: 8.1 deals with responsibility of the accounting officer in relation to payments made from funds of a department, for example in your case. Do you see that in 8.1.1?

MR MOKHESI: Yes, I see.

ADV PRETORIUS SC: And 8.2.1 says that:

20 “An official of an institution may not spend or commit public money except with the approval either in writing or by duly authorised electronic means of the accounting or a properly delegated or authorise officer.”

Do you see that?

MR MOKHESI: H’m.

ADV PRETORIUS SC: Let us then go through to 16A

which appears – if you would bear with me for a moment, Mr Mokhesi. Under the head Supply Chain Management on page 60. These now are the regulations that have been issued under the auspices of the Public Finance Management Act, they are part of that hierarchy of control provisions that we spoke about earlier but if I may refer you to 16A 3.1, just to confirm the position in terms of the regulations. It reads:

10 “The accounting officer of accounting authority of an institution to which these regulations apply must develop and implement and effective and efficient supply chain management system in his or her institution for the acquisition of goods and services.”

That is consistent with provisions and other instruments that we have referred to.

MR MOKHESI: Yes.

ADV PRETORIUS SC: And then 16A 3.2:

20 “A supply chain management system referred in paragraph 16A 3.1 must be fair, equitable, transparent, competitive and cost effective.”

And then there are various other provisions that apply, again mirroring both your prescripts in your department and your supply chain management policy at the bottom of the pile and the constitution at the top of the pile, correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: Then, 16A 6.6, if you would go there, please?

MR MOKHESI: The following page?

ADV PRETORIUS SC: It is on page 62.

MR MOKHESI: 62.

ADV PRETORIUS SC: This is the provision that was sought to be applied in the present matter, although you have made certain concessions that it could not be. Do I
10 understand you correctly?

MR MOKHESI: Yes.

ADV PRETORIUS SC: Alright, it reads:

“The accounting officer or accounting authority may, on behalf of the department, constitutional institution of public entity participate in any contract arranged by means of a competitive bidding process by any other organ of state subject to the written approval of such organ of state and the relevant contractors.”

20 **MR MOKHESI:** Yes.

CHAIRPERSON: I am sorry, Mr Pretorius, precisely where under 16A, A6 are you reading?

ADV PRETORIUS SC: 16A 6.6 on page 62.

CHAIRPERSON: 16A 6.2?

ADV PRETORIUS SC: Point 6.

CHAIRPERSON: Point 6?

ADV PRETORIUS SC: Yes on page 62.

CHAIRPERSON: Oh, okay, alright I have found it.

ADV PRETORIUS SC: There are several requirements contained in that provision but perhaps we could short circuit the whole debate or the whole series of questions if you just said to the Chair in what respect it was incorrect to apply this provision in the case of the asbestos contract.

MR MOKHESI: I think I will – in the main I will mention
10 three things. Yes. Because which is what I asked the supply chain because more often than not, as an accounting officer, you get to know about problems when they will get or when they are picked up by an auditor.

CHAIRPERSON: Okay, just raise your voice again?

MR MOKHESI: I am saying you pick up more often than not, as an accounting officer, you pick up when they have occurred, when problems have occurred.

CHAIRPERSON: Yes.

MR MOKHESI: And through either internal audit or
20 external auditors. That is when you realise that there are problems.

CHAIRPERSON: H'm.

MR MOKHESI: That is when you realise that there are problems. Now the questions that I ask, there are only three things, to the Supply Chain. One, why 16(a)(6) in

other words if you are participating in a contract of another institution if it is not a joint venture there it cannot be a joint venture here. That is the first – those are the – secondly...[intervenes].

ADV PRETORIUS SC: And it reads:

“The above has reference to your proposal submitted to this department and your appointment by the National Department of Human Settlements.”

Is there any reason why you addressed Blackhead
10 Consulting Pty Limited and not the joint venture?

ADV PRETORIUS SC: Sorry to interrupt you, Mr Mokhesi but I didn't hear that, if you could repeat that please.

MR MOKHESI: Okay, I'm saying the three issues that I requested when picking up that there is a problem in terms of the irregularity, so say, one, the joint venture, you know the 16(a)(6) requires that it must be the same company if you participate you must participate in a contract with the same company. Two, did you request documents, right, because that's the first process of – that's where the due
20 diligence starts because you don't want to - you know if it is a regular on the other side you can't regularise it yourself and the only way that you can be in a position to know is to get all the documents, you know from the advert, how they were appointed, who were the participants etcetera, etcetera, all that information. Then you'll be in

the position to identify possible risk of any irregular expenditure. Now the third issue is around the issue of the unit price, right 650 there, you can, up to a point, if you participate increase the price because, indeed, the Free State Province, it's a vast province but they know that you have to get – make a motivation to Treasury, Treasury would have to allow you to be able to increase that. If, for any reason, you have to deviate from the existing price. So, those three issues, because they were not complied,
10 that's what made us to be where we are in the main. Obviously, you know, there are other processes when irregular expenditures, there's a framework that defines what you have to do and so on and so on.

ADV PRETORIUS SC: Alright, well perhaps you could assist us with the provisions that you refer to in due course but if I may just see if I understand you correct...[intervenues].

CHAIRPERSON: Just one second, had you finished?

MR MOKHESI: Ja.

20 **CHAIRPERSON:** Oh, okay.

ADV PRETORIUS SC: The first issue you raised was that, in order to apply this provision, 16(a) 6.6 of the Treasury regulations, in order to participate in a contract that has been entered into an executed elsewhere you must actually participate in that very contract, is that correct and that did

not occur in this case?

MR MOKHESI: You – not only that, but you must – it must be like for like.

ADV PRETORIUS SC: Yes, right so it must be the same parties, same terms and conditions, same price?

MR MOKHESI: Yes.

ADV PRETORIUS SC: Correct and that didn't occur in this case?

MR MOKHESI: It could not – you know, they could not
10 pick it up because they did not request the documents, I
mean this is one of the things, they could not – in other
words, that's where the due diligence start. Your first –
because – well they gave three answers which they –
maybe If I can – the answers around – maybe let's start
with this issue of the JV, say why. In their opinion, they
did not see that as an issue because I think in one of the
affidavits a mention is made that, one, that was appointed
there was a lead consultant and therefore did not find it
necessary for – did not think it is an issue but it is an
20 issue.

CHAIRPERSON: Yes, they may be having that view but your view is different.

MR MOKHESI: It's an issue, ja it is an issue.

CHAIRPERSON: Okay.

MR MOKHESI: Secondly, on the issue of the due

diligence to say, let's get – why did you not get documents from Gauteng, you know, all documents...[intervenes].

CHAIRPERSON: Which would have given them a full picture.

MR MOKHESI: It would give you the full picture of whether this is – this is where we should participate or not. Now, one of the things that has been – I think even before the 90 you know before the 19 Gauge issue, because that's the one that actually clarifies what must happen, for the
10 application of the 16(a)(6), also take into consideration that this particular issue happened, we had different interpretation but the fact of the matter is, if you have to do a – if you have to avoid the risk of irregular expenditure, you still have to do more and see – so that you don't transfer your problem to you basically and the response is that there is nowhere, either in the Act itself, in the regulations that say you must seek documents, that was some of the – but as a matter of course you need to do that so that to avoid this particular – indeed it doesn't
20 say that, simply, their interpretation was that, as long as the Accounting Officer of the other institution assures you that you, you know, due process has been followed and so on and so on that's all that you need to do but with the advent of the 90 Gauge it emphasises that you must get documents.

CHAIRPERSON: In other words part of what you are saying is, you might be hearing whatever view they had, you are saying, they had to satisfy themselves that, what happened in Gauteng was regular and the way to do that was to ask for documents and they did not do that.

MR MOKHESI: Yes, because at the time – at the time when this – it was only declared irregular subsequent, at a later stage but you could have probably have been in the position to identify risk that because of X, Y, Z there's a
10 possibility that this particular contract might be declared irregular. Now, you can't regularise it if it has been declared irregular at the source.

CHAIRPERSON: Yes, Mr Pretorius.

ADV PRETORIUS SC: If we could just summarise so that I make sure I understand your answer, Mr Mokhesi. In order for the Free State Department to participate in a contract that had been entered into between the Gauteng Department of Human Settlements and a service provider, certain requirements had to be in place. You've described
20 it appropriately, I think, when you used the words like for like, it must be the same service provider, it must be the same terms and conditions in relation to performance and price and that, that should be evidenced by an examination of the documentary record.

MR MOKHESI: Yes.

ADV PRETORIUS SC: And ...[intervenes].

MR MOKHESI: Because that – if you do that at least you'll be in the position to reduce the risk.

ADV PRETORIUS SC: Yes, so as I understand what didn't happen in the Free State Department was that the evidence to show that the regulation could indeed apply, like for like, was not called for or examined.

MR MOKHESI: Ja, remember, I think the 19 Gauge case also came up with a lot of other issues in the process but,
10 indeed, even then, you know, like for like, yes that should be.

ADV PRETORIUS SC: Yes, well had they looked at the documentation in your Department they would have discovered that it wasn't like for like, it wasn't the same service provider, it wasn't the same terms and conditions of contract.

MR MOKHESI: Yes, in other words, it was not, for example the JV issue that I alluded to...[intervenes].

ADV PRETORIUS SC: Well we'll come to those issues in
20 a moment when we get to the detail at the moment we're just dealing with the general principles.

MR MOKHESI: Yes.

ADV PRETORIUS SC: Lets then, look at what actually happened and hopefully we can deal with this more quickly than we've dealt with the issues thus far but before we go

there, did you know that the Premier's office in 2010/2011 issued a directive that all procurement documentation should be sent to the legal advisor in the office of the Premier?

MR MOKHESI: No, I was not even...[intervenes].

ADV PRETORIUS SC: Yes, they pre-dated your appointment.

MR MOKHESI: Ja it pre-dates my appointment.

ADV PRETORIUS SC: Yes, but did you
10 know...[intervenes].

MR MOKHESI: But what I've seen in the files was, simply that there's a contract, I don't know whether it implied procurement documents, I thought I saw, in the files it simply says the contracts be sent to the State Law Advisors...[intervenes].

ADV PRETORIUS SC: Well we'll get to those...[intervenes].

MR MOKHESI: That's what I saw.

ADV PRETORIUS SC: Just before we go there then, we'll
20 look at the documents, they're in FS7 page 305, if you want to go there.

MR MOKHESI: 305?

ADV PRETORIUS SC: 305, now at page 305, and perhaps this is the only one we need to refer to, is a document dated the 23rd of June 2011, it signed by the Director

General, in the office of the Premier and it says,

“Submission of contracts, agreements to the State Law Advisors and the office of the Premier, and it reads, it was brought to my attention that Departments submit contracts/agreements without submission of the relevant background and supporting documents which includes procurement documents”,

It then goes on to say that, procurement must be
10 fair, equitable, transparent, competitive and cost effective and it say, what should be supplied to the State Law Advisor in the office of the Premier, do you see that? That includes all procurement documents, correct?

