

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

24 NOVEMBER 2020

DAY 311



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TRANSCRIBERS:

B KLINE; Y KLIEM; V FAASEN; D STANIFORTH



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PROCEEDINGS RESUME ON 24 NOVEMBER 2020

CHAIRPERSON: Good afternoon Mr Kennedy, good afternoon everybody.

ADV KENNEDY SC: Good afternoon Chair.

CHAIRPERSON: Are we ready?

ADV KENNEDY SC: We are thank you Chair and thank you for accommodating further evidence of the Denel witness from whom you have heard.

CHAIRPERSON: Yes.

10 **ADV KENNEDY SC:** Parts a week or so ago Mr Burger.

CHAIRPERSON: Yes.

ADV KENNEDY SC: May I thank Mr Burger and his attorney Mr Crouse for accommodating us.

CHAIRPERSON: Yes.

ADV KENNEDY SC: At short notice this morning.

CHAIRPERSON: Yes, no thank you Mr Burger and your attorney for making yourselves available at very short notice to assist the commission to make use of the time that it has. Thank you.

20 **MR BURGER:** Huge pleasure Chair.

CHAIRPERSON: Thank you. Yes I think we will have to do the oath again.

ADV KENNEDY SC: Thank you Chair.

CHAIRPERSON: Or affirmation.

REGISTRAR: Please state your full names for the record/

MR BURGER: Abraham Stephanus Burger

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

MR BURGER: No.

REGISTRAR: Do you true – do you solemnly affirm that the evidence you will give will be the truth; the whole truth and nothing else but the truth; if so please raise your right hand and say, I truly affirm?

MR BURGER: I truly affirm.

10 **CHAIRPERSON:** Thank you Mr Burger; you may be seated. So you confirm Mr Kennedy we will be using Denel Bundle 10 is that right?

ADV KENNEDY SC: That is correct and it is Exhibit W25 in Bundle 10.

CHAIRPERSON: Yes Exhibit W25.1.

ADV KENNEDY SC: That is correct.

CHAIRPERSON: Or – okay alright.

ADV KENNEDY SC: Chair we will in fact be referring to some other exhibits as well for purposes of cross-
20 reference.

CHAIRPERSON: That is fine.

ADV KENNEDY SC: Particularly ...

CHAIRPERSON: That is fine.

ADV KENNEDY SC: Annexures to the affidavits of Ms Malahlela.

CHAIRPERSON: Yes.

ADV KENNEDY SC: And Mr Mlambo.

CHAIRPERSON: Okay no that is alright.

ADV KENNEDY SC: Mr Burger you will recall on the last occasion that we dealt at length with the award of the Hulls contract – the Platform Hulls Contract by DLS to VR Laser, do you recall that?

MR BURGER: Yes Chair I do.

ADV KENNEDY SC: And then we just started with certain
10 aspects relating to the next award to VR Laser by DLS while you were the DLS CEO and that was the Sole Supplier Contract or the Single Supplier Contract for various...

MR BURGER: I recall Chair.

ADV KENNEDY SC: That was for various steel fabricated parts, correct?

MR BURGER: Correct Chair.

ADV KENNEDY SC: Right. And we dealt mainly with these
20 topics Mr Saloojee giving you the instruction and of course his version is that the initiative came from you but we have covered your evidence on that. Why you accepted the instruction and you made the acknowledgement to your credit that in retrospect you realised that the correct procedures were not necessarily followed in the award of that contract.

MR BURGER: Correct Chair.

ADV KENNEDY SC: Right. Now I just want to go into some of the background that led up to the actual finalisation of the – of the contract. May I ask you to look at Bundle 1 – Denel Bundle 1? You have listened to the evidence have you not of Ms Malahlela and you have also been provided with a copy of her affidavit for your comment, correct?

MR BURGER: Yes I have Chair.

10 **ADV KENNEDY SC:** And you are aware that at an early stage according to Ms Malahlela's evidence she raised a serious concern about the award of the Single Supplier Contract to VR Laser particularly because there was no tender or RFQ - Competitive Procurement Process?

MR BURGER: I learnt that from her evidence yes Chair.

ADV KENNEDY SC: And were you not aware of that at the time?

MR BURGER: As I – as I stated in my affidavit the – the first time I heard about not being happy with the process
20 followed was – was in – in the early parts of 2016 when she first mentioned this to me in – in the passing and said we did not follow correct procedure. I was surprised to hear that. Shortly thereafter there was an EXCO meeting and where I recall it was raised again and then this was in 2016 and then she followed it up with an email to me when

I was overseas and I know I reacted quite sharply on her email because I thought the way she put it in the email was – was in a much more serious tone than what I heard it in the passing and at the EXCO meeting and I thought that was serious enough to be discussed on a one on one basis or in a committee and not writing an email while I was abroad. So yes that is when I found out Chair.

ADV KENNEDY SC: So you found that out only 2016? You sure you were not aware of that in 2015 at all?

10 **MR BURGER:** I – I cannot recall that. I really cannot recall that – it being discussed.

ADV KENNEDY SC: Then how – then how do you come to say that you only found out about it in 2016 if you say you cannot recall if you found out about it during 2015?

MR BURGER: I cannot recall – I would not have reacted in the way I did and stated at that time – this is four years' ago this is the first time apart from raising it in the passing is the first time that you now officially raise it with me. So that is why I say at the time in 2016 I could not remember
20 that she did. I can less so now – so...

ADV KENNEDY SC: So you can?

MR BURGER: I can less so now recall that she – she mentioned anything of the likes to me. I saw – I heard in the affidavit that it was discussed with Mr Teubes. I was – I was – I cannot recall any of that currently.

ADV KENNEDY SC: Well can I take you in Bundle 1 to page 659? Now this is an email from Ms Malahlela dated the 23 March 2015 so it is early in 2015 addressed exclusively to Mr Teubes. It is not copied into you. Can you recall if you saw this email?

MR BURGER: I cannot recall Chair.

ADV KENNEDY SC: Right. Is it possible you may have?

MR BURGER: I – I have not even read it Chair so I – I...

ADV KENNEDY SC: Okay.

10 **MR BURGER:** I cannot recall this.

CHAIRPERSON: I guess you would need to read it to see whether you remember having read it at some stage.

ADV KENNEDY SC: Yes perhaps I can just read the relevant parts to the witness Chair?

CHAIRPERSON: Yes.

ADV KENNEDY SC: This is what Ms Malahlela said to Mr Teubes.

20 “Hi Reenen, I have given – gone through the document and I realise that you have taken out my recommendation and now the document has the name of the supplier specified. I do not mean to belabour the point but I am still of the opinion that should management approve this request DLS must go out on tender or RFQ for the

appointment of a single source for this scope of work. Once we have identified the supplier that meets DLS's requirements through a competitive process then we can appoint such a supplier for a minimum of three years as a single source specification and evaluation criteria must be sent to all suppliers listed before time etcetera."

Now Ms Malahlela gave evidence ...

10 **CHAIRPERSON:** Mr Kennedy you did not say minimum hey you said maximum?

ADV KENNEDY SC: I am sorry?

CHAIRPERSON: You did not say minimum – it is written maximum but I heard you as if you were saying.

ADV KENNEDY SC: Oh I am sorry – did I say?

CHAIRPERSON: As if you were saying minimum.

ADV KENNEDY SC: I am sorry did I misread it? I apologise.

CHAIRPERSON: Yes.

20 **ADV KENNEDY SC:** From maximum of three years as single source. Thank you Chair.

CHAIRPERSON: I recall this from the evidence that was given to me.

ADV KENNEDY SC: And the context she gave to this in her affidavit and in her oral evidence was this. She had

initially prepared a motivation recommendation and unfortunately it is referred to in her affidavit but not attached – just the recovering email and it appears that the memorandum itself has gone astray. But there is no dispute between here and Teubes that she initially when she put out the recommendation as the head of Supply Chain at DLS said this needs to go out to tender. And here she is replying to Mr Teubes. Because if we look on the next page – page 660 in the middle of the page – in fact
10 the foot of the page the bottom email is from her dated the 12 March 2015.

“Please find the attached document as requested.”

And her evidence has been that was the – that was the recommendation in which she had recommended that it this is to go out on a Single Source Supplier Contract there would have to be a competitive process. And he then replies the middle of page 660 on the 20 March and he says:

20 “Hello Celia, I have changed the angle that we ask for approval from Riaz. Please see attached submission in the inputs.”

And her response is the email that I have just quoted from where she specifically says:

“I see you have changed the angles in a

fundamental way. You no longer are incorporating my recommendation. As head of Supply Chain Management whose job is to advise management on these things. That you should be going out to tender or at least RFQ to ensure that it is competitive.”

Now Mr Teubes did he not discuss this with you or can you not remember?

MR BURGER: I – I did not see this email. I cannot recall.

10 I recall this email from the evidence that was given recently – I cannot recall this email – having seen this email then.

ADV KENNEDY SC: Yes but my question earlier was whether you saw this email and you have already answered that before.

MR BURGER: Okay.

ADV KENNEDY SC: My question now is did he discuss it with you – Mr Teubes whether by email or person to person or however?

20 **MR BURGER:** Chair this – it is really difficult to recall. He might have asked my opinion on – do – what is my opinion? Should we go out on open tender or on closed tender for that matter? My opinion at the time was I stated it quite a number of times that the way to go out on open tender with something like this or on – firstly to go out on open tender

is – is more or less impossible. The – to do it on a closed tender – multiple tender is to prepare drawings; is to supply potential single source suppliers with these drawings for them to – to tender a price, demonstrate their capability, demonstrate their quality and so on; on an actual example and then...

ADV KENNEDY SC: Yes I think we understand what a RFQ process involved we have been through this a number of times before.

10 **MR BURGER:** Ja.

ADV KENNEDY SC: My interest is really in the – in – on the question of accountability and who discussed what with whom and who gave approval, and who was taking the initiative? For example you have said in your affidavit repeatedly and adamantly Mr Saloojee was pressuring you to award the contract – this contract to VR Laser. He says no he was not pressuring you – you were pressuring him and your colleagues. And that – I believe that it may be of interest to the learned Commissioner in the commission to
20 know where the buck stopped? Because you as CEO have already said in great detail on the previous occasion that there was huge good reason why DLS should give a Single Supplier Contract to VR Laser and nobody else. You recall that?

MR BURGER: I recall that vividly Chair.

ADV KENNEDY SC: Which seems to perhaps make sense if you were the one who was driving the process and – and I think it would be fair for the commission to understand whether you were aware of this at the time or not. So with respect to you Mr Burger may I suggest you do not dwell on what is involved in a RFQ process? We know that Ms Malahlela was saying you should go out on a tender or RFQ process. We know what those processes involve and we know why they are there to try and ensure a measure of
10 competitiveness and that is why she was promoting the idea. But it was not being picked up by management of which you formed part. If you cannot remember whether this was discussed with you by Mr Teubes or Ms Malahlela at the time you must say that.

MR BURGER: Chair I cannot recall. I was – I was however of the opinion that a process was followed a year earlier and based on that I did not feel it necessary to go out on a tender again. That was my opinion at the time but I cannot recall this being discussed.

20 **ADV KENNEDY SC:** And then the last paragraph.

CHAIRPERSON: Just one second Mr Kennedy. I wonder if they can reduce the air conditioner noise but if – ja I hoping that that will not be problematic in terms of heat. But if it is too hot please somebody must tell me. Mr Kennedy how is it like?

ADV KENNEDY SC: It is very hot.

CHAIRPERSON: It is very hot.

ADV KENNEDY SC: I am finding that – but quite honestly
Chair...

CHAIRPERSON: Oh. No, no, no.

ADV KENNEDY SC: It is very important you hear the
evidence.

CHAIRPERSON: No maybe if – maybe what you can do
because it is not like I cannot hear – maybe what you can
10 do is put your microphone I do not know where it can be
closer because I was hearing you but I wanted to improve
my hearing in terms of what you are saying. So I do not
want everybody to complain about heat.

ADV KENNEDY SC: Thank you Chair.

CHAIRPERSON: Maybe – maybe where I am it is not as
hot as where you are. Okay alright but I think if you do not
speak too far from the phone – from the microphone.

ADV KENNEDY SC: Yes I have moved it Chair.

CHAIRPERSON: It will help me. Yes.

20 **ADV KENNEDY SC:** Thank you.

CHAIRPERSON: Yes, ja. Okay alright.

ADV KENNEDY SC: I hope it is better.

CHAIRPERSON: Okay.

ADV KENNEDY SC: Mr Burger can I take you to the last
paragraph of this email?

“I do not think we should piggy-back on the process that was followed for the Platform Hull. We should go out on a separate RFQ tender process where we invite all suppliers that we think are capable and then do such appointment. We will ask Michelle to schedule a meeting.”

So she specifically saying it does not help that we went on a RFQ process for the Platform Hulls Contract and
10 we have dealt with this in your evidence before.

MR BURGER: Correct.

ADV KENNEDY SC: That involved three bids that was the RFQ process which was to an extent a competitive process.

MR BURGER: Correct Chair.

ADV KENNEDY SC: So she is saying but we cannot just piggy-back on that because that process was for that contract – for those items – Platform Hulls. And as you confirmed in your evidence last time this was for a different
20 type of component. You cannot say well because I have awarded you Contract A therefore you entitled to Contract B. That was her rationale. Now does that not make sense to you now?

MR BURGER: It makes sense to me now Chair. At the time it did not but it does now.

ADV KENNEDY SC: Yes. And in fact in the previous paragraph I am not going to read it into the record she in fact says: “We should invite LMT in this process – they should be one of the parties that we invite to bid. And she says at the end of that second paragraph:

10 “I am not saying that the work must be given to LMT all I am saying is that LMT and other capable suppliers must be given a chance to prove themselves through a transparent, competitive and fair RFQ or tender process.”

But it was not a concern for you at this stage early in 2015 that – that there was no RFQ procurement process being followed. It is not something you raised or were concerned about yourself, correct?

MR BURGER: Chair I am running the risk of repeating myself but at the time I state again I got an instruction; I welcomed the instruction; I – it was minuted in the EXCO minutes of Denel Land Systems. I wanted to make very
20 sure that the – the engineers and the operation supported that – that initiative. I told Mr Teubes that we should do this and for that reason he ensured that the engineers did a study and to – that it was supported by the study. The emails that followed it is very clear if it is analysed that I was not – I did not want to sign the MOU or the MOA. I

instructed in that it must be Mr Saloojee. So it is all of these things that – that demonstrates that this does not – did not – the initiative did not come from me. The very fact that in the past we used to on lower levels approve MOA's probably made me not focus enough and understand enough that we should have gone out on tender. In today's current scenario we should have gone out on tender; we did not. I – at the time I did not think it necessary.

CHAIRPERSON: I – this is something you may have dealt
10 with previously but I may have forgotten what you said. What did you think then was the process that should have been followed if the open tender system should not be followed if you thought that was not the right process?

MR BURGER: Chair.

CHAIRPERSON: What is the process that you thought should be followed?

MR BURGER: Hundred percent Chair. Prior – prior to
20 2014 earlier 2010 thereabouts I cannot remember the exact date a person like the Supply Chain Executive without further authority approved Single Source Agreements. Because we believed it had certain advantages for the company. If the – if the Group CEO said we should do something like this I was hundred percent convinced at the time that this was within his delegation to do. I knew and I said that my delegations were curtailed quite substantially

but I was under the impression if that gets approved by the Group CEO then it is fine. And that was my departure point and therefore I did not give it a lot of concern until now.

CHAIRPERSON: Yes Mr Kennedy.

ADV KENNEDY SC: Thank you Chair. So we have just seen the email from Ms Malahlela to Mr Teubes and that was in March 2015. Now we know and you have agreed in your affidavit as I understand it that the MOA was signed in
10 May 2015.

MR BURGER: Correct.

ADV KENNEDY SC: You recall that/

MR BURGER: Correct Chair.

ADV KENNEDY SC: I would like you now in the same bundle to please turn to page 672. Do you have it?

MR BURGER: I have got it Chair.

ADV KENNEDY SC: Now this is an EXCO committee meeting minute of the 29 October 2015. Unfortunately it does not as one normally would expect state who was
20 present and who may have been absent or who chaired it. May I just refresh your memory as to what it says. Paragraph 1.1.

“A concern was noted with regard to placement of orders on VR Laser. The predicament here is that the GSCE approval

– sorry approved this deviation from the procurement process on the following condition. “Under no circumstances shall products or services that can be procured from a group entity or division be procured from an external supplier to a non-Denel company unless there is approval by the Group Supply Chain Executive based on sound business reasons.” This is also in
10 line with the Group Supply Chain Policy and the DLS Supply Chain Procedure. The above provisions are in direct conflict with the MOU that DLS signed with VR Laser where VR Laser is the sole supplier for all complex welding and machining work to DLS for the next ten years.”

And there was a resolution.

“The committee took a decision that the MOU takes precedence over the GSCE’s
20 condition and the Group Supply Chain Policy and the DLS Supply Chain Procedure. The committee stated also that given the – it says resend history – presumably it should be recent history with regard to prize – it should be presumably

price and turnaround time VR was the preferred supplier with all opportunities. It was further stated that in terms of the MOU VR Laser prices must be market related and in line with the Provisions of the MOA before an order can be placed on them. Due to this reason and previous experience with VR Laser committee felt confident that the VR Laser prices will be market related and reasonable. Celia Malahlela was tasked to draft a letter to the GSCE and explain the decision taken in this regard.”

