

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

21 SEPTEMBER 2020

DAY 268



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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 21 SEPTEMBER 2020

CHAIRPERSON: Good morning Mr Pretorius, good morning everybody.

ADV PRETORIUS SC: Good morning DCJ. Chair.

CHAIRPERSON: Hm.

ADV PRETORIUS SC: I believe you need to deal with certain issues before we begin?

CHAIRPERSON: Yes before we – yes before we proceed with today's business, I just want to deal with a matter that
10 as quite correctly attracted the attention of the public and the media a lot.

Previously I determined that today up to Friday would be the week when the former President Mr Jacob Zuma would appear before this commission.

He was notified thereof and after some time his attorneys wrote to the commission and said that he would not be appearing before this commission during this week.

The reasons they gave include that he was busy preparing for his criminal trial that his doctors have
20 advised him to limit his movements because of his age and Covid-19 and that he is – he was seeking legal advice on the implications of the recent amendments to the Regulations of this commission.

I do not want to comment at this stage on his reasons for deciding that he would not appear before this

commission this week.

The media have sent a number of enquiries with regard to him including a question such as whether this commission will issue a subpoena to compel him to appear before it and whether there are other dates which have been determined when he should appear.

Since his attorneys informed the commission that he would not be appearing this week in order for the commission to use its time optimally arrangements were
10 made for the matter that we are going to hear this week to be heard this week. This was a matter that was going to be heard later in the year. So the commission had to rearrange its plans so that we could use this week properly which otherwise would be wasted.

I decided after receiving – the commission had received his response through his attorneys to fix the date for the hearing of the commission legal team's application for an order authorising the issuing of a summons against Mr Zuma.

20 I have determined that that date will be the 9 October at 09:00 am. He and his lawyers have been informed that unless I am satisfied on that date that there are good grounds for them not to appear if they do not appear that application will proceed without them.

They have been informed that should they wish to

make use of a virtual appearance before the commission and if they inform the commission timeously arrangements will be made for them to appear virtually before the commission. But that application will proceed with or without them unless I am satisfied that there are good grounds for them not to be here.

I have also determined new dates for Mr Zuma's appearance before the commission since becoming aware of the letter from his attorneys. Those dates are 16 to 20
10 November 2020. Those are the dates that I have determined. I know that in their letter they – his attorneys said dates should be negotiated with him or with them. No dates will be negotiated with them or with him.

This commission has made it clear to the attorneys who represented him before that this commission does not negotiate dates with witnesses. The commission fixes the dates and people are supposed to appear and if they have got good grounds for not appearing then they make an application – a necessary application and show that they
20 have got good grounds. And if I am satisfied that they are good grounds other dates will be determined.

But we will not negotiate dates with witnesses. So the position as it stands is the application brought by the legal team of the commission for the authorisation of a summons – the issuing of a summons against Mr Zuma will

proceed on the 9 October at 09:00 and the dates of 16 to 20 November 2020 have been determined for his appearance.

That is all I wanted to say about that matter and now we may proceed.

ADV PRETORIUS SC: Thank you Chair. Chair the evidence contemplated for this week concerns matters related to the Department's – in the Free State dealing with housing. And in particular a series of events that took
10 place during 2010 and 2011 concerning certain pre-payments over half a billion Rand made to suppliers in order to avoid forfeiting funds to the fiscus.

What has been described as a fraudulent scheme of payments to suppliers causing great prejudice and loss to the department? And that really is the focus of the evidence this week.

Now Chair the witnesses who will testify will firstly be Mr Mokhesi who came onto the scene later than the relevant period but brought an application on behalf of the
20 department or the department to review its own decisions and that application summarises most of the relevant facts which are common cause between a number of parties – not all the parties but the relevant parties. Mr Mokhesi will take you through the events Chair to deal with the matters.

Mr Mokoena was the Head of Department at the

time. He will testify to certain issues and then a Mr Mkhathshwa will also testify in relation to certain issues.

But Chair there have been a number of reports and investigations into this matter. The Special Investigations Union – Unit have dealt with the matter. There have been forensic reports – the number of forensic reports and there has been of course the application for – by the department which involved a great deal of research into the events that happened.

10 There was also a very, very thorough disciplinary inquiry which is the focus of certain factual investigations that have been conducted for that purpose and that too is a matter of record.

So Chair it is not the intention of the evidence leaders in this matter to rehash all those investigations it would be a matter of repetition.

But what we would like to do with your leave Chair is focus on two issues? One is the issue of accountability. Who was held accountable for what happened and why
20 were certain people not held accountable? That will be the first focus.

The second focus would be to show that this prepayment scheme to suppliers that was devised in order to allow the department to spend over a half a billion Rand for little or no value under a – what has been termed by

the court in their application as a fraudulent scheme is – took place within a context and that context was an entirely irregular background of the irregularities in relation to procurement.

From the start in 2010 matters went wrong or deliberately were caused to go wrong in an entirely irregular scheme and that is – that context in the housing – housing settlements – Human Settlements Department will be placed before you.

10 Those two issues important as they are seemed to have really escaped notice and whilst it is important to tell the whole story for the purposes of the commission which we will do it is those two issues upon which we will focus.

Chair there are a number of bundles that have been prepared. They contain the statements of nine witnesses not necessary to deal with the evidence of all nine witnesses as will become apparent.

There is a file containing transcripts of the interviews with certain of the witnesses.

20 Then there is a file which deals with the court proceedings and contains the judgment of a full bench of the Free State Division.

Then there is a file containing a number of forensic reports which it is not necessary to detail but we will refer to certain aspects of those forensic reports.

And there is a file containing the relevant legislation and prescripts and then importantly there is a file which contains the disciplinary records. The full disciplinary record which is there then for – and the findings 177 pages of findings parts of which we will rely on as well Chair to complete the picture which would otherwise not be complete. That – those records are before you for purposes of the commission, submissions, your findings Chair and any other purpose to which they
10 may be put in due course.

And then similarly to the Asbestos matter Chair we have together with the investigators compiled an investigators report which sets out from beginning to end all the detailed facts which is there as a matter of record again for submissions and the final report. It is supported by documentary evidence and again it is not necessary to go through that.

So Chair if by your leave I can just deal with a few matters by way of opening and then summarise the
20 important events to which reference will be made in evidence and then if we may deal with the evidence of Mr Mokhesi who brought the application on behalf of the department – for the Department to review its own decisions in relation to the prepayments.

CHAIRPERSON: That is in order.

ADV PRETORIUS SC: Chair there were two applications or perhaps still are two applications for cross-examination of Mr Mokoena.

Mr Mokoena the HOD at the time in his statement made certain allegations concerning a Mr Mkhathwa and Mr Koloi. They both filed applications for cross-examination but after correspondence with the attorneys and given the evidence that is to be led, they have put those applications on hold. So it is not necessary to deal
10 with them at this stage and they will in all probability not be preceded with.

I have dealt with the bundles and documentation that is before you and I have dealt with what we will focus on in opening and in the evidence. The three witnesses have been named and then a Mr Zwane who in a sense devised this scheme the evidence will be – it was apparently and I stress the word apparently not held accountable for any of the outcomes of that scheme and its illegality – manifest illegality will be asked to explain his
20 position in relation to that.

In essence what happened here is a number of junior employees were disciplined and I say junior with respect they were not mere functionaries they were officials of some seniority but the people who were ultimately responsible for the scheme and its

implementation no consequences followed.

Chair the – the background is important because it is important to understand the impropriety of the prepayment scheme within its proper context.

In 2010/2011 there were actually regular contracts entered into with contractors. And at a stage during that financial year the normal properly procured contracts were ready to be implemented. Then there came a change the Premier at the time Mr Magashule decided that there would
10 be a change in the whole system, bigger houses would be built, disputes arose with the contractors and a new tender process had to be commenced.

The new tender process was indeed commenced during the 2010/2011 financial year. But what happened was that by the time the bid adjudication committee came to consider the bids the period of validity of the tenders had expired. Instead of regularising the position by extending the validity of the period or the period of validity of the tenders – instead of simply regularising that and
20 there are various ways that are required to do that it was just abandoned.

The – those who qualified in terms of the bids and those who were disqualified including those who were declared incompetent to build were all put on a data base. And that data base certain officials including Mr Zwane the

evidence will be merely selected who they wanted to – to do the work.

So the contractors that were appointed during this whole process who received goods from the suppliers which accounts were prepaid were there irregularly in the first place. Instead of going through a proper tender process the relevant departments simply abandoned the process, threw it overboard and put qualified, disqualified on a data base and then just subjectively selected who
10 they wanted to appoint. Huge contract 500 000 houses in Municipalities in the Free State.

So in the original process Chair 361 bids were received. 105 were disqualified for basic bid compliance reasons; not properly registered, no tax returns or other formal reasons but important reasons. 147 were disqualified because they did not meet the minimum functionality threshold. In other words, were not competent to do the work. There were 109 who qualified. 81 established contractors and 28 emerging contractors.
20 That was the situation when the whole bidding process was thrown overboard because of the – expiry of the validity period.

So instead of reinstating the process and there are ways to do that which will be dealt with Chair all those qualified and disqualified were put onto a data base and

then at the discretion of officials subjective discretion of officials people were appointed to do work.

Of course, this had alarming consequences at the end which is the subject matter reports. Contractors simply could not do the work. They walked off site. Monies disappeared and all that is the subject of investigation in due course.

CHAIRPERSON: And of course putting the service providers on the data base implies that as far as the department is concerned they can be given jobs.

ADV PRETORIUS SC: Correct. So it opens the door for subjective allocation of work.

CHAIRPERSON: Ja it is putting...

ADV PRETORIUS SC: At a discretion of an official.

CHAIRPERSON: And if you put onto the data base service providers that have been found to be incomp – not competent to do the job it means you could be giving jobs to service providers who are not competent to do the job.

ADV PRETORIUS SC: It is exactly what happened Chair.

20 **CHAIRPERSON:** Yes.

ADV PRETORIUS SC: In fact the outcome of this whole process began here. It was disastrous for those people in the Free State who needed housing – low cost housing. There was a huge national project for the development of low cost housing originally and in its conception but

ironically it was designed to avoid mismanagement and corruption but that is precisely what happened in the Free State.

CHAIRPERSON: Hm.

ADV PRETORIUS SC: So the first in the 2010/2011 year the first issue that has really not received much attention was that the foundations – well there were not very many foundations at the end of the day but the foundation of the project – the housing project was fraught with
10 irregularities.

CHAIRPERSON: Hm.

ADV PRETORIUS SC: Quite simply a whole lot of qualified – disqualified people were put on the data base and from that data base people were then selected subjectively at the instance of particular officials.

CHAIRPERSON: Hm.

ADV PRETORIUS SC: The detail of how the matter should have been regularised will be dealt with in evidence Chair but for the moment suffice it to say that it was not a lawful
20 option simply to abandon the process simply because a particular time period had expired.

We will deal with the regulatory framework governing both the appointment of contractors on the one hand and suppliers to contractors on the other. But what is clear from the start Chair is neither contractors nor

suppliers of materials to contractors were subject to any competitive bidding process which as we have dealt with in the Asbestos matter is clearly unlawful and inexcusable.

So we will deal with the Section 217 of The Constitution; we will deal with the Public Finance Management Act Provisions; the Treasury Regulations and we will deal with the division of Revenue Act.

This money that was allocated by the National Fiscus to the Free State for the construction of houses was
10 allocated in terms of an Act colloquially called DORA the Division of Revenue Act. And that act is quite explicit. It says that we are going to allocate money to the Province for a particular express purpose in this case the construction of low cost housing.

The Act is very clear that if any of that money is to be paid to third parties such as contractors or suppliers it has to be done in terms of the regular procurement process – open bidding process which complies with the Supply Chain Management requirements of the Province. That did
20 – simply did not happen.

That fact it is clear was concealed from National. So not only must goods be procured or services be procured from third parties in accordance with Supply Chain Management Policy or Procurement Policy of the relevant Province and for which adequate documentation

for payment has been received.

So not only that but the – the purpose must be complied with. So it is only for housing in terms of the Act and in accordance with proper procedures.

But then there is a third provision which is important in this case. It says you cannot make advanced payments to anybody. You have to have received the goods or the services have to have been verified and done before you pay money out. For obvious reasons to avoid
10 precisely what happened in the Province.

That can only happen in two circumstances according to DORA. The first is the Receiving Officer in the Free State who receives the money has certified to the National Treasury that the transfer is not an attempt to artificially inflate its spending estimates and that there are good reasons for the advanced payment or transfer.

That it is clear on the department's own version subsequently was precisely the purpose. What happened was that by – towards the end of the financial year the
20 Free State had not spent over a billion Rand of its income and had to devise a fraudulent scheme or well a scheme which turned out to be fraudulent in order to spend that money. And all sorts of mechanisms were devised to ensure that that money could be spent completely irregular schemes and that will be – that story will be told and

placed before you.

But the second thing is that National Treasury must approve the advanced payment. It did not and in fact it was told something completely different and that – that evidence will be placed before you.

So this scheme that was devised Chair by the Free State Human Settlements Department in order to spend the money before the year end otherwise the money goes back to Treasury was devised at the highest level. It was
10 devised at the level of the MEC in a War Room – Mr Zwane. He devised it and executed it and that War Room supervised the execution of the scheme; the detail of which will become clear in the evidence of Mr Mokhesi.

Not only did they devise it but they ignored warnings from National that this was illegal and should not be proceeded with and notwithstanding those warnings the scheme was in fact proceeded.

The matter was done without proper legal advice being taken perhaps for obvious reasons because the – the
20 advice had already been given by National that this scheme was illegal and on the face of it was manifestly illegal.

There are various elements of this scheme that will emerge in evidence. Not only were payments made to suppliers before goods were even supplied but payments

were made to suppliers and then on paid to contractors as so called bridging finance is not the business of the Human Settlements Department at all. And then in addition and in order to ensure that as much money was spent as fast possible retainer agreements retentions which would be kept back by the department to compensate for work poorly done or work not done those rights were abandoned entirely. So even the retainer amounts were paid out prematurely. Of course, they had serious consequences
10 because as matters turned out, the result was all but hopeless and that retention money was needed but that had been foregone to insure it. The details of that will be put before you.

The agreements that were entered into as part of the scheme, which the court found to be a fraudulent scheme, are quite complicated but we will do our best to explain them so that they are accessible to those who have an interest in following it.

But essentially, there were three levels of contract. The
20 first is the contract with the construction entity, the builder. That contract with the builder was clear in its terms, was on the face of it regular insofar as the contents of the contract concerned.

We have already said that the selection was entirely irregular but once the contract was entered into, it was the

duty of the contractor to source the materials, to pay for the materials, to put the materials into the building.

And then on three milestones being achieved, would invoice the department and the department would paid the contractors. So the contract in itself was, on the face of it, quite regular.

But in order to spend the money before the year-end because, of course, these buildings would only be constructed and these milestones would only be reached in
10 the next financial year, but the money had to spend in the 2010/2011 year, a scheme was devised to pay suppliers upfront even before goods were delivered to the builders.

So a scheme was devised to pay the suppliers sums of money. With that money, the suppliers not only paid “bridging finance” to the contractors, which was not the business of the Housing Settlement Department Fraud.

But the suppliers would enter into agreements with the department to receive monies and eventually to deliver goods but those were all prepayments. R 600 million Chair
20 was spent in this ...[intervenes]

CHAIRPERSON: That way...

ADV PRETORIUS SC: ...fraudulent way.

CHAIRPERSON: But the whole idea was to avoid a situation whereby the end of the financial year the department had not used this money for housing?

ADV PRETORIUS SC: Yes.

CHAIRPERSON: So there had to be... a scheme had to be arranged in terms of which it would be appear as if they had used the money properly ...[intervenes]

ADV PRETORIUS SC: Properly

CHAIRPERSON: ...for housing.

ADV PRETORIUS SC: Yes.

CHAIRPERSON: But actually, they had not used the money properly.

10 **ADV PRETORIUS SC:** Correct. And that was the essence of the fraud found by the high court.

CHAIRPERSON: H'm, h'm.

ADV PRETORIUS SC: So the question is, who was accountable for that and how did accountability follow? The facts which I have just related Chair are in a sense common cause.

Mr McKenzie was the deponent to the founding affidavit where these facts were placed before the court and they are fully set out and we will go through them in some detail and
20 try and unravel them. They are quite elaborate in some ways but quite clumsy in other ways.

So for example, in order to make this appear regular and in order to provide documentation to the Provincial Treasury on which monies could pay out, there was a scheme that took some time to... for the legal team to understand, let

alone communicate sensible to anybody else Chair, which I will attempt to do, of sessions entered into.

So what... there had to be a paper trail ...[intervenes]

CHAIRPERSON: Were those sessions spelt with an s-e-s-s-i-o-n-s? [laughing]

ADV PRETORIUS SC: Yes, sometimes it is spelt with a C but you will see Chair that right up to the end they are spelt with an s and that is... I suppose not to give them the qualification of a real cession.

10 **CHAIRPERSON**: Ja.

ADV PRETORIUS SC: But you will recall Chair that we pointed out that the... any claim by the builder against the department would only arise when a milestone was reached which would probably be in the following financial year.

But what the scheme was devised whereby that claim against the department or materials as part of the work was seeded through the supplier.

Of course, there was no such plan upon which the supplier then as part of the prepayment scheme invoiced the
20 department and got paid its money.

And of course, even further, quite ironically, of course there would no claim because the supplier had already been paid by the time the cession came to operate but it is complicated now and try to explain it properly in due course.

But that whole scheme of cessions was the third layer of

agreements which were entirely nonsensical in a way. Then of course Chair, there were two other methods devised for getting rid of money quickly.

The Free state Housing Settlement Department became involved in the job of bridging finance. And it emerged in the investigations that what the suppliers were doing with the monies they received is they were handing it on through the builders before anything had happened as part of bridging finance.

10 That is dealt with in a certain way and I will deal with it with Mr Mokhesi who describes that whole scheme as quite frankly bizarre and uses those particular words.

And then of course the abandonment of the right of retention. If the department has got 5% of all the expenditure on construction it needs that money and in particularly needed in this case to remedy defect.

But decided because we need to spend this money, we are going to pay that money and not rely on the retention. So that money was also part of the scheme.

20 That does not arise out of the application. That came out of further investigations but that will be dealt with. It was dealt with in the disciplinary inquiry.

So Chair, there are a number of investigations too that have taken place.

The Commission simply would not have the capacity to

go into hundreds and hundreds of individual contracts to show why those particular persons benefited on an irregular and unlawful basis from the distribution of monies in haste during the 2010/2011 financial year.

But we will highlight some matters which have been highlighted in the investigations and which require investigation and Mr Mkhathshwa will give evidence in relation to certain of the matters that concerned him.

He was, in fact, relatively low down in the seniority
10 hierarchy but he was one of the people that were dismissed.

It is stated Chair that there and quite interestingly, and perhaps a matter of concern in itself, were... there was an overdose of forensic reports in this matter.

The Auditor General, quite properly of course, conducted its investigation and report. There was an entity called Open Waters Advanced Risk Solution that was employed to conduct forensic audits.

The Special Investigations Unit did its own. Nurcha (n-
u-r-c-h-a) Finance Company Limited did an expensive
20 investigation as well.

And the outcome of all that has yet to be realised. That in itself is a matter of concern. How matters are investigated, who is appointed to investigate matters and what is the outcome of that. And we will deal with that submissions in due course.

So Chair that is a very brief overview of the evidence that will be lead and if we may take you through the application that was brought subsequently through that series of events by the department itself and Mr Mokhesi will hopefully help us in that.

CHAIRPERSON: Okay. No, that is fine. Does that mean he is ready to be sworn in?

ADV PRETORIUS SC: Yes, please.

CHAIRPERSON: Yes. Before that is done. I did not deal
10 earlier on with a matter that I should have dealt with when I responded to some media queries with regard to Mr Zuma.

I think the media queries at different times have been about his appearance before the Commission but also about the fact that he has not filed any affidavit before the Commission to help the Commission put his side of the story. I did not deal with the last part.

I just want to deal with that immediately because it is in the public interest that the public knows what is happening, particularly about somebody who was president of the
20 country.

And I just want to say that towards the end of August I issued a directive in terms of Regulation 10(6) of the regulations of this Commission, compelling Mr Zuma to depose to an affidavit or declaration to answer certain matters relating to Eskom with special reference to the

affidavits submitted by Mr Zola Tsotsi, who was chairperson of Eskom at some stage, as well as, the affidavit of Mr Nick Linnell with regard to a particular meeting that they both said had been held in Mr Zuma's official residence in Durban where, according to them, had a discussion relating to the removal of certain executives at Eskom was discussed or a discussion took place relating to the removal or suspension of certain executives. That was towards the end of August.