MR MOKHESI: Well, the letter – okay the document that I’ve seen is this one, I think 307 which emphasis the [indistinct – dropping voice] contract ...[intervenes]

ADV PRETORIUS SC: Well let’s deal with the one at 305 first and then we can go to 307 if you wish.

MR MOKHESI: Okay.

20 **ADV PRETORIUS SC:** The one at 305 is dated 23rd of June 2011, the one at 307 is dated a year earlier, 1st of July 2010. So, in other words, I would assume that the document at 307 cannot override the directive in 305 to 306, you’d accept that, I’d presume?

MR MOKHESI: It cannot?

ADV PRETORIUS SC: It cannot override it because it pre-dates it, in other words, it was a valid instruction in 305/306 the letter of 23rd June 2011, I'm not sure we should be arguing about this.

MR MOKHESI: 305.

CHAIRPERSON: Are you talking about the one at 305?

ADV PRETORIUS SC: Yes Chair, 305 and 306.

CHAIRPERSON: Have you got that page Mr Mokhesi?

MR MOKHESI: Ja I have 305 but I don't understand Mr
10 Pretorius ...[intervenens].

CHAIRPERSON: The question, the proposition okay do you want to try again Mr Pretorius?

ADV PRETORIUS SC: Well, let's just deal with the document at page 305 to 306, correct? You've got that document?

MR MOKHESI: Yes, I have it, 305.

ADV PRETORIUS SC: That document says that all procurement documents, background and supporting documents to contracts and agreements entered into by a
20 Department...[intervenens].

MR MOKHESI: Are you reading somewhere Mr...

ADV PRETORIUS SC: Yes, I'm looking at paragraph two, I'm paraphrasing but perhaps I should read it for clarity.

“It was brought to my attention, says the
Director General of the Premier's office, that

Departments submit contracts/agreements without submission of the relevant background and supporting documents which includes procurement documents’,

And then paragraph three,

“In order to further clarify what is expected from Departments when contracts/agreements are submitted for scrutiny, the following must at least, accompany all contracts/agreements submitted to the State Law Advisors. 3.1 Procurement documents relating to the service provider, which could include the tender documents, quotation documents or submissions for deviation. 3.2 Soft copies, electronic of all contracts/agreements. 3.3 Inputs/comments of provincial Legal Advisors relating to the specific contract/agreement. 3.4 Any other information that could be relevant and should be taken into account”,

10

In other words what the office of the Premier is saying to every department, give us full information of all procurement and contracts entered into, is that a fair summary of this directive?

20

MR MOKHESI: In terms of this letter?

ADV PRETORIUS SC: Sorry?

MR MOKHESI: In terms of this letter?

ADV PRETORIUS SC: Yes, in terms of this letter.

MR MOKHESI: Okay.

ADV PRETORIUS SC: Now the question I have, it's pretty clear what this letter says, I don't think there can be much debate about it but were you aware of this when you took office in 2012?

MR MOKHESI: No.

ADV PRETORIUS SC: No, do you know whether or not your Department complied with this directive in relation to
10 the Free State asbestos project?

MR MOKHESI: I don't know, certainly, from my side I've never submitted any procurement documents through all this.

ADV PRETORIUS SC: Okay and do you know – or how long before you arrived in the Department, Mr Matlakala had been there?

MR MOKHESI: He arrived after me.

ADV PRETORIUS SC: He arrived after you, okay thank you. If we could go to FS6 - 445, that is once again to the
20 transcript...[intervenues].

MR MOKHESI: FS?

ADV PRETORIUS SC: FS6, so that's another file, Ms Ragata will help you. If you could go to page 445 please. There Mr Lampbrecht asks you, in the first third of the page, 445 so can you then confirm that this contract, and

they're talking about the contract in the asbestos matter, was never sent to Mr Venter's office and you say, not to my – not that I'm aware of but then you clarify to say, maybe it was, maybe not. So, is it correct that the position is, you don't have any knowledge as to whether it was submitted or not?

MR MOKHESI: We have our own legal division – legal unit, Chairperson, so all the contracts will, ordinarily be referred to – and they are responsible for compiling the
10 contracts and so on. If they choose to use the State Law Advisors in the name of Mr Venter, it doesn't mean that we don't use Mr Venter from time to time because of his experience, it does happen but I cannot say certainly, in this instance...[intervenes].

ADV PRETORIUS SC: So, would you have had a legal advisor in your own office, that's the Free State Department of Human Settlements?

MR MOKHESI: Yes, we have a legal...[intervenes].

ADV PRETORIUS SC: And that person would have had a
20 duty to look through this contract and the procurement process.

MR MOKHESI: Yes.

ADV PRETORIUS SC: Did that happen?

MR MOKHESI: The practitioner, in the main, in other words the person who hold or who advises, particularly in

matters of supply chain processes will be the Director Supply Chain, however, in the formulation of the contract and so on he will then, in the process, also consult with the legal department. I assume that it did happen because it should happen that way...[intervenes].

ADV PRETORIUS SC: Did you check whether it had happened?

MR MOKHESI: I didn't check whether it has happened it's a matter of course it must happen that way, he knows.

10 **ADV PRETORIUS SC:** Right, well this was an unusual circumstance it's not every day that 16(a) 6.6 would apply, I understand, this was an unusual circumstance, correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: Was it not a circumstance that would require the Accounting Officer to make sure that the process and the resultant agreement was subject to legal scrutiny?

MR MOKHESI: I was given an assurance that it has happened.

20 **ADV PRETORIUS SC:** Who told you that it had happened?

MR MOKHESI: The Supply Chain Practitioner.

ADV PRETORIUS SC: The Supply Chain Manager?

MR MOKHESI: Yes, the Supply Chain Practitioner.

ADV PRETORIUS SC: Mr Matlakala?

MR MOKHESI: Mr Matlakala.

ADV PRETORIUS SC: If you go to FS6 again please, once again to the transcript of your interview at page 460, 460-FS6.

MR MOKHESI: Ja.

ADV PRETORIUS SC: There, once again, the contract in this matter was being discussed and two thirds the way down the page Mr Lampbrecht asks,

10 “Was the Premier aware of this contract, and your answer was, Premier will be aware of all the contracts of all the contract in – because you know in the province not specifically for this particular, in the same way as my because I report to the MEC, they will know”,

Simple question is, would the Premier have known about this contract?

MR MOKHESI: Well, I cannot say for certain but I report to the MEC.

20 **ADV PRETORIUS SC:** So, you would have reported this to the MEC, this contract?

MR MOKHESI: That’s who I report to.

ADV PRETORIUS SC: The MEC would have known and I take it from your answer there that you infer that if the MEC knew it was likely that the Premier knew, do I interpret your answer here correctly? Where you say the

Premier will be aware of all the contracts because I report to the MEC.

MR MOKHESI: I cannot say with commitment that the Premier would know.

ADV PRETORIUS SC: But are you prepared to stand by your statement here on 460?

MR MOKHESI: To say – in respect of?

ADV PRETORIUS SC: Well you say here, Mr Mokhesi,

10 “The Premier will be aware of all the contracts of all the contracts because you know in the province, not specifically for this particular, as the same way as my because I report to the MEC, they will know”,

Now, I understand that it’s not entirely clear what is said here but I’m suggesting to you that what you’re saying here, the Premier would know because I report to the MEC and the MEC knows.

MR MOKHESI: The Premier will be aware of – generally of the projects in the province.

20 **ADV PRETORIUS SC:** Okay, let’s then deal with the process that actually occurred, and I’d like to put to you some of the correspondence between parties, including yourself, if you’ll just bear with me a moment. If you would go to FS8 please.

CHAIRPERSON: Have you got FS8?

MR MOKHESI: Ja, FS8.

CHAIRPERSON: Okay, Mr Pretorius, is still going to say the page number.

ADV PRETORIUS SC: Page 169, that is a letter addressed by yourself, that's your signature is it?

MR MOKHESI: Yes.

ADV PRETORIUS SC: Dated 19 June 2014 to the CEO of Blackhead Consulting Pty Ltd.

MR MOKHESI: Yes.

ADV PRETORIUS SC: And it says that the above has
10 reference to your proposal submitted to this department and your appointment by the National Department of Human Settlements. Now, to be fair to you, if you look at the top right-hand corner of the letter you'll see there, enquiries J Matlakala, did he draft this letter?

MR MOKHESI: He did.

ADV PRETORIUS SC: Right, did you pay attention to what was contained in this letter when you signed it?

MR MOKHESI: Ja, we did have a discussion and obviously it is through – you know I act through his
20 recommendation.

ADV PRETORIUS SC: Right, because if you remember the proposal to – was submitted by Blackhead and by Diamond Hill, do you remember that, on the cover page?

MR MOKHESI: Yes.

ADV PRETORIUS SC: Right, but this letter is addressed

only to the CEO of Blackhead Consulting, do you see that?

MR MOKHESI: Yes.

ADV PRETORIUS SC: And it reads,

“The above has reference to your proposal submitted to this department and your appointment by the National Department of Human Settlements.”

Is there any reason why you addressed Blackhead Consulting Pty Limited and not the joint venture?

MR MOKHESI: It was not – you know the issue of – of the
10 Joint Venture you know we subsequently came. I think I
have already – I have already Chairperson addressed how it
happened. Because if you see on all the letters that are
written here the enquiries has always been the Supply Chain
practitioner. Now the only reason why it was addressed to
Blackhead in my understanding there was that it was
Blackhead which was doing the work in Gauteng and had a
contract – sorry – and had a contract. Now that Diamond
Hill was not part of Gauteng it only became apparent later
and as I have indicated you know some of these particular
20 issues but ...[indistinct] in our accounting office, is when
they were you know where the bananas hit the fan for lack of
a better word. It is when you pick up not through this – the
practitioners have said for the people who are doing the
work but because of external auditors either internal auditor
or external auditor it is them that those particular issues

come up.

ADV PRETORIUS SC: Because I understand your answer Mr Mokhesi it is that you addressed this letter to Blackhead Consulting Pty Limited because you knew that it was Blackhead that had entered into the Gauteng contract and it was only Blackhead that could participate in a contract that had been sourced from Gauteng.

MR MOKHESI: Ja but also let me just – you know I earlier on spoke about the – the issue of – of the deal – documents.

10 Now in this you know my understanding at that particular time because normally if you get documents then you will know that it was not only Blackhead that was appointed it was a couple of other people. And even in that particularity you need to have sort of a – of a bidding sort of. There were so many people that were – there were so many companies that were appointed there to do this particular [01:12:48]. It was set aside the issue of irregularity first. But it was not only Blackhead that was appointed it was Alice. So what – what – what present – how this presented itself you know in
20 the beginning it presented itself as if it is Blackhead that won the bid basically. I mean this is how it presented itself.

ADV PRETORIUS SC: Alright. Well if you look at the content of this document at 169 of FS8 you will see references made to the Department of Human Settlements Free State wishing to extend the contract that Blackhead had with the National

Department of Human Settlements in line with Treasury Regulation 16a66 of 2005. Do you see that?