10

Now Mr Burger do you recall being at this meeting where this was discussed and this was decided?

MR BURGER: Yes Chair.

ADV KENNEDY SC: And the concern – the predicament that was raised in the first bullet point and the heading 1.1 a concern was noted. That was concern – that concern or concern about the predicament was raised by Ms Malahlela herself, not so?

20

MR BURGER: Chair I cannot – cannot remember. I know about this email I cannot remember who said what but I presume it was her that raised those points.

ADV KENNEDY SC: Yes. And this clearly is that we have not complied with the Group Supply Chain Management

Policy because the GCSE or the GSCE rather Mr Mlambo had not approved the transaction relating to whether an outside supplier rather than an internal supplier could be used. Correct? That was the concern she raised.

MR BURGER: Correct Chair.

ADV KENNEDY SC: Right. Now this was raised in October 2015.

MR BURGER: Correct Chair.

ADV KENNEDY SC: Formerly in a meeting and it is
10 minuted. So your evidence cannot be correct earlier which suggested although you seemed to go back on that later that you only heard about it in passing from Ms Malahlela only in 2016. It cannot be correct can it?

MR BURGER: Ja. Chair I cannot recall the exact date. I know it was substantially later. I know there was an EXCO meeting where it was discussed maybe it was this one and it was October 2015 I cannot recall.

ADV KENNEDY SC: Yes.

MR BURGER: The – but as I said it was – it was
20 discussed in an EXCO meeting.

ADV KENNEDY SC: Yes and presumably this is the EXCO meeting.

MR BURGER: Yes Chair.

ADV KENNEDY SC: Right. Now if I can take you back for a moment in the same bundle to page 669? But let us start

at 662. This is the Denel SOC Limited Procurement Policy Group Supply Chain Policy. Correct?

MR BURGER: Correct Chair.

ADV KENNEDY SC: And that became effective as it is indicated near the top right on page 662 on the 19 November 2014.

MR BURGER: Correct Chair.

ADV KENNEDY SC: Now if we look at page 669 Clause 6.10.1 under the heading Intergroup and Group
10 Procurement Contracts 6.10.1 says:

“Under no circumstances shall products or services that can be procured from a group entity or division or procured from an external supplier or non- Denel company unless there is approval by the Group Supply Chain Executive based on sound business reasons.”

That is the very provision that is quoted in the minutes.

20 **MR BURGER:** Yes. Correct.

ADV KENNEDY SC: Of that EXCO meeting that you attended.

MR BURGER: Correct Chair.

ADV KENNEDY SC: Ms Malahlela was specifically quoting and recording a provision of the Group Supply Chain

Management Policy that she contended had been breached, correct?

MR BURGER: Correct Chair.

ADV KENNEDY SC: Right. Now is it correct that you had a discussion about this and you discussed it in these terms. Which one takes precedence? Does the MOA/MOU take precedence over the Group Supply Chain Policy the policy take precedence over the MOU/MOA? Is that the frame of reference of the discussion?

10 **MR BURGER:** Correct Chair.

ADV KENNEDY SC: But what did you understand Mr Burger to be the status of the Group Supply Chain Management Policy? Can I just suggest something that I would with great respect suggest must be very obviously particularly to somebody so experienced in business and that is you have a policy which lays down rules for the Denel group which you must comply with when procuring goods or services, correct?

MR BURGER: Correct Chair.

20 **ADV KENNEDY SC:** And you do so through contracts, correct?

MR BURGER: Correct Chair.

ADV KENNEDY SC: So when you procure through a contract you must comply with the rules that are set out in the Supply Chain Management Policy, correct?

MR BURGER: Correct Chair.

ADV KENNEDY SC: So could you explain to us please how on earth you came to decide in this meeting that the agreement takes precedence over the policy? Surely it is the other way around?

MR BURGER: In my mind at the time there was a policy and that policy was a Denel written policy and that policy the custodian of that policy my understanding was the Group CEO. So what is – what is written here is not
10 hundred percent my understanding. The resolution was that our recommendation is very strong that there is a legal contract between us and VR Laser and that legal contract must be respected.

There is a conflict between the contract and group policies. And my understanding at the time was, the group policies is an internal matter and therefore can be accepted by the necessary level of authority.

So. And for that reason I said not to get into a legal dispute with a valid contract. The precedence should be on
20 the contract but we should get approval from our bosses that we can do this.

So I cannot recall Chair that we took a decision and just implemented it based on that decision. We took a decision as a recommendation to hire(?) and if I recall correctly, there was a motivation that was written that was sent to Denel's

corporate office in this regard.

ADV KENNEDY SC: Yes, we will get to that memorandum in a moment. What I want to put to you Mr Burger is that, the mere fact that a contract has been entered into in violation of a policy does not mean that there are no implications.

It does not mean that you say: Well, take(?) your folders. It is tough. We breached the policy. Oh, well. We have made a contract with an outside party and we breached our own internal policy. That is only internal. So let us just
10 carry on implementing the contract.

Are you not aware or were you not aware then Mr Burger that government owned entities such as Denel are subject to the rule of law including the procurement regulations which include your own internal Supply Chain Management policy and if you breach a material provision of that it can nullify the contract?

Were you aware of that at that time?

MR BURGER: At the time, I was most definitely aware that it was a breach of any laws. I was aware that it was a
20 breach of the Denel of the procurement policy.

And Chair, I have to say. This Single Source Agreement was not a document that was kept in a dark corner and nobody knew about it.

Every single body knew about this and including my boss at the time. And for that reason, if we did something

unlawful and incorrectly, there should have been action or there would have been action taken.

So Chair, I – at the time I knew about Ms Malahlela's concern. There was a discussion. She raised her objections.

There were many people sitting around the table. I was the chairperson of that meeting. I tried to summarise the discussion and it is written in the resolution and therefore we went to corporate office with the resolution.

10 So Chair, I have got really not anything to add to that.

CHAIRPERSON: Well, I think from what you have said. One of the things you have said is that at the time you accepted that you were going to be acting in breach of this policy.

MR BURGER: Correct.

CHAIRPERSON: Is that correct?

MR BURGER: Correct, Chair.

CHAIRPERSON: But you considered – maybe I should not say this. You must say it if that is the case. What – did you
20 consider that the breach was justified in any way, and if so, what is that you – that you thought justified the breach of the policy?

MR BURGER: Chair, I got an instruction to form a Single Source Agreement with VR Laser. The content or the objective of that Single Source Agreement was minute in

Exco meetings. And I was under the impression that it was approved at the correct levels.

So by the same token, the very same person that signed that agreement also signed the policy and also approved the policy for Denel.

So I thought if there was a conflict between the two, it is easier to deal with an internal matter than an external matter.

And for that reason I said, I support – and it was not my
10 decision, this was a committee decision that was minute here.

For that reason I supported that this – that we should uphold the contract between us and VR Laser. But at no time did somebody stand up and say: You know what, you are doing it against the law here. You are not allowed to do this. At no time did anybody say that.

I was under the impression it is a conflict with internal policies and for that reason I said... And it was approved by the levels that – the same level that signed the policy and
20 therefore I thought it was not a problem.

CHAIRPERSON: Did you think that the GCEO could give an instruction to anybody to actually act in breach of company policy?

MR BURGER: Chair. [laughs] It is a difficult question and I understand why you ask it. I thought it – me, though that it

made absolute business sense at the time why that Single Source Agreement existed and therefore there were good business reasons for it and given the good business reasons, I thought the Group CEO could override the policy. I really thought so.

CHAIRPERSON: H'm.

MR BURGER: I also agree that he cannot just do what he wants.

CHAIRPERSON: H'm, h'm.

10 **MR BURGER**: I understand. I understand your concern. So, yes he cannot do what he wants but I was under the impression this was for good business reasons and given the good business reasons, yes.

CHAIRPERSON: But you would also accept, would you not, that it is people – it is particularly people as senior as you were who ought to have found it easy to say to the GCEO: Hang on GCEO. It looks like your instruction is in breach of the policy. Can you do that?

Is it not? It is the senior people who find it easy to say:
20 I know you have given me an instruction but it looks like it is in breach of the policy. Can you give me an instruction that goes against the company policy?

MR BURGER: Ja, Chair. Hindsight is perfect sign.

CHAIRPERSON: Yes, yes.

MR BURGER: Yes.

CHAIRPERSON: And it was not done.

MR BURGER: It was not done.

CHAIRPERSON: Ja.

MR BURGER: Well, not that I can recall Chair.

CHAIRPERSON: Yes.

MR BURGER: Yes.

CHAIRPERSON: Certainly not by you.

MR BURGER: Ja.

CHAIRPERSON: Not by...

10 **MR BURGER**: Yes.

CHAIRPERSON: Ja. Mr Kennedy.

ADV KENNEDY SC: Thank you, Chair. If the policy was not a law that you did not have to comply with – and if you entered into a contract that was contrary to that policy, well then the contract must just fore stand. What is the point of having a policy at all?

Oh, because it would mean that people could, as actually happened here, go into a – signing an agreement with full knowledge thanks to Ms Malahlela that there was
20 there a breach. She first raised the issue of noting your RFP process. That was rejected by Mr Teubes.

And secondly, she raised the point that you have not got GC / GSCE approval to go outside the divisions. But if you could – if you felt that well that does not matter because it is not the law, it is only a policy.

What is the purpose of having a policy if you are not going to comply with it?

MR BURGER: Chair, no. I think that is, with great respect, taking the point a little bit far. The policy is there to govern the organisation and to make sure that good decisions as a norm but like everything in life there are always exceptions and that does not mean that one can ignore the policy.

It means, in my mind, that if you are doing something that is not stipulated in the policy then you have to get approval at the correct level of the organisation.

And in my mind, this – having a policy like it is better to manufacture something internally than externally. It is a good policy.

I agree with the policy. I am not questioning the policy. But in this specific case, with the problems we had, with the risk we were running – I have already indicated this would have been a good place where we have complex fabricated steelworks done.

And Chair, my apology for saying it again. It is also common knowledge that you have – when you deal with highly complex things, having Single Source Agreement is not a bad thing. It is a good thing in this complex environment.

So I did support it. I supported the idea then. I support the idea now. But it does not take away that the policy is a

good policy and it makes sense in general terms.

ADV KENNEDY SC: And in fact, the policy – you talk about exceptions. The policy specifically says that where you wanting to procure something that could be purchase to procure in-house, you want to go outside to an external supplier. You have to get – there have to two things satisfied.

The one is, you have to get the approval of the Group Supply Chain Executive, not from the Divisional CEO, 10 namely Mr Burger, or his deputy or his assistant, Mr Teubes.

Only the GSCE could give that approval. Do you agree with me?

MR BURGER: I do agree Chair but to qualify that. I also thought and this how all decisions worked that if his boss and his boss's boss listen to the arguments, they had the authority to decide what is the best for the company.

ADV KENNEDY SC: Well, in fact, that approval at a higher level than Mr Mlambo had, took place long after this. It did not happen at this time.

20 **MR BURGER:** Ja.

ADV KENNEDY SC: May I suggest we focus on the topic of my question?

MR BURGER: Ja.

ADV KENNEDY SC: Which is what happened in October 2015 when you were chairing a meeting of Exco at

divisional level. The fact that a year later or more, Mr Ntshepe may have signed to say: Well, I am not going to override Mr Mlambo. You cannot, with respect, be particularly an impressive answer to explain what was going through your mind on the 25th of October 2015.

MR BURGER: Ja.

ADV KENNEDY SC: Do you accept that?

MR BURGER: I do accept.

ADV KENNEDY SC: Is that fair to say?

10 **MR BURGER**: Yes ...[intervenes]

ADV KENNEDY SC: Let us try to confine ourselves to that. You were the CEO. You were there to ensure that there was proper compliance with whatever was required. And here we have a situation with Ms Malahlela who is saying: We have got a policy which precludes this.

This is now the second time that Ms Malahlela was doing her job in drawing attention to her bosses. IN the first place Mr Teubes earlier that year, saying: We have to go out on tender or RFQ, otherwise, we are in big trouble.

20 And he overrules her. It then comes – it is then signed, despite all of that. Despite non-compliance with that requirement of the policy, not falling into any of the exceptions of the policy itself provides for, such as an emergency situation. None of that. It is then signed, not so, in May 2015?

MR BURGER: Correct, Chair.

ADV KENNEDY SC: And then a further problem is raised by Ms Malahlela a few months later. There is another reason why we have a respect in which we have not complied with the policy and that is, we never go the GSCE approval.

Now it just seems to me that the policy does not really have any sense or usefulness if twice in a row its provisions are breached but management say: Well, do not worry. We carry on.

10 And secondly. It does not make sense why you have no doubt of the substantial salary. Ms Malahlela employed as your Divisional Supply Chain Management Head if twice she raises serious concerns that this in breach of the policy and twice she is ignored or overruled by you.

MR BURGER: My I repeat Chair? I reject the fact that it was overruled by me. I state again. There was a meeting held that consisted of executive members. She raised her concerns. It was discussed. A resolution was taken by the committee, not by me, by the committee. And a joint
20 resolution was written down.

ADV KENNEDY SC: Did you not ...[intervenes]

MR BURGER: Sorry, sorry.

ADV KENNEDY SC: Yes.

MR BURGER: In this resolution, it is not minute that Ms Malahlela raised her objection about the decision. It was

taken as a group, a group discussion and a group resolution.

And Chair, I hear what Mr Kennedy is saying but at the time it was an Executive Committee meeting and a joint resolution was taken. It was not just – it was discussed and it was accepted.

ADV KENNEDY SC: Well, let us accept all that evidence Mr Burger. But may I go back to the question? You overruled it. You say: No, it was not you. It was the committee.

10 Now if it was a decision of the members of the committee, it was not their decision supported by Ms Malahlela, not so? She was against the decision.

MR BURGER: Chair, in all meetings there are difference of opinions. In all meetings.

ADV KENNEDY SC: Sorry, the principle?

MR BURGER: In all meetings, there a differences of opinions and ...[intervenes]

ADV KENNEDY SC: Will you not just answer the question? Was she for or against this resolution?

20 **MR BURGER:** She was – she put her point on the table and she was against it.

ADV KENNEDY SC: Against it?

MR BURGER: Correct.

ADV KENNEDY SC: So was a minority. Was she joined by you Mr Burger? Did you take her side or were you against

her side?

MR BURGER: How these meetings usually happen. I am the chairperson. The chairperson does not say, I – what you say is nonsense. I will – I think it should be different. How it happens, everybody gets an opportunity to state their opinion and I ...[intervenes]

ADV KENNEDY SC: I am asking what you did Mr Burger. Let us not hear about how you allow other people to express ...[intervenes]

10 **MR BURGER**: I repeat again. The – I formulated the consensus view of the meeting and that is written in the resolution.

ADV KENNEDY SC: And you supported it?

MR BURGER: I supported it.

ADV KENNEDY SC: Right. So you were part of a collective that overruled Ms Malahlela. Is that a formulation that you are more comfortable with?

MR BURGER: [No audible reply]

ADV KENNEDY SC: Or is it wrong?

20 **MR BURGER**: I ...[intervenes]

CHAIRPERSON: [laughs] It has to be correct Mr Burger.

MR BURGER: Sorry, Chair?

CHAIRPERSON: The proposition has to be correct.

[Parties intervening each other – unclear]

MR BURGER: Remember I said ...[intervenes]

CHAIRPERSON: ...or the questions is: When you are part of the group that overruled Ms Malahlela – you have already said, she put her point of view and she was against it. And you have already said you were one of those who supported it.

MR BURGER: Yes.

CHAIRPERSON: So Mr Kennedy is saying, you were part of the collective group that overruled her. Do you agree?

MR BURGER: Correct Chair. I – why I was hesitating is, is
10 I wanted to qualify. The word overruled is a very strong word. I do not recall – and maybe the other members that was in this meeting should divulge – but I cannot recall by saying: We hear you. We thought about what you said. You are herewith overruled.

CHAIRPERSON: It does not have to be – the word does not have to be used, overruled.

MR BURGER: Ja.

CHAIRPERSON: The fact of the matter is. Two views were on the table.

20 **MR BURGER:** Correct, Chair.

CHAIRPERSON: Have you and in the view of the other view ...[intervenes]

MR BURGER: Correct, Chair, I ...[intervenes]

CHAIRPERSON: ...and you said: In fact, we do not agree with your view. This is the view that we support.

MR BURGER: Correct.

CHAIRPERSON: Ja.

MR BURGER: Correct, Chair.

CHAIRPERSON: Ja. H'm.

ADV KENNEDY SC: Right. So, did you – to go back to your point earlier that you know had a contract, whether you liked it or not, you did have a contract with an outside supplier and you felt that the policy was really just an internal matter that should not affect your relationship with the outside
10 supplier.

Did you even bother to approach VR Laser and say: Guys, we have a bit of a problem. You know, we are a state institution and our internal Supply Chain Management expert, Ms Malahlela has drawn our attention to two defects, that we have not complied with our own policy.