And I have issued another 10(6) directive against Mr
10 Zuma in regard to another matter. The Commission might not compel him to respond to all the affidavits that have been filed but certainly there are certain affidavits that the Commission believes are very important for him to deal with and in regard to those as the legal team makes a request for me to issue directives to him to submit affidavits.

I will consider those requests and make a decision on the basis of each application or request. I thought I must just add this because I did not deal with it earlier on and it is a matter that the public has an interest on. Yes.

20 **ADV PRETORIUS SC:** Thank you, Chair. Chair, before proceeding with the evidence of Mr Mokhesi. He is legally represented. May his counsel place themselves on record?

CHAIRPERSON: Oh, yes sure.

COUNSEL: May it please you Chairperson. I appear on behalf of Mr Mokhesi together with my learned junior, Mr

Manye(?), instructed by Ms Bhavani Miranjani of the State Attorney, Bloemfontein.

CHAIRPERSON: Yes.

COUNSEL: We understand he is merely a witness and I doubt that you will hear from me again ...[intervenes]

CHAIRPERSON: Yes.

COUNSEL: ...in this matter. Thank you.

CHAIRPERSON: Thank you. Okay. Administer the oath or furnish, please.

10 **REGISTRAR**: Please state your full names for the record.

WITNESS: Nthimotse Mokhesi.

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

WITNESS: No, I do not.

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

WITNESS: Yes, I do.

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

WITNESS: So help me God.

NTHIMOTSE MOKHESI: (d.s.s.)

CHAIRPERSON: Thank you. You may be seated Mr Mokhesi.

EXAMINATION BY ADVOCATE PRETORIUS SC: Morning,
Mr Mokhesi.

MR MOKHESI: Morning.

CHAIRPERSON: We are happy that you are back Mr
Mokhesi.

MR MOKHESI: [No audible reply]

CHAIRPERSON: Yes. Mr Pretorius, are you only going to
deal with the housing matter in regard to him at this stage
and deal with the remainder of his evidence relating to the
10 asbestos matter on another day? Or are you ...[intervenes]

ADV PRETORIUS SC: Yes, Chair that is the intention. Mr
Mpho did appear this morning.

CHAIRPERSON: H'm?

ADV PRETORIUS SC: In the expectation that Mr Mokhesi
would also be dealing with asbestos matters. Unfortunately,
in our preparations we were not in a position to deal with
both matters today. Alternative arrangements will then be
made in consultation with Mr Mpho, the attorneys and Mr
Mokhesi. But I can give Mokhesi the assurance that that
20 period of questioning will be very short.

CHAIRPERSON: Yes.

ADV PRETORIUS SC: And it could take place either
Monday or Tuesday next week.

CHAIRPERSON: Yes.

ADV PRETORIUS SC: All parties or even other

arrangements could be made.

CHAIRPERSON: Yes. Well, you just sat in consultation with Mr Mpho.

ADV PRETORIUS SC: Yes. After consultation with Mr Mpho.

CHAIRPERSON: When I just said we do not negotiate dates with lawyers and their clients, witness and their clients. [laughing] Okay alright.

ADV PRETORIUS SC: Although ...[intervenes]

10 **CHAIRPERSON**: If it is short notice, we can talk because it is short notice but if it is reasonable notice...

ADV PRETORIUS SC: Yes. Unfortunately, we did inconvenience Mr Mpho.

CHAIRPERSON: Ja. [laughing] Yes. Okay alright.

ADV PRETORIUS SC: But that will be sorted out in the spirit of collegiality and it will be after consultation.

CHAIRPERSON: Well, as I say, if they are given reasonable notice, there is no need but if you seek have short notice then it is understandable.

20 **ADV PRETORIUS SC**: Yes.

CHAIRPERSON: Because they will complain of short notice. But if they are given reasonable notice, then there is no need because, otherwise, we would never get anything done if we got to negotiate dates with lawyers and witnesses.

ADV PRETORIUS SC: I understand Chair.

CHAIRPERSON: Ja.

ADV PRETORIUS SC: And ...[intervenes]

CHAIRPERSON: But Mr Mokhesi's other evidence should be dealt with pretty soon.

ADV PRETORIUS SC: Yes, it will be Chair.

CHAIRPERSON: Ja.

ADV PRETORIUS SC: It must be and ...[intervenes]

CHAIRPERSON: If at all possible.

10 **ADV PRETORIUS SC:** ...I think that at least is ...[intervenes]

CHAIRPERSON: Next week if at all possible.

ADV PRETORIUS SC: Yes.

CHAIRPERSON: But you will have a look. Okay alright.

ADV PRETORIUS SC: Mr Mokhesi, there is a file FS14. Is that the file in front of you?

MR MOKHESI: Yes, FS14.

CHAIRPERSON: This file Mr Pretorius, I guess should be marked Bundle FS14?

20 **ADV PRETORIUS SC:** Your...

CHAIRPERSON: Or not?

ADV PRETORIUS SC: Yes, it should be.

CHAIRPERSON: Ja.

ADV PRETORIUS SC: That is the file marked Court Proceedings.

CHAIRPERSON: Sorry?

ADV PRETORIUS SC: Is that the file marked Court Proceedings?

CHAIRPERSON: Ja, ja.

ADV PRETORIUS SC: It should be. If it has not, that was part of the ...[intervenes]

CHAIRPERSON: Okay alright.

ADV PRETORIUS SC: ...file that were given this morning.

CHAIRPERSON: Ja, ja. Okay bundle... it will be referred to
10 as Bundle FS14. That is the file marked Court Proceedings,
Exhibit UU11.

ADV PRETORIUS SC: Thank you, Chair. I understand, and there is no dispute about this Mr Mokhesi, that during 2013 the Free State Department of Human Settlements brought an application before the High Court in Bloemfontein to review and set aside certain contracts that had been entered into with a number of suppliers. In fact, a 106 of them.

MR MOKHESI: Yes.

ADV PRETORIUS SC: And you were instrumental in doing
20 the necessary investigation and research, reading the necessary documentation in preparing the papers for that application.

MR MOKHESI: Yes, I was.

ADV PRETORIUS SC: If you would please go to page 95. You will see Mr Mokhesi and you are fortunately an old hand

at this, that there are two numbers, two sets of numbers at the top of each page. We will be dealing with the black numbers in the top left-hand corner.

MR MOKHESI: Yes, I am on page 95.

ADV PRETORIUS SC: Now that is a founding affidavit. If you would go to page 173, please. At the bottom of that page, whose signature is that?

MR MOKHESI: Ja, that is my signature.

ADV PRETORIUS SC: Is that the founding affidavit then
10 that was brought during these court proceedings attested to
by yourself?

MR MOKHESI: Yes.

ADV PRETORIUS SC: And it appears from page 95 to page
174.

MR MOKHESI: Yes, it is. That is the one.

ADV PRETORIUS SC: The notice of motion appears before
that after divider 2. One can ignore the summons
proceedings in the first divider. But if one could go to page
60.1, please.

20 **MR MOKHESI**: Yes, I am on 60.1.

ADV PRETORIUS SC: And that was the application to
review and set aside the agreement with suppliers listed as
respondents, a 106 of them. And to set aside the decisions
made by the Free State Department of Human Settlements to
make the payments listed in Annexure 3 to the notice. Is

that correct?

MR MOKHESI: Yes, that is correct.

ADV PRETORIUS SC: Right.

CHAIRPERSON: I am sorry, Mr Pretorius.

ADV PRETORIUS SC: Yes, Chair.

CHAIRPERSON: You say page 60 point something?

ADV PRETORIUS SC: Yes.

CHAIRPERSON: 60.1?

ADV PRETORIUS SC: Yes, Chair.

10 **CHAIRPERSON:** It does not look like I have got 60.1. I have got 61. And at 61 is the list of respondents. That is Annexure 1 to the notice of motion.

ADV PRETORIUS SC: Alright Chair. May I... there is a divider marked 2.

CHAIRPERSON: Yes.

ADV PRETORIUS SC: A cardboard divider.

CHAIRPERSON: Ja.

ADV PRETORIUS SC: The first page after that divider, may I ask what page...?

20 **CHAIRPERSON:** 61.

ADV PRETORIUS SC: 61?

CHAIRPERSON: H'm. It is supposed to be 60.1?

ADV PRETORIUS SC: 60.1. Is that 60.1 or 61?

CHAIRPERSON: It is 61.

ADV PRETORIUS SC: Well, then it is the incorrect page.

Chair, perhaps this is a ...[intervenes]

CHAIRPERSON: A mistake.

ADV PRETORIUS SC: I may run for cover.

CHAIRPERSON: Yes. [laughing]

ADV PRETORIUS SC: And we will return after the short adjournment?

CHAIRPERSON: Okay alright. Let us take the tea adjournment and we give you a chance to have this attended to.

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

CHAIRPERSON: We adjourn.

INQUIRY ADJOURNS

INQUIRY RESUMES

CHAIRPERSON: Okay, it looks like the pagination has been corrected.

ADV PRETORIUS SC: Yes, for the present, thank you, Chair.

CHAIRPERSON: Yes, okay. Let us continue then. If you would go to page 60.1 please, Mr Mokhesi of FS14.

20 **MR MOKHESI:** Ja, I am on page 60.1.

ADV PRETORIUS SC: That is the notice of motion preceding the affidavit to which we have just referred the Chair.

CHAIRPERSON: I am sorry, Mr Pretorius, there is quite some noise I think from the air con which was not there

before tea at least I did not notice that. It looks like quite – it is loud. Did anybody ask for it to be put on?

ADV PRETORIUS SC: I did.

CHAIRPERSON: Oh, you did.

ADV PRETORIUS SC: But it can be put off, we would warned that it would be noisy.

CHAIRPERSON: Yes. It seems quite – I do not know if there is a way of reducing the sound so that it is not too noisy. I think somebody will look at that. Okay, alright.

10 **ADV PRETORIUS SC:** Yes, thank you, Chair. Otherwise we could just have it on during the breaks.

CHAIRPERSON: Yes.

ADV PRETORIUS SC: That might be a way of solving the problem but it is pretty hot down here.

CHAIRPERSON: Ja. No, that is fine, we will just have to see how we strike the balance. I do not want you to feel too hot. Okay, alright, I think they have reduced it. That should be fine.

ADV PRETORIUS SC: Thank you, Chair. Mr Mokhesi,
20 that is the notice of motion about which we have been speaking, is that correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: And it seeks to set aside certain agreements with persons listed in the annexure of 106 contracting parties and it also seeks to set aside decisions

of the Free State Department of Human Settlements to make payments in terms of those agreements, is that correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: The date of that notice of motion, I did refer to a document dated 2013 but this application was brought, as I understand it, in 2016.

MR MOKHESI: Yes.

ADV PRETORIUS SC: Some years after the events in
10 question which took place in 2010 and 2011.

MR MOKHESI: Yes.

ADV PRETORIUS SC: If one could go please to FS14 at page 96.

MR MOKHESI: Page 96?

ADV PRETORIUS SC: Yes, paragraph 4. Do you have that?

MR MOKHESI: Yes.

ADV PRETORIUS SC: There you set out the sources of the information relied upon by you in this affidavit.

20 **MR MOKHESI:** Yes.

ADV PRETORIUS SC: Many of those sources are not a matter of great controversy, they may be in certain cases in relation to certain person but generally speaking, those are the facts upon which you relied. Would you tell the Chair please what you relied on for the preparation of this

affidavit?

MR MOKHESI: First, as I have indicated in my affidavit, the thing, the disciplinary records because I think the disciplinary process was completed around about that time, 2016, and also the – ja, the findings as well as the SIU finding in respect of our communication. Also taking into consideration, Chair, that the report of the SIU is a report of the President. However, in the process we have been working together with the SIU and also getting some
10 information of which made us to rely on this – for us to compile this motion.

ADV PRETORIUS SC: Alright, we will talk about the SIU report in due course, briefly, but just for the record, Chair, the transcript of the disciplinary hearing relied up by Mr Mokhesi is in bundle FS16, 17, 18 and 19. The findings are in bundle FS19 at page 612 to page 788 and the SIU report is in bundle FS15 at page 384, it is a report dated August 2015.

Subject to that and as far as you are aware are the
20 facts contained in this affidavit true and correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: Of course many of the facts that are contained in this affidavit were summarised in heads of argument which we also have available, Chair, prepared on the basis of the papers by Adv Budlender and those facts

were found by the court, Pohl AJ, largely to be reliable and correct. Do I understand that correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: And we will deal with his judgment insofar as it is relevant in due course, is that correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: Now we have told the Chair that the events relevant to your evidence today, Mr Mokhesi, took place in the 2010/2011 financial year within the Free State Department of Human Settlements.

MR MOKHESI: Yes, correct.

ADV PRETORIUS SC: Who was the head of department of Free State Human Settlements at the time?

MR MOKHESI: It was Mr Mokoena.

ADV PRETORIUS SC: And who was the MEC for Human Settlements in the Free State Province at the time?

MR MOKHESI: It was MEC Zwane.

ADV PRETORIUS SC: If one could go please to paragraph 8, if I may just put that on record. In paragraph 7, just by way of introduction, you say in the affidavit that this application arises from a set of agreements concluded in late 2010 and early 2011 between the department and a number of building contractors and suppliers of building materials and to payments made by the department to the suppliers. Is that a correct summary of the application?

MR MOKHESI: Yes.

ADV PRETORIUS SC: Or the subject matter of the application.

MR MOKHESI: Yes, that ...[intervenes]

CHAIRPERSON: Would you raise your voice, Mr Mokhesi?

ADV PRETORIUS SC: And then you explain in paragraph 8, the agreements relate to the construction of low cost housing in the Free State Province.

10 “The department received a large conditional funding allocation from National Treasury to build low cost housing.”

That is a correct statement of fact, I understand.

MR MOKHESI: Yes.

CHAIRPERSON: Do raise your voice, Mr Mokhesi.

MR MOKHESI: Yes.

CHAIRPERSON: Okay.

20 **ADV PRETORIUS SC:** And the legislation which governed that funding allocation from National Treasury was the applicable Division of Revenue Act, DORA, is that correct?

MR MOKHESI: Correct.

ADV PRETORIUS SC: You continue in the affidavit to say:

“The agreements form part of a fraudulent scheme which was conceived by the department to disburse very substantial sums of money mainly to the

suppliers in order to avoid the funds becoming a so-called unspent conditional allocation and therefore reverting to the National Revenue Fund.”

Is that a correct statement of fact?

MR MOKHESI: Yes.

ADV PRETORIUS SC: Would you explain it please to ...[intervenes]

MR MOKHESI: This also I must also be very careful because not everything that looks like fraud is fraud and
10 also to – because the sole purpose of this affidavit also taking into consideration that the SIU was also on it, was really to try and plea(?) with the court to give us a favourable judgment to recover the money. So that was really the whole purpose of this court proceeding in the main.

CHAIRPERSON: Well, if – you simply have to describe matters as you believe them, genuinely believe them to be so. If you genuinely believe that this was fraud. That is what you say. It may be that you are mistaken but if that is
20 your genuine belief, that is what you say. If you do not genuinely believe so, you do not say so, you do not say you believe it to be fraud. If you say it appears to me to be fraudulent, that is what you say. So I am just explaining that ...[intervenes]

MR MOKHESI: Okay.

CHAIRPERSON: ...because I seem to detect that you think that there may be aspects in the affidavit where maybe you put statements in a certain way and you just want it to be understood in a certain context. Or Mr Pretorius may be putting certain propositions to you and you are not sure whether they – it is something you can agree to completely or whether you need to qualify it. So I am just explaining that in the end whatever you say must reflect what you genuinely believe to be the position.

10 **MR MOKHESI:** I think what I can say with utmost commitment it is that they were irregular in that way because in the manner that they were done, you know, and one cannot conclusively say it is fraud because, you know, my adviser also informed that, you know, there must be an element, an proven element of intention as well. It certainly looked like that but, you know...

CHAIRPERSON: You are quite entitled to say this is how it looks to you or this is how it looked to you at the time. You are quite entitled to say well, it looked like that at the time but
20 since then I have had an opportunity to reflect, I do not think it looks like that. So nobody wants you to say something that you do not genuinely believe to be true. Okay?

MR MOKHESI: Okay.

CHAIRPERSON: Okay, so as Mr Pretorius puts questions to you, just bear that in mind. Okay. Mr Pretorius?

ADV PRETORIUS SC: Well, let us deal with that briefly. We will get into the detail in due course as to why you would have said in this affidavit it was a fraudulent scheme and it said more than once, Mr Mokhesi. Why the judge would have found it a fraudulent scheme and why your counsel presented extensive heads of argument describing the scheme which was fraudulent. That scheme, what was its purpose?

MR MOKHESI: It is mainly – I think as you have also
10 articulated, it was one meant to spend the money because it came up – I am informed that at that particular time the department – I think expenditure of the department was around about 10% and there was issues of concern that they will not be in the position to spend the money, a full allocation by the end of the year. So it came as a result of that to try and spend what has been allocated because there was also – it came clear that ...[intervenes]

CHAIRPERSON: Is it your analysis of what happened, that the purpose was to avoid this money being taken back
20 to National Revenue Fund, the National Revenue Fund if it had not been spent by the end of the financial year?

MR MOKHESI: Ja, ordinarily it will be reallocated to other provinces, that is what ordinarily happens.

CHAIRPERSON: Yes, ja, so basically ordinarily the province would forfeit the funds that had not been spent.

MR MOKHESI: Yes, a certain portion.

CHAIRPERSON: A certain portion.

MR MOKHESI: And it will be allocated and reallocated to other provinces.

CHAIRPERSON: Yes.

MR MOKHESI: Who are spending, and that is how normally it works.

CHAIRPERSON: And what must happen before the province forfeits such money? What is required to have
10 happened before the province [inaudible – speaking simultaneously]

MR MOKHESI: Well, there will be reports that are presented to – of all the provinces in terms of where they are, how much they have spent up to particular point. Normally after half year you are expected at least to be as close as possible to 50% and the projects that are running and the level of commitments that you have. And then you are given an opportunity to say particularly for those who are under spending.

20 Then you are given an opportunity to make a case as to why your allocation or certain funds should not be taken away from yourselves and reallocated elsewhere.

CHAIRPERSON: Would it be correct to say as a province or a department you would forfeit those funds or a portion of those funds if either it is National Treasury or National

Department, I do not know which one, concludes that you have failed to spend the funds sufficiently during that financial year for the purpose for which they were allocated to you?

MR MOKHESI: Will be correct ...[intervenes]

CHAIRPERSON: Would it be correct to say as a department you would forfeit such funds or a portion of such funds if either it is the National Treasury or the National Department, I do not know which one, you would
10 know, concludes that you, as a department, have failed to sufficiently spend the funds that were allocated to you for the purpose for which they were allocated to you?

MR MOKHESI: Yes, you will forfeit – two stages – you know, the first part is a report provinces that have not spent or that have not reached a specific milestone in their expenditure will then be identified. You know, it can be one or two, a number of, and those provinces will then have to make a sort of a recovery plan. Expenditure recovery plan that will indicate, for example, how you
20 would be – how you would recover and, you know, be on track with the rest and that is informed by the projects that are running and with all that information, then the National Department will either say no, we agree with you or no, we do not agree with you and therefore we are taking money anyway.

CHAIRPERSON: Yes.

MR MOKHESI: And allocate, you know?

CHAIRPERSON: Yes, okay.

MR MOKHESI: It is a question of a discussion between that relevant province and the National Department.

CHAIRPERSON: But in the end you are not going to forfeit any money if the National Department believes that you are spending the money appropriately.

MR MOKHESI: Yes, you will not – if they believe – if you
10 have made your case ...[intervenes]

CHAIRPERSON: Ja, you persuade them.

MR MOKHESI: Yes, you ...[intervenes]

CHAIRPERSON: But if despite whatever you say they are convinced that you are not spending the money sufficiently ...[intervenes]

MR MOKHESI: They take it and ...[intervenes]

CHAIRPERSON: Then they take it away.

MR MOKHESI: Yes.

CHAIRPERSON: Okay. Mr Pretorius? So if I want to
20 avoid that, that consequence, whatever I do, I would have to create the impression at least that I have sufficiently used the money for the purpose for which it was given to me, is it not?

MR MOKHESI: Chair, maybe I am I misunderstanding your question.

CHAIRPERSON: In other words, if I do not want the National Department to conclude that I have not sufficiently used the money for the purpose for which it was given to me...

MR MOKHESI: Yes?

CHAIRPERSON: I would have to create the impression that I have sufficiently used the money for the purpose for which it was given to me during that financial year. Then if I persuade them that that is the position, they will not take
10 it away from ...[intervenes]

MR MOKHESI: They must believe in your plan.

CHAIRPERSON: H'm?

MR MOKHESI: They must believe in your plan.

CHAIRPERSON: Yes, yes.

MR MOKHESI: That you are putting forward. They have to believe in your plan.

CHAIRPERSON: Yes.

MR MOKHESI: If they do not believe in your plan they will take the money anyway.