MR MOKHESI: Hm.

ADV PRETORIUS SC: Now that we understand from other evidence and you can correct this evidence if you feel it is incorrect. That was the appointment of Blackhead Consulting Pty Limited to a panel of service providers. Do you understand that to be the case then?

CHAIRPERSON: Do you want to draw his attention to the
10 specific paragraph in the letter?

ADV PRETORIUS SC: If you look at paragraph 1 reads:

“That the department wishes to extend your current contract – that is Blackhead’s contract – secured by the National Department of Human Settlements in line with Treasury Regulations Number 16a6.6 of 2005.”

MR MOKHESI: Hm.

ADV PRETORIUS SC: Now it is apparent from other
20 documentation which I can show you in a moment as well as the evidence of the bid of department in the National Department of Human Settlements that what was being talked of here was the appointment of Blackhead to a panel. It was not an individual instruction to perform work.

MR MOKHESI: Oh okay.

ADV PRETORIUS SC: Which had terms and conditions.

MR MOKHESI: Okay.

ADV PRETORIUS SC: You agree with that?

MR MOKHESI: Okay. Yes.

ADV PRETORIUS SC: Do you accept that?

MR MOKHESI: There was no contract it was a panel.

ADV PRETORIUS SC: Yes.

MR MOKHESI: Okay.

ADV PRETORIUS SC: But what is sought here – well let me
10 just ask you this question? It seems from an answer you
gave to an earlier question that even in relation to the
documentation which would have existed in the National
Department the Free State Department might not have
requested all the documentation to understand exactly what
was being requested.

MR MOKHESI: Repeat that Mr Pretorius?

ADV PRETORIUS SC: Remember you said Mr Mokhesi that
there was a problem about requesting documentation in this
process.

20 **MR MOKHESI:** Okay.

ADV PRETORIUS SC: That the documentation was not
requested and was not examined.

MR MOKHESI: Okay.

ADV PRETORIUS SC: And therefore, there could be no
proper understanding of what was going to be extended and

whether it complied with the regulation.

MR MOKHESI: Okay.

ADV PRETORIUS SC: Correct?

MR MOKHESI: Okay.

ADV PRETORIUS SC: Now I am asking does that same comment apply to the National Department. We know that you did not ask or no one in your department asked for documentation relating to the Gauteng contractual position or the panel position. Does the same comment apply to the

10 National Department?

MR MOKHESI: Yes. Yes.

ADV PRETORIUS SC: It does.

MR MOKHESI: Yes.

CHAIRPERSON: Now at the time of sending this letter to the CEO of Blackhead did you know that the appointment of Blackhead by National – by the National Department of Human Settlements was an appointment to a panel as opposed to an appointment or conclusion of a contract for performing work?

20 **MR MOKHESI**: Personally, at that time it was not clear that – Chair your question is that did I know at the time?

CHAIRPERSON: Ja. At the time you sent this letter to the CEO of Blackhead and you wrote as you did in paragraph 1 of this letter. Did you know that the appointment of Blackhead to – by the National Department of Human

Settlements was simply a panel?

MR MOKHESI: Ja a panel and not a contract?

CHAIRPERSON: Yes. Did you know that at that time?

MR MOKHESI: No I did not know that it was a panel.

CHAIRPERSON: By that time?

MR MOKHESI: Ja.

CHAIRPERSON: You thought it was a contract?

MR MOKHESI: It is – ja. Until – until later to say no but this is a panel.

10 **CHAIRPERSON:** Yes.

MR MOKHESI: Actually, the work did not happen.

CHAIRPERSON: Hm.

MR MOKHESI: In you know in the National Department it happened in Gauteng.

CHAIRPERSON: Yes. And at this stage I take it at the stage of this letter I take it that you would have known about the fact that there had been – that Blackhead had been given a contract in Gauteng. You would have known that by this time?

20 **MR MOKHESI:** No not – I would – I would have known.

CHAIRPERSON: Yes because that was the first thing that was...

MR MOKHESI: That Gauteng.

CHAIRPERSON: Yes.

MR MOKHESI: Had engaged.

CHAIRPERSON: Yes.

MR MOKHESI: In the removal.

CHAIRPERSON: Yes.

MR MOKHESI: Sorry the assessment. Because what trigger that I think was the storm.

CHAIRPERSON: Hm.

MR MOKHESI: What happened there in Gauteng and then it became necessary for them to you know – to determine what is the size of the problem.

10 **CHAIRPERSON:** Yes.

MR MOKHESI: Ja.

CHAIRPERSON: Yes.

MR MOKHESI: That is was specifically Blackhead.

CHAIRPERSON: Yes.

MR MOKHESI: Ja.

20 **CHAIRPERSON:** What I did not understand when previous evidence was given previously with his regard to this letter was why you would have thought that – you would have gone to the National Department – you would have gone to the appointment – the appointment of Blackhead by the National Department for purposes of finding a contract when in fact you ought to have known that it was in Gauteng where Blackhead had been given a contract. That is what I did not understand.

MR MOKHESI: What – what – you know without – because I

assume my colleague is going to come.

CHAIRPERSON: Ja.

MR MOKHESI: You know at some stage – here.

CHAIRPERSON: I am sorry you are soft – your voice is...

MR MOKHESI: I am saying I am informed that the director Supply Chain will also come before the commission at some future. You know I would – because at all material times in respect of this particular letter as to why it went to National Department and not Gauteng. It probably was you know
10 during his engagement when he was giving or you know investigating what is the most appropriate method of procuring this contract. Indeed, we started in – in National Department because this was where we thought only to find – to discover that it is actually a panel it is not a contract. There it is not National Department that was responsible for – for eradication of – for the asbestos project per se. So it is Gauteng and of course the DG who served did indicate that issue to say here is a panel.

CHAIRPERSON: Yes

20 **MR MOKHESI:** It is not a contract.

CHAIRPERSON: Yes. Okay Mr Pretorius.

ADV PRETORIUS SC: We understood from evidence already given Mr Mokhesi that the National contract was – or the National arrangement rather I should not say contract was the establishment of a panel nationally for general housing

matters. Do you understand the same? It was not an asbestos related panel.

MR MOKHESI: No it was a general...

ADV PRETORIUS SC: It was general housing matters.

MR MOKHESI: General housing matters.

ADV PRETORIUS SC: Is that correct?

MR MOKHESI: Ja.

ADV PRETORIUS SC: Now I understood...

CHAIRPERSON: Was that a yes?

10 **MR MOKHESI**: Yes, Yes.

CHAIRPERSON: Ja okay.

MR MOKHESI: It was clarified.

ADV PRETORIUS SC: You of course signed the letter. Did you know at the time and I think you have answered this already what contract you were seeking to extend? Did you make any enquires of your supply chain director? Did you say well what contract are we extending here?

MR MOKHESI: Yes I did.

ADV PRETORIUS SC: And what did he say to that?

20 **MR MOKHESI**: To – it is the asbestos contract.

ADV PRETORIUS SC: So did Mr Matlakala say to you when you signed this letter addressed to the National Department that the contract sought to be extended here was a contract for the removal of asbestos – identification and removal of asbestos? Did he actually say that to you?

MR MOKHESI: Identification okay removal because it had two phases.

CHAIRPERSON: I am sorry. Just repeat the answer and look this side ja.

MR MOKHESI: Oh sorry.

CHAIRPERSON: What did Mr Matlakala say this National Department arrangement or contract was about?

MR MOKHESI: The – proposal.

CHAIRPERSON: Hm.

10 **MR MOKHESI:** Was about the removal and the

CHAIRPERSON: Disposal.

MR MOKHESI: Audit assessment.

CHAIRPERSON: Yes.

MR MOKHESI: And disposal. It was in two phases.

CHAIRPERSON: Yes.

MR MOKHESI: So this is the contract that will be participating on.

CHAIRPERSON: Ja.

MR MOKHESI: Or participating – yes.

20 **CHAIRPERSON:** Ja.

MR MOKHESI: Now in all this particular processes that followed subsequently there the intention was exactly that. To participate in – because we knew that Gauteng had already done it.

CHAIRPERSON: You knew that Gauteng was?

MR MOKHESI: Gauteng had – had done it already.

CHAIRPERSON: Yes, yes.

MR MOKHESI: Yes we know.

CHAIRPERSON: Yes. But you – I think Mr Pretorius asked a question and your answer seemed to suggest that when you were signing this letter or before you signed this letter you asked Mr Matlakala what contract or arrangement Blackhead had been appointed to in the National Department.

10 **MR MOKHESI:** Okay the confusion was – was initially that this was done by National Department.

CHAIRPERSON: Yes.

MR MOKHESI: Initially.

CHAIRPERSON: Ja.

MR MOKHESI: And hence – and that is the reason we wrote to which I will imagine to the National Department.

CHAIRPERSON: Hm.

MR MOKHESI: And actually, it was done by [01:25:52].

20 **CHAIRPERSON:** Hm. So are you saying at the time of signing this letter you were not aware that it was Gauteng – the Gauteng Provincial Government?

MR MOKHESI: Yes.

CHAIRPERSON: That had given an asbestos contract to Blackhead.

MR MOKHESI: Yes.

CHAIRPERSON: You were not aware of that?

MR MOKHESI: No I was not.

CHAIRPERSON: At this time.

MR MOKHESI: Yes.

CHAIRPERSON: That is what you are saying?

MR MOKHESI: Ja.

CHAIRPERSON: And did you say you discussed it with Mr Matlakala and he also – his understanding was also that ...

MR MOKHESI: It was a National Department.

10 **CHAIRPERSON:** The National Department of Human Settlement is the one that had provided Blackhead.

MR MOKHESI: Yes.

CHAIRPERSON: With a contract for asbestos.

MR MOKHESI: Whereas it was only a panel.

CHAIRPERSON: Hm.

MR MOKHESI: I am saying whereas it was only a panel.

CHAIRPERSON: Yes, yes but you say that was the understanding of both of you?

MR MOKHESI: That was the understanding.

20 **CHAIRPERSON:** Yourself and Mr Matlakala?

MR MOKHESI: And Matlakala.

CHAIRPERSON: Okay.

ADV PRETORIUS SC: So I understand your evidence when you signed this letter you actually asked Mr Matlakala well what contract is being extended here that was entered into

by the National Department of Human Settlements and you say that Mr Matlakala told you that it was an asbestos related contract.

MR MOKHESI: Yes.

ADV PRETORIUS SC: Did you ask to see any documentation in this regard?

MR MOKHESI: No.

ADV PRETORIUS SC: To assure yourself that this was in fact correct.

10 **MR MOKHESI**: Remember we – when we – when it later turns out that it is actually not you know in – in National Department it is only in

ADV PRETORIUS SC: Gauteng.

MR MOKHESI: No, no. It is only a panel. So when it later turned out that it is only a panel there is no contract actually the work was done by Gauteng. I have already eluded earlier on that the documents that normally – you know when you do – when you participate in a contract of this nature the thing that you have to do is also to request the documents.

