

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

**09 FEBRUARY 2021**

**DAY 340**



**Gauteng Transcribers**  
Recording & Transcriptions

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B KLINE; Y KLIEM; V FAASEN; D STANIFORTH



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**PROCEEDINGS RESUME ON 09 FEBRUARY 2021**

**CHAIRPERSON:** Good morning Mr Freund, good morning everybody.

**ADV FREUND SC:** Good morning Chair.

**PROF CALLAND:** Good morning.

**CHAIRPERSON:** Technicians will you please put on – switch on the screen. You must just always check whether it is on before I come in. Okay alright. Are you ready Mr Freund?

10 **ADV FREUND SC:** Yes thank you Chair may I proceed?

**CHAIRPERSON:** Yes you may proceed. Professor Calland.

**ADV FREUND SC:** Thank you Chair.

**CHAIRPERSON:** Professor Calland.

**PROF CALLAND:** Good morning DCJ.

**CHAIRPERSON:** Good morning, good morning. The oath you took yesterday will continue to apply this morning.

**PROF CALLAND:** Yes Sir.

**CHAIRPERSON:** Thank you very much.

20 **ADV FREUND SC:** Mr –

**CHAIRPERSON:** Yes you may proceed Mr Freund.

**ADV FREUND SC:** Mr Calland we were at – thank you Chair. Mr Calland we were at page 19 in Bundle 3 and I would – we were dealing with the question of the position of the member of Parliament in holding the Executive to

account. You make the point that much reference has been made to about the oath of office and then you say there is a tension between the abstract constitutional duty to the people and the very real political sanction for dissidence and when we adjourned last evening you would refer to the provision in the constitution that requires a member of Parliament who loses membership of that members' party to leave Parliament. And I would just like to pick it up from there. You deal with the economic implications for  
10 members of Parliament of the problems of – of rebellion or dissidence from party instructions. If you could maybe just talk to that very briefly?

**PROF CALLAND:** Well this came to my attention relatively early in my – in my relationship as it were with Parliament and my understanding of the institution itself. And in fact I deal with this episode in my report as a mini case study and I am talking up here about the arms deal.

The arms deal scandal as it became known had a very serious (audio break) Themba Godi. SCOPA overall  
20 has been one of the better and strongest committees in Parliament and in fact during the early part of the post-'94 period during the First Parliament SCOPA I think was the committee that first really got its teeth into the concept of oversight. It was the first committee to really start to grapple with the challenge of oversight and to exercise its

oversight function.

And it developed a certain practice in that regard which I think hinged largely on its relationship with the Auditor General. There was a very significant and fruitful relationship there.

All of that was ripped apart by the arms deal because SCOPA then became a victim collateral damage as it were to the attend by the ruling party to close down the issue and to politically manage the issue in their language.

10 And I followed those proceedings very, very closely and one of the things that came to my attention and this is now in the public domain so I feel comfortable referring to it because Andrew Feinstein an ANC MP at the time has written about this and it is on the record on all of this.

Now he made it clear to me that the pressure that was brought to bear on the ANC Study Group that is to say as you – as you well know now the ANC members of Parliament of a particular committee form themselves into a Study Group. The pressure that was brought to bear on  
20 the that Study Group by the leadership of the party in different forms was really excruciating and in there Mr Feinstein of course himself was pushed out. He left Parliament and left the ANC and left the country in the end.

But some of his colleagues I know from their own accounts and indirectly through Mr Feinstein Section 47(3)

was used as a pressure point and it was used to say basically, do you want to remain a member of Parliament with all of the benefits that come with that or are you willing to risk that and risk the reputation of the ANC by continuing to exercise the oversight that you are in asking the difficult questions that SCOPA at that point was trying to ask in relation to the arms deal.

So several members or colleagues of Mr Feinstein in the end backed down – they backed down from their  
10 initially quite strong positions because they feared losing their position in Parliament and they could not afford to lose their position in Parliament.

**ADV FREUND SC:** Well that is really the point that I want to come to is the – is whether the average MP can afford to lose their job as a MP?

**PROF CALLAND:** So I think Mr Feinstein would probably be one of the first people to accept that he is an unusual position. First of all he had had a career in I think Merchant Banking before coming to Parliament. He had  
20 other skills; he had other experience and he was able to move out of Parliament and find comfortable employment elsewhere and build a new career elsewhere. Not every member of Parliament has that possibility and those that do not like anybody I guess – all of us probably would cling therefore as much as possible to their position for fear of

losing it. And of course I think as the different Parliaments have gone by and we may come to that today I suspect in evidence in due course but as I would say the experience, quality and calibre of members of Parliament particularly the ruling party has declined over a succession of Parliaments.

So the opportunity to pursue a different career elsewhere out of Parliament has also diminished for obvious reasons. And if your – your talent base of folks  
10 coming into Parliament is weaker then it seems to me that this point about members of Parliament being dependent on that position and therefore even more fearful of that sword of Damocles falling on their head through Section 47(3) is even greater.

**ADV FREUND SC:** Well let us deal with that issue now. You emphasised yesterday the very high calibre of the initial ANC contingent to the First Parliament. Could you just give us a thumbnail sketch of how that has developed over six Parliaments?

20 **PROF CALLAND:** Well in ball brush strokes yes. As I said yesterday that First Parliament '94 to '99 was quite remarkable because of the extraordinary depth of talent and experience and wisdom that was deposited there.