20 **CHAIRPERSON:** Yes, okay.

MR MOKHESI: And how they take the money, is that you will not receive your next allocation.

CHAIRPERSON: Yes.

MR MOKHESI: For example, if you are receiving, just by way, 100 000 per month which goes to 1.2 million. I am

just making an example. The last two, they will decide and say right, you are not going to receive – for February and March you will not receive.

CHAIRPERSON: Ja.

MR MOKHESI: They may decide to take 200 000.

CHAIRPERSON: Yes.

MR MOKHESI: Or 300 000, whatever the case might be.

CHAIRPERSON: Ja, okay.

MR MOKHESI: So that is how it works.

10 **CHAIRPERSON:** It works, ja. Thank you. Mr Pretorius?

ADV PRETORIUS SC: Mr Mokhesi, you have told ...[intervenens]

CHAIRPERSON: I hope that has clarified something.

ADV PRETORIUS SC: I am sorry, Chair?

CHAIRPERSON: I am saying I hope that has clarified something.

ADV PRETORIUS SC: Well, it is mainly for the clarification, if I may, Chair.

20 **CHAIRPERSON:** But by all means continue if you seek to have more clarification.

ADV PRETORIUS SC: Thank you. You have told the Chair, Mr Mokhesi, of the sources that you relied on to prepare this affidavit.

MR MOKHESI: Yes.

ADV PRETORIUS SC: They included the disciplinary

hearing transcript, the evidence that was given, an order to dismiss certain employees of the department, correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: The findings of the disciplinary hearing which resulted in the dismissal of certain employees, correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: And the investigation carried out by the Special Investigating Unit, right?

10 **MR MOKHESI:** Yes.

ADV PRETORIUS SC: You looked at those documents and you reached certain conclusions which led you on behalf of the department to attest to this affidavit for review, correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: You say in paragraph 8 in this affidavit:

“The agreements...”

Which you seeked to set aside.

20 “...formed part of a fraudulent scheme which was conceived by the department to disburse very substantial sums of money mainly to the suppliers in order to avoid the funds becoming a so-called unspent conditional allocation and therefore reverting to the National Revenue Fund.”

Now when you attested to this affidavit did you believe that to be a correct statement?

MR MOKHESI: Yes, I believed so.

ADV PRETORIUS SC: Has anything happened for you to change your mind?

MR MOKHESI: Well, to change my mind? Simply that was – you know, the process was unlawful.

ADV PRETORIUS SC: Okay. Well, you know the process was unlawful, we will go into the detail of that.

10 **MR MOKHESI:** Okay.

ADV PRETORIUS SC: You accept the process was unlawful?

MR MOKHESI: Yes.

ADV PRETORIUS SC: Right. And you accept that certain representations had to be made to National in order to persuade them not to take your money away, correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: And many of those representations were not true, correct?

20 **MR MOKHESI:** Yes.

ADV PRETORIUS SC: And as a result the law that should have been carried out, the forfeiture, was not carried out, correct?

MR MOKHESI: The...? Can you repeat that, Mr Pretorius?

ADV PRETORIUS SC: In other words, you were required

to explain to National why they should not forfeit the money.

MR MOKHESI: Yes, okay.

ADV PRETORIUS SC: Or why you should not forfeit the money.

MR MOKHESI: Yes.

ADV PRETORIUS SC: Explanations were made, documents were put up, statements were made, many of which were false, correct?

10 **MR MOKHESI:** Yes, many – yes, many of ...[intervenes]

ADV PRETORIUS SC: We will come to the detail.

MR MOKHESI: Okay, alright.

ADV PRETORIUS SC: I do not want to hold you to generalisations, we will come to that. And, as a result, what should have happened in accordance with the law did not happen, the money should have been forfeited, but was not, correct?

MR MOKHESI: Yes, the money should have been forfeited because the National Department did not accept that
20 expenditure recovery plan of [inaudible – speaking simultaneously]

ADV PRETORIUS SC: Well, we will come to that, the expenditure recovery plan.

MR MOKHESI: On that basis to forfeit the money.

ADV PRETORIUS SC: Because that in itself is a gross

misrepresentation but we will come to that. And you say so yourself. So I am not taking things further than what you say in this affidavit.

MR MOKHESI: Okay.

ADV PRETORIUS SC: But let us move on, if we may, because it is all in the detail. You say it was a fraudulent scheme in your affidavit. You say it again in paragraph 10, you say:

10 “The agreements and payments formed part of a fraudulent scheme and are tainted by fraud.”

You say that yourself, correct? It is not just a passing comment in one paragraph, you say it repeatedly throughout, correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: Were you in court when your counsel argued the matter?

MR MOKHESI: No, I was not in court.

20 **ADV PRETORIUS SC:** Well, let me just tell you that your counsel argued strenuously that the scheme was a fraudulent scheme. Did you take note of the judgment of the court?

MR MOKHESI: Yes, I have seen the judgment.

ADV PRETORIUS SC: If I can just take you to FS14 at page 599. It is right at the end of the bundle.

CHAIRPERSON: Did you say 599?

ADV PRETORIUS SC: Yes.

CHAIRPERSON: Okay.

MR MOKHESI: 599.

ADV PRETORIUS SC: Paragraph 9. You would have read this and no doubt accepted the finding because you acted on it. If you look at paragraph 9 on page 602.

MR MOKHESI: Paragraph 9.

ADV PRETORIUS SC: This is the judgment of the court, was presided over by Loubser J and Pohl AJ. The matter
10 was heard on the 26 August 2019, according to this, even though the application was brought three years prior to that. The judgment was delivered on the 26 August 2019 and in paragraph 9 the following is said and I am referring to page 602:

“The department was not able to spend the funding referred to in paragraph 6 supra fast enough and within the fiscal year to avoid the situation that most of it would revert back to the National Revenue Fund in terms of DORA.”

20 You have already told the Chair about that. The judgment continues to read:

“The department therefore conceived an illegal scheme to facilitate the advance payment of very substantial amounts of money mainly to suppliers within the fiscal year so that the funds would not

revert back to the National Treasury Fund.”

Judgment continues:

“The agreements that from the subject matter of this application were a key part of this illegal scheme. The agreements were unlawful for two major reasons. They were concluded without any proper procurement process having been followed and the agreements and the payments made under them formed part of a fraudulent scheme to avoid the
10 consequences of DORA.”

That is the finding of the court and it continues in paragraph 10:

“This illegal scheme was devised to allow the department to pay material suppliers very significant sums of money over a short period of time, in total more than R630 million over the period 2010 to 2011.”

That is the judgment that arose and was granted or relief was grant in accordance with the application that you
20 brought.

Now if we could go back to page 10 – oh it is at page 98 of the bundle, paragraph 10, there your affidavit reads:

“There are two major grounds on which the department seeks its relief; the first is that the agreements were concluded and the payments were

made in breach of Procurement Law. The second is that the agreements and payments form part of a fraudulent scheme and are tainted by fraud.”

That – those observations there in paragraph 10 are mirrored in the judgment and the portion I have just read. Correct?

MR MOKHESI: Correct.

ADV PRETORIUS SC: Right. Let us go to the components of the scheme if we may in paragraph 22 of your affidavit. Once again your make reference in paragraph 22 to a fraudulent scheme and if I can just read what you say in paragraph 22.

“I have said that this application relates to a set of agreements which the department concluded in late 2010 and early 2011 with contractors and suppliers. I have also said that the agreements form

part of a fraudulent scheme conceived by the department to pay out funds from its conditional funding allocation in order to avoid the funds becoming an unspent conditional allocation and reverting to the National Revenue Fund.”

That is at least the third reference to a fraudulent scheme it does not seem to be an error on your part. Correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: And then you describe the nature features of the scheme in paragraph 23. You say firstly that:

“The department concluded some 125 written building contracts with contractors.”

Are you able to say when those were concluded, that was before the pre-payments were made to suppliers. Is that correct?

MR MOKHESI: Yes, ja.

10 **ADV PRETORIUS SC:** And what did those building contracts provide in relation to who would purchase materials or supply materials and who would pay for them?

MR MOKHESI: Ja the – you know it is a standard contract, supplier – the contractor is responsible to purchase material and also to build, to covert that material into a product. A product referring to different milestones whether it is foundation, all plates of completions and then upon that then the contractor will then if he has completed the first milestone like your foundation P5.1 he can then
20 claim.

ADV PRETORIUS SC: Right.

MR MOKHESI: That is the basics, that is the contract, terms of that contact.

ADV PRETORIUS SC: Now these are standard building contracts that comply with the regulatory framework

applicable to construction. Correct?

MR MOKHESI: Correct.

ADV PRETORIUS SC: What is important about that scheme that you have just described is that the contractor sources the materials in accordance with the needs of the contractor.

MR MOKHESI: Yes.

ADV PRETORIUS SC: The contractor can then certify that those have been delivered. Is that correct?

10 **MR MOKHESI:** Yes that is it.

ADV PRETORIUS SC: And the contractor then incorporates those materials such as they are into the building.

MR MOKHESI: The normal contract is the contractor, if I did not understand your question you can – the normal is that the contractor is responsible for procuring material. That is basically how it works and he must convert that material into a product the foundation and then he must – once he has completed the foundation that is the first
20 milestone he then can claim that foundation subject to the certification and the signing off by the engineer and so on.

ADV PRETORIUS SC: Yes, of course.

MR MOKHESI: So that is the normal process.

ADV PRETORIUS SC: So the process you have described has a number of checks and balances in it.

MR MOKHESI: Yes.

ADV PRETORIUS SC: That can put the client, the Department of Human Settlements in a position of some comfort that materials have been ordered, supplied, incorporated into the building and then certified that have been so placed in the building. Correct?

MR MOKHESI: Yes, we do not buy material we buy a complete product.

ADV PRETORIUS SC: Yes, well however we describe
10 them but in the normal course and in terms of the contracts that you entered into or the department entered into with the contractors, the builders that was the scheme that was to be followed. Am I correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: Correct, right. But then further agreements were entered into – by the way it will become clear later that even those contractors were not appointed in accordance with a proper procurement scheme, you say that later. Is that correct?

20 **MR MOKHESI:** Yes.

ADV PRETORIUS SC: We will just flag that for the moment and deal with it later. But then further agreements were entered into, you say in paragraph 23.2:

“That despite the supply of materials or whatever being dealt with in the contracts with the builders or

the contractor's further agreements were entered into."

The department you say in paragraph 23.2:

"Also concluded some 112 written tri-partake supplier agreements with contractors and building material suppliers. A material term of these supplier

10 agreements was that the department would pay suppliers for building materials which the supplier suppliers supplied to contractors."

So now instead of the original scheme that you have just described to the Chair taking place we have a different scheme. Is that correct? Which differs entirely from the first scheme, right?

MR MOKHESI: Yes.

ADV PRETORIUS SC: So here the department was going to pay the suppliers for the building materials which the suppliers would then supply to the contractors. Correct?

MR MOKHESI: Yes.

20 **ADV PRETORIUS SC:** Why was it necessary to do that?

MR MOKHESI: It was not necessary; I do not know why it was necessary at the time to...[intervene]

ADV PRETORIUS SC: You do know Mr Mokhesi because you say so but anyway would you just tell the Chair please.

MR MOKHESI: Look there...[intervene]

ADV PRETORIUS SC: I could help you if you would like but I do not want to lead you on.

MR MOKHESI: Ja, the supplier – the first there was a second, what is it – the material supply agreements that we entered into with I think it says 112 agreements. Now this agreement – this material supplier will then supply materials to the contractor which in way contradicts the first part because the responsibility of acquiring material is not the responsibility of the department it is the
10 responsibility of the contractor. So that the contractor can at a later stage claim.

Now here we have an instance where it now becomes a responsibility that which is the responsibility of the contractor becomes the responsibility of the department and this is where part of the problem also is. But it can only mean that you know by acquiring material then you show a better expenditure per say. So that is basically...[intervene]

ADV PRETORIUS SC: Well let us explain it because it is
20 important and it is fundamental to the substance of your affidavit and what happened afterwards Mr Mokhesi. If one goes back to the original scheme the way, it was originally planned to happen in the normal cause. The contractor enters into a contract with the department to build a house.

MR MOKHESI: Yes.

ADV PRETORIUS SC: It is the contractor's responsibility to source the materials.

MR MOKHESI: Yes.

ADV PRETORIUS SC: And to use them in the house and to pay the supplier.

MR MOKHESI: Correct.

ADV PRETORIUS SC: There are three stages, three milestones. The first milestone is the foundation.

MR MOKHESI: Correct.

10 **ADV PRETORIUS SC:** The second is the...[intervene]

MR MOKHESI: Wall plate.

ADV PRETORIUS SC: ...the walls of the building, correct, and the third is the roofing.

MR MOKHESI: Yes.

ADV PRETORIUS SC: At the completion of each stage once the work has been checked and verified the contractor can then claim the money from the department and the department will pay it if everything is in order.

MR MOKHESI: Yes.

20 **ADV PRETORIUS SC:** And included in those charges that the contractor bills the department with is the materials that it has bought.

MR MOKHESI: Yes.

ADV PRETORIUS SC: Correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: Now if the house has not been built yet this would only happen sometime in the future. Correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: It will only – that money would only be paid when the foundations are built or when the wall is built. Correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: But the department had to find a
10 way of spending money quickly. Correct, in order to avoid its reversion to the fiscus. Correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: And so this scheme was devised to make sure that money could be spent before the year end. Is that correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: You say as much.

MR MOKHESI: Yes.

ADV PRETORIUS SC: Please I am not putting words in
20 your mouth and it was done through a devise a series of agreements which as you yourself say made very little sense and let us go into the detail then, in paragraph 23.2:

“A second set of agreements the tri-partake supply agreements a 112 agreements were entered into and in terms of those agreements it was agreed that

the department would pay the suppliers for building materials which were to be supplied or were supplied to the contractors.”

Correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: Even before the foundation was built, even before the walls were built and especially even before the roof was put on. Correct?

MR MOKHESI: Correct.

10 **ADV PRETORIUS SC:** Then there was a third set of agreements and these are the so-called session agreements sometime spelt with a C, sometimes spelt with four S's instead of just three. Now do you know what these agreements were can you try and explain to the Chair because it is quite complicated?

MR MOKHESI: Ja, the – what give rise to a session is you know you sent your claim to a third party. Now there cannot be a cost for payment if there is no claim. Now and this is also part of the problem because in that particular
20 process you know there was no claim or course for payment against a claim because there was no claim to be ceded in the first instances because all those three agreements in my view contradicted each other you know they did not make sense on one process.

ADV PRETORIUS SC: Let us try and explain that in a way

that those who are following the evidence can understand because it is elusive. You have told the Chair that the contractor would have a claim against the department once the foundations were set or once the walls had been built or once the roof has been put on. Correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: Of course when these session agreements were entered into that had not been done. Correct?

10 **MR MOKHESI:** Ja, there were no foundation, there was no claim.

ADV PRETORIUS SC: Yes, so at that stage when the session agreements were entered into, in other words when the claim of the contractor was given to the supplier that is the session there was no claim because the house had not been built. Correct?

MR MOKHESI: Correct.

ADV PRETORIUS SC: So at that stage the contractor had no claim to cede. Correct?

20 **MR MOKHESI:** Yes.

ADV PRETORIUS SC: But nevertheless entered into a session agreement giving its claim against the department to the supplier for the materials. Correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: At a time where no such claim

existed.

MR MOKHESI: Yes.

ADV PRETORIUS SC: Correct. And even later of course there would be no claim to cede because the suppliers would already have been paid.

MR MOKHESI: Yes.

ADV PRETORIUS SC: So there were problems with this session, not so?

MR MOKHESI: Yes.

10 **ADV PRETORIUS SC:** As you say it was part of the problem. Correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: But as you point out later in the affidavit these very sessions were used as part of the documentation even to Provincial Treasury to persuade them to pay. Is that correct?

MR MOKHESI: Yes.

20 **ADV PRETORIUS SC:** Anyway prior to the claim of the contractors even arising and pursuant to the sessions the department made payments to the suppliers in excess of R500million. Correct?

MR MOKHESI: Correct.

ADV PRETORIUS SC: And you say in paragraph 23.5 as you have just said to the Chair:

“There was no lawful cause for the payments.”

Correct? Now that is a general statement because of course some materials might have been delivered and some not.

MR MOKHESI: Yes.

ADV PRETORIUS SC: But the detail of that would depend on the detailed investigations being done by various bodies in relation to particular contracts and we are not going there in this hearing. Do I understand the position correctly?

10 **MR MOKHESI:** Yes.

ADV PRETORIUS SC: Right. But in 23.6 you say:

“The tri-partake supplier agreements between the department and the suppliers and the contractors did not give rise to a course for the payments because the suppliers had not supplied materials to the contractors before being paid.”

And that was correct as far as you were concerned at the time.

20 **MR MOKHESI:** As far as I am concerned at the time, that was correct.

ADV PRETORIUS SC: Yes, you have continued to say:

“The payment structure in the supply agreements requiring supply before payment was not followed. The invoicing and certification requirements in the supply agreements were not complied with.”

Correct?

MR MOKHESI: Correct.

ADV PRETORIUS SC: Now just to get back to the fraud, nowhere in the documentation and in fact the contrary appears does it appear that the Free State Department said to national listen do not take our money back because we are going to spend it in this way but we must warn you that it is completely irregular and we must warn you that these requirements are not being followed and they all pre-
10 payments, nowhere was national told that. Correct?

MR MOKHESI: Ja, no.

ADV PRETORIUS SC: Correct.

MR MOKHESI: Correct.

ADV PRETORIUS SC: Am I correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: And then in paragraph 23.7 you deal with the sessions. You say:

“Nor did the sessions of claims by the contractors to the suppliers give rise to a cause for payments.
20 This is because the claims which were being purported ceded that is claims by the contractors against the department had not yet arisen.”

You have just told the Chair that, is that right?

MR MOKHESI: Yes.

ADV PRETORIUS SC:

“The contractors had not executed the construction works or portions of the construction works nor had they provided materials to the department. The contractors therefore did not have claims for payment against the department.”

You have told the Chair that.

MR MOKHESI: Yes.

ADV PRETORIUS SC: And I take it nobody told national in writing or otherwise look there is a problem with all
10 these contracts because we pre-paying and nothing is being done and the sessions really are not worth the paper they written on. Correct?

MR MOKHESI: Correct.

ADV PRETORIUS SC: Nobody told national that?

MR MOKHESI: No.

ADV PRETORIUS SC: So you say in paragraph 23.8:

20 “The department nonetheless paid more than R500million to various suppliers over the cause of 2009 to 2011. It did so purportedly on the strength of the session agreements. In other words, department officials used the deeds of session as the paperwork justifying the instruction to their accounting staff to pay out. Department officials also manipulated the housing subsidy system to make it look as if construction work had been

executed and that payments were therefore due when in truth this was not the case.”

Those are correct statements of fact are they?

MR MOKHESI: Yes.

ADV PRETORIUS SC: So not only were the sessions that ceded claims that did not exist or purported to cede claims that did not exist used to persuade accounting staff to pay out. But it is a complicated arrangement that was entered into but milestones were inserted into the agreements.

10 Correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: And those milestones really were not regularly inserted.

MR MOKHESI: Yes.

ADV PRETORIUS SC: Now I do not want to go into the detail now if necessary we could go later. Correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: But the system was unlawfully or irregularly manipulated to put a milestone in the agreement
20 which did not really exist.

MR MOKHESI: Yes.

ADV PRETORIUS SC: Well I asked you earlier Mr Mokhesi why the department implemented the scheme which was clearly irregular, deceptive and in your own words fraudulent and you deal with that at paragraph 24

and following. If you could just tell the Chair, please in your own words why, what the reason was for this scheme to be implemented?

MR MOKHESI: Well Chair I think it is simple the reason why it went this way it was to ensure that you know the department does not lose money back to the fiscus and therefore to the other provinces. So the acquisition of material or paying or buying material resulted in this particular type of process or scheme. That was in the
10 name why it went – it was because you know there was a possible loss to other provinces of the money of the conditional grant.

ADV PRETORIUS SC: Right. In other words, it was necessary to persuade the National Department of Human Settlements and National Treasury to do what they would not have done had they known the true facts. Correct?

MR MOKHESI: Ja.

ADV PRETORIUS SC: You say yes?

MR MOKHESI: Yes.

20 **ADV PRETORIUS SC:** And you say:

“That there was a threat that the unspent allocation would revert to National Revenue Fund.”

You say that in 24.2:

“To be relocated to provinces with better spending record.”

And then in paragraph 24.3 you say:

“In the face of that threat the department proceeded to implement the scheme dispersing funds to the tune of more than R500million from its conditional allocation with no lawful cause for the payments to be made.”