20 And sometimes these documents are voluminous. The mere assurance – because I am not talking about an intern here we are not talking about and intern we are talking about a senior manager. If you give me an assurance that indeed you have done your work that is sufficient for me particularly if you this – you know because documents – procurement

documents are voluminous. Now I do not have – I simply have to get an assurance that indeed you have followed due process.

ADV PRETORIUS SC: Well that is...

MR MOKHESI: In that ...

ADV PRETORIUS SC: That is...

MR MOKHESI: So that assurance was given to me.

ADV PRETORIUS SC: Yes that is a further question but the question is and I think you have answered it that you did not
10 ask for documentation you relied on an assurance?

MR MOKHESI: Yes we – we all do. Also take into consideration you know I – how many people report to me and it is eleven people who are my direct reporting plus the district and the district as well they report – my sphere of control is – it is very wide. Now I am not talking about interns here. I am talking about senior managers who in their own right can also be in future the Accounting Officer. So if a person who has been – or people who have been in the supply chain – I mean they – they – the supply chain
20 practitioners almost on a monthly basis you know they have their own supply chain forums. They attend – and that is also the reason why they – they have to be in all the committees of procurement to advise other members as well. So we are not talking about a – you know somebody who – who is an intern and so on.

CHAIRPERSON: Okay I think – I think you...

MR MOKHESI: So it depends what the level of assurance that we – you know how far should I really in certain instances demand all those particular documents. He knows I do not have to tell him. I do not have to tell anybody particular. He knows. He has been employed for that he is being paid for that.

CHAIRPERSON: Okay I guess the – the short answer is that you did not ask for documents but Mr Matlakala gave you an
10 assurance that put you at ease, is that right? Ja okay.

ADV PRETORIUS SC: Would you have expected as his reporting official – would you have expected him to have looked at the documents?

MR MOKHESI: I would have expected him to do so. I will have – to have documents – all the documents with us.

ADV PRETORIUS SC: And would you accept as other witnesses before on this topic have testified that you cannot extend a panel. You can only extend a contract with terms and conditions.

20 **MR MOKHESI:** Ja we participate in a contract not in a panel. A panel – a panel ordinarily has – you know you are at the functionality base you know. You qualify them and say right the 10 or the 15 or the 30 of you qualify to do – to be on the panel.

ADV PRETORIUS SC: Yes.

MR MOKHESI: But even then, as you go forward, they still have to compete. Because what will remain now is a price in the main.

ADV PRETORIUS SC: Yes on the same day that you wrote to Blackhead Consulting Pty Limited you appear to have written to the Director General Department of Human Settlements Mr Zulu and that letter appears at page 214.9 of FS1 and I am sorry to make you shuffle bundles yet again Mr Mokhesi but if you would go to Free State 1.

10 **CHAIRPERSON:** FS1.

ADV PRETORIUS SC: Page 214.9. It is not the most legible document.

CHAIRPERSON: What is the page?

ADV PRETORIUS SC: 214.9

CHAIRPERSON: 214.9. Are you managing there Mr Mokhesi? Do you need assistance from somebody? I think he is fine.

MR MOKHESI: This one. Oh.

CHAIRPERSON: 214?

20 **ADV PRETORIUS SC:** Point 9 Chair.

CHAIRPERSON: Point 9.

MR MOKHESI: Page?

ADV PRETORIUS SC: Page 214.9. I must apologise it is not entirely legible hence the dark background but it is more or less in the same terms as the letter we have just referred

to addressed to Blackhead. It is asking for participation in a National contract. Do you see that?

MR MOKHESI: Yes.

ADV PRETORIUS SC: And I presume the same comments that you made about documentation and the like would apply? Correct and your reliance on Mr Matlakala's assurances.

MR MOKHESI: Yes.

ADV PRETORIUS SC: Correct?

10 **MR MOKHESI**: Yes.

ADV PRETORIUS SC: Then if we could go to another document. It is a letter from yourself to a Ms Diedericks dated 15 July 2014 and it appears in FS2 at page 111.

MR MOKHESI: FS2.

ADV PRETORIUS SC: Chair I see it is four o'clock may I ask what the intentions are?

CHAIRPERSON: Let us talk about whether we – what we will do. I suspect that everyone prefer that we finish if we can but it might not be possible.

20 **ADV PRETORIUS SC**: Well that is an understatement Chair.

CHAIRPERSON: Well you – you are on the podium there what do you suggest?

ADV PRETORIUS SC: Well Chair.

CHAIRPERSON: You know how long you still...

ADV PRETORIUS SC: I am quite willing to proceed if that is

in order with everybody else.

CHAIRPERSON: Yes.

ADV PRETORIUS SC: We have a witness and other parties present who should perhaps be consulted.

CHAIRPERSON: Ja no, no we – I will be – I will be asking Mr.

ADV PRETORIUS SC: But we must bear in mind that I will not finish today.

CHAIRPERSON: Yes

10 **ADV PRETORIUS SC:** And that both Mr Mokhesi and Mr Sodi have to come back.

CHAIRPERSON: Yes.

ADV PRETORIUS SC: And we could try and arrange for them to come back on a single day.

CHAIRPERSON: Yes of course the more we do today even if we do not finish the better the chances are that we can find another space.

ADV PRETORIUS SC: Yes Chair.

20 **CHAIRPERSON:** Somewhere you know and there is not a lot of space.

ADV PRETORIUS SC: No I understand that entirely Chair.

CHAIRPERSON: So.

ADV PRETORIUS SC: We are pressured.

CHAIRPERSON: Yes.

ADV PRETORIUS SC: Provided we...

CHAIRPERSON: As long as your...

ADV PRETORIUS SC: Have a reasonable limit.

CHAIRPERSON: What is your own estimate of how much time you might still need?

ADV PRETORIUS SC: Three hours Chair.

CHAIRPERSON: Three hours?

ADV PRETORIUS SC: Yes.

CHAIRPERSON: Okay. Mr Mpofo what is your situation?

ADV PRETORIUS SC: You may be more persuasive than
10 me.

ADV MPOFU SC: I can just speak from here?

CHAIRPERSON: You can speak from there ja.

ADV MPOFU SC: Thank you. I am sorry Chair I have to sit
down this is – these are too...

CHAIRPERSON: No, no that is fine.

ADV MPOFU SC: Too low yes.

CHAIRPERSON: Ja.

ADV MPOFU SC: Chairperson you have – you take – you
took the words out my mouth. My first question was whether
20 there is a likelihood of finishing or not.

CHAIRPERSON: Yes.

ADV MPOFU SC: Because if there is not.

CHAIRPERSON: Yes.

ADV MPOFU SC: Then at least we – we do not need to
invest more – much more time. And my second question was

how much longer?

CHAIRPERSON: Ja.

ADV MPOFU SC: Mr Pretorius has indicated another three hours.

CHAIRPERSON: Ja.

ADV MPOFU SC: Chair to put it blindly I would prefer therefore that we stop as soon as possible on the understanding that we all going to have to come back and what I understand is that Mr Pretorius wants to – to for the
10 next occasion to have two witnesses back to back let us say maybe use the three hours for us and then another couple of hours for somebody else. So that – we are quite comfortable with that Chair. The – well of course in the – I am sorry. In our case the three hours might actually not be three hours.

CHAIRPERSON: Yes.

ADV MPOFU SC: Because as soon as we get to the stage where we feel that there is a risk of self-incrimination.

CHAIRPERSON: Ja.

ADV MPOFU SC: It might well be shorter.

20 **CHAIRPERSON:** Ja.

ADV MPOFU SC: But so far, we are still fine.

CHAIRPERSON: Ja. Well my inclination is that if Mr Pretorius says it is about three hours that he estimates he might take would be that maybe we – we continue even if it is just for one more hour. Because if what is left should take

two hours that should be easy even to fit into an evening session. Like starting at four o'clock or five o'clock. It is easy to finish two hours if we cannot find time during the day you know. So – so that would be my inclination.

ADV MPOFU SC: Okay.

CHAIRPERSON: You have no problem with that?

ADV MPOFU SC: I can live with that Chair.

CHAIRPERSON: Yes. Mr Mokhesi you hear what we are talking about what is your situation? Are you happy that we

10 continue for about another hour?

MR MOKHESI: Ja one – one hour I am fine.

CHAIRPERSON: You are in line with your Counsel?

MR MOKHESI: Ja one hour it is – I think one hour from now it is...

CHAIRPERSON: It should be fine.

MR MOKHESI: Is okay but...

CHAIRPERSON: Yes.

MR MOKHESI: After that I will feel...

CHAIRPERSON: You might be exhausted?

20 **MR MOKHESI:** Because I have other issues.

CHAIRPERSON: Yes.

MR MOKHESI: That I have to attend – to attend. But certainly I am available.

CHAIRPERSON: Yes okay.

MR MOKHESI: Even I think I have indicated that earlier on

even for the evening sessions.

CHAIRPERSON: Yes. Okay no I think maybe then we are going to – let us take a short break now and then we will come back and we go for an hour and then we adjourn.

ADV MPOFU SC: Thanks Chair.

CHAIRPERSON: We are at four minutes past shall we resume at twenty past four?

ADV PRETORIUS SC: Fine Chair.

CHAIRPERSON: Ja okay. So we will adjourn now and
10 resume at twenty past four. We adjourn.

REGISTRAR: All rise.

INQUIRY ADJOURNS

INQUIRY RESUMES

MR MOKHESI: Okay.

CHAIRPERSON: Okay. Let us continue.

ADV PRETORIUS SC: Thank you, Chair. Sorry. I had my back to you. If you would go to FS2, please Mr Mokhesi at page 111.

MR MOKHESI: Page 111?

20 **ADV PRETORIUS SC:** Yes. Another letter addressed by yourself, on the face of it at least, to the Head of Department Gauteng dated the 15th of July 2014.

CHAIRPERSON: Yes, Mr Pretorius.

ADV PRETORIUS SC: Do you have that?

MR MOKHESI: Yes, yes.

ADV PRETORIUS SC: If you look at paragraph 3 of that letter.

“It is, therefore, in this regard that the privilege hereby sought, that you provide written confirmation to extent same in line with your approved terms and conditions as contained in your instruction to perform.”

There it seems that what is sought to be extended is an instruction to perform work which would have contained
10 approved terms and conditions such as specifications, price and the like. Do you understand that in the same way?

MR MOKHESI: Okay. My understanding here is, obviously the instruction to perform work is, it is the one that gives a contract to execute the work but there will be a contract that is ...[intervenes]

CHAIRPERSON: That is what you had in mind?

MR MOKHESI: Yes.

ADV PRETORIUS SC: But we have seen... you recall the phrase that we referred to this morning, Terms of Reference,
20 we had seen the Gauteng Terms of Reference but what we do know is that the, at least the terms and conditions relating to performance and the price in Gauteng, were different than that entered into in the Free State. You are aware of that?

MR MOKHESI: Ja.

ADV PRETORIUS SC: Yes. And so we know then that the ...[intervenes]

MR MOKHESI: The 6(50). This is the 8(50).

ADV PRETORIUS SC: I am sorry?