Now we know that you, VR Laser, are a private entity, not subject to our policy but we are. And there is a problem. We need to terminate this agreement. We need to agree that we will not proceed.

20 In fact, the very point of the meeting was, can we proceed? Can we, Denel, proceed to place orders on VR Laser in terms of the agreement? And the decision was yes, we must.

So to get back to my question. Did you make any attempt to contact VR Laser to say: We are sorry. There is

a problem here. Can we try and resolve it?

MR BURGER: No, Chair we did not.

ADV KENNEDY SC: Why not Mr Burger?

MR BURGER: Because I held the view at the time that it – it was within the mandate of the Group CEO to sign something like this and that it was a document that was done according to the policy or to the Delegation of Authority.

I have to add, however, that this – the time when the arguments became stronger, was the time when the press
10 became more vocal about the Gupta involvement.

So – and the opinion of me was that that was not my place to give an opinion of that. But from a – from Ms Malahlela's side, she was vocal on that she did not support the idea of tarnishing Denel's name of the link between the Gupta's, and that was, in my mind, her real concern.

And therefore, I took note of what was said. Everybody around the table took note of what was said and the resolution was taken.

20 **ADV KENNEDY SC**: So you were aware at that stage that there was media controversy and public controversy about Denel's involvement with Gupta associates and businesses, correct?

MR BURGER: Chair, if I recall correctly. It started late 2015. It started with everything. In the beginning of 2016,

there was a quite a lot of media attention.

ADV KENNEDY SC: Yes. Now you say that you thought that featured more in Ms Malahlela's approach. What are you suggesting? That she was trying to use wrongly Supply Chain Management Rules to try and get the company to stop doing business with the Gupta's or what? What are you suggesting?

MR BURGER: I am not suggesting anything. I am just saying that the - Ms Malahlela thought it will bring Denel in
10 disrepute and, I mean, she was correct.

ADV KENNEDY SC: She was correct, not so?

MR BURGER: [No audible reply]

ADV KENNEDY SC: And in fact, she was also correct that the Supply Chain Management Policy was breached. You have already acknowledged that, to your credit.

MR BURGER: Ja, ja.

ADV KENNEDY SC: Did you see Ms Malahlela when she ended her evidence in tears here?

MR BURGER: I did Chair.

20 **ADV KENNEDY SC:** A long time after she left Denel, she is still moved to tears and gave evidence that she tried her best as the citizen of this country and as an honest, loyal servant of... Sorry, that is a bad terminology from the old days.

A loyal employee of a state-owned corporation where

she tried repeatedly to get her bosses, including you, to comply with the policy and you would not.

And she did it in the context of where there was indeed growing controversy about Denel's links with the very controversial Gupta family and their associates.

And she was trying to warn you repeatedly: We must keep Denel's modus clean. We must make sure that if we are going to award any contracts, particularly to people who are associated with or owned by controversial people, such
10 as the Gupta's, we must be absolutely sure in complying with our policy. That was her function, not so?

MR BURGER: Correct, Chair.

ADV KENNEDY SC: It was a major part of her responsibility.

MR BURGER: Correct, Chair.

ADV KENNEDY SC: And despite knowing that she had views as a professional that was not acting in bad faith, not so? You already conceded that.

MR BURGER: For sure.

20 **ADV KENNEDY SC**: Yes. So she is saying to you: We need to make sure that we comply with the policy. We are not complying. And twice she gets rebuffed and effectively overruled by her bosses.

And eventually leaves Denel in a state of absolute demoralisation, huge financial prejudice to herself and her

family and still traumatised, as you saw when she was sitting in the very witness chair that you are sitting in now, on national TV.

She had the dignity of showing her emotion but to her credit, she did it because she felt it.

Now it just seems absolutely tragic Mr Burger and I am putting it to you, just as a human being, it seems tragic that an organisation which is owned by the public, members of the public, served by diligent good-faith members of the
10 public, such as Ms Malahlela.

When she does her job to earn her salary, to try and keep Denel's image good and to keep Denel's image as a legally complied state entity good, she gets ignored, not least by you as her boss in Denel Land System.

Do you have anything to say about that?

MR BURGER: Chair, I am not sure what I should say on what was ...[intervenes]

ADV KENNEDY SC: Perhaps as a human being Mr Burger, what you feel. May I remind you – I have taken you through
20 this already. Your 138-page affidavit, I think it is, spends probably, at least half of that, saying how innocent you are and how this has been such a terrible thing for you personally to have to go through the glare of the nation and the glare of the media, associating you with the Gupta's and associating you with allegations of corruption and so forth.

I have never received a penny from the Gupta's or anybody else. You protest your innocence repeatedly but what you do not have there is an acknowledgement, that you eventually gave in the witness box, which is that: I actually acknowledge with hindsight.

Now if I only I had known before that all of this was actually in breach of the Supply Chain Management Policy and that the policy had legal effect.

And I only realise now that Ms Malahlela was correct. If
10 I only I had listened to her.

Well, with respect, what I am suggesting to you is that particularly where you as the CEO of Denel Land Systems went into such a major contract with VR Laser, knowing that they were connected with the Gupta's who were under the spotlight of media attention as potentially being corrupt.

You should have been absolutely scrupulous in ensuring compliance with the policy. And your suggestion on the previous occasion, a few weeks back in this Commission, that you just simply did not know about this. If only you had
20 known. Now you know. Now, of course, the benefit of hindsight.

You knew because you were told by Ms Malahlela. You cannot hide behind ignorance. Surely, Mr Burger.

MR BURGER: Okay Mr Kennedy. Sorry, Chair. Quite a lot of statements were made.

CHAIRPERSON: Yes.

MR BURGER: And I cannot recall them. Just a word of correction. I did acknowledge that she was correct in her summation. I do acknowledge that.

CHAIRPERSON: H'm.

MR BURGER: Secondly, I want to state again that she gave her inputs and her inputs were taken seriously at the time. It was not just overruled, just ignored. I think the word that was used. Her inputs were acknowledged and taken. The

10 ...[intervenes]

ADV KENNEDY SC: But not followed.

MR BURGER: Sorry, Chair?

ADV KENNEDY SC: But not followed.

MR BURGER: Not followed.

ADV KENNEDY SC: No.

MR BURGER: No, not followed after a discussion within the Executive Committee.

ADV KENNEDY SC: Yes.

20 **MR BURGER:** It is – I never realised she was that traumatised by what happened. I was also hoping that she had due to the cultural that existed in Denel Land Systems, she really felt part of Denel and wanted to do the best for Denel. I accept all of that. And ...[intervenes]

ADV KENNEDY SC: Do you feel any regret? Just at a level of a human being as to effectively her career was wrecked at

Denel. It is effectively what she was saying to the Chairman last time. Took some months to try and manoeuvre her financial situation so that she could be at a point that she could actually leave, totally demoralised and heartbroken, effectively.

MR BURGER: Yes, Chair ...[intervenes]

ADV KENNEDY SC: And again you say: Well, I did not realise it at the time. There is a lot you are rather naïve in, to put it mildly. Seem not have realised at the time.

10 **MR BURGER**: Yes, Chair. Having looked at her and seeing what she has gone through of course I feel deeply moved. If one takes cognisance of my own affidavit and the circumstances in which I left Denel I can truly sympathise with her. My situation was very similar so I can really sympathise with her.

ADV KENNEDY SC: Was it really similar, Mr Burger?

MR BURGER: Say again?

ADV KENNEDY SC: Was it really similar? You breached the procurement policy in important respects despite the
20 fact that she was telling you do not breach the procurement policy? Is that truly similar? Who was right and who was wrong?

MR BURGER: She was correct, Chair.

ADV KENNEDY SC: Yes.

MR BURGER: But ...[intervenes]

ADV KENNEDY SC: So are you playing the victim then, you say well, poor her because poor me. That is effectively what you seem to be saying.

MR BURGER: No. No, Chair, Mr Kennedy is laying words in my mouth. I am saying I can sympathise with her because I had a scenario that over years responsibilities, accountabilities ...[intervenes]

CHAIRPERSON: Hang on, Mr Burger. If sympathising with her is important to mention you can deal with it later, I
10 think Mr Kennedy's question is not directed at sympathising or anything, I think what his question is directed at saying, knowing what you know now, one, that you were part of those who approved acting in breach of the policy despite her making it very clear to all of you that this would be in breach of policy and even quoting what the policy says and bearing in mind how you know she must have felt at the time when all of you in that meeting did not – or rejected what she told you and knowing she felt because you have seen how she was moved to tears when
20 she was giving evidence before me when that issue arose again, are you able to say you feel that you should – or all of you should actually apologise to her for making her feel like this on something that at least now you see was quite clear or is that not the position? I do not want you to say you apologise if that is not you feel.

MR BURGER: Yes.

CHAIRPERSON: Okay? But what is quite clear and I think you acknowledge that at least as of now. I will go back to the question of what your knowledge of the policy at the time because I wanted to go back to that but now you acknowledge the policy is quite clear.

MR BURGER: I do, Chair.

CHAIRPERSON: The policy is quite clear.

MR BURGER: I do, Chair.

10 **CHAIRPERSON:** And you were part of those who made a decision that was in breach of the policy despite that the fact that she brought the policy to your attention and we know how she felt about this because we saw how even years later when she was testifying how she was moved to tears when she was talking about this.

What do you say when you now look at the whole picture, about the fact that you were one of those who rejected what you now see was the right advice as to what should be done?

20 **MR BURGER:** Chair ...[intervenes]

CHAIRPERSON: And bearing in mind that you were the CEO of the division.

MR BURGER: Chair, I cannot take away the frustration and the objective I wanted to reach to have various suppliers of good competency delivering with quick

turnarounds to Denel Land Systems and I cannot – I cannot take away the feeling I had then and I still have today that all things being equal, VR Laser was a good company to form a single source agreement with. So that is on the one side on my emotion or on my feelings.

On the other side, she was correct. She was correct that the mere fact that VR Laser is today bankrupt, does not exist anymore, it was a bad decision in taking what happened up to now.

10 So if that decision was such a good decision at the time then Denel should be delivering hulls now for a month. That did not happen because they are bankrupt, so – for whatever reason. So that emotion is also in me that if only I had a crystal ball and only I could see, look into the future. The one thing I can say about Ms Malahlela, I had huge respect for her, she was – her work ethic was extremely high and she – her recommendations were always based on what she thought was the best for the company. I, however, at the time expected that from
20 everybody, not just her, everybody in the division.

So, Chair, I can only acknowledge the facts are the facts. The whole single source agreement and the whole agreement today is a mess and it is to the detriment of Denel. So therefore she was obviously correct in her assessment and I acknowledge that but there was no way

at the time for us to have known that, so ...[intervenes]

CHAIRPERSON: Well, there was a way, Mr Burger. One is, you read the policy or she told you – quoted the policy and you did not see anything in the policy that said that the Group CEO could override the Group Supply Chain Executive, is it not?

MR BURGER: No, Chair, I did not.

CHAIRPERSON: There was nothing like that. And you were aware, were you not, that in terms of the policy, 10 generally speaking will make rules and will also state where there are to be exceptions to the rules, were you not?

MR BURGER: Correct, Chair.

CHAIRPERSON: So, in other words, the policy tells you this is the general rule but in certain circumstances you can depart and it tells you if you have got to get approval from somebody else in order to depart from the general rule, is it not? You knew that.

MR BURGER: Correct, Chair.

20 **CHAIRPERSON:** In terms of the policy.

MR BURGER: Correct, Chair.

CHAIRPERSON: And in taking the view that the Group CEO could instruct you to do something in breach of the policy, you did not check the policy whether it allows that, did you?

MR BURGER: No, Chair, I did not.

CHAIRPERSON: And that was no right, you should have checked, particularly because of you position as the CEO of the division.

MR BURGER: No argument, I ...[intervenes]

CHAIRPERSON: Yes.

MR BURGER: :You are right.

CHAIRPERSON: Yes, okay. Mr Kennedy?

ADV KENNEDY SC: Thank you, Chair. May I take
10 ...[intervenes]

CHAIRPERSON: Just one last point in regard to that. I said I was going to go back to the question of your knowledge of the policy because I had a little bit of some concern because last time you testified I think the idea that you did not have much knowledge of the policy seemed to loom large in your evidence. Is my recollection correct? To a very large extent you seem to be saying, you know, I am not a supply chain management policy person.

MR BURGER: Ja. Chair, I understand that when you are
20 CEO of a division of a company, want to know what is in the policies ...[intervenes]

CHAIRPERSON: Yes, that is what I wanted to come to, that one of your duties must be to uphold the policy of the company.

MR BURGER: Correct, Chair.

CHAIRPERSON: And if you are serious about your duties as CEO you are going to make sure that each time you are going to make sure that you know the policy as much as possible and where you are not sure you will consult it and where you are not sure you could even ask for legal advice, is it not?

MR BURGER: Correct, Chair.

ADV KENNEDY SC: And none of this was done.

MR BURGER: No, Chair, it was not but I know that should
10 be case, one should study the policies and one should know the policies. These policies, this specific policy also changed every so often and I was really focused on growing the burns unit and not try – and not being bureaucrat and making sure that all policies being adhered to, I was – at the time I was focusing on growing the business, having meetings with the clients and I was away a lot of times from the company travelling abroad. So it is a mistake, it is a fault on my side but that was what the situation was at the time.

20 **CHAIRPERSON:** Mr Kennedy?

ADV KENNEDY SC: Thank you, Chair. Chair, may I now ask the witness to turn to page 824?

CHAIRPERSON: What page?

ADV KENNEDY SC: 824.

CHAIRPERSON: X24?

ADV KENNEDY SC: 824.

CHAIRPERSON: 824, okay.

ADV KENNEDY SC: 824, correct.

CHAIRPERSON: Okay, thank you. Is that the – which bundle, the one we are using at the moment?

ADV KENNEDY SC: Yes, the same bundle 1.

CHAIRPERSON: Okay, alright, 824.

ADV KENNEDY SC: Now this is a memorandum that was sent by Ms Malahlela to Mr Dennis Mlambo, the supply chain executive at Denel head office level, dated the 29 October 2015, correct?

MR BURGER: Correct, Chair.

ADV KENNEDY SC: And that was sent on the instructions of Exco.

MR BURGER: Correct, Chair.

ADV KENNEDY SC: Following on the meeting held just before this memo was sent.

MR BURGER: Correct, Chair.

ADV KENNEDY SC: The one we just looked at the 20 minutes, correct?

MR BURGER: Correct, Chair.

ADV KENNEDY SC: Yes. And you will have heard from Ms Malahlela's evidence that she complied with the instruction although with some misgivings and she said at the top of page 825:

“I request permission to implement the Exco decision in this regard.”

Now that was the majority decision taken by you and your colleagues on the Exco despite the disagreement of Ms Malahlela .

MR BURGER: Correct, Chair.

ADV KENNEDY SC: Right.

MR BURGER: Correct.

ADV KENNEDY SC: Now of course we have seen in this
10 memorandum that has been dealt with at some length by
Ms Malahlela and Mr Mlambo that she has referred to the
previous indication by the Group Supply Chain Executive
that products such as these should be sourced in-house
unless there was a good reason to depart from this. And
then in the second paragraph she actually quotes the
Group Supply Chain policy, the very same quotation that
she had given in the earlier document that we have looked
at that it has to be approved by the GCSE if you are going
outside the group and he or she as the GCSE can only give
20 such a decision based on sound business reasons.

MR BURGER: Correct, Chair.

ADV KENNEDY SC: So she was alerting him to that and
then she says in the third paragraph on page 824 that DLS
in fact had already signed. This is in May, so that was five
months earlier, DLS had signed an MOA with VR Laser for

the scope of work. It then refers to the BBBEE credentials and it refers also to provisions of the MOA relating to prices being market-related, etcetera. And then she says, the last paragraph on page 824:

“Due to these contradicting positions...”

If I might stop for a moment, that is a contradiction between the agreement and the supply chain policy, correct? Is that what you understand?

MR BURGER: Correct, Chair.

10 **ADV KENNEDY SC:** “...supply chain approached DLS Exco

to make a decision as to whether to honour the MOA and placed the order on VR Laser or to follow the supply chain policy and procure from inter-group namely DVS or LMT for this project. Given the timeframe, urgency and history, Exco has recommended that the work be done by VR Laser.”

And then she concludes with the passage I have already read. And of course we know that Mr Mlambo refused to
20 give the approval that she was requesting here on behalf of Exco and we see his handwritten note under the blank area where it says approval, he refused to sign it and then says in his handwritten words:

“NB DVS and LMT must submit proof that they cannot meet the requirements prior to the contract

being awarded to VR Laser.”

He then signs it. Now that was then overruled later by Mr Ntshepe as Group CEO or perhaps Acting Group CEO as he then was, correct?

MR BURGER: Correct. Correct, Chair.

ADV KENNEDY SC: Now that was sometime later. What happened before Mr Ntshepe signed, as we see here, to say he has approved, in other words he has approved the stance of your Exco that you must honour the MOA with VR
10 Laser. Something else happened and that was you attempted to persuade Mr Mlambo to give his approval, is that right?

MR BURGER: If you say so, Chair.

ADV KENNEDY SC: Well, I do not want to invent anything. To be fair to you, let me take you to page 837. If you cannot recall, this may jog your memory. 837, it is just a few pages further on. Now that is a letter from you on the Denel Land Systems letterhead and we see in very small print the date is the 29 April 2016 Do you see that?