Now the department faced a difficulty you have literally hundreds of contractors and over a hundred suppliers each with their own arrangements in relation to the supply materials and its dealings with the department. Correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: Were you able at this time to do sufficient investigation to examine each and every contract?

MR MOKHESI: All the 100 and...[intervene]

ADV PRETORIUS SC: Yes.

MR MOKHESI: It was extremely difficult.

ADV PRETORIUS SC: Right you appointed several investigators to that. Correct?

20 **MR MOKHESI:** Ja, in general we could not do it, yes.

ADV PRETORIUS SC: And we have an examples of what happened.

MR MOKHESI: Yes.

ADV PRETORIUS SC: For example, examples of charges being levied against the department with nothing being

delivered. Correct?

MR MOKHESI: Yes, we have examples of that, yes.

ADV PRETORIUS SC: And fraudulent charges. Correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: But in paragraph 26 you make an estimate which I think is worth putting before the Chair. What do you say there in paragraph 26?

MR MOKHESI: You wanted me to read it out?

ADV PRETORIUS SC: Well you can read it if you like.

10 Let us just establish that you signed this affidavit in 2016. Correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: By that time had all these houses been built?

MR MOKHESI: No, not all, not all has...[intervene]

ADV PRETORIUS SC: That is five years later so let alone in 2010, 2011.

MR MOKHESI: It is?

ADV PRETORIUS SC: Sorry five years later not all the
20 houses were built.

MR MOKHESI: Not all the houses were built.

ADV PRETORIUS SC: In 2010, 2011 how many of the houses had been built?

MR MOKHESI: 2010, 2011?

ADV PRETORIUS SC: Virtually none.

MR MOKHESI: That I do not know, 2010, 2011
...[intervene]

ADV PRETORIUS SC: Well the reports will tell us what had been done that is not a matter of great controversy here. But the point is you had spent in advance of the building of the houses something like R600million.

MR MOKHESI: Okay.

ADV PRETORIUS SC: Correct?

MR MOKHESI: Yes.

10 **ADV PRETORIUS SC:** Alright but you say here:

“The department however has however obtained reports which indicate how much more it will cost to procure that the housing which the contractors were contracted to build.”

The 14 769 units to which I referred to above is built.

“It will cost the department an estimated further approximately R500million.”

Then you say:

20 “The calculation is not straight forward but the department’s best estimate is that it has lost approximately R400 866 000”.

That was your best estimate at the time.

MR MOKHESI: Yes.

CHAIRPERSON: So it is R400 866 000. I do not know if you got the number right. Do you want to; you may have

got it right.

ADV PRETORIUS SC: R400 866 000.

CHAIRPERSON: R400 866 000.

ADV PRETORIUS SC: Yes.

CHAIRPERSON: Ja, okay. You may have got it right first time around I might have just heard something else.

ADV PRETORIUS SC: I could easily have got it wrong Chair.

CHAIRPERSON: Ja.

10 **ADV PRETORIUS SC:** Let us just say that almost half a billion rand was spent before anything was done.

MR MOKHESI: Okay.

ADV PRETORIUS SC: More than half a billion rand and the ultimate loss to the department was in the region of half a billion rand.

MR MOKHESI: The ultimate ja, 400 and ...[intervene]

ADV PRETORIUS SC: Yes, so and this is in relation to building houses for people who need houses to be built delivered, it is for low cost housing. Correct?

20 **MR MOKHESI:** Yes, this is for low cost housing.

ADV PRETORIUS SC: That is what the money should have spent on.

MR MOKHESI: Yes, this is for low cost housing.

CHAIRPERSON: So this money that was paid out to contractors about R500million was paid out. Is that right?

And then – but you say the loss is R400 866 000. Is that right?

MR MOKHESI: Ja Chair it is - I think the estimate is the equivalent number of houses. How much is it going to cost ...[intervene]

CHAIRPERSON: Yes.

MR MOKHESI: ...the department to build.

CHAIRPERSON: Yes.

MR MOKHESI: That is where the R500million
10 ...[intervene]

CHAIRPERSON: Yes.

MR MOKHESI: And that will also...[intervene]

CHAIRPERSON: The actual amount that was paid out would be, is how much?

MR MOKHESI: No we are not there okay the actual amount that was paid out I think ...[intervene].

CHAIRPERSON: We have not dealt with that I thought we had.

MR MOKHESI: But I think what is being tried to be
20 explained here is that the houses that was supposed to be built that part of 14 769 this is the estimate ...[intervene]

CHAIRPERSON: Yes.

MR MOKHESI: ...of how much it will cost R500million.

CHAIRPERSON: Yes.

MR MOKHESI: But already we had made advanced

payments.

CHAIRPERSON: Yes.

MR MOKHESI: And that 408 – 40866 million is probably what has not been accounted for in respect of the advanced payments that were made.

CHAIRPERSON: Yes.

MR MOKHESI: Because it is not in all instances where material were not delivered and houses were not built.

CHAIRPERSON: Yes.

10 **MR MOKHESI:** There are instances – there are houses that were built but....

CHAIRPERSON: Yes.

MR MOKHESI: But as to the extent of the view that we have received it was a problem.

CHAIRPERSON: Yes.

MR MOKHESI: To say – and that is why we had also had to – I think we did two actions. One as they say it is before the review application the action proceedings just to force the contractors to give us invoices delivering notes and so on
20 and so on.

CHAIRPERSON: But as things presently stood at the time of your affidavit and I guess maybe even now but certainly at that time your estimate was that the department has lost – had lost more than R400 million.

MR MOKHESI: Ja we could not properly know...

CHAIRPERSON: Be accounted for.

MR MOKHESI: Accounted for as to....

CHAIRPERSON: Yes.

MR MOKHESI: Because of this particular...

CHAIRPERSON: But money had been paid out to people.

MR MOKHESI: Yes.

CHAIRPERSON: Some houses had been built.

MR MOKHESI: Yes.

CHAIRPERSON: Some that were not – some were not and it
10 looks like there were many which were not.

MR MOKHESI: Yes.

CHAIRPERSON: And your estimate was the department had
lost more than R400 million.

MR MOKHESI: Ja. Which might well have changed over
time.

CHAIRPERSON: Yes. But at that time when you deposed to
the affidavit.

MR MOKHESI: Yes.

CHAIRPERSON: That was your estimate.

20 **MR MOKHESI:** Because I am aware of – even though I am
not exactly sure what the amounts that were recovered by
SIU.

CHAIRPERSON: Ja.

MR MOKHESI: In the process.

CHAIRPERSON: Okay. But by whatever account it was

substantial amounts.

MR MOKHESI: Yes.

CHAIRPERSON: That were not accounted for.

MR MOKHESI: Correct.

CHAIRPERSON: Okay.

ADV PRETORIUS SC: Well we know that – and Chair the figures vary by R100 million at times but we know from your affidavit that approximate – well more than R500 million was spent as part of this scheme – this irregular scheme of
10 prepayments to suppliers. That much we know. Correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: We know that there are examples and these examples emerged from the various investigations that have taken place of unqualified builders just walking off site and that money being therefore lost, correct?

MR MOKHESI: Correct.

ADV PRETORIUS SC: And there are many other examples of losses but the first point is that the – this unlawful irregular scheme of prepayments and we will describe it yet
20 again in your own words in a moment cost the department in the Free State over R500 million, correct? You then ..

CHAIRPERSON: Just make sure Mr Mokhesi your responses get - ja.

MR MOKHESI: Yes.

ADV PRETORIUS SC: You then did an investigation and you

estimated how much more have we got to spend in order to complete the building of these houses and you say that that would have been over R500 million you say that in paragraph 26 of course an estimate.

MR MOKHESI: Yes it is an estimate.

ADV PRETORIUS SC: Correct. And you say in the last sentence:

10 “The calculation is not straightforward but the department’s best estimate and that is best estimate in 2016 is that it has lost approximately R400 866 000.00.”

Correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: Substantial amount of money. Now at R50 000.00 per house I have just been told by someone who has done the calculation that could have built over 8 000 houses. That is a substantial amount of money.

MR MOKHESI: Yes.

20 **ADV PRETORIUS SC:** In – on any calculation. Now of course as you point out that this was difficult to establish because you have got hundreds of contracts; hundreds of transaction each one different in its own way. Many fraudulent; many suppliers did not supply; many claims were overstated but it is a massive job to investigate each and every single contract and that you have employed people to

do.

MR MOKHESI: Yes.

ADV PRETORIUS SC: Then in paragraph 27 if we may go there? You made a submission. You said:

10 “I submit that the department scheme was a fraud on the National Government specifically on the fiscus. It was also a fraud on the public on all who expect state funds to be spent regularly or properly including on improving the standard of living of the poor on those in the Free State and in other provinces with an expectation of receiving state funded housing and on all tax payers.”

That I understand was your belief at the time.

MR MOKHESI: Yes.

ADV PRETORIUS SC: Anything to change your mind?

MR MOKHESI: No not really.

ADV PRETORIUS SC: Not really. Then in paragraph 28 you say:

20 “I have described the above – I have described above the fraudulent aspects of the department scheme. It is important to point out that the contracts were also unlawful because the department did not follow any lawful procurement process before

concluding them. This is in itself a ground on which the contract should be declared void.”

In case we have not made it clear already Mr Mokhesi the selection of the suppliers to which payments were made – we will come in due course to how those people were selected perhaps not in your evidence but in the evidence of witnesses to come. But what we do know there was no open tender and bidding process that preceded the
10 appointment of suppliers. We know that as a fact. Correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: You give the factual background and it is not necessary to go into too much details here Mr Mokhesi because we have dealt with it in some respects already. But what was the – it is in paragraph 30 and following of your affidavit at page 105 and following of FS14. What was the Breaking New Ground Project of the Cabinet announced in September 2004?

MR MOKHESI: Sustainable – sustainable human
20 settlements.

ADV PRETORIUS SC: Ja it was comprehensive plan for the development of sustainable human settlements, correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: Which included the building of houses?

MR MOKHESI: It is including the building of houses and it is a whole comprehensive plan.

ADV PRETORIUS SC: The infrastructure required.

MR MOKHESI: You know it has got infrastructure; building houses, amenities, social amenities.

ADV PRETORIUS SC: Yes.

MR MOKHESI: And so on. And not only about houses but also to understand that when you – when you – and that is why they changed from housing to Human Settlements
10 because then it takes into consideration the entire ...

ADV PRETORIUS SC: The entire community.

MR MOKHESI: Community whether it be social amenities, infrastructure and so on as and when we get there. That is what it was about.

ADV PRETORIUS SC: So that was a comprehensive and ambitious plan to provide sustainable human settlements for poor people.

MR MOKHESI: Yes.

ADV PRETORIUS SC: Right. And you say in the last
20 sentence in paragraph 30:

“Among the ways it tries to retrieve that aim are easing delivery constraints, increasing building capacity and rooting out corruption and maladministration.”

At least that was the intent, correct?

MR MOKHESI: Correct.

ADV PRETORIUS SC: Then in paragraph 31 and following you set out certain facts and it is necessary to deal with those in paragraph 32. You say:

“In pursuance of this scheme the Breaking New Ground Low Cost Housing Project Scheme funds are allocated in terms of the Division of Revenue Act to Provinces each year.”

10 **MR MOKHESI:** Yes.

ADV PRETORIUS SC: You have told the Chair that. But paragraph 32 is important. That allocation you say in paragraph 32:

“Is a specific purpose and conditional allocation. In other words a Province receiving funds is not unconstrained in how it spends those funds.”

In other words when the money is allocated to you by National Treasury in terms of DORA that is the Division of
20 Revenue Act is the Province free to spend it as it likes?

MR MOKHESI: No. You – you have to spend it first you know in terms of the housing code where you can spend it and in terms of the approved business plan. So you cannot just spend it as [talking over one another].

ADV PRETORIUS SC: Right there is a housing code that

governs ...

MR MOKHESI: That governs that funds ja. To make sure that you fall within the policy framework and also of course the business plan also approved by National Department and then determines what – how you are going to spend money where and in whatever.

ADV PRETORIUS SC: Now we know in relation to the business plan that National – the National Department under Minister Sexwale at the time said you must give me a plan
10 otherwise this money is going to be lost to the Province and that was the expenditure recovery.

MR MOKHESI: Recovery Plan.

ADV PRETORIUS SC: Plan. We will come to that in a moment because that was a representation to National which we will see was completely misleading. But let us first deal with the points you make in 32.1 to 32.3 Mr Mokhesi. The money is given to the Province. The Province obviously has to disburse that money to contractors, to suppliers and to other parties. People who build infrastructure and the like,
20 advisors and the like. Those are third parties.

MR MOKHESI: Yes.

ADV PRETORIUS SC: Now in relation to third parties what are the restrictions in the Division Of Revenue Act? You deal with those in 32.1 to 32.3. Those are important for the purposes of this evidence.

MR MOKHESI: Yes. There is a standard we – of – when money is allocated. You must spend on the approved business plan and approved projects. They will have been identified. Each project. You also – you should have planned before. You know you do not do your planning in the year you are supposed to implement the planning. Implementation precedes planning and those particular projects that you are going to spend the money on will have then been pre-approved through a process before you know
10 before we start the financial – financial year. And you know that is how the process works in terms of different programs within. You know we – infrastructure and as well as housing.

ADV PRETORIUS SC: So you would tell National how you are going to spend the money. They would then give you the money. You would be obliged to spend it in accordance with those plans.

MR MOKHESI: With those particular plans and you will also have an opportunity halfway you know through say through half yearly to either revise your business plan because
20 certain projects are not performing as they should and that becomes a matter of discussions.

ADV PRETORIUS SC: Right.

MR MOKHESI: Ja. That in a certain year..

ADV PRETORIUS SC: But in all times the way that the allocation is managed in terms of the Division of Revenue

Act is that there must be complete transparency between the Provincial Department and...

MR MOKHESI: And the National.

ADV PRETORIUS SC: And the National Department.

MR MOKHESI: Yes.

ADV PRETORIUS SC: And Treasury, correct?

MR MOKHESI: Correct.

ADV PRETORIUS SC: They must be informed exactly what is being done with that money.

10 **MR MOKHESI**: Correct.

ADV PRETORIUS SC: Correct. Right and in relation to payments to third parties for example contractors there are special restrictions in the Act, am I correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: There are special restrictions in the Act, am I correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: The first is that the Province must have entered into a payment schedule with the third party.

20 In other words, there must be a schedule which says precisely when and how much must be paid to the third party and on what performance, correct?

MR MOKHESI: Yes it is based on your contractual arrangement between yourself. You know if it is obviously if it is houses that payment schedule will be per milestones.

ADV PRETORIUS SC: Yes. As per the contract..

MR MOKHESI: The first contract.

MR MOKHESI: The first contract that we spoke about with the contract?

MR MOKHESI: Yes.

ADV PRETORIUS SC: But that did not exist with the suppliers?

MR MOKHESI: No it did not. And insofar as what we have seen as material supply agreements.

10 **ADV PRETORIUS SC:** Yes.

MR MOKHESI: Which I think are problematic.

ADV PRETORIUS SC: Well you make more explicit statements later that we will come to that. Paragraph 32.2:

“The payment must be for services rendered by or goods received from the third party.”

That is the first thing.

MR MOKHESI: Yes.

ADV PRETORIUS SC: Services must have been performed and the goods must have been received.

20 **MR MOKHESI:** Yes.

ADV PRETORIUS SC: No prepayments?

MR MOKHESI: Yes.

ADV PRETORIUS SC:

“And those services which must have been properly procured in accordance with Supply

Chain Management requirements.”

In other words, you cannot spend a DORA allocation unless you spend it in accordance with a proper Supply Chain Management process, correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: And we know that in relation to contractors and suppliers in this case those simply did not exist – that did not happen. Correct?

MR MOKHESI: Yes.

10 **ADV PRETORIUS SC:** And then 32.3:

“Advanced payments to third parties i.e. where services have not yet been rendered or the goods not yet delivered are subject to specific requirements including the approval by National Treasury.”

So before the Province can make any prepayment you have got to tell National Treasury and get their permission, correct?

20 **MR MOKHESI:** Ja that is a [00:16:32] that – that clearly indicates how prepayments are to be done.

ADV PRETORIUS SC: Yes.

MR MOKHESI: And they must be part of the contract first and foremost.

ADV PRETORIUS SC: Yes. And that did not happen in this case. Well certainly approval by National Treasury was not

obtained.

MR MOKHESI: Ja I think you – you do not necessarily need approval of National Treasury but the framework has been laid by National Treasury that this is how you know.

ADV PRETORIUS SC: Well firstly you say here that one of the specific requirements includes approval by National Treasury. I must say on our understanding of the law that is correct. That statement is correct.

CHAIRPERSON: That is [Chair and Mr Mokhesi and Adv
10 Pretorius all speaking at once].

MR MOKHESI: Because National Treasury has laid out the framework.

CHAIRPERSON: I am saying that is in 32 – paragraph 32.3 of your affidavit.

MR MOKHESI: 32.3.

CHAIRPERSON: Yes.

MR MOKHESI: Yes. National Treasury has laid out the framework under which we can make advanced payments. That framework is there in terms of Treasury Regulations.

20 **CHAIRPERSON:** So are you saying in other words...

MR MOKHESI: I must – ja.

CHAIRPERSON: That by putting up or prescribing that framework National Treasury has given approval that provided you act within this framework then you have our approval.

MR MOKHESI: Yes.

CHAIRPERSON: That is what...

MR MOKHESI: That is the...

CHAIRPERSON: It means

MR MOKHESI: Yes.

CHAIRPERSON: Okay.

MR MOKHESI: If it is prescribed you cannot move outside that particular framework.

CHAIRPERSON: Yes. Yes. So – so in other words what
10 you are saying is it might not – you might not be required to
obtain separate or specific approval from National Treasury
provided you have acted within that framework.

MR MOKHESI: That frame.

CHAIRPERSON: That National Treasury has approved.

MR MOKHESI: Yes. If there is – if for some other reason
there is any – because of circumstances or whatever the
case might be you are unable to...

CHAIRPERSON: Comply with the framework?

MR MOKHESI: To comply with the framework because of
20 good reasons that might be there.

CHAIRPERSON: Ja.

MR MOKHESI: Then you will have to go back to National
Treasury and make your case.

CHAIRPERSON: Oh okay. Mr Pretorius.

ADV PRETORIUS SC: Alright. So what you are saying in

paragraph 32.3 you now say must be qualified?

MR MOKHESI: Ja.

ADV PRETORIUS SC: By the words all and...

CHAIRPERSON: The framework.

ADV PRETORIUS SC: Compliance with the framework.

MR MOKHESI: Yes.

ADV PRETORIUS SC: Laid down by National Treasury.

MR MOKHESI: Yes. There is a framework.

ADV PRETORIUS SC: Alright. We will look at that and I will
10 come back to you on that because the evidence of persons
from National at the disciplinary inquiry was somewhat
different but let us not deal with that now. I will come back
to it.

MR MOKHESI: Okay.

ADV PRETORIUS SC: You say in paragraph 33 clearly:

“If a conditional allocation has not been
spent by the end of the financial year it
reverts to and must be repaid to the National
Revenue Fund.”

20 That we have established, right?

MR MOKHESI: Hm.

ADV PRETORIUS SC: Then you say in paragraph 34 for the
third or fourth time now:

“The agreements at issue in this application
form part of a fraudulent scheme contrived

by the department and the respondents to circumvent the provisions of DORA and avoid the Department's unspent conditional housing allocation reverting to the National Revenue Fund."

Do I understand it that you believed that to be true and correct at the time?

MR MOKHESI: Yes correct.

ADV PRETORIUS SC: And nothing has happened to change
10 your mind?

MR MOKHESI: Yes.

CHAIRPERSON: Well it is important Mr Mokhesi that you – you answer particularly to that question be heard because I think that some – somewhere much earlier anybody listening might have thought you have – you have second thoughts about describing the scheme as fraudulent. So I am just saying [interrupting] that you say nothing has changed your mind it is important that it comes out clearly.

MR MOKHESI: Ja I think – okay. No I think you have
20 clarified for me Chair.

CHAIRPERSON: Yes.

MR MOKHESI: Earlier on.

CHAIRPERSON: Yes.

MR MOKHESI: To say whether I believed.

CHAIRPERSON: Yes.

MR MOKHESI: It is not that it actually is.

CHAIRPERSON: Yes. Ja.

MR MOKHESI: You know and that is – to me gives me....

CHAIRPERSON: That is still your ...

MR MOKHESI: Comfort because I am not competent.

CHAIRPERSON: Yes.

MR MOKHESI: To say something is fraud or not but if it looks like fraud it does not mean that it is fraud.

CHAIRPERSON: Ja. Okay no that is fine.

10 **MR MOKHESI:** You know so...

ADV PRETORIUS SC: Well let us – because that is a qualification that you have not placed before the Chair before in very clear terms in answer to my questions and perhaps I should be fair to you to allow you an opportunity to explain. You have said not once but several times in this affidavit that the scheme was fraudulent, right?