MR MOKHESI: That is what you are referring to?

ADV PRETORIUS SC: The 6(50) and 80... 8(50)?

MR MOKHESI: Yes.

ADV PRETORIUS SC: Yes.

MR MOKHESI: Yes, okay.

10 **ADV PRETORIUS SC:** Per unit. There are other differences but I do not necessarily want to go into those, unless you wish to. I do not think it is relevant for the point that we make now.

Is that I understand your evidence to be, you would not have looked at the documentation in Gauteng to establish what those terms and conditions were.

MR MOKHESI: Ja, simply because of the voluminous. You know, procurement documents are voluminous in that. And each one of us has got a role to do his or her work.

20 I mean, the documents, I would have expected that Supply Chain in Gauteng to have supplied by request, per request, of course, which is part of the due diligence to say, please give us all the documents, you know, from the advertisement.

And you know documents, tenders, those who... even

those that were disqualified, you know. Because you have to have that information. You have to have that information as if it is you who is doing it, you know.

ADV PRETORIUS SC: Ja.

MR MOKHESI: Yes, you know.

ADV PRETORIUS SC: And...[intervenens]

MR MOKHESI: That information by itself will be voluminous because then you also have to look at the rest of the reports to different committees. So you have to request all
10 information from A – Z.

ADV PRETORIUS SC: I am not sure that it would have been too difficult and too voluminous a task to simple establish what the price per unit was in Gauteng. Would it? Simple question, what was the price per unit in Gauteng?

MR MOKHESI: No, the unit in Gauteng was R 650,00 a unit.

ADV PRETORIUS SC: But what I am saying is, it would not have been too difficult to establish just that fact before entering into a contract in Free State at R 850,00.

20 **MR MOKHESI:** I think what I have indicated previously Mr Pretorius. You know, I said, you know, after the fact I have asked three questions. And one of them was: Did you ask... did you get permission from Treasury? In other words, did you make as a Supply Chain Practitioner your contract to... did you make a ...[intervenens]

CHAIRPERSON: Look this side again, Mr Mokhesi.

MR MOKHESI: Okay sorry. Sorry, Chair.

CHAIRPERSON: You asked three questions.

MR MOKHESI: I asked three questions. One of the questions is: Did you request and make motivation to Treasury to...? You can... we can... you can vary the price but it should be provided. Treasury has approved and saw... given the motivation to Treasury. Because those are the three questions that they asked. And one of them was that.

10 So it did not happen.

ADV PRETORIUS SC: Good. When you asked Mr Matlakala, did you seek approval of Treasury to adjust the price, what was the answer?

MR MOKHESI: Well, they could not... you could not, you know...[intervenes]

ADV PRETORIUS SC: You could not respond?

MR MOKHESI: I could not respond.

ADV PRETORIUS SC: When did you ask them?

20 **MR MOKHESI:** Well, at the point when the... remember, there was a finding, okay? A contract... in other words, the contract was... and one of those... and one of the issues that was raised around it was precisely that particular point but you could not provide a motivation... *ag*, a proof that there was a Treasury approval.

ADV PRETORIUS SC: But the question is, when did you

ask him and when did he give you this false assurance for...
the inability to assure you?

MR MOKHESI: Upon... you know, upon... when one of the
issues in the contract. In other words, one of the issues
upon the finding. Let me put it that way.

ADV PRETORIUS SC: Of the Public Protector?

MR MOKHESI: No.

ADV PRETORIUS SC: What findings?

MR MOKHESI: The finding by the AG.

10 **ADV PRETORIUS SC**: Alright. Well, we have not really
canvassed that but were you aware that the Auditor General
in the Gauteng Province had declared the Gauteng contract,
Asbestos Contract, invalid?

MR MOKHESI: I became... we became subsequently aware
of that particular issue.

ADV PRETORIUS SC: Yes and were... when did
you...[intervenues]

MR MOKHESI: At that time when this participation was
happening. It had not been declared.

20 **ADV PRETORIUS SC**: Yes.

MR MOKHESI: Ja.

ADV PRETORIUS SC: Not the Gauteng Contract.

MR MOKHESI: Yes.

ADV PRETORIUS SC: But ultimately the Free State
contract was also declared invalid by the Auditor General in

the Free State.

MR MOKHESI: By extension. In other words, if it is irregular in Gauteng, they cannot be irregular with you.

ADV PRETORIUS SC: Alright. But I understand that... well, when did you become aware of that finding? At the time it was made? You must have, surely.

MR MOKHESI: The audit of... I think it was 2015.

ADV PRETORIUS SC: Now do you know that payments were made pursuant to the Gauteng... to the Free State
10 agreement? Payments were made after the Attorney General... not the Attorney General, the Auditor General had declared the contract invalid, whether by extension or not?

MR MOKHESI: Ja, but the work had already been done by that time.

ADV PRETORIUS SC: But... alright. Well, let us just... let me just take it step by step and take a deep breath. In the Free State, the Auditor General declares the contract invalid. Correct?

MR MOKHESI: Irregular. I do not know if that means the
20 same.

ADV PRETORIUS SC: And you become aware of that?

MR MOKHESI: Yes, we became aware through the audit but this particular contract, irregular in Gauteng ...[intervenes]

ADV PRETORIUS SC: Is it correct that after you became aware of this fact, payments were still made to the service

provider in relation to the Free State contract?

MR MOKHESI: Because the work was done.

ADV PRETORIUS SC: Well, is that...[intervenes]

CHAIRPERSON: I did not hear that answer.

MR MOKHESI: Okay. I am saying the work was already done.

CHAIRPERSON: Ja.

MR MOKHESI: Ja.

CHAIRPERSON: Okay.

10 **ADV PRETORIUS SC:** Well, let me ask ...[intervenes]

MR MOKHESI: Now what we could not continue with is a certain phase.

CHAIRPERSON: Yes.

MR MOKHESI: Of the contract.

CHAIRPERSON: Okay.

MR MOKHESI: The only thing that we could... because ordinarily Chair, if something is declared irregular, that there is a certain formula that you will have to follow that what happened, who was responsible for example and whether
20 there was money that was received.

Now, they always say and who is responsible, obviously will lead to certain consequences for that particular individual or individuals that caused the irregular expenditure because you would have to investigate it and so on and so on.

Now in this instance, work was done, completed. Now the questions is, overpayment of money, which is a point of contention even right now.

You would recall also, that was a... there was a case or a judgment which was sponsored by a political party. Now I am aware that it was not, or perhaps going forward it was... what was decided there was not on merits.

In other words, whether the contract is irregular or not but part of what was in that particular judgment, which
10 perhaps may be for people like ourselves, created a confusion, was in a finding that says there was no overpayment because that was also part of the issue.

And so whether we paid... the department paid too much for that or not. Now that... in that was... in that judgment, it says there was no overpayments. Perhaps on probabilities. Now if you have that, that is the... that assertion that says, there is no overpayment, it sort of in a way suggests that, you know, money was received.

So what remains is irregular expenditures occurred.
20 Who is responsible? Then we will have to do that particular investigation to say: Okay how did it occur? What systems are we going to put in place to ensure that there is no recurrence of that in the future.

Now... so those payments were made on those in terms of that understanding that says at the time money was

received.

However, subsequently, then came in the investigations by the Public Protector which then is of the view that, you know, instead of assuming.

You know, there is an investigation that is going on. So let us wait for the outcome of that particular investigation because it is done independently and see to what extent can you apply the consequence management thereafter.

I think that has happened now with the event of the
10 release by the Public Protector of the report which is another leg because we thought we should not do it internally because the alternative was to do that internally but now you run the risk that if you blame individuals while you are... and the Public Protector comes in.

Now at a later stage and finds against, you will then have to revert back. So the consequence management of, you know, of that action is now happening because of what the Public Protector is...

And I think it also applies to me as an Accounting Officer
20 and this is what is happening. Now, the other part is... okay. Okay that is... Thank you.

CHAIRPERSON: Mr Pretorius.

ADV PRETORIUS SC: The position is as follows then. The Auditor General in the Free State declares the contract, the Asbestos Contract, irregular or invalid. You continue to

make payment nevertheless and you say the reason you did was because the work had been done.

MR MOKHESI: The work ...[intervenes]

CHAIRPERSON: And there was a judgment which said there was no overpayment.

MR MOKHESI: Yes.

CHAIRPERSON: I think you gave those reasons.

MR MOKHESI: Yes.

ADV PRETORIUS SC: Yes, I understand that but that we
10 can investigate as to whether that is...[intervenes]

MR MOKHESI: But also Chairperson, I think... you know, if something has been...[intervenes]

CHAIRPERSON: Do not put...[intervenes]

MR MOKHESI: Oh, sorry.

CHAIRPERSON: Ja.

MR MOKHESI: If something has been declared irregular, depending on irregularities, you know. Let us make a simple example. I ask you to build a house. You complete the house. And after you have completed the house, I have to
20 pay you. The auditor comes and say it is irregular, right.

Now you cannot say, I am not paying you and keep the benefit, you know. And those are some of the considerations that we have to take into account when you decide to...

Look, obviously, you cannot continue with the contract. The contract ends there. And we could not also continue

with the second phase.

ADV PRETORIUS SC: Alright. I do not want to debate the law with you but the principles upon which... in which we claim, which the legal term would be calculated, would be entirely different from the contract.

If the contract is declared irregular, my understanding of the law is, that the contract cannot therefore be enforced from either side.

But if a party has benefited unduly from the
10 implementation of the contract, there may be circumstances where that party may still recover payments but the principles are entirely different.

MR MOKHESI: Well ...[intervenes]

ADV PRETORIUS SC: It would have resulted in a different financial outcome. But I do not want to debate the law with you in that regard.

MR MOKHESI: No.

ADV PRETORIUS SC: We know the facts. Let us just go to another letter, please. But before we go on. when the
20 Public Protector issued her report, payments were stopped. Correct?

MR MOKHESI: [No audible reply]

CHAIRPERSON: Is that a yes?

MR MOKHESI: Yes.

ADV PRETORIUS SC: Yes ...[intervenes]

MR MOKHESI: And the reason being...[intervenes]

CHAIRPERSON: Yes?

MR MOKHESI: The reason being that one of the issues that was mentioned by the Public Officer, was looking for money, right. Now you do not continue when there is already that particular finding.

CHAIRPERSON: You can continue only...?

MR MOKHESI: I am saying, the reason being, one of the issues that was raised by the Public Protector, was value for
10 money.

CHAIRPERSON: Yes.

MR MOKHESI: So it needed... that also needed also to be exhausted indeed, to find out, indeed, is this correct or is this not correct? And it is also going to come out perhaps because there has been a proclamation on this matter by the... sorry, by the SIU which I think in their mandate, that is also what they have to determine.

ADV PRETORIUS SC: You say, value for money was one of the issues raised?

20 **MR MOKHESI:** It is one of the issues.

ADV PRETORIUS SC: Yes. But I must say for the record that if the contract was invalid of a result of anything found by the Auditor General in the Free State, the same or similar principles of value for money unjust enrichment principles would have applied but again, perhaps we should not debate

that law. It is quite complex.