20 **MR BURGER:** Yes, Chair.

ADV KENNEDY SC: And that is in fact a letter that came from you. Is that your name and signature on page 838? Correct.

MR BURGER: Yes, that is my name.

ADV KENNEDY SC: Now this is what you say in your

letter:

“Firstly, thank you for the constructive meeting held at DCO with Mr Odwa Mhlwana and yourself on the 28 April 2016.”

So that was a meeting you attended, is it?

MR BURGER: Correct.

ADV KENNEDY SC: “I confirm my discussion that a single source supplier agreement hereinafter referred to as the MOA was entered into with VR Laser on 19 May 2015 pursuant to a motivation being submitted to DCO. The motivation was recommended for approval by both the Group Executive Business Development Mr Zwelakhe Ntshepe and the Group Chief Operations Officer, Mr Johan Wessels, whereupon it was approved by the Group CEO at the time, namely Mr Riaz Saloojee. The approval by the Group CEO of VR Laser as a single source supplier is in accordance with regulation 16A 6.4 of the National Treasury Regulations 2005. Copy of the approval dated 22 April 2015, the signed MOA and the applicable National Treasury Regulation is attached marked A, B and C respectively.”

Now you have indicated that around this time you were not fully knowledgeable about the law relating to public procurement and what exactly applied, whether this was

lawful and so forth. May I suggest to you that you seem now to have acquired some knowledge because you are here referring to – whether your reference is correct or not is something Mr Mlambo deals with later but you certainly here seem to know quite a bit about the National Treasury Regulations, you are in fact quoting the specific clause of the Regulation 16A 6.4 of the 2005 regulation and you then attach it. May I ask you where you got that knowledge from, have you had that all along or – I see you are
10 smiling? Had somebody enlightened you, is that you asked for somebody to assist you on this?

MR BURGER: Ja. In matters like this I would not have the knowledge, Chair, and I still do not have the knowledge but I am – if I remember correctly, this letter in all probability would have - I would have requested the head of legal at Denel Land Systems, Ms Denise Govender to ...[intervenes]

ADV KENNEDY SC: Ms Govender?

MR BURGER: Ja, to support ...[intervenes]

20 **ADV KENNEDY SC:** To assist you on that.

MR BURGER: To support my – in all likelihood, yes.

ADV KENNEDY SC: Yes. And let us just get the context of this. We know that Mr Mlambo had been sent for his approval the recommendation we looked at a moment ago saying that will you what has been done. Can you recall if

he had rejected his approval at the stage you had the meeting with him and then your letter? Was he still deciding it or was it after he had put in this handwritten portion on page 825?

MR BURGER: Chair, I really cannot remember. What surprises me here, this letter was written in October 2015, the first letter. I cannot remember when he wrote his note. I do not know when Mr Ntshepe approved it. This letter is six months later, you know, in 29 April 2016.

10 **ADV KENNEDY SC:** Yes.

MR BURGER: So I can remember frustration.

ADV KENNEDY SC: Yes.

MR BURGER: Lots of frustration, that I can remember, but ...[intervenes]

ADV KENNEDY SC: On your part or on his part or both?

MR BURGER: Both probably.

ADV KENNEDY SC: Both, yes.

MR BURGER: Both probably.

20 **ADV KENNEDY SC:** You knew there was a problem, not so?

MR BURGER: Oh yes, for sure.

ADV KENNEDY SC: Yes. Okay, let us see what else you say in your motivation for him to give approval.

CHAIRPERSON: Well, I am sorry, Mr Kennedy, before you proceed. Mr Burger, you say that this reference to

Regulation 16A 6.4 was not based on your knowledge, you spoke to somebody.

MR BURGER: Yes, my ...[intervenes]

CHAIRPERSON: Head of the legal department.

MR BURGER: Head of legal supported me in writing this letter, yes. I am pretty convinced, I am not saying hundred percent.

CHAIRPERSON: Ja but I would have thought that if you – it was not based on your knowledge but based on what you –
10 had been advised by the head of legal your letter would be couched in those terms to say I have been informed or advised by the head of legal that actually it is Regulation blah, blah, blah, that does – you would not present it as your own knowledge because here it is presented as your own knowledge, would you not agree?

MR BURGER: I agree, Chair.

CHAIRPERSON: Yes.

MR BURGER: You are right, I agree.

CHAIRPERSON: Yes. Okay, Mr Kennedy?

20 **ADV KENNEDY SC:** Thank you, Chair. And you did not refer in your letter to the fact that Ms Malahlela had already raised concerns about noncompliance with the policy, not so?

MR BURGER: Ja ...[intervenes]

ADV KENNEDY SC: On the contrary you were saying this

can be done in terms of the National Treasury Regulations.

MR BURGER: That was my impression at the time, yes.

ADV KENNEDY SC: I see. Well, let us carry on at the foot of page 837 with what you said to Mr Mlambo.

“As indicated during the meeting and in terms of the abovementioned approval...”

Presumably the GCEO’s approval that had already taken place, is that right?

MR BURGER: On the previous – on the October one? Are
10 you referring to the October one?

ADV KENNEDY SC: I am looking at the letter at page 837.

MR BURGER: Yes?

ADV KENNEDY SC: And I am looking at your last paragraph at the foot of this page:

“As indicated during the meeting and in terms of the abovementioned approval...”

What approval were you referring to there? It seems to me that you were probably referring to the approval given by
20 Mr Saloojee.

MR BURGER: For the single source agreement, Chair.

ADV KENNEDY SC: Yes. And then you carry on:

“The rationale for appointing VR Laser as a sole supplier was based on *inter alia* the following:

1. Its unparalleled expertise on fabrication of

complex engineering systems which includes but is not limited to turrets, outer shields, add on armour and vehicle hull structures.

2. It is a key supplier and strategic partner to DLS.
3. It offers the best value having *inter alia* committed to invest capital and resources in the facilities in order to ensure that the capability remains intact and available to DLS for minimum period of 10 years.
4. It is prepared to assist and has assisted DLS with its obligations to foreign jurisdictions such as Malaysia in transferring skills relating to its manufacturing process hereinafter referred to as intellectual property, IP.
5. It promotes a black industrialist entrepreneurial company within the defence industry.”

10

Now these are all reasons why you felt strongly that VR Laser was somebody good worth appointing not so?

MR BURGER: Correct, Chair.

20

ADV KENNEDY SC: Yes. But Mr Mlambo’s concern was not so much as to whether VR Laser was good at its job, Mr Mlambo’s concern was the supply chain management policy says that before we go outside the group there has to be a good business reason why we go outside the group, not is the outside supplier a good supplier, but why can we

not use our in-house suppliers? Now presumably, if he had been presented with reasons that the in-house entity such as LMT and DVS did not have the capacity, that would have constituted a sound business reason but none of the reason you are putting forward here had anything to do with that, not so? You just simply say VR Laser are great, correct?

MR BURGER: I said VR Laser is great and we have got an agreement with them.

10 **ADV KENNEDY SC:** Yes. And then you conclude your letter after paragraph 5 on 838:

“It is hereby recommended that the attached submissions relating to the fire compartment module FCM and the outer shield marked D and C respectively be sourced with VR Laser in accordance with the terms and conditions of the MOA.”

So you understood, as I read this letter, you understood that although there was an MOA you were going to have to go through the process of trying to persuade Mr Mlambo to place orders under the MOA for these two categories of items you would have to give his approval, not so?

MR BURGER: Correct, Chair.

ADV KENNEDY SC: Can you explain why you made no attempt to actually address the real problem which is why

you could not source them from LMT or DVS, I am not asking why you could not source from those, I am asking you why you did not even raise that point in your letter because that was the point of concern to him, not so?

MR BURGER: Ja. Once should – the letter is probably not complete, you are correct. The point we wanted to raise was we have got an agreement and they are a good company to have an agreement with ...[intervenes]

ADV KENNEDY SC: Well, that you did say in the letter.

10 **MR BURGER:** Ja. And that was my main thrust of the letter.

ADV KENNEDY SC: That is his only thrust of his concern, was you have not complied with the supply chain management policy. If you want to comply you must ask me, the Group Supply Chain Executive, for approval as to why we should not give the contract to an in-house entity which at that stage was LMT and DVS, correct?

MR BURGER: Correct.

20 **ADV KENNEDY SC:** And to do that you have to satisfy me, as GSCE, that there are good business reasons for sending it outside the company. So all you have given him is well, we have done an agreement with them, seemingly suggesting well, if we have done an agreement and it is in breach of the policy well, tough. And secondly, well, VR Laser are great guys. With respect, it does not actually

address at all Mr Mlambo's concern which seems to be to be a valid concern.

MR BURGER: You are right and I also did not go through the whole argument of why ...[intervenes]

ADV KENNEDY SC: You did not go through any of the argument that Mr Mlambo had invited you to give, why should you go outside the group entities? Why should go outside? You did not address that at all.

MR BURGER: Yes, I was trying t say, Chair, the reason I
10 did not do that was because I did not also write a long story about the DVS was not a fabrication house. Yes, they did make hulls in the past and also the frustrations and the technical failures we had with other products we placed on the LMT, so I did not go through those arguments. At the time when we wrote the letter we thought we will get approval based on those arguments.

CHAIRPERSON: Well, you see, Mr Burger, there may be a concern here that maybe we are seeing what may have been a pattern. Ms Malahlela raises concerns, valid
20 concerns, and she have used her concerns that rejected on what we all now, including you, accept were not valid grounds. Mr Mlambo also raises concerns about procurement policy and there is a long letter from you written to you but in this long letter there isn't a response on it, so one begins to say – excuse me – one begins to

say how could it be that such legitimate concerns, when such legitimate concerns were raised by certain individuals who were very concerned about ensuring that the policy of the company was followed, how is it possible that each time you did not see their point of view. How is it possible that you did not respond to the actual concern in the case of Mr Mlambo, one begins to ask that question.

Do you want to say something?

MR BURGER: Chair I cannot argue with you, the long and
10 the short was there were different camps.

CHAIRPERSON: Yes.

MR BURGER: And Ms Malahlela and Mr Mlambo both felt that V R Laser was not the right company to place an order on. I have to qualify what I am saying now, Ms Malahlela still supported V R Laser in the early days, in 2014 to the middle of 2015, it then changed and it was clear that Mr Mlambo was not in support of VR Laser doing business for all the reasons given. The opinion I had at the time it had more to do with what's going on in the public domain than
20 what their capability was and never could anybody say they are not good at what they are doing. Everybody agreed they were good at what they were doing.

So there were different schools of thought and from my perspective I thought it was a good idea and therefore I supported it. In hindsight you are absolutely right, I should

have written a letter that is more wise, the risk of doing that and was – if I write a motivation letter because of all these policy reasons and all these governance reasons it is better to go to LNT than or to DBS than to VR Laser, I am sure that he will not support the idea. I knew what his position was, it was not a surprise to me, I knew what his position was and therefore I tried to put the relevant issues on the email, but in hindsight Chair yes, I mean ...[intervenes]

- 10 **CHAIRPERSON:** So you – from what you are saying it seems you are saying to me maybe the reason why your letter didn't address his stated concern was because you may have been trying to address not his stated concerns but what you believed was him being against VR Laser?

MR BURGER: Correct Chair.

CHAIRPERSON: Ja, but not the point that he had raised because he didn't raise the merits as it were, it was the process.

MR BURGER; Correct Chair.

- 20 **CHAIRPERSON:** And one would have expected that at a level at which all of you cooperated all of you would have known including yourself the difference between the process and the merits of a particular supplier, to say when the objection is to the process let's address the process. You can't say let's breach the process because the

supplier is such a good supplier. It doesn't work like that, the process is there and you only depart from it if the policy allows you to depart from it?

MR BURGER: Correct Chair.

CHAIRPERSON: Yes, Mr Kennedy?

ADV KENNEDY SC: Thank you Chair. I want to pick up with something you said a little earlier and that is that you were aware of the sensitivity arising from the media controversy concerning Denel's doing business with VR
10 Laser and their links with the Guptas. Now if it is true what you have said in your affidavit repeatedly that you were aware that the Guptas were linked with this, you were aware that there was this controversy but to link you with any wrongdoing is just completely inappropriate, because you were simply trying to do your job, objectively and honestly in the interest of Denel.

Surely it would have made sense for you, especially when Ms Malahlela and then at Group Level Mr Mlambo had both raised repeatedly real concerns about non-
20 compliance with procurement procedures, it would have been at least expedient and sensible for you to say I think I need to protect myself to make absolutely sure because this is something that could well backfire. The spotlight of the media and the public and possibly courts, and possibly commissions in the future may be looking at all of this

because there is so much controversy, I better make sure that I am squeaky clean on this, and yet you go against the guidance, the very strong advice of the two experts, the one in your division who was part of your own personnel as well as above you at Head Office, and you seem to have just thought well I can ignore what they say, isn't that really what you were doing?

MR BURGER: No Chair I have to repeat the time when this became public knowledge and became a real problem
10 was more or less around when this letter was written.

ADV KENNEDY SC: Exactly.

MR BURGER: It wasn't prior to that so much in our faces. So it was only later on ...[intervenes]

ADV KENNEDY SC: I am sorry I am not sure if I understand your earlier evidence. You raised the concern about the media controversy in the context of the earlier memorandum from Ms Malahlela that we looked at some time back, not this correspondence between you and Mr Mlambo's latest April 2016, you in fact gave evidence that
20 you believe it was in the latter part of 2015 that media controversy was becoming so intense and that was in the context of her motivation dated the 29th of October 2015. Do you remember your evidence that was that ...[intervenes]

MR BURGER: No correction, correction Chair. It is true

that we became knowledgeable about the press situation I cannot recall saying it became intense at the end of 2015, but I do recall around middle of 2016 it started getting intense but I knew about it at the end of 2015, yes I did, but it wasn't intense at that stage.

ADV KENNEDY SC: The point remains though whether it was intense or pale, whether it was light or heavy intensity you were aware at this time that the media were scrutinising in the public domain with some measure of real
10 interest, in fact you suggested that they went really overboard with exaggerating and distorting the facts and so forth. Surely your – alarm bells should have been ringing, I being the CEO of a State Owned Corporation must make sure that my operations are squeaky clean in complying with legal requirements, and here you are twice told by supply chain officials, Ms Malehlela and Mr Mlambo you cannot do this and you have been telling the Chairperson as I understand it well you thought you could do it, they were telling you, you can't do that and still you
20 went on ahead and now you acknowledge to the Chairperson with the benefit of hindsight you know what they were right all along. It is just a mystifying, can you perhaps explain?

MR BURGER: Chair, and I am running a big risk of repeating myself, which I don't want to do, but we went

through a process wherein the highest authority in the company supported this, gave instructions to do this and for all the reasons I had given we thought it was a good idea and we also had the scenario which I explained about the press articles in India where single articles can really influence the future of a company and I did state earlier that that made me realise that I should not pay too much attention to what is going on in the press, and that we should do what is the best for the company and I have tried
10 to do that.

Yes, both Mr Mlambo and Ms Malahlela did raise their concerns but this was at a later stage after the agreement was signed, so I had an option, I had an option to cancel the agreement based on the media and Ms Malahlela and Mr Mlambo or make sure that it is supported by Denel and as I said on numerous occasions the whole media coverage was not done on a divisional level or the image of the company, that was done by corporate and I said we have here a valid agreement, I am not sure on
20 what basis I would have cancelled it, and for that reason I supported the agreement, that it was a valid agreement. In my life in Denel I always thought Denel employees were very good at the initial stages of partnering with people, it – and my opinion was always that early stages of partnership was a good time, but when the going got tough

Denel didn't always honour their commitments to their partners and I wanted to make sure that if we have a partnership agreement with somebody that we do our bit to uphold the agreement, so that was in my mind always, I never ever, and I say this again, thought that there was a conflict with the law, that never passed by – I was under the impression this was supported by the group, there were people both Ms Malahlela and Mr Mlambo that did not support it and therefore I wrote these letters to say please
10 approve it and if it is not approved then higher authority must take the decision.

ADV KENNEDY SC: I would like to pick up on one point that made you, that higher authority approved it, and it is so that Mr Saloojee signed it but the Chairperson has all the evidence before him as to which version applies to which witness, but of course Mr Saloojee's attitude has been well I wasn't alerted by Mr Burger about issues relating to non-compliance with these supply chain management policy, so I assumed that he was doing the
20 right thing. He was the one who was pushing me resolutely to expedite the approval and signature of this process.

You on the other hand say well I thought that although I knew Malahlela and Mlambo were against this on the basis that there breaches of the supply chain management policy I in my wisdom thought no they are

actually wrong and well it should be fine because the Group CEO has been persuaded to sign so obviously he must be happy. It just seems it is sort of passing the buck back and forth isn't it Mr Burger?

MR BURGER: Correction Chair, the Group CEO was not persuaded to sign the agreement, he gave me instruction to sign it and all the evidence with supporting documentation is there to prove that he gave me instruction to do that, so it was from that perspective.