We will go into the details provided by you to show that it was in fact fraudulent. We can leave that for the moment.

20 **MR MOKHESI:** Okay.

ADV PRETORIUS SC: But we are dealing with a conclusion that you reached here. Right. At the time I take it because this is a statement on oath that you believed it was fraudulent on all the research that you had done, correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: Can you now give any reason why it was not fraudulent?

MR MOKHESI: I say I believe that it was fraudulent and I think I have said I cannot say with – let me put it this way. I believe it was fraudulent.

ADV PRETORIUS SC: Correct.

MR MOKHESI: Okay. Ja. And I think the Chair has sort of indicated to me to say the fact that you believe does not necessarily mean it was.

10 **ADV PRETORIUS SC:** The Chair has suggested nothing to you Mr Mokhesi.

MR MOKHESI: No.

ADV PRETORIUS SC: This is your evidence.

MR MOKHESI: But do you not know...

ADV PRETORIUS SC: It is not your – no suggestion of any sort of that to you. All the Chair said to you.

MR MOKHESI: What did the Chair say?

ADV PRETORIUS SC: Was that you are free to give evidence as you now believe to be the case.

20 **MR MOKHESI:** I said – I said so. I said I believe that it was at the time I believe that it was – it was fraudulent at the time and I still believe that it is.

ADV PRETORIUS SC: And you still believe so.

MR MOKHESI: I still believe that it is.

ADV PRETORIUS SC: Correct so. Alright there is – there

has been no revelation to you outside of the reports that you referred to earlier that would persuade you that you were completely wrong or partially wrong, correct? No new information has come to your attention.

MR MOKHESI: No new information has come to my attention yes.

ADV PRETORIUS SC: Is that correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: Alright let us just go please if you
10 would to paragraph 35 of your affidavit on page 107.

CHAIRPERSON: What page – 107?

ADV PRETORIUS SC: 107 Chair. Paragraph 35.

“The total allocation however it is made up we need not go into that detail for present purposes for housing in the Free State for the 2010/2011 year was R1.42 billion.”

Substantial amount of money.

MR MOKHESI: Where are you – where are you reading?
135 for the last ...

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

MR MOKHESI: No I was saying where are you reading from?

ADV PRETORIUS SC: Paragraph 35.

MR MOKHESI: Which paragraph 35?

ADV PRETORIUS SC: Second last line.

MR MOKHESI: Okay. Yes.

ADV PRETORIUS SC: Correct. And the plan was during the course of 2010/2011 and 2011/2012 to build 21 050 low cost houses apart from everything else that you have just mentioned. Correct? Is that correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: You see that in paragraph 36 third last line.

MR MOKHESI: Okay yes. Yes I see it.

10 **ADV PRETORIUS SC:** Correct. Now we know that was not achieved. The extent to which it was not achieved is the subject of investigations, correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: Then in paragraph 37 you give the detail of what we have summarised for the Chair earlier that the 2010/2011 financial year ended on 31 March 2011. By late 2010 it was very clear that the Department would not be able to spend the Breaking New Ground allocation or even a meaningful portion of the allocation by the end of the
20 financial year. Correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: Now there were several things that happened to cause the delay in spending. One of them was that the plans for the sizes of the houses were changed, correct? You had contracts or the department had contracts

to build 40 square meter houses. The idea was changed to build 50 square meter houses and a number of contractual disputes arose. You say that in paragraph 38, correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: Alright. And you say in paragraph 39:

10 “In addition a tender which the department had put out in early 2010 for the construction of low cost houses lapsed and was cancelled as I explain more fully below.”

 Now those circumstances Mr Mokhesi preceded the prepayment scheme.

MR MOKHESI: Yes.

ADV PRETORIUS SC: And you describe it fully later on. And we believe it is important as a legal team to go through that in some detail because the whole housing arrangement in the Province from the very beginning – from the appointment of the contractors right through to the prepayment to suppliers at the end of the financial year was
20 completely irregular with the result that the housing scheme in the department was to put it at its lowest a total failure and it is important to place that context before the Chair because that context has not really been given any prominence in the material to date. So that is something new that we could put on the table for the Chair. Chair could

we do that after the adjournment?

CHAIRPERSON: Yes we can do that after lunch. We will take the lunch adjournment now and resume at two o'clock. We adjourn.

REGISTRAR: All rise.

INQUIRY ADJOURNS

INQUIRY RESUMES:

CHAIRPERSON: Okay, let us continue.

ADV PRETORIUS SC: Thank you, Chair. Mr Mokhesi, if
10 you go to page 117 of Bundle FS14, you will see that we deal there with ...[intervenes]

CHAIRPERSON: I am sorry.

ADV PRETORIUS SC: ...with the matter of cancellation of the housing tender ...[intervenes]

CHAIRPERSON: I am sorry, Mr Pretorius. The volume of the aircon has gone up. So somebody will attend to it. Okay alright. Let us continue.

ADV PRETORIUS SC: Are you at page 117?

MR MOKHESI: [No audible reply]

20 **CHAIRPERSON:** Did you say 117?

ADV PRETORIUS SC: Yes, Chair.

CHAIRPERSON: Okay.

ADV PRETORIUS SC: You deal there with the lapse and cancellation of the housing tender. In paragraph 75.1, you record that in early 2010 the department by means of a

public tender invited bids for the construction of houses to be funded by the housing allocation. That tender closed on the 16th of April 2010.

MR MOKHESI: Yes.

ADV PRETORIUS SC: The department's Supply Chain Management Directorate and the Bid Evaluation Committee dealt with it and prepared a report for the Adjudication Committee. That says you record in paragraph 75.2. Do you see that?

10 **MR MOKHESI:** Yes.

ADV PRETORIUS SC: Then at paragraph 75.3, you record, and this important for future judication, that 361 bids were received. A 105 were disqualified for basic bid compliance, for example, no valid tax clearance certificate. And 147 were disqualified because they did not meet the minimum functionality threshold. Do you know what is meant by the minimum functionality threshold.

MR MOKHESI: Ja, the minimum score to bid on the next level.

20 **ADV PRETORIUS SC:** Ja. Basically, in terms of the scoring, they could not do the work.

MR MOKHESI: Yes.

ADV PRETORIUS SC: Right. And 28 bids from so-called established contractors and 81 bids from so-called emerging contractors. The Bid Evaluation Committee then

recommended that only 109 qualifying bids be adjudicated on price. Then at 75.4, you record that on the 28th July 2010, the Bid Adjudication Committee met to consider the tender. Do you know why they delayed for so long?

MR MOKHESI: Well, I do not know.

ADV PRETORIUS SC: You do not know?

MR MOKHESI: Honestly.

ADV PRETORIUS SC: That is fair enough. But at that
10 meeting, the Bid Adjudication members acknowledged that the tender validity period had lapsed. And then the BAC did something ...[intervenes]

CHAIRPERSON: I am sorry, Mr Pretorius. The tender validity period, does that... what does that refer to? What period is that?

MR MOKHESI: Ordinarily, it will refer to the validity of the tender price because if that period passes, then they have to go back to the bidder to say are they still on the same price. In other words ...[intervenes]

20 **CHAIRPERSON:** Does that mean when a bidder submits their bid they would say we will do this job for this price?

MR MOKHESI: Correct.

CHAIRPERSON: But that is... this price is valid only up to a certain date.

MR MOKHESI: Yes.

CHAIRPERSON: Is that what they talk about?

MR MOKHESI: Normally, 60 to 90 days.

CHAIRPERSON: 60 to 90 days?

MR MOKHESI: 90 days.

CHAIRPERSON: And that period is fixed by the bidder individually or is it fixed by the department?

MR MOKHESI: It is prescribed to say that would be the validity period. In an event that it goes beyond that, you will then have to go back to the bidders and say are you still on
10 that price.

CHAIRPERSON: Yes. So it is prescribed in terms of the regulations?

MR MOKHESI: Yes.

CHAIRPERSON: In terms of the National Treasury Regulations?

MR MOKHESI: Yes.

CHAIRPERSON: So when you invite bids, the invitation to bid would include something that says the period will be X.

MR MOKHESI: Yes.

20 **CHAIRPERSON:** Is that right?

MR MOKHESI: Yes.

CHAIRPERSON: So when you referred to the tender validity period having lapsed, that is the period we are talking about?

MR MOKHESI: Yes.

CHAIRPERSON: Okay.

MR MOKHESI: And hence the earlier statement by Mr Pretorius to say, it could... you know, the regulation means you ask the tenderers ...[intervenes]

CHAIRPERSON: Yes.

MR MOKHESI: ...to say are you still on that price.

CHAIRPERSON: Ja. And if they say yes, you continue.

MR MOKHESI: You continue.

CHAIRPERSON: Yes.

10 **MR MOKHESI**: Ja, then you can continue.

CHAIRPERSON: Okay alright.

ADV PRETORIUS SC: Yes. Thank you. We will get there Mr Mokhesi. The decision, however, that the BAC made was to say: Well, we must cancel the tender and we must take all those who qualified and all those who were disqualified and include them in a database as service providers. Is that as you understand the decision that was made?

MR MOKHESI: Yes, in terms of the documents and that... yes.

20 **ADV PRETORIUS SC**: That was... the decision that is recorded in the following paragraph 75.5. But what is interesting is the minute of that meeting which reads:

“The chairperson indicated to the committee that the tender has been evaluated but due to the fact that the validity of the tender has expired and they

cannot adjudicate, they have to cancel the tender.”

But as you pointed out, that is not correct. There is no obligation to cancel the tender. You can regularise.

MR MOKHESI: Ja, it is a... you can.... you know, it depends. You can cancel. You can decide to ask whether they will simple, you know ...[intervenes]

ADV PRETORIUS SC: Well ...[intervenes]

MR MOKHESI: It is really that was what you will have to make

10 **ADV PRETORIUS SC**: You can cancel but then the obligation to have a proper procurement process still remained.

MR MOKHESI: Yes.

ADV PRETORIUS SC: So ...[intervenes]

CHAIRPERSON: So you cannot cancel for the reasons that they gave. Is that right? Or...

MR MOKHESI: No, you cancel because it has expired but also because the validity period has expired. You can do that.

20 **CHAIRPERSON**: Yes, but what I am saying is. They cancelled because of certain reasons as I understand it. They still wanted to use the money from what I read here, to still use the money. They say appropriately... spend the money appropriately.

MR MOKHESI: Ja.

CHAIRPERSON: Spend the money appropriately without a tender on a matter that required a tender.

MR MOKHESI: Ja, the best way that they could... that could, you know, given that everything was okay, the only issue was the validity period. It is simply to communicate with the bidders and say are you still on that price. You know, if they are still on that price you continue with the evaluation and the hour, et cetera.

CHAIRPERSON: Ja, okay.

10 **ADV PRETORIUS SC:** Yes. Well, we have done a little investigation ourselves into the matter Mr Mokhesi. The first point is that the only option was not to cancel the tender. They had other options. We agreed on that.

MR MOKHESI: H'm.

ADV PRETORIUS SC: Yes. Oh, you have to say.

MR MOKHESI: Yes.

CHAIRPERSON: Mr Mokhesi...

MR MOKHESI: Yes.

CHAIRPERSON: Ja.

20 **ADV PRETORIUS SC:** In the first place, they might have taken the trouble to complete the process timeously and without delay. That was the first option. We know that did not happen. The second option is that before the expiry of the tender period they could have extended it unilaterally. Before its expiry they could have extended it unilaterally. Is

it ...[intervenes]

CHAIRPERSON: Is that correct Mr Mokhesi?

MR MOKHESI: No. Remember the issue, particularly the price issue. To be fair to the tenderers, you... you know, you must actually indicate to them. Because you can only hold a price for so long.

CHAIRPERSON: H'm.

MR MOKHESI: You know, the fixed price. Taking into consideration that because you are dealing with construction
10 here, prices are not status quo.

CHAIRPERSON: Oh.

MR MOKHESI: You know, they are rising.

CHAIRPERSON: Oh.

MR MOKHESI: So to be fair to them, you must indicate to them: Are you still on that particular price, yes or no?

CHAIRPERSON: H'm. So you can do that ...[intervenes]

MR MOKHESI: That is the practise, you know. Whether you can do that unilaterally...

CHAIRPERSON: Ja.

20 **MR MOKHESI**: You know...

CHAIRPERSON: You might not be sure about that.

MR MOKHESI: I am not sure about that but ...[intervenes]

CHAIRPERSON: In practise.

MR MOKHESI: You know, in other instances, issues have been taken whether you are doing that. You have to inform

the tenderers to say: Are you still on that particular price?
Because that price, ordinarily, it will be valid for a period.

CHAIRPERSON: H'm, h'm. Okay. Mr Pretorius.

ADV PRETORIUS SC: Yes, we will keep track on this and to
the DCJ. To the Chair and due course. But you are quite
correct that there is another step that must be followed.
Before the expiry of the period, the department could have
initiated a process to extend the period. It would then have
required some communication with the tenderers that would
10 either say extend your bid at the same price or bid again.

MR MOKHESI: Yes, depending... yes, depending on what is
the outcome of that.

ADV PRETORIUS SC: Yes.

MR MOKHESI: Because I would imagine, even on the
tender documents themselves, the period or that period
would have been specified.

ADV PRETORIUS SC: Yes. So ...[intervenes]

MR MOKHESI: To go back to them to say, we have
extended. Are you still on that price, yes or no?

20 **ADV PRETORIUS SC:** So a bidder could have said: Look,
you are extending it but I am withdrawing my bid. Right. Or
it could have said: I am agreeing to the extension. My bid
remains the same.

MR MOKHESI: Yes.

ADV PRETORIUS SC: This happens... this should happen

before the period expires. But even after the period expires, you could, for example, cancel the old process and start a new process.

MR MOKHESI: Ja, you could cancel. You could cancel and start the new process but also again, you also have to indicate that you have cancelled.

ADV PRETORIUS SC: Yes. Well, you could say to the bidders, and that is one of the options that is allowed, you could say to the bidders: Listen, the period has expired. We
10 want to continue with the process. Will you maintain your price?

MR MOKHESI: Yes.

ADV PRETORIUS SC: Or do you want to give us a new price?

MR MOKHESI: Yes.

ADV PRETORIUS SC: So that option is also there. But what you cannot do Mr Mokhesi, where you are required to have an open tender process, is just forget about the process and establish your own database at your own
20 discretion. You cannot do that.

MR MOKHESI: No, you cannot.

ADV PRETORIUS SC: Yes.

MR MOKHESI: Yes.

ADV PRETORIUS SC: Anyway, so that decision was approved, according to your statement or your affidavit at

paragraph 75.7. That decision to cancel the tender and to establish a database in the discretion of the department was approved on the 30th of July 2010 by Mr Mokoena. And we will ask him about that. Do you see that in paragraph 75.7?

MR MOKHESI: Oh, seven... okay. Yes.

CHAIRPERSON: So when you are looking at this whole thing Mr Mokhesi, did it appear like the Bid Adjudication Committee said: Look, the tender validity period has expired but we do need to do what we were going to do through a
10 tender period. So we will just do it in a different way. We will put everybody on the database and then we will choose who will be getting the job. Is that the impression you got when you ...[intervenes]

MR MOKHESI: Ja.

CHAIRPERSON: ...were going through this whole thing to understand what was happening?

MR MOKHESI: Ja, but you cannot do that because certain of the bidders were disqualified anyway.

CHAIRPERSON: Yes. No, no, no. That is a different point.
20 I am just asking your own understanding as you were looking at this whole thing before preparing the affidavit. Is that the impression you got that this Bid Adjudication Committee said: Look, the tender validity has expired.

MR MOKHESI: Has expired.

CHAIRPERSON: We want to achieve a certain objective

through the tender process. We cannot do that now or we are not going to do that now but we will do what we are going to do through another process, namely put everybody into the database and then we will choose who will get the job from ...[intervenes]

MR MOKHESI: No, but that is just a... that is not the choice. Irrespective of what the circumstances are, you have to follow the... you know, you cannot decide your own process.

10 **CHAIRPERSON:** Yes. No, no, no. But listen to my question.

MR MOKHESI: Okay.

CHAIRPERSON: Okay. [laughing] My question is, looking at what your own understanding was as to what this Bid Adjudication Committee sought to do when they found that the validity period had lapsed.

MR MOKHESI: Yes?

CHAIRPERSON: Was your impression that they decided that the way to achieve what they wanted to achieve through
20 a tender process was to put everybody into the database and then choose the people who will get the job from the database?

MR MOKHESI: It seems like ...[intervenes]

CHAIRPERSON: Yes.

MR MOKHESI: ...you know, from the ...[intervenes]

CHAIRPERSON: From the affidavits.

MR MOKHESI: ...the facts and the affidavit.

CHAIRPERSON: Ja.

MR MOKHESI: It seems that was their ...[intervenes]

CHAIRPERSON: Yes, their approach.

MR MOKHESI: Like their approach.

CHAIRPERSON: Ja, okay alright.

ADV PRETORIUS SC: Okay let us just summarise that Mr Mokhesi. And I understand that that is what you are saying.

10 In the first place, the department must appoint contractors through an open tender process. That is obligatory.

MR MOKHESI: Ja.

ADV PRETORIUS SC: So when something happens, such as what happened here at the data of the period expired, one must rectify it.

MR MOKHESI: Yes.

ADV PRETORIUS SC: But one is still bound to have an open tender process.

20 **MR MOKHESI:** Well, assuming there was an open tender going towards that. Remember, this is about the extension of the validity period. So the process of open tender would have happened because you simply indicating to the bidders: Are you prepared to, you know, to remain at the same price?

ADV PRETORIUS SC: Yes.

MR MOKHESI: Yes or no.

ADV PRETORIUS SC: Yes. So if the remedy had been applied, if the process had been remedied through an agreed or extension or whatever it was ...[intervenes]

MR MOKHESI: Yes.

ADV PRETORIUS SC: ...then that would have been an open tender process, is what you are saying?

MR MOKHESI: Yes. Yes.

CHAIRPERSON: It would have been a continuation ...[intervenes]

10 **MR MOKHESI:** It would have been a continuation, yes.

CHAIRPERSON: of ...[intervenes]

MR MOKHESI: It would be continuing.

CHAIRPERSON: Yes.

MR MOKHESI: Yes. Assuming that everything was done, there was an advertisement and the specification and evaluation and so on. And then had a valuation point. Then there is the validity period expires and you go back to the very same tenderers and say: Right, are you okay with the... can you hold on that particular price? Yes. And then you

20 continue.

ADV PRETORIUS SC: Yes.

MR MOKHESI: The adjudication and all.

ADV PRETORIUS SC: Yes, because in that case, the remedy would have been put in place. The same process would have been continued to its conclusion and then there

would have been a proper assessment of the bids.

MR MOKHESI: Yes.

ADV PRETORIUS SC: Proper and fair assessment of all the competing bids, correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: What one cannot do, however, is throw the whole process overboard and simply select your own database.

MR MOKHESI: Yes.

10 **ADV PRETORIUS SC:** And that is what you say here. You say in paragraph 76:

“The department thus decided to award contract to contractors on various databases as well as to the contractors who had bid for the tender notwithstanding that a 105 of the bidders were disqualified for basic bid compliance reasons and that a further 147 were disqualified because they did not meet the minimum functionality threshold. Those 252 disqualified bidders were simply allowed
20 back into the process. And then some decision was made and we are not sure how that decision was made. We will inquire at questions as to who would get contracts.”

MR MOKHESI: Yes.

ADV PRETORIUS SC: Do you know who in particular

decided that particular contractors would be appointed?

MR MOKHESI: I do not know.

ADV PRETORIUS SC: You concede, however, as the Chair has already pointed out earlier this morning, that process is flawed with danger because people can be appointed for the wrong reasons.

MR MOKHESI: Ja. Yes. It leaves too much discretion to then in delivering and ...[intervenes]

CHAIRPERSON: Were you able to understand how anybody
10 could do this Mr Mokhesi? I cannot understand how anybody could do that. I mean, you know that there are people who, they are service providers who have been found to be disqualified to do this kind of job.

And during the open tender process that you have now decided to ditch. And then you say now, all of you must come back, qualified or disqualified. You will... we will see. You are now all eligible to be given the job. I cannot how understand how anybody could do that.

MR MOKHESI: No, it should not have been like that.

20 **CHAIRPERSON:** But were you able to... is there anything, any information you got that made you understand how anybody could do that kind of thing?

MR MOKHESI: Unfortunately not. I do not know why they would do it in that particular fashion.

CHAIRPERSON: I do not know. I am just thinking...

thinking of a situation where you need teachers for a school. They... people apply. You select. You say: Okay, these ones have qualifications. These do not have any qualifications. Or these are under qualified. Because something has happened about the period within which they had to apply.