MR MOKHESI: But you know this... when irregular expenditure has been determined, you know there is a process what they referred to as a write-off.

CHAIRPERSON: What is the process?

MR MOKHESI: Of write-off.

CHAIRPERSON: Ja, of write-off. Writing off something, yes.

MR MOKHESI: Writing of the irregular expenditure. Right?

10 **CHAIRPERSON**: H'm.

MR MOKHESI: And you also go through that particular process. Now the AG will never allow you to write that off if he is not satisfied with what we have done. Now, you know, it has been written off basically. So I do not know as to... because the determination of the value for money as well, is also part of whether you will be allowed to write off that particular irregular expenditure or not.

ADV PRETORIUS SC: Perhaps you could answer this question and then we can move on. In terms of all the
20 regulatory prescripts that would bind an accounting officer, if a contract is declared irregular or invalid, I an Auditor General, as happened in this case, what are the duties that rest upon an accounting officer?

MR MOKHESI: Okay the first thing is you investigate. You investigate. Okay. As I have indicated, what happened,

right, who is responsible, did we receive value for money because sometimes terminating the contract can actually be very costly in certain instances. I am not saying all instances but it there might be particularly in construction, you can actually end up with a bigger bill than you anticipated simply because you chose to [indistinct – dropping voice]

Also taking in consideration that, you know, your own internal issues cannot be – okay, I suppose I am
10 talking to a judge and a lawyer here but your own internal issues cannot be at the prejudice of external parties who are not part of your processes. They have delivered what you asked for and then you come up at a later stage and say no, no, this contract it is irregular and therefore I am not going to pay you but you keep the benefit.

I understand – look, I do not want to, as you say, Mr Pretorius, you know, I am not a lawyer, so – but that is basically sometimes where you have to, you know, apply your mind in terms whether you have to not to pay and if
20 you are not going to be – why are you not paying if you have received a value and what informs that.

ADV PRETORIUS SC: Let us avoid legal terminology then because it seems to me that the principles that you have been dealing with now are reflected at least to an extent in the law but let us leave the law to one side. As I

understand your proposition now is that once you had learnt that the contract was irregular you would have investigated whether there was value for money received by the department for which it should have paid or should pay. Do I understand the proposition correctly?

MR MOKHESI: Yes.

ADV PRETORIUS SC: Did you – you say yes?

MR MOKHESI: Yes, I am saying you investigate and...

ADV PRETORIUS SC: Yes.

10 **MR MOKHESI:** And what happened.

ADV PRETORIUS SC: Yes and particularly under the heading value for money.

MR MOKHESI: H'm.

ADV PRETORIUS SC: Because, as I understand your proposition, if you have received value for money you should pay for it.

MR MOKHESI: Yes.

ADV PRETORIUS SC: Did you investigate whether the department had received value for money?

20 **MR MOKHESI:** Yes, we – obviously we use the internal expertise to say okay, fine. In respect of this particular project, did we receive – did the work – was the work done as it was supposed to have been done?

ADV PRETORIUS SC: They are two different questions, Mr Mokhesi. The first question and what you have been

speaking about is value for money, not whether the contract – the performance under the contract was carried out. The question is value for money. Because, remember, the contract is now set aside, it is irregular. So we are now looking at value for money. Did you investigate whether the department had received value for money?

MR MOKHESI: Yes, we did investigate whether the department [inaudible – speaking simultaneously]

10 **ADV PRETORIUS SC**: Who did that investigation?

MR MOKHESI: The product management unit did that investigation in terms of the terms of what was supposed to happen and that. So that we did.

ADV PRETORIUS SC: No, once again, I am asking about the prospect – or, not the prospect, the concept of value for money which you have just raised. Did you ask for an investigation to be conducted when it was drawn to your attention that the contract was irregular, be conducted into whether the Free State department had received value for
20 money as opposed to whether the terms of the contract had been carried out?

MR MOKHESI: Mr Pretorius, I think I have answered that question, I said we did. You might not agree in terms of what just transpired perhaps right now, Chairperson, to say - I do not think you did and so ...[intervenes]

ADV PRETORIUS SC: Was this investigation carried – I am sorry ...[intervenes]

CHAIRPERSON: Let him finish, Mr Pretorius.

MR MOKHESI: In the normal course of events. You know, when an irregular expenditure happens, that is exactly what you did and the AG will never allow you because they will also do independently, of course through a sample basis because it is not about – the sample, there are investigations as well to say fine, was - you know, on the
10 basis of a spot check. If for any other reason they are not happy around what we did, they will not allow that to be written off, they will not allow that irregular expenditure to be written off.

So maybe not to your satisfaction, I do not know, but we did.

ADV PRETORIUS SC: Well, the question that arises out of what you have said, Mr Mokhesi, let us take it step-by-step. When you learnt, as accounting officer, of the fact that the contract had been declared irregular, right? You,
20 as accounting officer, must have been concerned having received that information, surely?

MR MOKHESI: Okay.

ADV PRETORIUS SC: Yes, right?

MR MOKHESI: Yes.

ADV PRETORIUS SC: What was important to the

department and particularly yourself in regard to whether further payments should be made was whether the department had received value for money.

MR MOKHESI: Yes.

ADV PRETORIUS SC: Did you ask anyone to investigate whether the department had now received value for money?

MR MOKHESI: I just said we did, alright?

ADV PRETORIUS SC: Who did you ask?

10 **MR MOKHESI:** There are two – no, the production – ag, sorry, the project management unit and the head of the project management unit is Mr [indistinct] 30.17, but coupled with that, we also had this court judgment which, in a way, suggested that there was no overpayment because that was also the concern because we might have overpaid in this instance.

ADV PRETORIUS SC: Alright.

MR MOKHESI: And it was also a matter of contestation in court as to whether we did or did not but, you know, the
20 court did not pronounce itself on whether the contract was irregular and that was not [indistinct – dropping voice] but they did pronounce on that part, that...

ADV PRETORIUS SC: That court judgment, you could give us a reference, I presume?

MR MOKHESI: Yes, that is how I understood it, that

...[intervenes]

ADV PRETORIUS SC: The investigators may ask

...[intervenes]

MR MOKHESI: And also, internally got assurance from - you know, from the legal division that indeed it says – it basically says we did not overpay.

ADV PRETORIUS SC: Well, the evidence before the Commission to date indicates that there was a gross overpayment but let us put that aside for the moment, I
10 would like to interrogate that judgment and perhaps we could a reference from your attorneys in due course.

But the question I have is, you asked the project management unit to investigate the issue of value for money. Did they provide you with a written report? Yes?

MR MOKHESI: Ja, normally what will happen is that – because the preparation of – we would have a register of all the irregular expenditures that have been identified and then there will be a preparation on those irregular expenditures that we – you know, that we have been able
20 to resolve and this one included and that – and then there will be that report that says – which we can – which we can, I think we can – which we can also make it available to the Commission around how that was written off.

ADV PRETORIUS SC: Yes, well, I am not sure whether we are necessarily talking about the same report but I

understood your evidence to be that as an accounting officer you would received information that the contract in the asbestos project was irregular, you would have asked your project management unit to investigate whether you had received value for money and my question is, did you receive a report pursuant to that request?

MR MOKHESI: Yes.

ADV PRETORIUS SC: And that report, was it in writing?

MR MOKHESI: It was in writing with all other identified
10 irregular expenditures and not only that.

ADV PRETORIUS SC: You see, the question I have, did you in this particular case ask the project management unit to report to you in relation to whether in this particular contract there was value for money? Did you make that request or are you relying on a general procedure?

MR MOKHESI: In every irregular expenditure value for money comes into play in all of that.

ADV PRETORIUS SC: Mr Mokhesi ...[intervenes]

MR MOKHESI: Not only the asbestos one but in all
20 irregular expenditures that have been identified, value for money is always ...[intervenes]

ADV PRETORIUS SC: Is that a practice that exists?

MR MOKHESI: It is a practice, it is a practice that ...[intervenes]

ADV PRETORIUS SC: Well, I am not asking about a

practice, I am asking you about a particular request arising in the particular circumstances of this case. You receive a report that a contract is irregular, you know that certain payments may still have to be made, you then decide that the value for money is an important consideration as to whether these monies should be paid or not and I am asking you whether you requested your project management unit to give you a report. You say yes. Now I am not talking about the practice that exists in relation to
10 all irregular expenditure, I am talking about a particular report and a particular circumstance. Did you ask for such a report?

MR MOKHESI: Ja, the report – the – what happens is that in a particular year there will be an issue that says the following contracts or the following expenditure are irregular. Some are easy to resolve, some not. Now those that are easy to – or those that have been apparently resolved, then there will be a one report on all of those particular irregular expenditures.

20 **ADV PRETORIUS SC:** And that happens in that practice?

MR MOKHESI: And that is how they have been treated. Whether it is the right thing to do or not, but this is how it has been done and that information will then be made available to the auditor general in terms of whether he agrees or not.

ADV PRETORIUS SC: No, I understand that if it is.

MR MOKHESI: So, I do not know what more I should say.

ADV PRETORIUS SC: No.

MR MOKHESI: On this particular issue.

ADV PRETORIUS SC: Well, perhaps just deal with the questions.

MR MOKHESI: Okay.

CHAIRPERSON: Okay, okay, Mr Pretorius, maybe part of the problem is that at some stage or another on both sides,
10 I think, the one starts talking before the other one finishes. So let us try and avoid that.

ADV PRETORIUS SC: Right, point taken, Chair, but it is necessary to be laborious over this issue, I am afraid.

CHAIRPERSON: Ja.

ADV PRETORIUS SC: You have referred, Mr Mokhesi, to a practice that exists in relation to a report or reports on all irregular expenditure. That would happen regardless of whether you instructed a particular report to be provided for you. Do I understand it correctly?

20 **MR MOKHESI:** I do not why you want to single out this particular one to say it should happen differently.

CHAIRPERSON: Okay, let us put the question this way. Is it true that when there is irregular expenditure there will be a report dealing with irregular expenditure without necessarily you instructing that such a report should be

prepared in general.

MR MOKHESI: That happens as a – you know
...[intervenes]

CHAIRPERSON: As a practice.

MR MOKHESI: It must happen.

CHAIRPERSON: Yes.

MR MOKHESI: It must – you know, that is what is
required.

CHAIRPERSON: Okay, ja, so your answer is yes.

10 **MR MOKHESI:** Yes. Now the question is, who is in the
...[intervenes]

CHAIRPERSON: Hang on, hang on.

MR MOKHESI: Okay, ja.

CHAIRPERSON: So do not go to the next question. So
the position is that if there has been irregular expenditure
there will be a report. You do not have to instruct
particularly that a report be prepared because it is a
practice or it is required, all concerned know that it is
required, is that right?

20 **MR MOKHESI:** [No audible reply]

CHAIRPERSON: Yes, okay. Now, Mr Pretorius, I think
that clarifies at least part of your question, you have a
follow up question I think?

ADV PRETORIUS SC: Yes.