10 **ADV KENNEDY SC:** Do you at least accept this Mr Burger, again with the benefit of hindsight, which as they say always gives you 20/20 vision, that it is not particularly surprising that where you went into a contract, one of three contracts within the Denel Group, two of which you were actively involved in, you went in knowing that you were doing business with VR Laser, that has had good track record and its previous owners had recently been acquired by Gupta Associates, it was part of the Gupta Group, where you knew that there was press, media controversy
20 and so forth, and where there had been questions raised subsequently as to compliance with the correct processes.

Now isn't it something to be expected by you as a CEO looking not only to making the best business decision but one which as part of being the best business decision should take into account in its protection reputation, avoid

reputational damage and the Commission has heard considerable evidence from various witnesses as to the terrible damage that has been done on – to Denel and its ability to trade, trade successfully, exploited opportunities that are otherwise available to it. There has been devastating impact on Denel’s image and that largely arises – so the evidence has been, and your own evidence seems to be to this extent as well that there has been huge controversy in the media and in the public domain about

10 the links between Denel and VR Laser and its links with the Guptas. It just seems in retrospect perhaps you can accept that it makes sense the people are wondering how did you give a contract like this to VR Laser in the first place, and how did – why did it happen that this was done by our own admission now in breach of procurement policies by your own admission now in the face of specific advice to the contrary given by your colleagues Malahlela and Mlambo and do you accept that it – there is some sense to the fact that people are raising the sort of

20 questions that I am asking you here, because if it was just so genuine and *bona fide* as your affidavit has repeatedly tried to make out how could it come about that at least two contracts involving you were given to VR Laser Services where by your own admission there had been breaches of policies, and you expect the Chairperson and the nation to

believe well that has nothing to do with the fact, it is a pure coincidence that this happens to have involved Gupta associates who have been involved according to other evidence in numerous other acts of corrupt and illegal activities.

MR BURGER: I cannot speculate on behalf of corrupt and illegal activities Chair, what I can say is that the passion and the beliefs I had then are the passion and beliefs I still have today. I cannot speak on behalf of other people and
10 on behalf of the Guptas, I don't know them. The problem here is that it is so much easier to distance yourself from this mess and I would not be able to live with myself to say it wasn't me, it was my boss that instructed me to do it, I didn't want to do it but it was him that instructed me and by doing that clear my name. I am trying to bring across what actually happened and if we can take one little step back and I will cover both of them now for you.

The hulls contract was not supported by me, it was supported by everybody in Denel Land Systems, all the
20 senior personnel and there's emails to prove that. The single source agreement was supported by all the executives because they thought it was the right thing to do at the time. Yes, Mr Mlambo and Ms Malehlela did raise the concerns and they did say these things but at the time when we were in the trenches fighting the fight we

really, we really thought that was the best thing and it was not my opinion, it was the opinion of all the executives in Denel Land Systems.

So that is the first point, the second point is looking back Chair it is a mess, the place is bankrupt and they are not producing any health so obviously I wish I could turn back the clock and say let's try and do it in a different way, for sure I would have done that. The one thing I would want to say however is the reason why this is in a mess is
10 for whatever the reasons and whatever their association by the owners they could not have a bank account and they are bankrupt as a result of that

So too is LNT bankrupt today, not because – or in business rescue, not because it did not place a hull contract on it but because they could not execute their orders, so whatever decision I would have taken at the time be it VR Laser or LNT I would sit today and say I am sorry that I took that decision it would have been the wrong decision because both instances would not have been able
20 to produce the hulls.

So with the benefit of hindsight Chair I wish I could have it differently, I wish I could have done it differently, for sure I would have, but at the time I had a certain opinion and I am reflecting that opinion I had the and I did not change my opinion from then to now for whatever

reasons there are, I am saying this is what actually happened.

ADV KENNEDY SC: If your opinion was that neither LNT nor DVS had the capacity and reliability to be able to produce these items why didn't you bother to say that to Mr Mlambo because that is exactly what he was asking for, he was saying give me a good business reason why we can't keep this work in-house.

MR BURGER: Yes Chair you will recall that just a little
10 earlier I sent him a very long email of ten points or something that I said LNT cannot be trusted to do this so that's – I didn't repeat it again. DVS was in my mind not a fabrication house, it was a vehicle assembly plant so it was for me almost irrelevant, so yes.

ADV KENNEDY SC: Let's look at Mr Mlambo's response on page 838.

MR BURGER: 83?

ADV KENNEDY SC: 838. He says this is again his
20 handwritten response instead of signing where it says approval he instead leaves that blank and simply writes in handwritten form:

“NB 1. The evidence on how VR Laser was selected is not available to support its appointment as a single source supplier.

2. The approval process of the MOA excluded

supply chain and the reasons thereof have not been furnished.”

Now let us stop there. That is true, supply chain at head office level was never consulted before the MOA was signed at your request by Mr Saloojee, not so?

MR BURGER: Correct, correct Chair.

ADV KENNEDY SC: Right and he is saying still this is now almost a year later, almost to the day a year later, 29th of April 2016, the MOA was signed I believe it was on the
10 15th of May 2015, he says:

“I still don’t have any reasons why we were left out.”

You have never given those reasons to him have you Mr Burger?

MR BURGER: No I haven’t Chair, apart from saying please discuss this with your line manager.

ADV KENNEDY SC: And then paragraph 3 says:

“The recommendation is given the fact that Denel
Executives committed the company to place orders
20 on VR Laser for specified products for ten years to
have the same executives approve future orders.”

Paragraph 4

“The paragraph in Treasury Regulations that has been cited in the motivation memo is irrelevant because it was not impractical to test the supply

market.”

As I understand it that is a reference to Treasury Regulation that you have referred to on the previous page, is that right?

MR BURGER: I understand so yes.

ADV KENNEDY SC: Regulation 16 [a] 6.4. Now as it happens, can I ask you to turn to page 719, as it happens Mr Mlambo, same bundle, has for the convenience of all of us in his affidavit quoted the treasury regulation. 719,
10 paragraph 6.16, this is what Mr Mlambo says:

“Dealing with your submission to him he says the submission further states that VR Laser Services was appointed as a single source supplier in accordance with Regulation 16[a] 6.4 of the National Treasury Regulations 2005.”

Which reads as follows:

“If in a specific case it is impractical to invite competitive bids the Accounting Officer or Accounting Authority may procure the required
20 goods or services by other means provided that the reasons for deviating from competitive bids must be recorded and approved by the accounting officer or accounting authority.”

Now his response to your point going back to page 838 says that this paragraph has no bearing on the matter

because it wasn't impractical to invite other competitive bids. In fact he says in his paragraph 6.17:

10 "I believe the National Treasury regulations were applied incorrectly. In the case of DLS there was no need for a deviation request because there was no emergency involved. In instances where there was no emergency DLS was supposed to go out to the market to establish if there was no other company apart from VR Laser that had the requisite capability and capacity, that process was not carried out. If at the time of approval the MOA it was brought to my office I would disagreed with the rationale behind the MOA and rejected it."

Now Mr Burger again you accept that Mr Mlambo was acting in good faith?

MR BURGER: Yes I do.

ADV KENNEDY SC: And you accept that that was part of his duties to highlight if there were any breaches of the procurement policy?

20 **MR BURGER:** I absolutely do yes Chair.

ADV KENNEDY SC: Yes, now what did you do in response to his response that we have just seen?

MR BURGER: Sorry Chair I say again that there were differences of opinion. It would have been my understanding because what he is saying is cancel the

agreement with VR Laser. It would have ...[intervenes]

ADV KENNEDY SC: He does not actually say that expressly in his words. Did he say that in the meeting?

MR BURGER: No he is saying that it is not in – what you read now the agreement is not really valid, should not be valid. So – and there was a difference of opinion as I said before, so from my perspective if he was – if he felt so strongly then as he is feeling today I would have expected, because he was on all the emails that came from VR Laser
10 for late payment or non-payment he was also copied, I would have also expected him to raise this issue with my – with his bosses to say we have got a dilemma here, this is a problem, I suggest we do the following, go into negotiations with VR Laser, tell them that that agreement is not valid, let us try and get it behind us and let's do it, proper governance. I would have expected that to happen. That never happened.

ADV KENNEDY SC: It is not a bit unfair on Mr Mlambo and a copout on your part Mr Burger? Why point a finger of
20 blame at Mr Mlambo? Mr Mlambo was also emotional; he was not brought to tears but you could see he was very emotional in his evidence too.

And he gave evidence that he acted in a particular way as he did and ultimately he too was demoralised to the extent that he then gave up an otherwise very impressive

career at Denel. Why criticise him? My questions are directed at you. You are sitting in this witness box. Now you say there was a difference of opinion.

MR BURGER: Correct Chair.

ADV KENNEDY SC: Yes. Now let us assume for a moment that both of you were acting completely in good faith. You were both acting honourably and you both had a genuine belief in your respective opinions. My question was that elicited your last answer where you pointed finger of blame
10 at him was why did you not respond Mr Mlambo's response to you? So let us look at this difference of opinion. For example the Regulations – Regulation 16.A6.4 of the National Treasury Regulations that you had now become aware of.

CHAIRPERSON: Hang on Mr Kennedy I am sorry to interrupt you. There is a question you formulated in a certain way earlier. I am very interested in Mr Burger's answer to that question.

ADV KENNEDY SC: Yes.

20 **CHAIRPERSON:** What did you do in response to this – to – after you received Mr Mlambo's response; what did you do?

MR BURGER: Chair I cannot recall. I think we had a discussion and agreed to probably and I am guessing now probably agreed to disagree.

CHAIRPERSON: You...

MR BURGER: But I cannot remember what we actually did about this.

CHAIRPERSON: Obviously having read he – what he said at page 838 – 838 you realised that he was saying that the Treasury Regulation on which you relied was irrelevant. You realise that that is what you are saying.

MR BURGER: Correct Chair.

CHAIRPERSON: Yes. And one would have expected that if you were genuinely engaging in a discussion to try and see
10 exactly what the correct position is you would have wanted to look into that issue. Why is he saying it is irrelevant when I believe it is relevant? Is it not?

That would be the natural thing if you were really interested in establishing is his point of view the correct one or is it my point of view that is correct? He has now said something that I was relying on is irrelevant. You would want to look into that, is it not?

MR BURGER: Chair I did not.

CHAIRPERSON: You did not ja.

20 **MR BURGER:** I did not.

CHAIRPERSON: But you accept that that is one – that is what one would have expected

MR BURGER: Would have expected.

CHAIRPERSON: From you if – and it did not happen?

MR BURGER: No it did not.

CHAIRPERSON: Why did it not happen because this was – if his – if his point that that regulation was irrelevant was valid it could have made a big difference in the view you took could it not?

MR BURGER: It could yes Chair.

CHAIRPERSON: Yes.

MR BURGER: It probably would have.

CHAIRPERSON: Yes. But why did you not pursue that and even go and look at the regulation yourself or go back to the head of the legal department and say, Mr Mlambo and expert in Supply Chain Management says this regulation you told me about is irrelevant what do you say? Because if he is right this might change my whole view. Why did you not go to the head of the legal department and say that?

MR BURGER: Ja. I did not analyse it as you are analysing now Chair. It was for me at that time and this is – this is a year of negotiating on the – starting with the hull contracts going through the Single Source Agreement, going through these other agreements I knew very well what is – what his position was. He did not support the Single Source Agreement and whilst there were many others that did support the Single Source Agreement.

I was not in my mind equipped enough to have a legal argument with him with regards to what is correct and what is not correct in PFMA. The feedback I got numerous

occasions was that the PFMA is sometimes we strangle ourselves too much with the PFMA and there is room for more flexible decision making within the PFMA. And for that reason I did not even try to venture there because I knew I would tie myself up in knots if I had that.

And I also stated earlier that – that he was very knowledgeable of these facts and I accept that and I – but at the time I can only say what happened was I – I got his feedback; I – it was not such a big surprise to me and it
10 confirmed that he was on the one side and we are on the other side.

CHAIRPERSON: Yes you see precisely because you acknowledge that he was very knowledgeable on these matters. It is precisely because of that that one is surprised.

MR BURGER: Yes.

CHAIRPERSON: Why you did not say look this person who is very knowledgeable in these matters is saying this regulation is irrelevant I must therefore take his view very seriously because he may be right or he is probably right.
20 And – so I am concerned as to why despite you knowing that this is somebody who is knowledgeable in these matters and he could go back to your evidence that you did not know much maybe about these matters all the more reason why you would be expected to take his view very seriously before there is – was any finality and if necessary get some advice

from other knowledgeable people. But at least go back to the head of the legal department and say, hang on here is Supply Chain Management Guru here says this is irrelevant we cannot take us views lightly. Tell me why he is wrong? You understand that?

MR BURGER: I understand and I take your point Chair.

CHAIRPERSON: Yes. Because now I would expect that you would agree now that when you look at that regulation as he has quoted it he was right, was he not?

10 **MR BURGER**: Yes Chair.

CHAIRPERSON: Yes. Mr Kennedy.

ADV KENNEDY SC: Thank you.

CHAIRPERSON: I know I interrupted you but I thought you had asked an important question that needed to be answered.

ADV KENNEDY SC: Indeed thank you Chair. Mr Burger the learned Chairperson asks you why you did not go to get advice and it would have made sense. If you had gone and got advice from for example as the Chair has suggested from
20 the head office legal person and the head office legal person might have felt well let us bring in an attorney or an advocate as often happens with entities such as this.

We have internally two different views which one legally is correct? We get objective independent advice. If that had been on your side – if the advice from Senior

Counsel or whoever or from the head of legal at head office had said, in fact Mr Burger is right the regulation 16.A6.4 or whatever it is actually did apply here, Mr Mlambo is right – is wrong Burger is right. That would have vindicated you not so?

MR BURGER: Correct Chair.

ADV KENNEDY SC: Yes. It would have protected you. It would have made you look good. If on the other hand the advice was no Mlambo is correct and Burger is wrong then
10 the advice would have been this is what we need to do about it? At least you would have looked good in this sense that you would have been accountable and showing initiative and saying well we have got this difference of opinion as you have put it to the Chair a moment ago let us have somebody determine which of us is right and whoever is found to be wrong is then told that they are wrong and we can then move on and take corrective action. But here you seem to have done nothing.

May I ask you Mr Burger what was the point of you
20 asking Mr Mlambo for approval if when he refuses to give approval and gives his reasons for rejecting approval you then do nothing? Surely there was a problem here. That is why you were asking for approval. If you felt relaxed about this you would not have asked him in the first place, not so?

MR BURGER: It is not about feeling relaxed it is about the

process dictated that we should...

ADV KENNEDY SC: Yes.

MR BURGER: We should get his approval for.

ADV KENNEDY SC: Yes you need – you needed his approval.

MR BURGER: Correct.

ADV KENNEDY SC: You knew that you needed his approval.

MR BURGER: Correct.

ADV KENNEDY SC: Correct?

10 **MR BURGER:** Correct.

ADV KENNEDY SC: You knew why – why did you know that you needed his approval?

MR BURGER: Because I know the Delegations of Authority.

ADV KENNEDY SC: Yes. So now he does not give your – give you his approval so do you have a problem? You now know at least by now you may not have known it previously if in your lack of knowledge previously you were not aware that it was necessary but at least by now you knew that it was necessary that is why you asked for it. And you put up some
20 reasons and he comes back to you and says, your reasons are not good enough, they are not relevant reasons, they are not persuasive reasons I am not going to approve it. But you do not do anything to deal with it.

Is the answer perhaps not simply this that at a pragmatic level the reality was the CEO had already signed

it? So if Mr Mlambo was saying well this was done improperly, irregularly and he is not going to approve it where you knew he had to approve it well tough we will just carry on. Was that – was that what went on in your mind?

MR BURGER: I stated in my affidavit a couple of times Chair that I – I was frustrated with the decision making at group level. It is a frustration I cannot hide it – it was there. I was also frustrated with – with in my mind the – the lack of guidance and the – and the number of stumbling blocks we
10 experienced when we brought things like this to head office.

ADV KENNEDY SC: So a lack of guidance by whom?

MR BURGER: By people like Mr Dennis Mlambo. So...

ADV KENNEDY SC: But he was giving you guidance.

MR BURGER: No I am saying in general.

ADV KENNEDY SC: He was not not giving you guidance he was giving you guidance.

MR BURGER: I understand.

ADV KENNEDY SC: Which you just refused to understand.

MR BURGER: But – but the – and this was a build-up over a
20 long period of time. So to answer your question I was frustrated. I do not take that feeling away and it was there. And maybe there is some truth in what you saying in the back of my mind I said I here you, I take note of what you saying but you know what the document is approved by the Group CEO I will not – I will not place orders without

approval but I will probably take things like this to higher levels of authority.

ADV KENNEDY SC: So you will not take approvals with – sorry orders without approval, is that what you saying?

MR BURGER: No I am saying we will – if he rejects something like this we will not just place an order.

ADV KENNEDY SC: Yes.

MR BURGER: We...

ADV KENNEDY SC: But is that not what you did?

10 **MR BURGER:** I cannot remember the...

ADV KENNEDY SC: Did you not place orders after this note was issued? Or did you write or speak to VR Laser and say, I am sorry we cannot implement this contract. I want to; I think that Mr Mlambo is being difficult but I am sorry we cannot place orders?

MR BURGER: Chair you talking about the Single Source Agreement

ADV KENNEDY SC: Yes.