You say: No, all of you come. Qualified or not qualified. You can be appointed to teach whatever class. I just cannot understand how anybody could do that.

10 And maybe there is something that I will still hear that will make me understand but I just cannot understand. I mean, if they said: Well, those that were eligible that qualified, we will take only those.

Then subject to the legalities, you know, one would say, at least they are looking for people who are qualified. But to then say: We will bring everybody, whether they were qualified or disqualified, we will now bring them together. We will choose. It just does not seem to make sense at all.

MR MOKHESI: No, it should not have been like that Chair.

20 I agree.

CHAIRPERSON: H'm. H'm. Yes, Mr Pretorius. Maybe you have worked with this thing for quite some time. You are not shocked like I am. [laughing]

ADV PRETORIUS SC: There is no acceptable explanation Chair.

CHAIRPERSON: Yes. [laughing]

ADV PRETORIUS SC: That is the simple answer. But the...
Chair, the various investigations have produced some examples of contractors who were not equipped to do the job, having been given contracts to do the job and utterly failed in the execution of the project or simply walked off site. There are several examples of contractors just deciding well they have got the money. They ...[intervenes]

CHAIRPERSON: They took the money and left.

10 **ADV PRETORIUS SC:** Yes. So there are examples of that. And that is why each particular contract and arrangement should be investigated.

CHAIRPERSON: H'm, h'm.

ADV PRETORIUS SC: Because there are somewhere the allegations of the links between illegitimately appointed contractors and the thresholds.

CHAIRPERSON: H'm, h'm.

ADV PRETORIUS SC: We will come to some allegations in that regard in the evidence in due course.

20 **CHAIRPERSON:** Okay alright.

ADV PRETORIUS SC: And of course, whilst all that was happening, a number of relatively junior employers get disciplined and dismissed and those who should be held accountable are not. And that will come clear in due course.

CHAIRPERSON: H'm, h'm.

ADV PRETORIUS SC: So you summarise in paragraph 78 Mr Mokhesi. You say in the second sentence of that paragraph:

“None of them...”

And you are talking of the building contracts that were concluded in and around July 2010.

10 “None of them was concluded pursuant to any proper procurement process. The department simply gave the contracts to contractors on its databases or to contractors who have submitted bids for the lapsed cancelled tender.”

So they were simply handed out. What we do not have in this affidavit is, who made the decisions to distribute contracts and on what basis those decisions were made and thirdly, what the consequences are of that type of decision making process. But we will come to that in due course and other evidence.

20 And perhaps references will be made to that in the course of the... with your evidence. But as far as you are concerned, do you know who selected the contractors who were to be given contracts?

MR MOKHESI: No, I do not know.

ADV PRETORIUS SC: Yes, we will give detail of the example in due course Chair. A disqualified contractor was indeed appointed and according to the Nurcha performed

miserable.

What is important too, in paragraph 80.2, and remember we putting together the whole jigsaw facts here Mr Mokhesi, is that in terms of these contracts, it was the contractor's obligation to provide "all of the necessary materials, labour, plant and equipment to erect the project".

MR MOKHESI: Yes.

ADV PRETORIUS SC: That was the building contract.

MR MOKHESI: That was the building, yes.

10 **ADV PRETORIUS SC**: And then in 80.4 just to give chapter and verse to your earlier evidence:

"The contractor was entitled to payment to the amount set out in Appendix 1 per milestone and date as set out in Appendix 1 read with appendix 3."

That would be the sort of payment plan that was provided for the Division of Revenue Act, I presume.

MR MOKHESI: Yes.

ADV PRETORIUS SC: Which said before you can pay money to a third party out of this store or grant, you must
20 have a payment plan or schedule.

MR MOKHESI: Yes, that identify the work that you have to do.

ADV PRETORIUS SC: Yes. What must be done and ...[intervenes]

MR MOKHESI: How many needs, how many foundations,

how many...

ADV PRETORIUS SC: Yes.

MR MOKHESI: Yes.

ADV PRETORIUS SC: And then the contractor was required to deliver to the department a claim for payments of all amounts it considers to be due which shall be verified by the department prior to processing and payment. So there would be a claim. You would say for 200 foundations of the 500 houses to be build.

10 **MR MOKHESI:** Yes.

ADV PRETORIUS SC: That claim would be put in after the work has been done and after the materials had been supplied and it would have to be verified on inception by the department. Am I correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: So in other words, the expenditure of the state is safeguarded by processes.

MR MOKHESI: Yes.

20 **ADV PRETORIUS SC:** Let alone the process of appointment in the first place by a fair and open tender. But even the execution is closely guarded.

MR MOKHESI: Yes.

ADV PRETORIUS SC: None of those provisions were applied to the R 600 million in this case. Is that correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: That is correct?

MR MOKHESI: Yes.

CHAIRPERSON: Remember you are talking to me Mr Mokhesi.

MR MOKHESI: Yes. Oh, sorry.

CHAIRPERSON: [laughing]

MR MOKHESI: Yes.

CHAIRPERSON: I need to hear what you are saying.

ADV PRETORIUS SC: So Appendix 3 which is the project
10 plan and what is required by Dora as the payment schedule
is dealt with in paragraph 81.

“There must be details of progress, milestones and
financial projections.”

Do you see that in paragraph 81?

MR MOKHESI: Yes.

ADV PRETORIUS SC: So you summarise that in paragraph
83 Mr Mokhesi. You say:

20 “The basic structure of the agreement is
nonetheless clear. The department would make
payments to the contractor against completion by
the contractor of particular stages or milestones of
the works with the works claimed for to be verified
by the department.”

Is that correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: And you make the point in paragraph 84 that that accords with construction industry practise. And also in paragraph 85 the housing subsidy system. What is the housing subsidy system? If you would just tell the Chair, please.?

MR MOKHESI: It is a project management system that the sector uses and it records all the milestones and you know, for housing and whether it is infrastructure and so on. So that is the housing subsidy system that we are using for all
10 the provinces. In fact, the sector as a whole. But the Department of Human Settlements uses that and their reports of how many of what you have done come out of that system, basically what the system is, basically your project management system.

ADV PRETORIUS SC: So you again summarise it and you provide some detail in paragraph 85.5 on page 123, Mr Mokhesi, also consistent with the evidence you are giving now. You say:

20 “I emphasise that achieving a milestone involves construction work. For example, the foundations milestone involves digging the foundations, throwing the appropriate slab, installing the necessary piping for services such as sewerage, water and the like.”

And then you say, importantly:

“The materials relating to a particular milestone must be used by being incorporated into the construction work before the milestone is met. The milestone is not met if the materials are standing loose on site. The principle behind this is expressed as the requirement that government achieve value for money before it makes a payment.”

So there are two things that emerge from that, Mr Mokhesi,
10 I take it that that is a correct summary of the position?

MR MOKHESI: Correct.

ADV PRETORIUS SC: The first is that before the contractor has a claim for the first milestone, the foundations, all that work must have been done and verified.

MR MOKHESI: Yes, before it ...[intervenes]

ADV PRETORIUS SC: And the second thing is before the supplier would receive any payment from the contractor all the materials would have to be in those foundations.

20 **MR MOKHESI:** Yes.

ADV PRETORIUS SC: And then you make the point in paragraph 85.6:

“A contractor’s work must be checked before the department or other organ of state feeds into the housing subsidy system the information that a

particular milestone has been reached and that payment can therefore be made.”

And that is a complex and controlled process in terms of various regulations and provisions, is that correct?

MR MOKHESI: Correct, yes.

ADV PRETORIUS SC: And then in 85.7 you say:

10 “A contractor on a government funded housing project is thus only entitled to an interim payment against his or her having achieved a properly verified milestone.”

Now that you say in paragraph 86 accords with National Treasury requirements, DORA requirements as well as all the building regulations that exist and including the housing subsidy system, is that correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: If we could go back then please to paragraph 40. I will give you a page in a moment. It is on page 108. Are you there?

MR MOKHESI: Yes.

20 **ADV PRETORIUS SC:** Paragraph 40 records that the National Department of Human Settlements as a practice, I presume, monitored what the provinces were spending of their DORA allocations. That was its duty, correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: And in October 2010, six months in

to the financial year the monitoring exercise indicated that four provinces, including the Free State, had not met their monthly spending targets nor their monthly targets for the delivery of low cost houses. That was a fact in 2010 in the Free State.

MR MOKHESI: Yes.

ADV PRETORIUS SC: Minister Sexwale, who was then the Minister of Human Settlements raised concerns with the various provincial MECs and issued a notice and said
10 to the Free State and the other provinces, I want to see your expenditure recovery plan, what is referred to in your affidavit later as the ERP. Do you see that?

MR MOKHESI: Yes.

ADV PRETORIUS SC: In other words he was saying show me how you are going to fix this.

MR MOKHESI: Ja.

ADV PRETORIUS SC: You make a representation to me as to how this situation of understanding is going to be remedied, otherwise you forfeit.

20 **MR MOKHESI:** Yes.

ADV PRETORIUS SC: And the money will be differently allocated. Is that light bothering you?

MR MOKHESI: No, not really.

ADV PRETORIUS SC: Is it okay? So in paragraph 42 you say the MEC, you have told that that was Mr Zwane, and

the department senior officials met to develop a plan to improve expenditure and you say in paragraph 42:

“The expenditure plan which the department developed, and which I describe in more detail below, projects a very high rate of expenditure over the period November 2010 to the end of March 2011.”

We will look at the plan in a moment because the plan itself, as you will probably recall, is quite remarkable for
10 what it says and what it does not say, but we will get there. Paragraph 43 – well, let us first deal with one issue. The name is instructive, expenditure recovery plan. Manifestly the whole object of the plan was to make sure that the money, the 1.4 million, was not taken away from the province.

MR MOKHESI: Yes.

ADV PRETORIUS SC: So what the purpose of the plan would have been was to persuade the National Department and Treasury not to take the money away.

20 **MR MOKHESI:** Yes, not to take a certain portion of the money, not all of it, you know, and this is measured against the performance to say this is what you are likely going to achieve and, you know, as it later turned out, only 200 million I think – or 200 – ja, 263 million ...[intervenes]

ADV PRETORIUS SC: 236 million.

MR MOKHESI: 36, sorry.

ADV PRETORIUS SC: Well, that depends on what you told them but we will come to that. The corollary to that is that if you did not manage to persuade them they would have put the money to lawful and in their minds better use by giving it to performing provinces.

MR MOKHESI: Yes, that is normally what will happen – that is what happens.

ADV PRETORIUS SC: Yes.

10 **MR MOKHESI:** You know, money is reallocated to other provinces that are performing.

ADV PRETORIUS SC: And, of course, if the department, the National Department and the Treasury is persuaded on false information, they are then prevented from doing their job in terms of the legislation by allocating the money appropriately.

MR MOKHESI: I do not know. National Treasury – ag sorry, the National Department was not convinced of the recovery plan, they give the money anyway.

20 **ADV PRETORIUS SC:** Right, we will come to that, what they were told and what they were not told. Right?

MR MOKHESI: Okay.

ADV PRETORIUS SC: And where they – and on basis of what information they finally made their decisions. But let us go to paragraph 43 and what you raise is important

because they warned the provincial department about noncompliance and you say that in your affidavit, not so?

MR MOKHESI: Yes.

ADV PRETORIUS SC: Paragraph 43 you say:

“By the time the department developed that plan...”

That is the expenditure recovery plan.

“...October 2010, it had already started making unlawful payments from its fiscal allocation to some contractors and suppliers. The high rate of expenditure projected in the plan for the period November 2010 to March 2011...”

10

Those are the remaining months after the plan was developed.

“...was premised on and depended upon such unlawful payments continuing. Furthermore, by the time the department developed the plan it knew because it had been told by the National Department that such payments were unlawful and must stop.”

20 Correct?

MR MOKHESI: Yes, the – ja.

ADV PRETORIUS SC: So the unlawful payments were unlawful in several respects, you pointed out. Firstly, they were made to persuade the National Treasury and department that money had been properly spent and that

always in order, correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: And, furthermore, they were unlawful because there had been no proper procurement process.

MR MOKHESI: Yes, there was no procurement ...[intervenens]

ADV PRETORIUS SC: And that was unlawful too because they were advance payments which had not been
10 processed in accordance with the requirements of DORA, correct? And Treasury regulations.

MR MOKHESI: Yes.

ADV PRETORIUS SC: Correct? Yes. So you say in paragraph 44 that:

“The department knew that the plan was unlawful yet continued to make the payments.”

Do I understand your statement correctly here?

MR MOKHESI: Yes.

ADV PRETORIUS SC: So you say the payments were
20 unlawful because no contracts were in place with the suppliers, no proper procurement process had been followed and neither the National Department nor the National Treasury had authorised or indeed even knew about the payments, those are the advance payments.

MR MOKHESI: Yes.

ADV PRETORIUS SC: Correct? So National Treasury was not told look, we have made a whole lot of payments, they are advance payments and that they are probably unlawful because no procurement process was followed. That information was not given to National.

MR MOKHESI: Yes.

ADV PRETORIUS SC: It came to learn of the situation through other means, which we will come to in a moment. Paragraph 44.2:

10 “Neville Chaney, who was Chief of Operations of the National Department had learned...”

And I emphasise the words had learned.

“...that the department was making unlawful payments.”

Now, as you say, Mr Mokhesi, that information would have been gleaned by you in the disciplinary proceedings that took place after 2010/2011. Am I correct? Do I understand the position correctly?

MR MOKHESI: Yes.

20 **ADV PRETORIUS SC:** What he said in those proceedings was no, no, I was not told this or the National Department was not told this by the province, we learnt by – through our Chief Financial Officer picking up the payments on the housing subsidy scheme ledgers, is that correct? Is that in accordance with what you recall?

MR MOKHESI: Yes, that is how they will pick it up.

ADV PRETORIUS SC: Yes, they picked it up, were the very words used, correct. You recall that?

MR MOKHESI: Yes.

ADV PRETORIUS SC: Yes. And he says or he said and you record this at the top of page 110:

“Chaney discussed this with officials from the National Department and the National Treasury.”

In other words, his discovery or his information that
10 payments were being made.

“The officials agreed that the department’s payments were unlawful. The officials also agreed that had the department...”

That is the Free State department.

“...approached the National Department or the National Treasury for permission to make such advance payments permission would have been refused.”

In any event that was Chaney’s evidence. For the record,
20 Chair, it is in volume 17, Free State bundle 17 at page 253 and following. I can go there if you wish.

CHAIRPERSON: No, no, that is fine. Thank you, I have noted.

ADV PRETORIUS SC: It seems at least from Mr Chaney’s evidence that he was of the understanding that permission

from National Treasury had to actually be given before advance payments could be made. That was at least his view. No framework here, permission.

MR MOKHESI: No, I think let us clarify that. In circumstances like this, for example, which clearly will fall outside the framework, you will then have to go to National Treasury of Treasury so that you can also outline how you are going to manage, you know, because the issue here is not to lose money, how you are going to implement this particular scheme, if I may call it that way. But there is a standard framework that says yes, prepayments are allowed – ag, advance payments are allowed provided they are part of a contract. But clearly this is an exception here. That we are dealing with here is an exception, it will require outside permission from Treasury. You know, it is not like me and you, one contractor, advance payments or prepayments and simply apply that particular framework and then you agree on a specific milestone. For example, it is a small contractor, he does not – he is not able to, you know, execute because he is an SMME and so on. In that instance, you do that particular advance payment but it is part of the contract which might also include that the department must co-sign with you at the bank account, for example, you know? All those particular controls were then [inaudible – speaking simultaneously]

ADV PRETORIUS SC: I understand, if we could just summarise then. I am sorry, I interrupted you, had you finished?

MR MOKHESI: Ja, I am done.

ADV PRETORIUS SC: The framework you talk about makes provision for advanced payment provided certain conditions are met.

MR MOKHESI: Correct.

ADV PRETORIUS SC: The circumstances that we are
10 dealing with in this case clearly fall outside that framework.

MR MOKHESI: And the sheer magnitude of it.

ADV PRETORIUS SC: And the sheer magnitude, right, fall outside that framework.

MR MOKHESI: Yes.

ADV PRETORIUS SC: So we can put that framework aside. In this case it would have been necessary to get the permission of National Treasury.

MR MOKHESI: Yes.

20 **ADV PRETORIUS SC:** Okay and that permission was not obtained.

MR MOKHESI: No, it was not.

ADV PRETORIUS SC: Okay. You say in paragraph 44.3:
“The National Department and National Treasury’s main objection to the payments was that they were

advanced payments.”

CHAIRPERSON: I am sorry, Mr Pretorius, I am sorry. Now were there situations, practical situations such as these where the existing framework was not used but National Treasury was approached for approval as to what should be done and if so, would the – did the National Treasury give approval for that situation in effect saying you can work outside the existing framework or did something like that never happen practically?

10 **MR MOKHESI:** I cannot recall any of those circumstances that they ever existed.

CHAIRPERSON: Ja.

MR MOKHESI: You know?

CHAIRPERSON: Yes.

MR MOKHESI: Because, you know, the advance prepaying or advance payments are more of an exception rather than the rule.

CHAIRPERSON: Yes.

20 **MR MOKHESI:** The rule is, you know, you pay – ag, work gets done and you pay.

CHAIRPERSON: Ja, yes.

MR MOKHESI: Or in certain instances where there might be some sort of a prepayment particularly in big contracts in huge contracts, you know, what they call site establishment. Site establishment, it is a sort of

prepayment, if you look it, but it will have been contracted upfront to say – to have the contractor to set up site, you know, he need money because they have not started working as yet. So it will be a certainly percentage, 10% of the value of the contract and that but it is within the framework to say it must be contracted to, it must be a part of it, but not at this scale that you are talking about.

CHAIRPERSON: But apart from the question whether at a practical level you know of any situations which arose in terms of instruments, regulations, is there a provision that says if you cannot work or if you do not work within this framework, existing framework, you can approach National Treasury outside of that framework or something for approval to be given outside of that framework?

MR MOKHESI: Well, not that I am aware ...[intervenes]

CHAIRPERSON: Or something just ...[intervenes]

MR MOKHESI: Not that I am aware of. Remember, Treasury is the custodians of the financial rules and regulations.

20 **CHAIRPERSON:** Yes, yes, yes.

MR MOKHESI: Now where there is uncertainty around a particular issue you will always go to them.

CHAIRPERSON: Yes.

MR MOKHESI: And solicit their view and request their support or approval and so on.

CHAIRPERSON: Yes.

MR MOKHESI: That is normally what you will do, particularly if you are not certain.

CHAIRPERSON: Yes, so when you say approval could have been – or the National Treasury could have been approached for approval, if I understood you correctly, you are simply – you are not basing that on any specific provision in any regulation.

MR MOKHESI: No.

10 **CHAIRPERSON:** You just think that because they are the custodians of these regulations and if you have difficulty working within the existing framework you might have to approach them. What they will say to you is something you do not know. They might say hard luck if you cannot work with [inaudible – speaking simultaneously]

MR MOKHESI: If you cannot work with it, yes.

CHAIRPERSON: Or they might devise something for you. You do not know whether they would be able to.

20 **MR MOKHESI:** Yes, they might come up with a better solution.

CHAIRPERSON: Yes.

MR MOKHESI: Of how to approach this particular, you know...

CHAIRPERSON: Ja.

MR MOKHESI: So you never know because obviously

they will be evaluating the risk in terms of what you want to do.

CHAIRPERSON: Okay, alright. Thank you, Mr Pretorius.

ADV PRETORIUS SC: Yes, again this is a matter and law regulation, we will provide with chapter and verse.

CHAIRPERSON: Okay, alright.

ADV PRETORIUS SC: There is also a judgment of His Lordship Mr Justice Plasket dealing with the ...[intervenes]

CHAIRPERSON: Yes, okay, alright.

10 **ADV PRETORIUS SC:** Which we will also provide. Paragraph 44.3 on page 110, Mr Mokhesi reads:

“The National Department’s and National Treasury’s main objection to the payments was that they were advance payments. Monies were being transferred to contractors or suppliers without any work having been done or materials having been received.”

That was their complaint, as I understand it.

MR MOKHESI: Yes.

20 **ADV PRETORIUS SC:** Yes. And then you say – and in fairness to yourself you explain it a little more thoroughly here, you say in paragraph 44.4:

“One of the basic features of the State’s policy on state funded housing schemes – and this is reflected in various regulatory instruments – is that payment may only be made against value actually

received and only on the achievement of set milestones.”

You have told the Chair about that.

MR MOKHESI: Yes.

ADV PRETORIUS SC: In other words, the State, as

10 employer, will only pay a contractor for a construction job once the job has actually been completed. Interim progress payments are permissible but only for predetermined defined sections of the job and then only once those sections of the job have actually been completed. The department’s payments to suppliers and contractors breached these basic requirements because the suppliers had not supplied any materials and the contractors had not done any work.”

That is the summary of the situation, correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: Is that correct?