CHAIRPERSON: Ja.

ADV PRETORIUS SC: So I understood you to say now in this series of questions, Mr Mokhesi, you said in this particular case you asked your project management unit head to give you a report on the issue of value for money in the asbestos contract, is that correct or not correct?

MR MOKHESI: Because they will have to do it because it is ...[intervenens]

CHAIRPERSON: Hang on, Mr Mokhesi, hang on.

MR MOKHESI: Okay.

10 **CHAIRPERSON:** At this stage you just need to confirm whether you did instruct a particular unit to prepare a report for you on whether there was value for money in this contract. Is that factually true?

MR MOKHESI: Yes.

CHAIRPERSON: Did you do that?

MR MOKHESI: Normally – normally what happens, we have a committee which we refer to as an irregular expenditure committee, okay?

CHAIRPERSON: Irregular expenditure committee.

20 **MR MOKHESI:** Irregular expenditure committee. I am not ...[intervenens]

CHAIRPERSON: That is for the department.

MR MOKHESI: Ja, I am not part of that.

CHAIRPERSON: Yes.

MR MOKHESI: Because those – the reports that comes

from there will then ordinarily come to me, right?

CHAIRPERSON: Ja.

MR MOKHESI: Now all those identified irregular expenditure will then go to that committee.

CHAIRPERSON: Yes.

MR MOKHESI: And they will be deliberated, it has got a Chairperson and so on but the key players in that irregular expenditure will be the CFO and ...[intervenes]

CHAIRPERSON: Ja.

10 **MR MOKHESI:** And some of the senior managers.

CHAIRPERSON: Yes.

MR MOKHESI: Okay. Now out of that, will then come a report.

CHAIRPERSON: To you.

MR MOKHESI: Ja, on every irregular expenditure that has happened, alright, to say okay, this particular one, this is how we are going to deal with it. This is how it must be dealt with.

CHAIRPERSON: Yes.

20 **MR MOKHESI:** With those recommendations.

CHAIRPERSON: Yes. And included in that report ...[intervenes]

MR MOKHESI: There will be minutes on that and so on.
Ja.

CHAIRPERSON: Okay. Included in that report would be

the topic of whether there was value for money. In each case where there was irregular expenditure or would it not be like that?

MR MOKHESI: Yes, there will be – in certain instances it is easy to determine whether there was value for money or not.

CHAIRPERSON: Yes, yes.

MR MOKHESI: But in certain instances ...[intervenes]

CHAIRPERSON: It is not easy.

10 **MR MOKHESI:** ...you still need a technical unit like the PMU to so go out and find out whether there was ...[intervenes]

CHAIRPERSON: Value for money.

MR MOKHESI: Value for money and so on.

CHAIRPERSON: But would it be correct to say that report that comes from that committee that – the report that comes to you on irregular expenditure, would it be correct that it has to address that issue of value for money whether it says yes, there was value for money or no, there
20 was no value for money?

MR MOKHESI: It has got to address ...[intervenes]

CHAIRPERSON: It has to address that issue.

MR MOKHESI: It has got to address that issue.

CHAIRPERSON: That issue.

MR MOKHESI: And, you know, in this particular

instances, I am not saying, you know, value for money, etcetera, was actually – I do not know at this particular point, I cannot with conviction say that.

CHAIRPERSON: Yes.

MR MOKHESI: Right? Because, you know, I relied originally – we relied originally on that court case but there have been subsequent investigation thereafter and now the SIU – I think that will settle it to some ...[intervenes]

CHAIRPERSON: Yes, okay. No, let us stop there. So, as
10 I understand you, there is an irregular expenditure committee that looks at all irregular expenditure within the department?

MR MOKHESI: Yes.

CHAIRPERSON: And that committee interacts will all role players affected by irregular expenditure, items of irregular expenditures in the department.

MR MOKHESI: Yes.

CHAIRPERSON: And they prepare a report that comes to
20 you and one of the issues they must address in that report in regard to each contract is whether there was value for money. Even without you saying anything, they know that that report must say whether there was value for money or there was no value for money.

MR MOKHESI: Yes.

CHAIRPERSON: Ja, okay.

ADV PRETORIUS SC: And is it on the strength of that report, Mr Mokhesi that you or the department decided that payment should continue to be made to the service provider in the asbestos project.

MR MOKHESI: On the strength of that plus, as I have indicated, on the ...[intervenes]

ADV PRETORIUS SC: Alright, so ...[intervenes]

MR MOKHESI: On the order.

ADV PRETORIUS SC: So is it fair to say then now, with
10 your recent answers, that in this particular case having received a report from the auditor general in the Free State that the asbestos contract was irregular, you did not of your own initiative cause an investigation into value for money to be made? You did not do that.

MR MOKHESI: What?

ADV PRETORIUS SC: You see, what the Chair has made very clear, Mr Mokhesi, is that this is a practice that occurs regardless of whether you intervene in any particular case or not. All irregular expenditure ...[intervenes]

20 **MR MOKHESI:** Was investigated.

ADV PRETORIUS SC: ...was examined by the committee and the department and it will then report to you without your initiative having been taken in any particular case, correct?

MR MOKHESI: Ja, and the AG might agree or disagree

with ...[intervenes]

ADV PRETORIUS SC: Yes. No, but my question is, earlier I understood you to say that in this particular case you approached - at your own initiative you approached the project management unit and you asked them to give you a report on this particular case as to whether there was value for money. Is that correct or incorrect?

MR MOKHESI: No, I – you know, the issue of – once irregular expenditure has been identified, it is practice, you know – because if you do not deal with it, you know, if ...[intervenes]

CHAIRPERSON: Yes, hang on, hang on, Mr Mokhesi. We know now what the practice is, you have told us, okay? Mr Pretorius' question is whether his understanding of what you said earlier is correct and his understanding is that you said earlier on that you had asked a particular unit, I think project management unit, to prepare a report for you in regard to this contract on whether there was value for money.

MR MOKHESI: Okay, let me put it Chair ...[intervenes]

CHAIRPERSON: ...on whether it was ...[indistinct] for money. So your answer should be yes you understood me correctly or no you did not understand me correctly.

MR MOKHESI: Chair, okay let me put it this way, every irregular expenditure I asked the responsible because we

sit in ...[intervenes]

CHAIRPERSON: Okay, I'm sorry, just repeat that.

MR MOKHESI: I'm saying in every irregular expenditure that occurs in the department I asked the relevant user department which is what the expense is on, to investigate that because it is also part of – you know we have an audit action plan that will identify specific areas of concern and so on, to say okay this is what the AG's, this is what the, this is the findings in that particular area, and in those
10 findings one of them would have been irregular expenditure and this is how it has been paid, right. Now all those issues that have been raised we then put that in terms of the action plan and say right you do it, who you know the monkey is whose back, it is on this particular one it is you, on that particular it is corporate services for example if it is something that involves issues of employment, which were done properly, and, and, and.

CHAIRPERSON: Okay, okay Mr ...[intervenes]

MR MOKHESI: So it is – it is – and this is what I am, I'm,
20 I'm, I'm trying to say – to say when the audit – when the AGS has finished or has done with his report we take that particular report, we put it up in a form of an action list that says which – who is responsible for what and that will also have included this matter.

CHAIRPERSON: Okay Mr Mokhesi it may be that it has

been a long day and you are the one who was being asked questions the whole day, but it is a very narrow question, forget about what normally happens, Mr Pretorius' question is in regard to this case is it correct that you said earlier on that you instructed or asked the Project Management Unit to prepare a report and tell you whether there was value for money. Is his understanding of what you said correct, did you say that or not earlier on, or are you not sure?

10 **MR MOKHESI:** Chair yes as you say it is a long day.

CHAIRPERSON: H'm?

MR MOKHESI: How we – because I am trying to explain by saying every year right ...[intervenes]

CHAIRPERSON: Yes, but I don't want you to explain now, I just want you to try and remember whether you did tell me that in regard to this case you asked the Project Management Unit to prepare a report.

MR MOKHESI: And so is on all other cases, I don't want to – and so is on all other cases where the ...[intervenes]

20 **CHAIRPERSON:** Yes, yes but ...[intervenes]

MR MOKHESI: ...expenditure has occurred that will happen.

CHAIRPERSON: No, no, no ...[intervenes]

MR MOKHESI: To say this is yours, that is what I am trying to say.

CHAIRPERSON: Yes, but you see the question is not about other cases.

MR MOKHESI: Okay, yes.

CHAIRPERSON: So in this case you did?

MR MOKHESI: Yes.

CHAIRPERSON: Okay, alright, thank you. Mr Pretorius?

ADV PRETORIUS SC: Alright. Just one more question then on this issue Mr Mokhesi. Apart from the system you've described that was in place whereby all irregular
10 expenditure is examined in relation to value for money and other topics and the report is presented to you, apart from that was there any other specific request by you to the Project Management Unit to report on this particular case?

MR MOKHESI: Are you not asking me the same question again?

CHAIRPERSON: Okay the question is whether with regard to the Project Management Unit.

MR MOKHESI: Yes.

CHAIRPERSON: Was there any other request you made
20 to them in regard to this case other than the request that they must prepare a report which would deal with whether there was a value for money. Is there another request that you ...[intervenes]

MR MOKHESI: Another report?

CHAIRPERSON: Whatever request in relation to this

contract, is there another request you made to them in relation to this contract that you can remember?

MR MOKHESI: There is – Chairperson the request happened in the ordinary course of business and it was once, it was a report with all these others submitted to the AG to say look at what are you – you are happy with what you have done and so on, and then particularly for – there for the write off, and intrinsically that is there value for money.

10 **CHAIRPERSON:** Mmm.

MR MOKHESI: Now if, if, if in certain instances the AG has refused to write off in certain – and has requested us to do further work, in other instances of irregular expenditure he has instructed us to do other work to say I am happy with this, and do some few tests and explain why they are not, they are happy, and then we had to do other work. In certain instances, we also had to particularly when it comes to irregular expenditure that because we had instances where we had to deal with irregular
20 expenditure of 2010/2011 and we had to outsource that part, so I don't know what more I can say.

CHAIRPERSON: Yes Mr Pretorius it may be that if you – it may be that you need to be more specific to say did he request ABC, then maybe that might help.

ADV PRETORIUS SC: Yes, well let me just do it once, or

attempt to clarify once more. You have described in detail Mr Mokhesi to the Chair a system that was in place whereby all irregular expenditure is investigated from various points of view including value for money by a committee and you are not a member of that committee. That routinely happens whether you instruct them in a particular case or not, am I correct? There is a standing practice and set of instructions whereby irregular expenditure ...[intervenes]

10 **CHAIRPERSON:** I think don't go back to it Mr Pretorius, it was clarified.

ADV PRETORIUS SC: Okay.

CHAIRPERSON: Ja.

ADV PRETORIUS SC: Is that correct?

MR MOKHESI: Yes..

ADV PRETORIUS SC: That's correct, well now the question have is apart from that process which happens in any event, whether you initiate it or not, did you in this particular case, when you received the report from the
20 Auditor General go to your Project Management Unit and say I want you to investigate this particular case as to whether there was value for money in this particular case please give me a report?