20 **MR BURGER:** Okay. Now I am talk – I am referring to separate orders on the back of the Single Source Agreement. So we went through the process if it was within a certain level of delegation we would take it to the Group CEO. So – but you asked me a question earlier, was it not – was it not a feeling of it was approved by the Group CEO and I am trying to give context to the fact that maybe there was an element

of truth in that.

ADV KENNEDY SC: Yes.

MR BURGER: I – I was frustrated and I felt look going – talk your troubles out with your boss – your Group CEO and give me guidance. I was frustrated.

ADV KENNEDY SC: I am interested in the – in the issue about frustration and of course the law does cause complications and frustrations for business and government officials but the law is the law. Now you used a phrase
10 earlier and I may have misheard it but I think you said you felt that we were often strangling ourselves too much with the PFMA. I am not sure if the notes that I made of your comment is quite correct but is that what you were saying?

MR BURGER: I am...

ADV KENNEDY SC: Or meaning?

MR BURGER: That was the opinion held by certain legal people that said any organisations sometimes act too conservatively and because of acting too conservatively as a result of the PFMA misses opportunities that there might be
20 and that the PFMA is more lenient than what we think. That was – that was opinions people gave in the passing like for instance the legal people within Denel Land Systems. So I am not saying that is what I thought I am just saying..

ADV KENNEDY SC: Well can I ask you what you did think? You were frustrated, you knew that Mr Mlambo and Ms

Malahlela were giving you advice based on their expert knowledge of the PFMA, the National Treasury Regulations that you were now so happily quoting from and being told by Mr Mlambo you have got it wrong.

MR BURGER: Ja.

ADV KENNEDY SC: So were you saying well I am – I did not respond to Mr Mlambo and I did not take it higher – I did not take it for example to the Group Legal Advisor to get a properly considered view because I was frustrated?

10 **MR BURGER:** No I would not – I would not have received this and done nothing. I just cannot remember. In all probability had a discussion with the Group CEO and say what must I do?

ADV KENNEDY SC: Mr Burger may I suggest to you that if you did in fact do something you would have remembered it.

MR BURGER: Ja.

ADV KENNEDY SC: This was surely a major issue. You had now been advised and decided that it was necessary to get the approval of the Group Supply Chain Executive because
20 that approval was necessary in terms of the Supply Chain Management Policies and that you had to get it in order to process further orders. Correct?

MR BURGER: Correct Chair and if – if the impression I held was the Group Supply Chain Executive needed in all accounts needed to be consulted I was under the impression

that if higher authority listened to both sides of the story they could make a call – a judgment call what is the right thing to do or not to do. That was my – that was my thinking at the time and my impression at the time.

ADV KENNEDY SC: And ...

CHAIRPERSON: I am sorry.

ADV KENNEDY SC: Sorry Chair.

CHAIRPERSON: I may – I might not have heard you correctly Mr Burger but I thought when you made the
10 comment about being strangled I think that is the term you used by the PFMA. I thought you said we sometimes felt that – I do not know whether you said we strangle ourselves or we were strangled by adhering to the PFMA. Did I ...

MR BURGER: Sorry Chair that was a different point.

CHAIRPERSON: Yes.

MR BURGER: That was – I was responding to getting his – his signoff on orders or not his signoff on orders.

CHAIRPERSON: Yes.

MR BURGER: But to your point.

20 **CHAIRPERSON:** Yes, yes.

MR BURGER: The – I am reflecting.

CHAIRPERSON: Yes.

MR BURGER: On discussions we had in executive committee meetings where it was stated that people may sometimes make too bit an issue of the PFMA and that it is

not so rigid as what certain companies or divisions might think it should be and that there is a – there is room for decision making within the PFMA. I – it is just a comment I made.

CHAIRPERSON: Yes.

MR BURGER: To say that ...

CHAIRPERSON: But I am – the reason why I am raising is that Mr Kennedy subsequently asked you whether that is what you had said and he seems to have heard it in the
10 same way as I think I did namely that when you made that remark you were saying you thought by which I understood you in the company thought sometimes I do not know whether you said strangled yourselves or the...

MR BURGER: Yes.

CHAIRPERSON: Or the PFMA has strangled you.

MR BURGER: Yes.

CHAIRPERSON: But later on you said it was an opinion held by some people I do not know whether you said in the legal department.

20 **MR BURGER:** It was – yes.

CHAIRPERSON: But – and you said it was not an opinion of – held by you.

MR BURGER: Yes.

CHAIRPERSON: So that is why I am going back.

MR BURGER: Okay.

CHAIRPERSON: To say I thought I heard you to be including yourself as one of the people who felt that sometimes the PFMA strangled you or you were strangled by the PFMA. So I am checking whether I did not hear you correctly to be saying we.

MR BURGER: No.

CHAIRPERSON: As opposed to other people.

MR BURGER: I think Chair you heard correctly. Let me try and rephrase it to be absolutely clear. There – there were
10 discussions within the Denel Land Systems EXCO. If you – and there were views held that some – by different people also by legal people that – that sometimes we apply the PFMA too strictly and strangle ourselves in doing that. The arguments put on the table when – during those discussions without knowing the PFMA – without sitting down and studying the full implication of the PFMA I supported that
view because it made logical sense to me that the – the PFMA should not be that rigid.

So you can also include me in that discussion
20 because I supported that view. What was clear to me at the time was there were different – differences of opinion on how to interpret the PFMA and that – that is why I refer my legal person – supported me in that letter that I wrote to Mr Mlambo I referred to the – to those paragraphs.

But Chair I just – I just want to say something and

speeding as an example and sorry to do that is very clear – it is very unambiguous. You drive at 60 kilometres you supposed to not drive that faster than 60 kilometres. If you drive faster than 60 kilometres and somebody catches you you will be caught and there will be a fine. Very unambiguous and very clear.

What I have come to learn in the last weeks and months is that I – I was wrong. I was wrong in the sense that the PFMA is not so flexible. The PFMA is actually fairly
10 clear and if I reflect back I would say it is – it is like a Formula 1 driver trying to win a race within the Road Ordinance Act trying to win a trace. And the law is very clear you are not supposed to drive faster than 120 or whatever the case may be. If he complies to the – to the rules of 120 kilometres an hour there is no way he can win a race.

So – so – and – but there is very good reasons for 120 kilometres an hour because if you let everybody drive fast at 120 there will be chaos. So – so I understand that
20 law but – but in my mind we were – we were operating in an environment where quick decision making was necessary; where sometimes you have to drive faster than 120 kilometres an hour.

And for Denel to succeed successfully in the international market I am – I am tempted to say that it is

going to be very difficult under the PFMA laws that I understand today which I did not understand so well then but which I understand today. And my advice would very strongly be it is for the future of Denel probably better to – to operate under a more privately owned scenario and that is just my opinion Chair. But – but that is the only way I can explain it.

CHAIRPERSON: Yes. Yes. But I must put this to you that it seems as I understand your evidence that with regard to
10 whether you were one of those who held that opinion about being strangled or strangling yourself it seems that when you made the remark you may have included yourself.

But later on when you were answering a question that Mr Kennedy put to you, you seem to have said that was not your opinion it was the opinion of others.

MR BURGER: Okay. No, no, no. Sorry I – I did not state it clearly enough. It was ...

CHAIRPERSON: Hang on – hang on let me finish – let me finish. But when you are answering me now I understand
20 you to be – to include yourself?

MR BURGER: Correct.

CHAIRPERSON: Now I am not sure I just want to make sure that I have understood you correct but this is how I have understood you.

MR BURGER: The second one Chair. The last – the last

one.

CHAIRPERSON: The – your answer to Mr Kennedy?

MR BURGER: Correct.

CHAIRPERSON: You were not including yourself? You did not hold that opinion that sometimes you strangle yourself – you strangled yourselves.

MR BURGER: No. It is a big...

CHAIRPERSON: Trying to comply with the PFMA that is not an opinion that you held at the time, is that what you are
10 saying?

MR BURGER: Sorry Chair I am battling to express myself.

CHAIRPERSON: Okay.

MR BURGER: I am saying the – it was an opinion held by people that – that we are too critical on ourselves when applying the PFMA and it – it was discussed in the meetings and it was – it was an opinion I also held at the time that we were strangling ourselves.

CHAIRPERSON: Okay.

MR BURGER: With the – in the way we were applying the
20 PFMA.

CHAIRPERSON: Yes. But – but did I understand your evidence correctly that when you were answering Mr Kennedy you had said it was not your opinion that is what I want to check? What – had you – did you say that to Mr Kennedy?

MR BURGER: What – what I tried to say to Mr Kennedy was I was not knowledgeable enough on the PFMA so I could not form an independent opinion by – I did not study the PFMA however and that is why I said it was not my opinion that I put on the table to say – to be part of the argument.

It was a – it was an opinion that I shared when there were arguments on the table that – that said we are strangling ourselves with the PFMA I supported the fact that we were strangling ourselves with the PFMA. But I did not –
10 I did not actively put arguments on the table from a point of knowledge and from a point of expertise.

CHAIRPERSON: Hm. Well there may be some inconsistency but Mr Kennedy you – you ...

ADV KENNEDY SC: May I proceed?

CHAIRPERSON: Ja.

ADV KENNEDY SC: Thank you Chair. Mr Burger I would like you to leave aside Bundle 1 now. I would like to go back to Bundle 10 which contains your affidavits.

CHAIRPERSON: Well Mr Kennedy we are at half past four
20 and I have certainly from my side we can continue but we – maybe we need to agree.

ADV KENNEDY SC: Yes.

CHAIRPERSON: At what stage we might take a short break and maybe we could take it now or maybe we can still go on until five and take it from there also depending on the

witness he might need a break.

ADV KENNEDY SC: Chair subject to your guidance I would be happy with a break but may I suggest respectfully that we finish this particular topic with the last few questions.

CHAIRPERSON: Yes.

ADV KENNEDY SC: And then take a break because I was going to ask in any event for an opportunity to chat with my team.

CHAIRPERSON: Yes.

10 **ADV KENNEDY SC:** Members to see what other issues we want to raise.

CHAIRPERSON: Yes.

ADV KENNEDY SC: We getting very near the end.

CHAIRPERSON: Okay. No ...

ADV KENNEDY SC: I had hoped that we be finished by five o'clock in any event.

CHAIRPERSON: Okay so maybe if we are – if you think we might be finished by five o'clock then maybe unless the witness or his attorney needs a break maybe we can just go
20 on. Mr Burger you do not particularly need a break now?

MR BURGER: I am happy Chair.

CHAIRPERSON: Oh you are fine.

MR BURGER: I am fine.

CHAIRPERSON: Are you fine?

ADV CROUSE: Chairman I am also happy to proceed.

CHAIRPERSON: Okay alright then let us proceed then.

ADV KENNEDY SC: Thank you Chair. What I am suggesting is just to complete this line.

CHAIRPERSON: Yes.

ADV KENNEDY SC: Which should take about five minutes.

CHAIRPERSON: Okay alright.

ADV KENNEDY SC: No more then take the break then.

CHAIRPERSON: Okay alright.

ADV KENNEDY SC: Thank you Chair. Mr Burger please
10 turn now in Bundle 10 to page 720. Have you got that?

CHAIRPERSON: We are now back in Bundle 10?

ADV KENNEDY SC: Yes Chair.

CHAIRPERSON: Yes. And it is page 7?

ADV KENNEDY SC: 20.

CHAIRPERSON: 720.

ADV KENNEDY SC: This is part of your affidavit and it is a section where you were dealing with a response to various questions that were being put to you by members of the investigation team, is that right?

20 **MR BURGER**: Correct, Chair.

ADV KENNEDY SC: And in that paragraph 162, the question that you have quoted in italics, that comes from the investigators, reads:

‘Why you proceeded with giving VR Laser work as a Single Source Supplier even after the Group

Executive Supply Chain refused to grant approval on the grounds that the process was flawed?”

So this is the very question that I was putting to you earlier. And I just want to pick up on something, a couple of things that you written here.

I would like to start, if I may, at the foot of the page, 162.3. We are going to come back to the earlier ones in a moment.

162.3, you say:

10 “Since Mlambo reported to the Executives of DCO, who again reported to the Group CEO, I expected that in the case of dissatisfaction, he would have taken the matter up through the appropriate channel.”

In other words, that Mr Mlambo should have raised it if he was dissatisfied.

MR BURGER: Correct, Chair.

ADV KENNEDY SC: You did not feel it appropriate that you should raise it. You simply left it to him because he was at
20 head office, is that right?

MR BURGER: That is correct, Chair.

ADV KENNEDY SC: And then you continue:

“From a DLS perspective, however, there was a Memorandum of Agreement in place.

However, regardless of the MOA, the delegations

required the DCO approves contract beyond R 20 million.

This was one of the contracts presented to the Executive Supply Chain Committee and were discussed and approved at various levels.

If the Group CEO took note of Mlambo's input and for good business reason decided to disregard his input and approve the submission, then I would imagine it was his right and authority to do so."

10 Now at this stage, the Group CEO was Mr Ntshepe, correct?

MR BURGER: I presume you are referring to ...[intervenes]

CHAIRPERSON: Mr Motsepe. Mr Motsepe. Is it not Motsepe?

ADV KENNEDY SC: Mr Motsepe, yes.

CHAIRPERSON: Ja.

ADV KENNEDY SC: Zulake Ntshepe.

MR BURGER: Correct. I ...[intervenes]

ADV KENNEDY SC: He was Group CEO, correct?

20 **MR BURGER**: Correct, Chair.

ADV KENNEDY SC: Yes. And he, in fact, did overrule Mr Mlambo in the note that we have seen.

MR BURGER: Correct, Chair.

ADV KENNEDY SC: That followed Mr Mlambo's concerns. So am I right in understanding, you felt that at divisional

level, if Mlambo does not like what I am doing – and he has already given his reasons for that – he can raise it higher up than himself and that is what he did.

MR BURGER: Correct, Chair.

ADV KENNEDY SC: Yes. But would you agree that it is not right to imagine, as you suggested here, it was his right to authority to uphold your approach and reject Mr Mlambo's approach if that in breach of that law? You would accept that the Group CEO cannot do something unlawfully?

10 **MR BURGER**: Fully. I agree Chair.

ADV KENNEDY SC: Ja. Now just while we are here. On the previous page 162.1, you say:

“The first insinuations that the process was flawed only came to my knowledge in 2016 when Malahlela mentioned something to that effect to me.

This coincided with a large amount of negative press for the Gupta family and Mlambo and Malahlela, by the same token, made no secret that his or their dislike for VR Laser was based on his or their perceptions formed by the media and not because of the performance of VR Laser.”

20

Now you have climbed down a fair bit on what you have said in this affidavit in your oral evidence, both last time and this time.

Mr Burger, may I ask you? Do you stand by this

statement or do you want to correct it? Because these are very serious allegations making – that you are making against Mr Mlambo and Ms Malahlela that they had some antiphony and some antagonism for, as you put it, a dislike for VR Laser based on their perceptions formed by the media.

MR BURGER: Chair, I actually said it 15-minutes ago that my opinion was that Mr Mlambo did not particularly support the contract because of the shareholding and the ownership
10 of VR Laser.

ADV KENNEDY SC: Did he say that? Or is that something that you just inferred from what he was saying?

MR BURGER: I cannot remember his words but maybe it was something that he – that is how it was projected to me.

ADV KENNEDY SC: It is not in any of the words that we do have in front of us, in the documents for example that we have looked at a moment ago. He raised a number of concerns that you have now acknowledged at legitimate.

MR BURGER: Yes.

20 **ADV KENNEDY SC**: Based on the provisions of the Supply Chain Management policy. Nowhere do you see anything like: I do not think we should be doing business with shady characters at VR Laser who are connected with shady characters called the Gupta's. Nothing remotely about that.

MR BURGER: H'm.

ADV KENNEDY SC: So where did you pick that up from?

MR BURGER: The – as an example, when I received the letter from Ms Malahlela when I was overseas – this letter I am referring to her in the first paragraph – I – that was for the me the first time I saw in those bold words: We have got a really big problem here.

The discussion I had with the – in my letter or reply, I felt very strongly that she knew that the mistake was being made.

10 I also felt that and probably if I did exactly the same thing as what she did, I would not be sitting here today. But she – I felt that she wrote the letter in such a way that she does distance herself from that deal.

And then when I had the discussion on my return, and I listened to her giving evidence and she said: Well, nothing really happened in that meeting. I can actually remember that meeting very well, very vividly.

And the discussion was not so much on the process. The discussion was on the image and the position of the
20 Gupta's and the effect that could have on the company.

That was what the – and my view to her was and I did action that, was the image of the company is really – there is a department within Denel that looks after that and should be handled by them.

So I am saying – I am making these comments because

of meetings like that Chair. Mr Mlambo also make no secret about the fact that it is – it is going to be bad for the reputation of Denel if we continue with these agreements.

So that is why I made these comments. Having said that Chair. The arguments put on the table by both Mr Mlambo and Ms Malahlela on their opinion about the application of the PMFA, the policies of Denel and so forth, are all very unemotional valid reasons and I cannot fault that and I take that point very strongly.

10 I am reflecting on how I felt at the time and the... So to put it in perspective. Looking at the affidavits. Yes, I think they are logical and emotional points being made.