20 **MR MOKHESI:** Yes, correct.

ADV PRETORIUS SC: But, of course, the money has now been spent. And it may seem obvious but it is perhaps worth emphasising, the whole purpose of these controls and provisions is to ensure that the people who need the money and the services provided by the money get those

services properly paid for and fairly spent, correct?

MR MOKHESI: Correct.

ADV PRETORIUS SC: Let us look at this expenditure recovery plan, if you will. If you could go please to page 226 of FS14. Now to make clear the context once again of this plan, this is now in October 2010. Half the year has already gone and this is an expenditure recovery plan to take place in the remaining six months of the year, October, November, December, January, February, March.

10 This is the plan at page 226 of bundle FS14. Do you see that?

MR MOKHESI: Yes.

ADV PRETORIUS SC: Do you recognise this document?

MR MOKHESI: Yes, I see it.

ADV PRETORIUS SC: Alright. It contains various provisions, it is actually a slide presentation but if I could ask you please to go to page 229. I am sorry, it is page – I am confusing myself with red and black numbers. My apologies. Go to page black number 232.

20 **MR MOKHESI:** Yes.

ADV PRETORIUS SC: It is actually over the page that I wanted you to go but - in fact I was not confused, please go back to page 229.

“Ten point plan on expenditure recovery plan continued.”

Are you at page 229?

MR MOKHESI: Yes, 229.

ADV PRETORIUS SC: The plan says that:

“Projects must be classified into two groups. Group A, ready to run. Focus on all projects that are ready to run...”

It should read.

“50 projects with 4 844 housing units. Focused approach on costing of foundations, wall plates and
10 finals.”

That would include the roof, I presume?

MR MOKHESI: Ja.

ADV PRETORIUS SC: Correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: In other words, what this plan was saying to National Treasury and the National Department is we are going to actually build the houses.

MR MOKHESI: Correct.

ADV PRETORIUS SC: Yes. And if one goes to – well, at
20 least 4 800 of them. If one goes to page 233 one sees the cash flow projections.

CHAIRPERSON: 233?

ADV PRETORIUS SC: Yes. In other words, what the Free State department is saying to National Treasury and to the National Department, in order to “recover the expenditure”,

in other words to avoid the loss of the expenditure is that this is our cash flow projection, this is what we are going to spend in the various months remaining this year. I understand that document correctly, do I?

MR MOKHESI: Yes, to say up to the end of the financial year this is how ...[intervenes]

ADV PRETORIUS SC: Yes.

MR MOKHESI: Yes.

ADV PRETORIUS SC: So it says November 2010 and
10 then there are various items of expenditure under that heading, correct?

MR MOKHESI: Ja.

ADV PRETORIUS SC: Totalling R256 million.

MR MOKHESI: November?

ADV PRETORIUS SC: I have rounded the figure, look at the total at the bottom.

MR MOKHESI: Oh, okay. Okay.

ADV PRETORIUS SC: Correct? In other words, what the
20 Department was telling National Treasury and the National Department was that in November 2010 we would do 8 500 foundations, we would expend R170 million and wall plates on the foundation's walls, 3 500 and then another expenditure figure of R86 593 500. So there would be 8 500 foundations, 170 million, 3 500 wall plates, 86.5 million. Do you see that?

MR MOKHESI: Yes.

ADV PRETORIUS SC: And so it goes on. In December 2010 the cash flow projection, estimated in expenditure, if you look at the total at the bottom of R201 million, correct?

MR MOKHESI: Where are you?

ADV PRETORIUS SC: Are you with me? Look at December 2010.

MR MOKHESI: Oh, December 2010.

ADV PRETORIUS SC: That column.

10 **MR MOKHESI:** Ja.

ADV PRETORIUS SC: 2 500 foundations, 50 million would be spent.

MR MOKHESI: Yes, yes.

ADV PRETORIUS SC: Wall plates, 3500, R86.5 million would be spent.

MR MOKHESI: Ja.

ADV PRETORIUS SC: There would be 3 000 completions and the expenditure there in relation to those completions would be R65 million. But the total would be R201 million
20 spent.

MR MOKHESI: Yes.

ADV PRETORIUS SC: January 2011, the various components would result in a total expenditure of R149 059 500, do you see that?

MR MOKHESI: Yes.

ADV PRETORIUS SC: February 2011 it was projected that R220million would be spent on the various components listed in the cash flow projection schedule, correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: March R170 004 300, and the title in the – the figure in the bottom right-hand corner, for all that work for the remaining six months would be an expenditure on work actually completed of R1 038 230 900, correct?

10 **MR MOKHESI:** Yes.

ADV PRETORIUS SC: So this is the expenditure recovery plan that the National Minister says to the Department, give me information as to how you're going to spend the money by the end of the year in order to persuade me not to forfeit the money or not to cause you to forfeit the money, to the Free State Department. This is the representation or the answer it gets, it says,

“By the end of the financial year we would have spent R1million – R1billion”,

20 Correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: Now, it must have been obvious to the Free State Department at the time that this could never be achieved, you would agree?

MR MOKHESI: Ja.

ADV PRETORIUS SC: In fact, this is a complete misrepresentation of the position because at the time there was a parallel project of advanced payments being made, correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: So, there's – can you give any explanation, other than this is complete fraud on the National Department? It's a difficult question for you to answer, I know you account to people but there can be no
10 other explanation, surely?

MR MOKHESI: Ja, so ...[intervenes].

ADV PRETORIUS SC: You agree with me?

MR MOKHESI: No, it's – ja, no it's not practically possible to spend that amount of money.

CHAIRPERSON: When they prepared this document, this would have been in which month of 2010, October?

MR MOKHESI: Ja it would have been October...[intervenes].

CHAIRPERSON: Ja, I think maybe saying October.

20 **MR MOKHESI:** Ja to say for the rest of the financial year.

CHAIRPERSON: Do you recall – are you able to say roughly how many houses or units they had been able to build in the – from the beginning of the financial year to October?

MR MOKHESI: Chair, at that time it was even very

difficult to reconcile because of this particular problem.

CHAIRPERSON: But as you sit there now, do you – did you get to conclude how many houses they had, particularly, built and completed?

MR MOKHESI: I will have to, you know we – no I can't say it off hand, there would have been some houses...[intervenes].

CHAIRPERSON: Ja but it's a figure you can find out?

MR MOKHESI: Ja, there would have been – because you
10 can extract that information from the HSSC system.

CHAIRPERSON: Yes.

MR MOKHESI: There would have been, perhaps, a few houses and work in progress in the form of milestones, foundations, so many and so on, there would have been.

CHAIRPERSON: Yes.

MR MOKHESI: But...[intervenes].

CHAIRPERSON: The reason why I was asking is that one might be able to say, they themselves, would have known that if from, April, May, June, July, August, September,
20 October, if in seven months that either, not built any houses or they'd built houses that fall below a certain number, there was no way they could build so many houses within the time that was left in the financial year and given certain practicalities that they knew?

MR MOKHESI: Ja I'm – normally, you know on a yearly

basis there will be some houses that have not been completed that are only completed in the current financial year.

CHAIRPERSON: Yes.

MR MOKHESI: You know that move sort of ...[intervenes]

CHAIRPERSON: Yes.

MR MOKHESI: Where, at the end of the year you'll have so many units and a certain portion will be work in progress, so many foundations and so on and so many wall
10 plates but not completions and then you move this – you'll move with that in the ...[intervenes].

CHAIRPERSON: Into the new financial year.

MR MOKHESI: In the new financial year.

CHAIRPERSON: Yes but of course you – in that situation, do you use the money of the new financial year to complete those or do you...[intervenes].

MR MOKHESI: Well it's a – remember the expenditure framework is three years. So, you have to look at the three-year period to say, you know, on this particular
20 financial year I'll probably end up – you know you'll have a target.

CHAIRPERSON: Ja.

MR MOKHESI: To say 3000 targets, you look at the budget yes, but it's units and sites as well and then units, it's across all programmes, you know, not necessarily

RDP's but it might also be affordable rental accommodation, so units and sites and that's basically how it will roll and then, you know, in this particular – you can have instances where some of the projects flow into the current financial year and you also – and that's why there'll be roll-overs that are approved because you have existing projects that are running that you can show to say I request a roll-over, I did not spend but here are my commitments and then National Treasury will then approve
10 and say, right, you have existing contracts that are running now your budget in that particular year will have been – let's say it would have been R100 000 but because of the approval of the roll-over maybe of R200 000 the budget for that project becomes R100 000. R200 000, the roll-over plus the budget for the current year, so it moves on like that.

CHAIRPERSON: But if I recall your evidence earlier, correctly, you said that as at October 2010, the National Department was saying that – or had determined that the
20 Free State Department had not exceeded 10% of expenditure in the funds that had been allocated, is that correct?

MR MOKHESI: Yes, the report was saying, you know, the monetary report was saying you have only spent 10% of...[intervenes].

CHAIRPERSON: Yes, of the allocation.

MR MOKHESI: Of the allocation.

CHAIRPERSON: So, now what it means now when you look at this document at page 233 that Mr Pretorius was dealing with, is that – I mean the 10% of R1billion would have been about R100million more or less.

MR MOKHESI: Possibly.

CHAIRPERSON: So, they – effectively, they were saying even though in six/seven months we are only able to use
10 10% in the balance of the months – of the financial year, namely, November, December, January, February, March, that's five months, and we know that there are holidays during December and the construction industry normally doesn't work for some of that period. They were saying, during those four or five months they were going to spend 90% of the allocation. It seems, that's what they were saying.

MR MOKHESI: That's what the recovery...[intervenes].

CHAIRPERSON: Something that was quite remarkable.

20 **MR MOKHESI:** Was attempting to say.

CHAIRPERSON: Yes okay.

ADV PRETORIUS SC: The provisions of the Divisions of Revenue Act, do I understand, also deals with the three-year medium term expenditure framework but for the purposes of this matter it was saying that in the financial

year ending – the single financial year ending March 2011, unless the allocation of R1.4billion was spent all or part of it would be forfeited, am I correct?

MR MOKHESI: Repeat that again Mr Pretorius?

ADV PRETORIUS SC: In other words, you mentioned a three-year medium-term expenditure framework provision that is provided for in DORA, as I understand.

MR MOKHESI: Yes.

ADV PRETORIUS SC: My recollection of DORA but what
10 we were dealing with here is a single financial year.

MR MOKHESI: Yes, it's a single financial year.

ADV PRETORIUS SC: Correct, ending March 2011?

MR MOKHESI: Yes.

ADV PRETORIUS SC: And what the National Treasury were saying, unless you spend your allocation of R1.4billion in that year, you're going to lose all or some of it.

MR MOKHESI: Unless you spend and you can demonstrate by contract, you know, existing contracts that
20 there are commitments for this money, it doesn't mean that you'll have to – you'll be able to spend and that will also allow you to get an approval for a roll-over because those projects are going to be running into the new financial year, so that you don't use the money allocated for the subsequent financial year with the projects that comes

from the previous financial year.

ADV PRETORIUS SC: Now if that – I’m sorry, yes I understand and in fact part of your R1.4billion or part of the Department’s R1.4billion was in fact, a roll-over from the previous year, the 2009/2010 financial year but that’s a detail that maybe, is in other information but the point is that the Department wasn’t saying, look we have contracts in place and we want to roll-over. What it was saying as is now clear and you fairly conceded Mr Mokhesi is that we’re
10 going to spend over a billion rand in the five remaining months of the year from November to March and this is how we’re going to spend it, in all the details set out on page 233 and you fairly stated that it would have been impossible to achieve that, correct.

MR MOKHESI: Correct, yes.

CHAIRPERSON: Well is it correct that, here in this document they just state, maybe what can be referred to as their targets or maybe their plans but I don’t know whether it can be called plans because, unless you draw my
20 attention to something that I haven’t picked up it doesn’t look like they show, in this document how they will achieve these targets within the timeframe that was – that they had?

MR MOKHESI: Ja, you know, for example, if you say 3 500 wall plates I just make an ...[intervenes].

CHAIRPERSON: Please raise your voice.

MR MOKHESI: If you say 3 500 wall plates for example where are they.

CHAIRPERSON: Yes.

MR MOKHESI: Right, because it means there must be 3 500 foundations somewhere.

CHAIRPERSON: Yes.

MR MOKHESI: And there must be contractors who on site who are working.

10 **CHAIRPERSON:** Who are already working and there must have been an assessment of what they are capable of doing within what time, that has enabled you to say, by a certain time they will have reached the – they would have done the walls.

MR MOKHESI: Because you can't have wall plates without foundations.

CHAIRPERSON: Of course, ja, yes.

MR MOKHESI: And you must also be in the position to pin-point it is in Bultfontein, in wherever, you know all
20 these other areas to say this are the 3 500.

CHAIRPERSON: Yes, now when you look at this document and you know what you know now about what the position was, namely, what houses had been built, what houses had not been built, to what extent are you able to say that this document was really a misrepresentation

because there's no way you could talk about walls when there are no foundations?

MR MOKHESI: Ja, it was – I don't know whether it's a wish list, for lack of a better term but it would be highly unlikely that the National Treasury – ag sorry the parent Department Human Settlement will approve without knowing exactly because you have to provide details about where those houses or where those foundations are because we're talking about the wall plates. So, you'll
10 have to say they are in this particular area and this is how – when you talk about the recovery plan you have to demonstrate that. If that information is lacking there's no way that it could be approved and also, on the face of it, it is improbable.

CHAIRPERSON: Yes, but I'm asking a different question. You are the HOD, you were the HOD who prepared the affidavit that we are dealing with. Now, to the extent that this document – was a representation to the National Department that the Provincial Department would achieve
20 these targets by end of the financial year, namely March 2011. Are you able to say that there was enough progress that had been made by October in terms of the building of the houses and the foundations and everything for them to have been able to achieve this, are you able to say...[intervenes]?

MR MOKHESI: If you think about the 10% that has been said this is where you were in terms of the expenditure, surely there were not enough, whether foundation or wall plates or whatever the situation might be at the time to be able to achieve this.

CHAIRPERSON: But also as at that time, based on what you know, what you got to know when you became HOD, are you not able to say, there were not enough contractors, for example who were qualified who could have done such
10 a job within such a short space of time, is that something you are not able to say based on the reports you subsequently got when you became HOD?

MR MOKHESI: Well, I'm not able to – you know, I can only venture to say, you know, in order to pull this you'll need contractors also – because it's also about capacity to be able to – to pull – you know 3 500 also require a certain level of capacity and financial capital – financial capital and given the, you know, the contractors that we know or we have in the sector, your small contractors...[intervenes].

20 **CHAIRPERSON:** Well it would be good, if this information is not already in the files here, it would be good if we can get information that tells me factually whether the progress that had been made in terms of the building of houses, at the time the plan was made, October 2010, what progress had been made and whether, by writing the targets that

they were putting up here, it can't be said, simply on that, that it was clear misrepresentation. So if that's not information that's available I would appreciate it if you could work on getting that kind of information for us but it ought to be possible because we are in 2020 now, we're talking about something that happened in 2010 at some stage in the years that followed somebody ought to have said, let us see what was the position at that time but on the information that must be available within the
10 Department it may be able to reach some conclusion as to how much progress had been made, based on that, was this not a clear misrepresentation, yes Mr Pretorius?

ADV PRETORIUS SC: Yes, but just to take a step back, I think you have fairly conceded that based on what you knew it would not have been possible to achieve these projections.

MR MOKHESI: Yes but not if you are able to say 3 500 wall plates there they are – or foundations sorry, foundations, there they are but whether they...[intervenes].

20 **ADV PRETORIUS SC:** Well your evidence is on record but there's another way to approach it because at this very time the Department was devising a pre-payment scheme which resulted in the expenditure of R600million, completely different parallel scheme. So at the time it's saying to National, we're going to spend this amount of

money on this amount of foundations, this amount of wall plates, this amount of completions for each month from November 2010 to March 2011 and we're going to spend over a billion rand on this, at that very time, it is planning the expenditure of R600million by way of pre-payments to contractors and suppliers, correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: The two can't sit together, we know the pre-payments of R600million happened, as a matter of
10 fact and if that was being implemented at this time nobody could have believed in the truth of that diagram, am I correct in that approach?

MR MOKHESI: Yes.

CHAIRPERSON: You don't seem very categorical on some of the matters Mr Mokhesi where I'd expect you to be quite categorical, you seem quite, very guarded in terms of some of the answers...[intervenes].

MR MOKHESI: No where I agree, I agree, I said yes.

CHAIRPERSON: Yes, but it looks like there is a lot that
20 you might need to refresh your memory on or what? For example, [intervenes].

MR MOKHESI: No, I think what should be appreciated as well, Chairperson, is remember it's – on some of what is being said here is possibly hearsay because I was not there but you know, as Accounting Officer you also account

for things that happened before you came, I acknowledge that but also, you know, that Department lost money it's a fact and this which I drew up or this affidavit was amongst others, mainly targeted at us trying to recover the money, firstly and secondly it's an affidavit that has been – where I can't say I have a first-hand experience or fist-hand information in terms of what happened, it's because of all the documents that one collected over time and tried to draw up this affidavit.

10 **CHAIRPERSON:** Well going back to this – I mean Mr Pretorius is coming from an angle to look at this document to say, nobody could have believed that – could have believed this information.

MR MOKHESI: I agreed.

CHAIRPERSON: Yes, yes, now – but surely you do, somewhere in the Department information as to how many houses had been built by end of that financial year, namely, end of March 2011 even if you might not remember it now.

20 **MR MOKHESI:** I might not remember it now but...[intervenues].

CHAIRPERSON: But you've got it somewhere.

MR MOKHESI: But the source of that particular information, as I've indicated will be the HSSC.

CHAIRPERSON: Yes, well I would like that because, here

is what was projected. What I would like is, if possible, by October when this document was prepared, this was the state of affairs about this project...[intervenes].

MR MOKHESI: Ja, well I think we'll try...[intervenes].

CHAIRPERSON: You'll try and do that.

MR MOKHESI: And go back, look also at – we'll also have to go and source documents like – because ordinarily there would be reports, DORA reports on a monthly basis that indicate where the targets are, you know, how much and so
10 on. There will be those particular reports that we'll compare and then we'll have to go back.

CHAIRPERSON: Even if we are not able to say, even accurate number of units that had been built by October 2010 but a reasonable estimate might do but from the mere fact that they spent 10%, about R100million that ought, on its own to give us an idea that maybe on the basis of R100million or so X number of units would have been completed, can't be more – it could not have been more but out of whatever units they may have – they may have
20 been working on some of them might not have been completed. Maybe none of them would have been complete but it could not have been more than X number, simply from the money – the amount of money that had been spent out of the R1billion and then you look at what was the state of affairs as at the end of the financial year,

how many units had been completed, how many units were not completed and in that way one could come back to this and be able to say, whoever was drawing this document, if they knew exactly what we're talking about, they knew they were misrepresenting the position in a very serious way, okay, Mr Pretorius?

ADV PRETORIUS SC: Thank you. Just to complete the point that I was raising with you, Mr Mokhesi, we know that during or about October 2010 the Free State Department of
10 Human Settlements was still contemplating spending R600million on materials let alone completed work, correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: So, I think the conclusions you've reached were, at the very least, not unfair or unreasonable conclusions. Let's move to another topic, and that was, what were the communications from the National Department Human Settlements to the Provincial Department of Human Settlements? On the 29th of October
20 2010 there was what is called a Technical Human Settlements MINMEC Meeting. Now there is MINMEC and there is Technical MINMEC, could you explain to the Chair what they are please?

MR MOKHESI: Technical MINMEC is Technokas officials and it's Chaired by the DG and all the relevant officials will

be there, primarily all the HOD's and the CFO's and perhaps certain support staff, that will be the Technical MINMEC. The MINMEC it's Ministers – Minister and MEC's. So, the Technical MINMEC then feeds into MINMEC for approvals of whatever decision, whether it's policy issues and so on. So that's, in short, what it is.

ADV PRETORIUS SC: Right if you go to paragraph 44.5, what you say there is that at a Technical MINMEC of Human Settlements held on the 29th of October
10 2010...[intervenes].

MR MOKHESI: Paragraph?

ADV PRETORIUS SC: Sorry paragraph 44.5 on page 110, I'm sorry, go back to page 110 of your affidavit.

CHAIRPERSON: 110?

ADV PRETORIUS SC: Yes Chair, paragraph 44.5.

MR MOKHESI: Yes, paragraph 44.5, yes.

ADV PRETORIUS SC: There reference is made to a Technical MINMEC [spelt into the record] meeting held on the 29th of October 2010, that would have been various
20 officials from the National Department and various officials from the Provincial Department of Human Settlements, correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: And you say at that meeting Mr Chaney, on behalf of the National Department and Mr

Makatswa on behalf of the Provincial Department were present and that Mr Chaney made it clear that payments were unlawful and impermissible, you see that?