MR MOKHESI: No, not – I don't want to say in this particular case and separate this particular issue from the

others that we are doing, which – of which are of similar importance, which are of similar importance.

CHAIRPERSON: Yes okay Mr Mokhesi I think we have been to – along that road. The answer that Mr Mokhesi gave earlier on was that he did give such an instruction in this particular case, but he did say that it does so in other cases as well, but in this particular case he said he did give, ja.

ADV PRETORIUS SC: Let the record, it will be an
10 exhaustive read but let the record be read and we can decide what it says.

CHAIRPERSON: Ja, if I misunderstood him, I am sure we will pick it up, ja.

ADV PRETORIUS SC: Alright, perhaps you can go then to 8, FS8, at page 176.

CHAIRPERSON: I mention for what it is worth that we are five minutes away from finishing an hour, we can stick to that or we can go to half past and stop at half past if we all agree.

20 **ADV PRETORIUS SC:** Chair I had a cordial discussion with Mr Mpofu in the break and our understanding of the arrangement was five o'clock.

CHAIRPERSON: It was five o'clock?

ADV PRETORIUS SC: Five o'clock so ...[intervenens]

CHAIRPERSON: [Laughing]

ADV PRETORIUS SC: So I think ...[intervenes]

CHAIRPERSON: Well it is now quarter past five.

ADV PRETORIUS SC: No, I understand that, so we have conceded that point already ...[intervenes]

CHAIRPERSON: Oh you're saying we have gone beyond.

ADV PRETORIUS SC: But I am not sure we are happy to concede yet another extension.

CHAIRPERSON: [Laughing] Okay, no, no I understand why you – I thought that what I said was the hour would be
10 calculated from twenty past when we came back, but it is not an issue.

ADV PRETORIUS SC: No, no I have received advice from behind Chair, your interpretation was correct, and that we were clutching at straws, but we are happy to settle for twenty past.

CHAIRPERSON: Ja, okay, alright then.

ADV PRETORIUS SC: If that is okay I mean if you insist Chair obviously to be serious ...[intervenes]

CHAIRPERSON: No, no, no I just wanted to make sure
20 because twenty past might be seen as an awkward time to stop, I thought in case you say let's – you all agree let's finish at half past I am quite happy that we do that.

ADV PRETORIUS SC: Twenty past is not awkward at all.

CHAIRPERSON: [Laughing] I won't insist on going beyond that because you are the only one standing Mr

Pretorius.

ADV PRETORIUS SC: Yes, the only one left standing.

CHAIRPERSON: Okay so we will stop at twenty past.

ADV PRETORIUS SC: Thank you Chair, but to be serious for a moment if you want to continue ...[intervenes]

CHAIRPERSON: No, no, no it is fine, it's fine.

ADV PRETORIUS SC: Mr Mokhesi if you would go to Free State 8, FS8 at 176 please. That is a letter that refers back to your letter of 15 July which we spoke about earlier.

10 Remember that we spoke about an instruction to perform work.

CHAIRPERSON: Page 176 of Bundle FS8?

ADV PRETORIUS SC: Yes, do you have that?

CHAIRPERSON: It is a letter from Ms Diedericks to you, you have got it?

ADV PRETORIUS SC: It is dated the 4th of August 2014 and it appears to refer back to your letter of 15 July which we have already discussed. Now here she says:

“Request to appoint a professional resource team.”

20 The second paragraph reads:

“I hereby confirm my decision taken on 21 July 2014 that the Gauteng Department of Human Settlements granted approval in terms of Treasury Regulation 16[A] 6.6 for the Free State Department of Human Settlements to participate in the contract arranged

by means of a competitive bidding process from the database of the Gauteng Department of Human Settlements or professional resource teams where Blackhead Consulting Pty Limited was appointed from.”

That appears on the face of it to be referring to a panel arrangement, do you agree with me?

MR MOKHESI: On the face of it you say it appears to be from a panel arrangement?

10 **ADV PRETORIUS SC:** Yes.

MR MOKHESI: Okay.

ADV PRETORIUS SC: Do you agree?

MR MOKHESI: Yes.

ADV PRETORIUS SC: Yes? Sorry?

MR MOKHESI: On the face of it yes.

CHAIRPERSON: On the face of it yes.

ADV PRETORIUS SC: On the face of it. And once again at this stage reference is to Blackhead Consulting Pty Limited, not to any joint venture or other entity. Do you
20 see that in paragraph 3?

MR MOKHESI: Paragraph 3, ja.

ADV PRETORIUS SC: You see that? He is giving her ...[intervenes]

MR MOKHESI: In the paragraph that says the approval, is that the paragraph that you are ...[intervenes]

ADV PRETORIUS SC: Yes, the approval is subject to the conditions that Blackhead Consulting Pty Limited ...[intervenes]

MR MOKHESI: So that is the paragraph that you are referring to?

ADV PRETORIUS SC: Yes.

MR MOKHESI: Okay.

ADV PRETORIUS SC: He is referring to Blackhead, not to the joint venture.

10 **MR MOKHESI:** Yes.

ADV PRETORIUS SC: Correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: Alright, let us go on then to a letter that was written to Mr Sodi by yourself on the 11th of August 2014, perhaps we should deal with this letter and then bring proceedings to a halt Chair.

CHAIRPERSON: Ja.

MR MOKHESI: What page is that?

20 **ADV PRETORIUS SC:** It is at page FS8 179. This is a letter dated 11 August 2014, it is addressed to the CEO Blackhead Consulting Pty Limited and it concerns the appointment of Blackhead Consulting Pty Limited for the asbestos eradication programme in the Free State Province, and paragraph 1 reads, and this is under your hand Mr Mokhesi:

“The above has reference to the concurrent approval by the Gauteng Province Department of Human Settlements dated 4 August 2014 [the letter we have just referred to] regarding your participation in an agreement currently secured by them and it will be appreciable [you say] if you could confirm in writing the following:

1. You formally agree to participate and extend your services to the Department of Human Settlements in line with terms and conditions of their IPW instruction to perform.”

Now just to put one question for the present Mr Mokhesi, it seems that on the one hand Ms Diedericks was talking about a panel arrangement, which we know cannot be extended, or participated in. On the other hand, you’re talking about an instruction to perform work with particular terms and condition of contract.

Is that observation a correct one?

MR MOKHESI: No my understanding is that there was a contract, there was an existing contract in Gauteng of Blackhead to do this work.

CHAIRPERSON: Don’t lower your voice.

MR MOKHESI: Sorry.

CHAIRPERSON: Don’t lower your voice too much.

MR MOKHESI: Okay, Chairperson my understanding was

that there was a contract, an existing contract with Blackhead in Gauteng which we participate on. You know the like for like issues that I mentioned earlier on. Now for you to or to start doing work it is one thing to say you have a contract, but in order for you to be able to start doing you have to wait for – there must be an instruction – an IPW, an instruction to perform work, and that is what we wait for. You can have an appointment and so on and a contract but then you have to also wait for the IPW.

10 **ADV PRETORIUS SC:** Yes, that seems to be your understanding Mr Mokhesi but it does not seem to have been the understanding of Ms Diedericks. Let us leave that aside for the moment. The point about the instruction to perform work that wouldn't have been concluded after a competitive bidding process, you agree with that, but you looked at the documentation?

MR MOKHESI: That wouldn't have?

ADV PRETORIUS SC: Been concluded as a result of a competitive bidding process. That was – those terms and
20 conditions were unilaterally imposed on the panel by the Gauteng Department, did you know that or had you looked at the documentation you would have discovered ...[intervenes]

MR MOKHESI: Which also suggests that you know my earlier point on to say if the documents have been

requested you could have picked up.

ADV PRETORIUS SC: If the documentation had been examined as you say you would have discovered that the instruction to perform work was not the result of a competitive bidding process and therefore 16A wouldn't have been applied.

Perhaps we could take it that far for the present Chair.

CHAIRPERSON: Maybe let me just ask this question, was
10 your understanding at the time that Blackhead Consulting and Diamond Hill made a proposal to the Free State Department ...[intervenes]

MR MOKHESI: Can you repeat that Chairperson, I think I missed something.

CHAIRPERSON: Yes was your understanding at the time that Blackhead Consulting and Diamond Hill made a proposal to your department, was your understanding that Blackhead was still continuing with the work or with some work in the Gauteng Department of Human Settlements or
20 was your understanding that they had done their work and finished it?

MR MOKHESI: No, my understanding was that they have an existing contract, there is work that they are doing in ...[intervenes]

CHAIRPERSON: In Gauteng.

MR MOKHESI: In Gauteng.

CHAIRPERSON: Which would explain why Ms Diedericks made the point that Blackheads commitment to do, to be involved in the Free State should not negatively affect them.

MR MOKHESI: Yes.

CHAIRPERSON: The work in Gauteng.

MR MOKHESI: Yes, and that is why you are required also to ...[intervenes]

10 **CHAIRPERSON:** To get approval.

MR MOKHESI: To get approval and get the ...[intervenes]

CHAIRPERSON: Yes.

MR MOKHESI: That undertaking.

CHAIRPERSON: Yes, but if at the time they made the proposal there was – the proposal to the Free State Department there was no existing contract for work, but there was simply an appointment to the panel then that would not justify extending any contract because there would be no contract to do work, there would simply be an
20 appointment to the panel, is that right?

MR MOKHESI: Ja, you know the panel is not a contract.

CHAIRPERSON: Yes, yes, that is what I am saying that in order for there to have been an extension or participation in a contract by the Free State Department then the contract for work or Blackhead in Gauteng had to be in

existence in the sense that they were still continuing?

MR MOKHESI: Yes it had to be in existence at the time.

CHAIRPERSON: It should not have expired, it should not have – they should not have finished the work.

MR MOKHESI: Yes, in other words the contract should have been valid.

CHAIRPERSON: Yes, should have been continuing.

MR MOKHESI: Ja, forget about whether it was irregular but there must have been a contract.

10 **CHAIRPERSON:** Yes, yes, ja, ja, okay, no that's fine. Okay we are going to stop here. I must thank everybody for your cooperation, I think we made a lot of progress, I think everybody was cooperating, we made a lot of progress, so I think next time we will be able to finish, but it has been a long day, but clearly for Mr Pretorius and Mr Mokhesi, Mr Pretorius because he was standing, Mr Mokhesi because he was answering questions, but thank you to you Mr Mokhesi, thank you to Mr Mpfu and the legal team and to Mr Pretorius and his team that we have
20 been able go up to this time and cover as much as we have, so another date will be determined as indicated it may be that it will be an evening session, starting at four o'clock or five o'clock so – but I understand everybody wants to cooperate to make sure we can finish.

Thank you very much.

Just for the sake of the public on Monday the Commission will hear evidence from Ms Thomas, the former PA to Ms Nomvula Mokonyane about BOSASA issues.

We adjourn.

REGISTRAR: All rise.

INQUIRY ADJOURNS TO 31 AUGUST 2020