ADV KENNEDY SC: Yes. Did ...[intervenes]

CHAIRPERSON: Why did you say that at Denel there was a separate department or you unit that looks after the image of the company?

MR BURGER: The ...[intervenes]

CHAIRPERSON: What was that to say, it was something that none of you should concern yourselves within the
20 context of the contracts?

MR BURGER: Chair, there was a Public Relations Department. I cannot remember exactly what it was. Or a Media Committee or something. I cannot remember the name of the department. That dealt with the image of Denel and they dealt with interaction with the press.

CHAIRPERSON: Yes, but what I mean is. Am I correct in understanding you to have taken the view that the discussions or engagements that you were having with them, should not bring in issues of the image of the company because there were other people whose job was to concern themselves about that. Is that what you meant?

MR BURGER: Ja, Chair very much so. I mean, I was told in no uncertain terms by the then Group CEO that this was not a domain I must concern myself about.

10 And so the legitimacy of contracts, because of media or threat of a media scandal was not something I really concerned myself about at that time. And I tried to explain how the delegations and the accountabilities moved to head office during that time.

So, yes, I truly left that to the Group CEO as well as the Media Department to deal with that.

CHAIRPERSON: So was your attitude that it did not matter how much, having the contract with a particular entity who could potentially tarnish the image of the Denel, it was fine
20 for all of you to approve that contract being entered into with such an entity because the Group CEO said do not concern yourselves about the issues of the image of the company?

MR BURGER: H'm. Chair, yes, of course, I was concerned about the image of Denel. I mean, I am still am.

CHAIRPERSON: I would have expected to you have been.

MR BURGER: It – at the time, there was much speculation of what is right and what is wrong. And in 2020, it is much easier to ...[intervenes]

CHAIRPERSON: Well, I am not sure if it is in 2020 Mr Burger because this was 2016.

MR BURGER: Yes.

CHAIRPERSON: Three years after the landing of the Gupta aeroplane at Waterkloof.

MR BURGER: H'm.

10 **CHAIRPERSON:** The Gupta jet landing at Waterkloof happened in 2013 around April. So this was April 2016. This was three years later.

MR BURGER: Correct, Chair.

CHAIRPERSON: And my recollection and the evidence that has been led before the Commission in regard to that landing, has been that the whole country was shocked that a private jet or an aeroplane hired by or owned by just some private people, foreigners or citizens or whatever they were, could be allowed to land at Waterkloof. And there was a big
20 issue in the whole country.

And for some people who might not have taken notice of the Gupta's or the influence that they appear to have within government, that was the moment that made them sit back and say: So what is happening?

Now, I am a little surprised if in 2016, you would not

have been quite aware that there was some negativity just in terms of – in the public domain about the Gupta's.

MR BURGER: Yes.

CHAIRPERSON: Or you accept that there was some negativity. It is a question of how much there was, how much negativity there was.

MR BURGER: Yes.

CHAIRPERSON: By 2016. Actually, I see that you say in paragraph 162.1, that is page 720 of your affidavit:

10 "This coincided with a large amount of negative
 press for the Gupta's."

MR BURGER: Correct.

CHAIRPERSON: So by then you must – there must have been in your own view quite some negative media attention surrounding the Gupta's.

MR BURGER: Absolutely Chair.

CHAIRPERSON: Yes.

MR BURGER: Yes, Chair.

20 **CHAIRPERSON**: Now, I would then have thought that it
 would have been a matter of concern to you and either
 senior people at Denel or DLS to conclude a contract with an
 entity that was connected with people who enjoy that
 negativity about them.

 Because if Denel concludes a contract with them,
 Denel's own image and reputation may be severely

damaged. They may be seen as friends to these people.

And why would that not be something that you would think seriously about to say: What are we going to do to the image and reputation of Denel if we conclude a contract with people who are so closely associated with the Gupta's.

MR BURGER: Chair ...[intervenes]

CHAIRPERSON: So what I am putting to you is that. I would have expected this to have been a matter of serious concern to any senior person within a company, particularly
10 at your level.

And especially when it was being pointed out by other people within the company. Because you do say that some of the people were concerned. One of them Mr Mlambo, I think you said.

Even though, in regard to this point, he might not have raised that but you say there were other discussions from which you knew, as far as you are concerned, that he was concerned about that.

MR BURGER: Yes. Chair, I state again. I was – obviously,
20 the image of Denel is and will always be of importance to me. Number two. Denel is operating locally and with foreign governments in a very much politically environment.

I have soon in my career, took a position that I do not want to be – I do not want to pick sides and I do not want to have an opinion on what is politically correct or incorrect.

And that attitude, I must be honest with you, served me well for a fair amount of time but it caught up with me.

The dilemma of picking of political sides is that sometimes you are in and sometimes you are not in and you, as a result, lose your job as a consequence.

So I, early on in my life, I said I just want to be a businessman. I do not want to pick political sides. And therefore, apart from – while I acknowledge that the image was important to me. I also did put my head in the ground a
10 little bit when it came to these things.

And you are right. In hindsight, I should have stood up and said: No, we cannot, you know, you cannot do that or whatever.

But I felt at the time this was the best company to do the job irrespective – and I did not concern myself with the political scenario.

Now, I – and I call it political scenario because it really relates to who they were supporting politically and not. So I, honestly, did not – I looked away from those things and in
20 hindsight, maybe I should have concerned myself more with that but that really was the scenario.

CHAIRPERSON: Well, you may have looked away and you may have decided at some stage that you did not want to take political sides, but there is always what is right and there is always what is wrong.

MR BURGER: No, you are right.

CHAIRPERSON: And leaving aside political sides within the context of the Gupta's, the negative press that you talk about here, was the press that was saying they were involved in acts of corruption.

It was the press that was making all kinds of allegations. And I accept that it was allegations at that stage. We will see by the end of the work of the Commission where we are with that particular allegations that they were involved in
10 corruption.

And I would have thought that when it came to allegations such as that, you would be concerned to say, it is not a question of taking political sides.

It is a question that I do not want Denel to be associated with an entity against whom there are all kinds of allegations of corruption. You understand?

MR BURGER: I understand fully Chair.

CHAIRPERSON: Yes, okay.

MR BURGER: I did not take that view.

20 **CHAIRPERSON**: Ja, ja. Mr Kennedy.

ADV KENNEDY SC: I would just like to ask one follow-up questions before we ask for the stand-down.

CHAIRPERSON: Yes. Ja.

ADV KENNEDY SC: And that is. Even if you had answered that question – asked that question and even if you had

decided that it was in the interest of Denel, despite the fact that there were so much controversy with the Gupta's, that the deal should have been done.

Does the fact not that there was controversy about them, did not that provide all the more reason for you, if you were really genuinely concerned about doing the right thing for Denel and its image, that you should have made absolutely sure that everything was squeaky clean as far as compliance with the law and with procurement policies was concerned?

10 **MR BURGER**: I take it – I take your point Chair. I can only say that during the Single Source Agreement, I was really under the impression this was something that the Group CEO had the authority to do. That it was in the best interest of Denel.

And by 2016, the agreement was in existence and my view I had then was the horse has been bolted. If there is evidence of corruption, then we have something to act on.

But in the absence of them being blacklisted or evidence of corruption. How do you act on that? And that was my
20 opinion at the time.

ADV KENNEDY SC: Chair, may we then ask for a brief stand-down, perhaps around ten, maybe 15-minutes maximum and then my team will be able to give their input and we will be able to complete.

CHAIRPERSON: Ja.

ADV KENNEDY SC: I do not believe we should need more than about ten minutes thereafter.

CHAIRPERSON: Yes.

ADV KENNEDY SC: I understand from Mr Crouse that there is at least one aspect on which he, as he has indicated to me, he may want to re-examine.

CHAIRPERSON: Okay.

ADV KENNEDY SC: But it should not be very long.

CHAIRPERSON: That is fine. Let us take a ten minutes' break.

ADV KENNEDY SC: Thank you.

CHAIRPERSON: So coming back at about... Well, let us just make it – we will resume at ten past five.

ADV KENNEDY SC: Thank you, Chair.

CHAIRPERSON: That will give you enough time with your team.

ADV KENNEDY SC: Thank you, Chair.

CHAIRPERSON: Okay we adjourn.

INQUIRY ADJOURNS

20 **INQUIRY RESUMES**

CHAIRPERSON: Yes, Mr Kennedy?

ADV KENNEDY SC: Thank you, Chair. Just a few follow-up questions and then we will be done. The evidence earlier relating to officials becoming too entangled in the PFMA, that was a view that was expressed by some legal

people. Was that people within your legal department who were suggesting that some officials were imagining that the PFMA was more complicated than it really was? Sorry, just switch on your mic, please?

MR BURGER: Correct, Chair, but this was a general discussion, this was not a VR Laser big discussion.

ADV KENNEDY SC: Yes.

MR BURGER: It is a general view that was ...[intervenes]

ADV KENNEDY SC: And can you recall who said that?

10 **MR BURGER:** It was a general view and if I remember correctly, the head of my legal department Ms Denise Govender also held that view. So but I stand corrected but I am pretty sure that was the scenario.

ADV KENNEDY SC: Okay. Then you were asked questions about that letter that you sent to Mr Mlambo where you referred to Treasury Regulation 16A, etcetera. How did it come about that you got that advice? What prompted you to get that advice?

20 **MR BURGER:** The normal practice was that any letter that was written for head office – not any letter, in 90% of the time of normal run of the mill letters like approval for certain things would be written by the person that wants to get it approved and I would read it, I would make sure I understand it and I support it and I would sign it.

This letter was one of them and words in that letter,

although it was a long time ago, words that were used in the letter were words like *inter alia* which is a typical legal term and something I would not write now. I am fairly sure that that letter was not written or I would be surprised if that letter was written by Ms Malahlela and for that reason I think it was between the Chief Operating Officer, Mr Reenen Teubes, who wanted to get these contracts placed and our legal department, Ms Denis Govender, that that letter was constructed and there might have been back and forth with the letter and I might have given inputs to it but the bulk of that letter was written by – and my guesstimate would be – and/or I am pretty sure by Ms Denis Govender, most of it, with inputs from Mr Reenen Teubes. What typically...[intervenes]

ADV KENNEDY SC: Mr Teubes?

MR BURGER: Ja. And what typically then would happen is I would scrutinise it, make sure it makes sense and so – and then take it to head office.

ADV KENNEDY SC: And the reason why you went to them for their advice and input was because you and they realised that Mr Mlambo had to approve this in terms of the policy.

MR BURGER: Correct, on the last bit of the statement and the earlier part of the statement, I did not go to them to say go and write a letter, they wanted – from operations'

side they wanted to place a contract on VR Laser. We might have had a discussion or they just brought the letter to me to say we need to get approval and therefore they did know that Mr Dennis Mlambo must sign it and presented a letter that, like in most cases, I would go through and sign it off and give inputs, if necessary but I did not initiate that letter, if that was the comment made.

ADV KENNEDY SC: Right. Can I ask you in bundle 10, still looking at your statement.

10 **MR BURGER:** Yes.

ADV KENNEDY SC: To turn please to page 646, paragraph 86 and 87 at the top. 646.

MR BURGER: I have got it, Chair.

ADV KENNEDY SC: In fact let us start, if we may, on the previous page, 645, to give it context. Paragraph 84:

20 “The reality is that Saloojee is himself a political animal, he never cautioned me or Ntshepe about our interactions with Essa and VR Laser and in fact encouraged it. He visited the Gupta residence on more than one occasion. That is more than I can say. It is therefore surprising that Saloojee will categorically deny that he instructed Ntshepe to manage the relationship with Essa. Not only does it fly in the face of his own testimony but it is simply disingenuous to suggest that my version in this

regard if not correct. I am certain that Ntshepe will corroborate me in this regard. Saloojee, and I again remind the reader, that Saloojee did not have a lot of patience with me as an individual. On more than occasion told me that my duty, as the CEO of a division, was simply to ensure that I focus on the implementation of programmes and that I should leave the political element and business development to him.”

10 Now is that correct?

MR BURGER: That is correct, Chair.

ADV KENNEDY SC: Alright. And then the top of the next page:

20 “I was therefore not surprised that at the beginning of 2014 he called me into his office and proposed that I give work to VR Laser as this was a supplier with political clout. He was surprised to learn at the time that Denel had been doing business with VR Laser since at least 2003 and that VR Laser was a very successful supplier in a niche environment. It was Saloojee, who in 2015, suggested that VR Laser be appointed a single source supplier of complex fabricated structures.”

Now of course you are aware that Mr Saloojee has denied a number of these allegations against him. He denies that

he proposed whether in 2014 or at any time that you should give work to VR Laser at all let alone that this was a supplier with political clout but you were aware, according to your version, as far back as the beginning of 2014 that Mr Saloojee was aware that VR Laser had political clout and was pressurising or encouraging you to give them business as a result.

MR BURGER: Correct, Chair.

ADV KENNEDY SC: And presumably on the strength of
10 that it came as no surprise to you that the following year in 2015 he was encouraging you to appoint to appoint VR Laser as a single source supplier of DLS.

MR BURGER: Correct, Chair.

ADV KENNEDY SC: Now you gave evidence on the previous occasion that you did not feel that this was necessarily appropriate but you left the politics to him and as it happened for technical business reasons, not political favouritism or anything like that, but for good business reasons for Denel you felt it would be a good idea to give
20 VR Laser a single source supply contract, is that right?

MR BURGER: That is correct, Chair.

ADV KENNEDY SC: Yes. But I want to go back to a line of questioning I put to you earlier and ask you with the benefit of some time since I asked you the first question in that regard, whether you have reflected on it, whether or

not it was a good business idea for Denel to go into a single source supply agreement with VR Laser - I am talking here about DLS specifically – whether or not you felt that was good and whether or not you felt well, this is a good opportunity, I can now exploit this opportunity to get a supplier that I have always liked and want now,. Should you not have actually reported that to somebody, that Saloojee had effectively been pressurising you to give business to VR Laser because of what you say he said, political clout, in other words, their connections, not their
10 business credentials. He obviously is accountable for whatever he said. He, of course, denies that and he will be asked questions in that regard but what about your own accountability? If your superior, albeit your superior, albeit that he was – he had more senior position in the group than you and you were accountable to him, surely you are accountable also as an official to the nation at large and if somebody is making such a proposition to you which clearly is inappropriate, was it not incumbent on you to
20 report that?

MR BURGER: Chair, I think knowing what I know now, having listen to evidence given supporting that Mr Saloojee was deeply involved than even what I thought at the time, it would have been the correct thing to do. I have got no doubt in my mind. At the time, however, the –what I call

political pressures, those things, Mr Saloojee made no bones about the fact that he is under political pressure for many things and that is his domain and I think over a long period of time I got used to the idea or accepted the idea an wrongly so that when a comment is made like that, that it needs to be supported. If I could have my life over I would have done that, Chair.

ADV KENNEDY SC: Are you saying that Mr Saloojee indicated to you a number of time that he was under
10 political pressure in the sense that he was being pressurised by politicians to ensure that work from Denel was given to political favourites such as the Guptas?

MR BURGER: No, Chair. No, I would not go that far. He did not elaborate in that ...[intervenes]

ADV KENNEDY SC: So what did you understand by his reference to his being under political pressure?

MR BURGER: That, well, it is political clout, he is moving in political circles, that he said a number of times to me and he has to conform to those pressures. I did not see it
20 as anything but – you called it favouritism and maybe that is – it is a good description. I did not see it as any funny business in that regard.

ADV KENNEDY SC: But should you not have seen that at least when he was saying to you in 2014 you should be giving favourable treatment to VR Laser because they have

political clout? What else could that mean?

MR BURGER: Ja.

ADV KENNEDY SC: But that he was saying to you people want you to favour them in business not because they are good but because they are politically connected. Is that not exactly what he was saying, according to your evidence.

MR BURGER: Ja. No, you are right, Chair, and I – if it was the only case then one can make a big argument about
10 it but it also happened in terms of the [indistinct] 13.58
business that I had to place on them, so – as I indicated in
the previous interview. So it was common knowledge that
Mr Saloojee was in general under political pressure and so
I - it is – not just relating to this, in general. So, you
know, with the clarity and the advantage of time passing,
you are right, I am not disputing that. At the time when we
were fighting the war, the – I just accepted that that is the
way it is and it in principle always been the case. It is not
new to – there has always been some form of political
20 imperatives that needed to be supported.

CHAIRPERSON: Well, let us understand that clearly, Mr
Burger. You would be able to make a distinction between
what he said and what you understood him to be saying,
hopefully the two will be in harmony, but they might not be
in harmony. The political pressure that you say he

generally spoke about that he was under...

MR BURGER: Yes, Chair?

CHAIRPERSON: What was your understanding of what he was being politically pressurised to do?

MR BURGER: Chair, it is a wide range of things.

CHAIRPERSON: That is what I want to hear, what are those things?

MR BURGER: Ja.

CHAIRPERSON: As you understood them.

10 **MR BURGER:** Yes. Things like the transformation of the organisation, the necessity to have deputies and fast-track the deputies to senior positions, the decisions to only appoint black female engineers in a very difficult time to get experienced people and if one argued a different angle to say we have got a programme running, it is good to do 80% of that but let us try and also get experience in, then the argument was understand the enormity of the political pressure.