MR MOKHESI: Yes.

ADV PRETORIUS SC: What payments were being referred to there?

MR MOKHESI: I would – it could be the advance payments.

10 **ADV PRETORIUS SC:** The advance payments. Alright now we...

MR MOKHESI: Of the – for the purchase of material.

ADV PRETORIUS SC: Yes you say in paragraph 44.6 you have relied for the account above on the evidence given by Chainey you had to – a disciplinary hearing on 20 June 2013 and you give reference to the transcription of that evidence. We have looked at that evidence and to be fair to you Mr Chainey is not entirely clear of when information reached the National Department in regard to the payments and the status of those payments.

20 He talks about various meetings. There was an October meeting; there was a November meeting, there was a meeting at Welkom, do you recall the Welkom meeting? But he is not entirely clear of precisely when National became aware of the irregularities. And it is also was debated in the disciplinary hearing of what the National

Department learned.

On the one hand it was put to Mr Chainey that what the National Department learned from its Chief Financial Officer who had perused the housing subsidy scheme records that payments were being made directly to suppliers and that the complaint at that stage at least was that payments to suppliers is not a good idea. In fact it is improper because there are no controls.

You simply paying to suppliers and the suppliers can
10 overcharge. They do not have - that system would not have the control in the contract with the contractor who must receive, verify, put on site and the like. On the other hand it may have been and it is not clear from Chainey's evidence that the nub of the complaint was the advance payments. But as far as you are concerned the complaint was advance payments, is that correct?

MR MOKHESI: Yes it – yes advance payments that is what we heard – that is what we are dealing with.

ADV PRETORIUS SC: Right. Alright if necessary we will
20 deal with that in submissions Chair or in that – I think it would not be fair to tax Mr Mokhesi on that issue. It lies within the mouths of others.

So Mr Chainey refers to various meetings; he was off ill for a long time; he talks about an October meeting, a November meeting and a meeting the following year. He

talks about the risks involved in paying suppliers directly without going through the contractors and he also talked I think about advance payments. But the sequence and the detail is elusive on his evidence so let us leave that there. Okay.

Your evidence is as I understand it is that National complained that the plans of the Province were unlawful and impermissible because they were advanced payments, correct?

10 **MR MOKHESI**: Yes.

ADV PRETORIUS SC: Yes. Alright. Then Mr Mkhathshwa also gave evidence of events around this time. If I can give you the reference Chair it is Bundle FS17 at page 259. What he said is that he conveyed this warning that he had received to the Head of Department Mr Mokoena and Mr Mokoena and later the MEC said you proceed nevertheless. Do you know anything about that?

MR MOKHESI: No I have seen it on the evidence of Mr Mkhathshwa – that is what – I do not know anything about
20 that.

ADV PRETORIUS SC: You do not deal with it here.

MR MOKHESI: Ja.

ADV PRETORIUS SC: We will deal with that through other evidence Chair. So the October meeting of MINMAC Technical you deal with – at paragraph 44.5 but there are no

minutes attached. Do you see that? You do not attach any minutes of that meeting when you deal with paragraph 44.5 and 44.6. You merely refer to Chainey's testimony. Correct?

MR MOKHESI: The technical and the name MINMAC minutes.

ADV PRETORIUS SC: At paragraph 44.5.

MR MOKHESI: Ja.

ADV PRETORIUS SC: You refer to the technical Human Settlements MIXMAX meeting of 29 October 2010. Correct?

10 **MR MOKHESI:** Yes.

ADV PRETORIUS SC: And over the page you say what happened at that meeting. And in paragraph 44.6 you say in saying that what you say in paragraph 44.5 you rely on Mr Chainey's testimony transcribed in the record of the disciplinary hearing.

MR MOKHESI: Yes.

ADV PRETORIUS SC: Okay. Correct?

MR MOKHESI: Ja.

20 **ADV PRETORIUS SC:** There was another meeting however that took place on the 18 November. Another technical MIXMAX meeting and you deal with that at paragraph 54. Well you deal with that at paragraph 50. You say in the second sentence or you say in paragraph 50:

"I referred earlier to the technical Human Settlements MINMAC meeting held on 20

October at which Chainey advised Mkhathshwa that the department's advance payments were unlawful."

MR MOKHESI: Which paragraph Mr Pretorius?

ADV PRETORIUS SC: 50.

MR MOKHESI: 50.

ADV PRETORIUS SC: On page 112.

MR MOKHESI: Okay.

ADV PRETORIUS SC: And then you say:

10 "A follow up technical Human Settlements MINMAC meeting was held on 18 November 2010."

You see that? And then you do attach a copy. And there you say in paragraph 52:

"Again Mkhathshwa attended on behalf of the department. He presented he department's expenditure recovery plan."

So it seems that that plan was actually presented at an official meeting according to this record.

MR MOKHESI: Yes.

20 **ADV PRETORIUS SC:** Correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: He also –

"That is in addition to presenting the plan raised the proposed use of tripartite agreements in the housing project."

Those are the agreements remember between the department, the supplier and the contractors.

MR MOKHESI: Yes.

ADV PRETORIUS SC: Correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: That second level of agreement. Not the cession agreements but the middle level of agreement. And you say in paragraph 53:

10 “The technical MINMAC meeting rejected the department’s expenditure recovery plan. It warned the department not to implement it.”

And over the page you say at paragraph 54:

20 “There were two major problems. First the plan did not demonstrate the department’s ability to spend its allocation in the few months remaining until the end of the financial year 30 March 2011. Second the proposed tripartite agreements were rejected since suppliers would have to supply materials in bulk without the necessary support to ensure quality and proper procurement proceedings. Also there are a lot of risks with this arrangement.”

Do you see that? There were two issues discussed.

MR MOKHESI: Yes.

ADV PRETORIUS SC: As you say. But what is clear that at least at that stage the department was not persuaded that the allocation could be spent. You referred to that earlier in your evidence. You recall that?

MR MOKHESI: Yes.

ADV PRETORIUS SC: Second however the proposed tripartite agreements were rejected. So it seems there were two issues on the table. The one is the expenditure recovery plan which we have referred to particularly that cash flow
10 projection and secondly another way of spending money which would be to play – pay suppliers direct. That was also rejected.

MR MOKHESI: Yes.

ADV PRETORIUS SC: Okay. Then it seems from paragraph 46 that another meeting was held on the 19 November that is the next day.

MR MOKHESI: Paragraph 46?

ADV PRETORIUS SC: Para 56.

MR MOKHESI: Oh 56.

20 **ADV PRETORIUS SC:** On page 113. A Human Settlements MINMAC meeting held on 19 November 2010. Again Mr Mkhathshwa attended on behalf of the department. You see that?

MR MOKHESI: Yes.

ADV PRETORIUS SC: Now that is with the National Minister

and the Provincial MEC of Human Settlements.

MR MOKHESI: Yes correct.

ADV PRETORIUS SC: As I understand your evidence.

Correct? Is that correct?

MR MOKHESI: Yes that is correct.

ADV PRETORIUS SC: Paragraph 58 the MINMAC meeting that is the one on the 19 November confirmed the approach adopted at the technical MINMAC meeting namely that funds would be shifted from non-performing Provinces. That is the

10 warning. Correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: Paragraph 59:

“Mr Mkhathshwa returned to Bloemfontein and advised the then Head of Department Mpho Mokoena that the department had been warned not to implement the expenditure recovery plan. However Mokoena instructed Mkhathshwa to proceed with the plan. I base this allegations on the – allegation on the findings of the disciplinary hearing where this evidence is thoroughly dealt with and in detail.”

20

But your conclusion I might say accurately reflects the proceedings in the disciplinary hearing. Correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: That is where you got your information.

MR MOKHESI: Yes that is where I got it.

ADV PRETORIUS SC: Right. Of course having followed the instructions of Mr Mokoena and Mr Mkhathwa ultimately gets dismissed but that is a story for later on in these proceedings. Paragraph 60 you say:

10 “Mokoena’s instruction was formalised by an internal memorandum. The memorandum was prepared by Moosa Tsometsi [?] who was then the Deputy Director General of the Department. Mokoena signed the memorandum approving the recommendations it contained.”

 There is some evidence to the effect that Mr Mokoena requested Mr Tsometsi [?] to prepare a legal opinion on the legality of the issue but that document prepared by Mr Tsometsi [?] is not an opinion at all. Do you know anything about that?

20 **MR MOKHESI:** No.

ADV PRETORIUS SC: Of course the memorandum itself as you point out in paragraph 62 and following which served to implement the advance payment plan was itself not followed let alone had not been proper in the first place to even contemplate such a plan the plan that was contemplated was

also not followed at all.

And you detail that in paragraph 62 to 64. Basically, the memorandum prepared by Mr Tsometsi said that the department would only pay material suppliers for material actually supplied to a contractor and invoiced with the invoices to be backed up certificate issued by the contractor confirming receipt of the material. That is contained in the memorandum. But that is not what happened am I correct?

MR MOKHESI: Yes it is not what happened.

10 **ADV PRETORIUS SC:** What happened in fact?

MR MOKHESI: Well materials were either not delivered or in instances and this is what we – we also picked up they were either not delivered or instances where they were delivered – they were not delivered in the quantities that are required or they simply some of the contractors denied that the materials were ever delivered to them and then this was what we were faced with to say in certain instances we had suppliers just dropping materials on site without any supervision and so on.

20 So that is basically what happened. But in terms of the certification of the material as contemplated in the memorandum it did not happen. It happened only to a very lesser extent where it happened. It did happen in certain instances but not in all instances.

ADV PRETORIUS SC: You summarise that in paragraph 65

and 66 on page 115. If I may just read that and you can confirm whether it is correct or not. Paragraph 65 on page 115 reads:

10 “The department’s decisions were in clear breach of the advice given to it by the National Department via Chainey and the technical MINMAC meetings. The department had been told that its expenditure recovery plan was not acceptable and that it should not be implemented. It had also been told that paying suppliers without the suppliers having supplied materials was unlawful.”

Is that your analysis?

MR MOKHESI: Yes.

ADV PRETORIUS SC: Of the documentation that you looked at?

MR MOKHESI: Yes.

20 **ADV PRETORIUS SC:** Alright we do not have a minute I must say of the expenditure recovery plan being rejected but we do have a minute of supplier’s payments being warned against. But that is part of the record that we can deal with with the Chair in submissions. Paragraph 66 goes:

“As I set out in more detail below the department proceeded to make payments to

suppliers without the suppliers having supplied material i.e. it made payments in advance. No written agreements were concluded governing these payments. The department did not follow any proper procurement process to identify the suppliers to which it paid payments. The total value of the payments made was nearly R1 billion.”

Now that is in relation to the prepayment scheme. Is
10 – does that reflect your researches into the materials that you referred to in paragraph 4 of your affidavit?

MR MOKHESI: Yes.

ADV PRETORIUS SC: Right before I get to the next topic I would like to just make one point or put one issue before you. There does not appear to be a minute of National – the National Department at a technical MINMAC or even a MINMAC or any other meeting saying to the Provincial Department your expenditure recovery plan cannot be implemented it is unrealistic. We do not have a minute of
20 that. And if in fact the National Department was saying, look you cannot play – pay suppliers directly because it is too risky then of course it would not be commenting on the expenditure recovery plan it would be commenting on the other process. Correct?

MR MOKHESI: Can you repeat that?

ADV PRETORIUS SC: Sorry.

MR MOKHESI: Mr Pretorius.

ADV PRETORIUS SC: It is a long question and it has been a long day. We do not have a minute of any meeting where National says to Provincial do not implement the expenditure recovery plan. We do not have a minute of a rejection of the expenditure recovery plan. One can of course argue that had they looked at it they would have obviously come to the same conclusion or that they actually did reject it as you say.

10 **MR MOKHESI:** Well one can only infer because here is the – that ERP was prepared. It must have been prepared and the way we know the process is that the recovery plan you present it to the – to the technical meeting. Either it will have been presented to this performance reviews which are not necessarily technical MINMAC per se. Or they will also be presented in the technical MINMAC where it will be approved or rejected. There should have been a process that decides that we are taking – we are taking money from you for that Province or Provinces.

20 **ADV PRETORIUS SC:** Is that what –

MR MOKHESI: And it happened.

ADV PRETORIUS SC: Yes.

MR MOKHESI: So you know there must have been some sort of an engagement.

ADV PRETORIUS SC: Yes.

MR MOKHESI: And some sort of correspondence.

ADV PRETORIUS SC: One can infer too that had – if they had asked for it the Minister had said give me an expenditure recovery plan they would have looked at it and I would imagine and I think it is reasonable to put to you would not have been convinced by it as you say.

MR MOKHESI: Yes they would have been.

ADV PRETORIUS SC: They would not have been convinced by it.

10 **MR MOKHESI:** Yes.

ADV PRETORIUS SC: Yes. Because clearly on the face of it it was not an achievable project. But you have given that evidence I do not want to repeat it. We might get into another round of exchanges. But the second point I wanted to make arising out of that is that a rejection of the idea that suppliers should be paid directly and not via contractors is another matter – it is a separate matter. Correct?

MR MOKHESI: Okay yes.

20 **ADV PRETORIUS SC:** Yes. Alright. Well we need not take that much further than that. If I could take you to paragraph 72. That refers to certain press statements and if you go back to paragraph 69 you record there:

“That on the 18 January 2011 the National Department issued a media statement.”

MR MOKHESI: Hm. Yes.

ADV PRETORIUS SC: Saying that it was shifting funding from underperforming Provinces, the Free State and KwaZulu Natal to other Provinces. Correct?

MR MOKHESI: Correct.

ADV PRETORIUS SC: And the response of the department to that was to say, no, no we are going to spend everything by the end of the financial year. By the end of January in its response press statement the Free State says according to paragraph 70:

10 “By the end of January 2011 expenditure should be around 85%.”

Now if one includes the R600 million plus spent on advance payments that might or might not be correct. We do not know that?

MR MOKHESI: We do not know that.

ADV PRETORIUS SC: But you do say in paragraph 72:

20 “By the time these statements – these press statements were issued the department had already transferred several hundred million rand from its conditional allocation to suppliers.”

And I stress suppliers and that would have been for materials.

MR MOKHESI: Materials yes.

ADV PRETORIUS SC:

“It continued to make unlawful transfers in January, February and March 2011. The transfers were made without the suppliers having supplied material; without written agreements in respect of or regulating the transfers and without any procurement process having been followed.”

Correct?

MR MOKHESI: Yes.

10 **ADV PRETORIUS SC:** You agree with that statement?

MR MOKHESI: Yes. Yes.

ADV PRETORIUS SC: And then paragraph 73:

“The department made the transfers for the purpose of avoiding having its conditional allocation stopped and transferred to better performing provinces.”

That was the object.

MR MOKHESI: Yes.

ADV PRETORIUS SC:

20 “It made the transfers so that it looked as if the conditional allocation had been spent. I submit that this was a fraud on the National Treasury and on the National Government more broadly as well as on the taxpayers and the public genre.”

That is a repeat of your earlier statements.

MR MOKHESI: Yes.

ADV PRETORIUS SC: Regarding the fraud correct?

MR MOKHESI: Correct.

ADV PRETORIUS SC: I repeat that the unlawful transfers you say in paragraph 74 amounted to plus minus R631 million in total. That deals with that section. You deal with the material supply agreements in paragraphs 87 and 88 of your statement. That is on page 124. You see that?

10 **MR MOKHESI:** Yes.

ADV PRETORIUS SC: That between October 2010 and August 2011 the department concluded approximately 112 agreements termed material supply agreements. These were the tripartite agreements of which we spoken earlier.

MR MOKHESI: Yes.

ADV PRETORIUS SC: They are well summarised in the judgment of Faul AJ which we may refer to because they are a convenient summary but we could do that at a later stage perhaps by way of revision tomorrow morning. But what is
20 instructive about that statement is that at the very time the expenditure recovery plan was being devised and presented to National that is October 2010 this parallel scheme of material supplier agreements to spend R600 million was being devised. Correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: You then deal with in the following paragraphs the material supply agreements and you highlight certain provisions of the tripartite agreement. Firstly there is the conflict between the contractor's obligation to source materials and pay for materials and the department doing so directly with the supplier. You recall that conflict?

MR MOKHESI: Ja the material supply and the contract.

ADV PRETORIUS SC: Yes.

MR MOKHESI: Yes.

10 **ADV PRETORIUS SC:** The contractors were the contract?

MR MOKHESI: Ja.

ADV PRETORIUS SC: Yes.

MR MOKHESI: Because the material supplier was put the responsibility of acquiring material was now put on the ...[mumbling].

ADV PRETORIUS SC: Now it was clear. Right. The agreement you say in 90.2:

“Obliges the contractor to order its building material from the material suppliers.”

20 But now on the tripartite agreement there is a possibility of a direct link between the department and the supplier.

MR MOKHESI: And the suppliers.

ADV PRETORIUS SC: Correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: But what is interesting about this tripartite agreement in paragraph 90.3 which you point out there are no fixed prices. So in other words the supply agreement is entered into with the hope as you put it that the material would be supplied at the best price. So one enters into a contract with no price being fixed and the material supplier is told just give us your best price. You make the remark later about whether this is a commercially viable way of going about business. What is your remark about that?

10 **MR MOKHESI:** Well there is an element of risk particularly for the contractor because all the milestones prices you know foundation, walls place those prices are fixed. Now if you do not manage because the biggest input – the biggest input in building of houses it is material. It constitutes perhaps 80 or 90% of the input costs.

Now if you do not manage that particular issue and you will simply leave it to – to the material supplier you run the risk of materials suppliers either overcharging and unfortunately because the price is fixed the contractor or
20 possibly because we pay – we pay a fixed price you know 100. If we say foundation is R10 000.00 that is what it is. That is what we are going to pay. So you can end up actually if you do not manage that material part of it you can – the contractor can up actually spending R12 000.00 for argument sake and we are certainly are not going to pay

R12 000.00 we are going to pay R10 000.00. And that is – it is again obviously what is going to happen is the contractor will abandon site because he is obviously losing money. So that is the risk basically.

ADV PRETORIUS SC: In summary Mr Mokhesi at page 125 and page 126 you deal with the terms of the tripartite agreement for the supply of materials. The agreement which provided for direct payment at no fixed price as you point out by the department to the supplier as opposed to the
10 contractor.

And you point out on page 127 how these tripartite agreements varied the contracts with the contractor. To give the simplest example the contractor was originally obliged to source materials and pay for them and would only be paid by the department once they have – the building – milestone had been completed. This provided for an upfront payment directly to the supplier without the controls that you have referred to and creating the risks that you referred to.

All that is detailed here I do not think it is necessary to go to
20 it in any detail. It is clear what you say here and that is backed up by an examination of the contracts and by the findings of Advocate Van Graan in the disciplinary inquiry. You make the point in paragraph 95 in addition on page 128 that this material supply agreement is unusual in the construction industry and it is at odds with the requirements

of the housing subsidy scheme, correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: You see that in paragraph 95. Again, we do not need to go into detail except that to say in paragraph 95.2, what you say is that there is a departure from the requirement that materials actually be incorporated into housing, houses been build and to the satisfaction of the employer before the employer is required to pay for the material. That is the department.

10 The department would ordinarily in proper expenditure process and in accordance with all the regulations and the regulatory framework have to be satisfied that the materials are actually there in the completed house before it pays for them, correct?

MR MOKHESI: Yes.

ADV PRETORIUS SC: And you also make the remark at the bottom of paragraph 96 on page 129.

“The department paid substantial amounts of money often with no invoice at all.”

20 **MR MOKHESI:** Page?

ADV PRETORIUS SC: Page 129

MR MOKHESI: 129.

ADV PRETORIUS SC: The last three lines of the first paragraph of the page, paragraph 96.

“The department paid substantial amounts of money

often with no invoice at all. Where there was a document purporting to be an invoice, it was not certified and was often patently false.”

You have given that evidence.

MR MOKHESI: Yes.

ADV PRETORIUS SC: And those examples would appear in the reports. But then at the bottom of page 129, you deal with the cession agreements. And if we are going to complete the summary, we should deal with those.

10 But before that. Chair, I would want to deal and I see we are beyond the time now. I would like to deal with another topic which I would like to deal with tomorrow also. Would this be a convenient time?

CHAIRPERSON: I wanted to find out whether in terms of how much time we will need during the week, whether we need to go beyond four o'clock or whether we should stop at four o'clock because we will be able to manage.

ADV PRETORIUS SC: Well, I was hoping to finish the evidence well in time.

20 **CHAIRPERSON:** Well in time?

ADV PRETORIUS SC: Yes.

CHAIRPERSON: Okay, okay. Then in that event, let us adjourn then and then we will continue tomorrow. Okay. We will adjourn and then tomorrow we will start at ten o'clock. We adjourn.

INQUIRY ADJOURNS TO 22 SEPTEMBER 2020