20 So those were the more general type – understandable and I am not saying it was incorrect, understandable pressures he was under. He was – he also comment fairly regularly that the interactions that he had with certain people of importance, if certain people visited the organisation, should be treated in a very special way because of their political position or whatever the case

may be.

So it was a wide range of things and in particular he also said there are companies of importance and with political clout that needs to be supported, for whatever reason that may be.

CHAIRPERSON: Do you recall any people that he thought should be treated in a special way when they visited the company? By any chance to you remember any names or you never got the names?

10 **MR BURGER:** Individuals?

CHAIRPERSON: Ja, individuals.

MR BURGER: No, Chair.

CHAIRPERSON: No. But did he mention or you have forgotten or he never mentioned?

MR BURGER: I cannot remember, it is six years ago, Chair.

CHAIRPERSON: Yes, okay.

MR BURGER: He might have mentioned, he might have mentioned.

20 **CHAIRPERSON:** Yes, okay. Okay and in terms of companies that he thought should be ...[intervenes]

MR BURGER: Sorry, Chair, maybe – there was – I can remember there was a called Tub and I am not hundred percent – I am fairly sure it was Mr Saloojee that said there was a company called Tub and there was a lady

owner of that company and he also referred – and I cannot remember her name now.

CHAIRPERSON: Okay, that is fine.

MR BURGER: But he did mention her name specifically ...[intervenes]

CHAIRPERSON: No, no, that is fine.

MR BURGER: As a very important person.

CHAIRPERSON: Okay. Well, if you do remember later on you can give us a supplementary affidavit.

10 **MR BURGER:** Will do, Chair.

CHAIRPERSON: Mr Kennedy?

ADV KENNEDY SC: Thank you, Chair. I just have one topic still to raise and that is after Mr Mlambo again refused to approve the single source supply contract retrospectively. Did you then take the matter up with Mr Ntshepe, the CEO? How did ...[intervenes]

MR BURGER: I did not have a discussion with – I cannot recall, Chair, whether I did. My argument would not have been I think we should cancel the single source agreement,
20 I would not have said that.

ADV KENNEDY SC: No, I am not asking ...[intervenes]

MR BURGER: Based on the inputs given by Mr Mlambo. Whether – I might have had a discussion with him about his – I am pretty sure I had a discussion with him about his discontent with the whole process, so yes.

ADV KENNEDY SC: But I am asking who raised it with Mr Ntshepe at the level of Group CEO the fact that there was now a need for a decision? Earlier you said you believed that once Mlambo was refusing to approve it would be dealt with higher up but in fact we know that Mr Ntshepe then signed. He said approved and then he signed.

MR BURGER: Oh sorry, are you talking about the specific T5 contract that was placed?

ADV KENNEDY SC: I am talking about the single source
10 supply agreement.

MR BURGER: The single source supply agreement?

ADV KENNEDY SC: Yes.

MR BURGER: No, I took that to Mr Saloojee, Chair, I did not take that to Mr Ntshepe.

ADV KENNEDY SC: But – if I can just have a moment, Chair? If you look please in bundle 1. Have got bundle 1, page 824? This is a document we looked at earlier.

MR BURGER: 824. Ja, this agreement was not the single source agreement. This ...[intervenes]

20 **CHAIRPERSON:** Did you say 824?

ADV KENNEDY SC: 824, yes, Chair.

MR BURGER: This was for a complex fabricated steel plate that was needed for the T5 demo on the back of the single source agreement.

ADV KENNEDY SC: Yes but if you look at the second last

paragraph. We went through this in some detail:

“Having identified a need for a single source supplier for the supply of steel component fabrications in May 2015 DLS signed an MOA with VR Laser for the scope of work. VR Laser is a hundred percent black-owned entity.”

Etcetera. Next paragraph:

10 “Due to these contradicting positions supply chain approached DLS Exco to make a decision as whether to honour the MOA and place the order of VR Laser or to follow up the supply chain policy and procure from intergroup. Exco has recommended that the work be done by VR Laser.”

So that was giving work pursuant to the MOA.

MR BURGER: Correct.

ADV KENNEDY SC: And the MOA was the single source – single supplier agreement.

MR BURGER: Correct.

ADV KENNEDY SC: Yes.

20 **MR BURGER:** But this request was for the T5 steel plate.

ADV KENNEDY SC: Yes, but it did reflect the fact that the MOA had been found by Ms Malahlela and later by Mr Mlambo not to be in compliance with the procurement policy.

MR BURGER: Correct, Chair. Correct, Chair.

ADV KENNEDY SC: Yes. So how did – who took the matter to Mr Ntshepe and obtained his signature as approved on the foot of page 825?

MR BURGER: In all probability, Chair, and I cannot state this a hundred percent but in all probability this was brought back to me by Ms Malahlela and this was a very urgent requirement because we had to go and do a demo and I in all probability took this to Mr Ntshepe.

ADV KENNEDY SC: Now Mr Mlambo has testified that
10 after he wrote what appears in handwritten form in the middle of page 825 he was effectively ignored. You did not come back to him, other executives did not come back to him, Mr Ntshepe never came back to him, he found out later through the backdoor, as it were, that Mr Ntshepe had just *sommer* approved this, overruled him and did not engage in any discussion with him let alone with you and with him.

MR BURGER: Yes, Chair.

ADV KENNEDY SC: You confirm that as far as your
20 understanding goes.

MR BURGER: I cannot recall having a discussion with Mr Mlambo.

ADV KENNEDY SC: Right. May I just have a moment, Chair? In fact I am reminded that Mr Ntshepe himself gave evidence here. When he was asked how long it would have

taken if Mr Mlambo's questions and concerns had been addressed and taken seriously, how long would it have taken, for example, to put up a proper business reason. He said about a day. Can your evidence seriously be correct that there was such urgency to this matter that needed an immediate decision by the CEO thereby ignoring the Group Supply Chain Executive's concerns?

MR BURGER: Chair, it is impossible to get a quote on something like this in a day. It is not possible. So I do not
10 know where he got the day from, it is just not possible to set up and do an analysis of the drawings, it is a complex drawing. Other people take weeks. I cannot comment on that but one can argue the fact that Mr Mlambo should have been taken more seriously and I have already acknowledged that, Chair, I do not want to go back on that argument. But I can only say and I say it with a fair amount of shame, but I was convinced that it was the right thing to do at the time, I was convinced that we had an
20 agreement, I wanted to honour that agreement and I was pushing for the work to be done there because I knew it would come out to be the correct configuration. So, yes.

ADV KENNEDY SC: Thank you, Chair, we have no further questions.

CHAIRPERSON: Thank you. Mr Burger, the answer that you have given with regard – when you said you do not

know where ...[intervenes]

MR BURGER: My apology, Chair, I did not hear. My answer...?

CHAIRPERSON: The answer that you gave to Mr Kennedy just now which involved you saying you could not get a quote within a day. Remember that answer?

MR BURGER: Yes, Chair.

CHAIRPERSON: Was that in relation to page 825 where Mr Mlambo made the handwritten note saying DVS and MLT
10 (sic) must submit proof that they cannot meet the requirements prior to the contract being awarded to VR Laser or that is in response to something else?

MR BURGER: Yes, Chair.

CHAIRPERSON: Or you are not sure?

MR BURGER: No, Chair, I am very sure, the ...[intervenes]

CHAIRPERSON: Ja. In terms of what were you – was that in the context of that because that question arose because, as I understood the position, it was said that
20 there was urgency.

MR BURGER: Correct, Chair.

CHAIRPERSON: That is why he – what he required could not be given. Is that what you were talking about because I am not sure that that required quotes if it was in the context of this handwritten note. All he wanted was proof

that they cannot meet the requirements, they cannot do the job, I guess is what he meant, as I understand it.

MR BURGER: Yes, Chair, when I read his comment, my deduction was both the – well, not DVS but LMT for sure, would in all probability want to do the work. So they would say – they were not supply proof, I cannot meet the requirements, they would say let me work out a quotation, let me speak to my engineers how quickly we can do that, let us see what the processes are, we will come back to
10 you with an answer. That is what I read when I read this, I did not expect LMT to write back, sorry, we cannot make it.

CHAIRPERSON: Yes.

MR BURGER: Not – in my mind, this would have protracted the whole thing. I took this to Mr Ntshepe and said what must we do, with his background in marketing he knew about the urgency and ...[intervenes]

CHAIRPERSON: How long do you think it would have taken from your understanding of ...[intervenes]

MR BURGER: I would guess ...[intervenes]

20 **CHAIRPERSON:** A week, two days?

MR BURGER: A week I would guess.

CHAIRPERSON: But a week wouldn't have made any – a week's delay wouldn't have made a big difference as I understand the position. As I understand the position in the scheme of that contract it would – a day or a week

wouldn't have made a big difference as I understand the position there.

MR BURGER: Sorry Chair, no this has got nothing to do with Badger or the Hoefyster Programme.

CHAIRPERSON: Yes.

MR BURGER: This was – there was a deadline for a demonstration in a client's country.

CHAIRPERSON: Ja.

MR BURGER: And we had to prepare a gun to – and
10 usually in a client's country there is a specific, a very, very specific time slot when demonstrations or evaluations, not demonstrations, evaluations are held and it is usually to summer temperature and ranges are available and the time scale on this invoice it is clean to we had to still build the gun, test the gun and ship the gun, so there was really huge diversion on this specific programme. If it was Hoefyster I accept your argument but this was not.

CHAIRPERSON: Yes, yes, Mr Kennedy you must help me, I may have been misunderstanding at least you and I have
20 been there with all the witnesses.

ADV KENNEDY SC: Yes.

CHAIRPERSON: Was your question in the context of this note?

ADV KENNEDY SC: It was.

CHAIRPERSON: Because now I don't know whether it

was Mr Burger or another previous witness, my impression was that really it wouldn't have made much difference if there was a delay of a few days.

ADV KENNEDY SC: That is my understanding Chair and that would have been Mr Ntshepe.

CHAIRPERSON: Yes, but now Mr Burger is talking about guns and so on, does that relate to guns?

ADV KENNEDY SC: The demo elements in the first paragraph do relate to guns as we understand it, or
10 something related to guns.

CHAIRPERSON: But I mean I would have thought that Mr Ntshepe would have known if there were good reasons for urgency?

ADV KENNEDY SC: Yes, and he discounted that.

CHAIRPERSON: Ja, he discounted that. Did you know, Mr Burger even with the - within the context of guns that you are talking about, the testing of guns or whatever, do you know what the deadline was as at the time of this memo, namely 29 October 2015? Because if you don't
20 know the deadline you – if you don't know the deadline you might not be able to say that the deadline would not have been matched if there was a delay of a week, but if you know that the deadline was within the three days after this then you would know that you couldn't afford that deadline but do you know what the deadline was?

MR BURGER: Chair I cannot – the deadline for one thing wasn't the urgency, there was say a month later or I cannot recall, but there was a month or two months later the gun had to be, we actually didn't ship it because of the ...[indistinct], we flew it to the country because of the urgency so there was an overall time pressure to make this happen. On top of that I can recall that after we received the components and we tested the gun there was a problem in the ammunition feeder for this gun, so then we had to
10 rectify that and there were extreme pressures.

CHAIRPERSON: But the long and short of your evidence in this regard is – I must just check with you – that you know that there were some time pressures.

MR BURGER: Correct Chair.

CHAIRPERSON: But you don't know whether those time pressures were such that a delay of a week would have made a difference or not, that you don't know, or do you?

MR BURGER: Chair we almost didn't make it and the reason was not because of the late placement of this
20 particular item, what happened was we received all the items, we assembled the gun, we took it down to the gate to get it tested and it didn't function properly, and we had to redo certain things. So there was and it almost didn't work, and we almost didn't make the ship or the flight for this, but at the time you could have argued but in your

schedule maybe there is a week to sort this in and I would have conceded to you yes you are correct Chair there is that week, we could have done that.

CHAIRPERSON: Yes, yes.

MR BURGER: But in hindsight in this case it didn't affect that there was a functioning problem, it was a good thing that we didn't waste time, so – but I cannot say a week would have worked or wouldn't have worked, I just remember very strongly the time pressure

10 **CHAIRPERSON:** Okay no that's fine.

ADV KENNEDY SC: Can I just ask your indulgence just to ask a follow up question just to try and get some clarity on the issue. Ms Malahlela gave evidence as I recall in explaining the memorandum that she wrote at page A24, do you have that?

MR BURGER: Yes.

ADV KENNEDY SC: A24, that this was specifically asking for approval retrospectively for the MOA for the single supplier contract, and what she was doing in paragraph –
20 in the first paragraph that refers to the T5 demo was simply reminding Mr Mlambo that previously he had given approval for the T5 demo as she says in giving the approval for the deviation from the normal procurement process and list of supplies to be used for the T5 demo the Group Supply Chain Executive, that is Mr Mlambo, gave an

instruction that DLS must first explore how Denel Vehicle Systems ...[indistinct] ratio and LNT inter-group companies will be used in the project on condition that they meet the quality, then she reminds him of what appears in the supply chain policy and then says having identified a need for a single source supplier for the supply of steel components in May 2015 DLS signed an MOA.

So the first paragraph was simply referring to a historic fact that had already occurred, namely he had
10 approved previously the special procurements by way of a deviation for the T5 demo but subject to specific conditions, try and deal with him them in-house, so she was just reminding him of his approach previously which said don't go outside the group if you can go inside the group, and now she is saying after reminding him of what the supply chain policy says in that regard requiring a sound business case to be made out, she now says there has already been an MOA recently, in May 2015, five months earlier, with VR Laser for the single supplier and
20 on the basis of what you have already Mr Mlambo raised in relation to the earlier approve for T5 and in relation to bearing in mind what the procurement policy requires may we now ask you for approval, well she is saying not herself but Exco has said may we now ask for your approval, not of the T5 demo contract, but of placing orders under the

MOA for single supplier, that is my understanding. Am I correct?

MR BURGER: Chair I never saw it like that, I cannot recall any retrospective request for approval of a single source agreement, that I facilitated.

ADV KENNEDY SC: But Mr Burger may I take you back to the minutes if my colleagues can just help me with the reference.

MR BURGER: Sorry Chair, I remember about the conflict
10 between the single source agreement and ...[intervenes]

ADV KENNEDY SC: Yes.

MR BURGER; That I remember.

ADV KENNEDY SC: Yes.

MR BURGER; And that because of that conflict but my understanding was to – there is a conflict so placing an order now there is a conflict, can we please get approval to place the order.

ADV KENNEDY SC: Yes, but that is a conflicted – that relates to the MOA or the single source ...[intervenes]

20 **MR BURGER:** Correct.

ADV KENNEDY SC: And because how people formulated it was the framework for the debate was which takes precedence, which trumps the other, does the MOA trump the procurement policy or does the procurement policy trump the MOA, not so?

MR BURGER: Yes, Chair but in the placement of a specific order, that was my understanding.

ADV KENNEDY SC: But in the placement of any order going forward, not so?

MR BURGER: Ja, I do not recall this as being a general paper and I haven't studied it enough, I see it now again, but yes because it was a conflict, I remember that there was conflict between the MOA and the procurement policy.

ADV KENNEDY SC: Yes, if I can take you back to the
10 minutes, page 672 in the same bundle.

MR BURGER: 672?

ADV KENNEDY SC: Yes. Under the heading resolution, committee took a decision that the MOU takes precedence over the GSCE's condition and the Group Supply Chain policy. Now the condition related to the T5 demo previously not so? That was his condition correct?

MR BURGER: Correct Chair.

ADV KENNEDY SC: Yes and the Group Supply Chain Policy and the DLS Supply Chain Procedure and that is
20 why – that is why Mr Mlambo was then approached after this resolution was taken in Ms Malahlele's memo so it specifically related to requesting approval by the Group Supply Chain Executive Mr Mlambo of orders being placed under the MOA single supply contract, is that right?

MR BURGER: It is correct Chair but I thought this was

driven by a specific requirement and not a generalistic discussion. I confirm to all of this but I just – I was under the impression it was driven a specific requirement which is not defined.

ADV KENNEDY SC: Okay, thank you very much, thank you Chair, no further questions.

CHAIRPERSON: Mr Crous do you still want to – would you like to re-examine?

MR CROUS: Chairman I have no re-examination.

10 **CHAIRPERSON:** You have no re-examination.

MR CROUS: No I don't.

CHAIRPERSON: Okay thank you very much. Thank you very much Mr Burger for coming to give evidence, if we need you to come back we will ask you and I am sure you will come back, but thank you very much for availing yourself and you are now excused.

MR BURGER: Thank you Chair.

CHAIRPERSON: Thank you.

20 **ADV KENNEDY SC:** Chair that is all we have for you in formal open session today, may we then ask for the matter to stand down and may I approach you chambers just to confirm arrangements in relation to the two remaining witnesses in the Denel stream.

CHAIRPERSON: Yes, okay no that is fine. We are going to adjourn for the day and tomorrow I will be hearing – this

is for the benefit of the public, I will be hearing evidence relating to OEH, the OEH Company, that evidence started yesterday, it will continue tomorrow and for the rest of the week.

We adjourn.

REGISTRAR: All rise.

INQUIRY ADJOURNS TO 25 NOVEMBER 2020