The ANC as I said yesterday deployed virtually all of its leadership and its senior people into Parliament. As

that – as time went by I think Mr – later President Mbeki realised and the leadership of Parliament realised that we could not and perhaps politically should not put all of your eggs in one basket you need to deploy your – your talent in different places and that process began.

So Parliament by Parliament as the different Parliaments went by what I observed as an observer sometimes spending a lot of time in Parliament, sometimes lesser was a weakening of the quality and experience and political weight and perhaps this is the most important point because what we are looking for in oversight is the ability of a member of Parliament to sufficiently – to act sufficiently independently, to be able to say it may be that this will cause embarrassment to the government and or to the ruling party, my party but unfortunately my duty is to the constitution, my duty is as a member of Parliament to ask the right questions, to raise difficult issues even if that is politically costly.

That requires a tough skin. It requires independent mind and it requires the ability to insulate yourself from potentially career limited to use the euphemism, career limiting consequences for you and yourself. And as the time has gone by I have seen that the – a number of members of Parliament who would fall into that category has declined Parliament by Parliament.



**ADV FREUND SC:** Now apart from questions of political weight I would like just to focus very briefly on questions of skill and diligence.

So for example Mr De Freitas gave evidence that in the committee overseeing PRASA his belief was that many of the members of that committee had not opened the packs of paper that they had been furnished before the meeting started. And – and – so if you would – whether you have any experienced that would either back that up or  
10 contradict that and also your view on the – on the skill and training and expertise of members of Parliament as time has gone by?

**PROF CALLAND:** Mr Freund there is some big issues contained within your questions there but let me – let me try and do justice to them.

I think it is absolutely clear that if you are a relatively inexperienced member of Parliament, if you relatively junior in your party's political hierarchy the more training you can get the more support you can get in  
20 playing the service cycle the better.

And it is clear to me that that – that training that capacity building is not present. And nor as several witnesses I have said – have said to the commission in the last week and nor is there the independent research and other capacity in the committee system available to

members of Parliament. It is a kind of 00:10:41.

It seems to me if the strongest committees in Parliament around the world are those that have an independent research capacity that can do the job for MP's. Can provide them with briefings. Can in a sense steer them towards appreciating what are the most important issues of the day in relation to the particular topic that comes before the committee and can therefore prepare them to ask the best questions.

10           Now if you combine the absence with that with the fact that as I think it was Ms Rantho who told the commission last week that often the witnesses for committees come before them at very short notice. Often the documents that they bring with them should have been prepared a week before often already presented on the day. I have seen that countless times, more often than not.

          And so invariably a committee is simply not prepared to – to digest the material and to ask the right  
20 questions. And as you and I know and as – that the Chief Justice well knows when trying to master a brief particularly if it is complex you need enough time to read the brief and you need enough time to reflect on what is really involved in that brief and to formulate in your mind the most important questions to pose.

And time and again I see in committees fail to do that for a variety of reasons. Partly lack of training and capacity, partly a lack of research, capacity for the committee and partly I am afraid to say lack of political will within the committee.

And more often than not in recent years recently committee members particularly on the benches of the ruling party who have simple not done their job, not taken the trouble to prepare themselves.

10 And in the end of course I really appreciated what Ms Rantho had to say when she said we really did not take a stand at one point, I heard her say in her evidence. And that really very crisply puts the point that when it comes to the power of a committee and individual members within it it is their willingness to take a stand on a particular issue that may well be the decisive factor as to whether the service site function is properly played or not.

And more often than not the stand is not taken.

**ADV FREUND SC:** Right now I want to move onto  
20 something more conceptual than factual. You deal at pages 20 to 21 with what does oversight and accountability really mean and you quote one of the English authorities. This is at page 21 of Bundles in the first paragraph you quote Turpin and Tomkins saying:

“The Parliamentary control over the

Executive and I quote “means influence not direct power, advice not command, criticism not obstructions, scrutiny not initiation and publicity not secrecy.”

But you also refer later in your report to two conceptions of oversight and accountability which you call the hard version and the soft version.

So I would like you just to comment generally on what is an incredibly difficult question which is what are  
10 the limits of proper Parliamentary scrutiny and oversight?

**PROF CALLAND:** So it is a complex and very I think very delicate question and it is one that I think the commission is clearly already wrestling with and it is going to have to wrestle with if it is to offer if I may say so Chair cogent recommendations in this regard.

But I see it in these terms Mr Freund that there is a spectrum. At one end of the spectrum is where a Parliament and its committees does nothing. In other words it is completely negligent; it completely fails to even  
20 begin to – to do what is required of it.

At the other end of the spectrum is when it does too much. Now that is very difficult too but why too much I mean a serious and grave bereaves of separation powers will be when the lesser branches of government tries and maybe succeeds in becoming the Executive.

Now clearly that is inappropriate. Parliament cannot over – take over the role and function of the Executive arm of government. And therein lies the limit because if somewhere between those two ends of the spectrum Parliament is trying to exercise oversight. It is trying to meaningfully say to the Executive, this is what we expect of you either by remedying a previous role or taking new action.

And if in those circumstances the Executive does  
10 not respond appropriately, does not do what Parliament asks of it what can Parliament do? It cannot take over the role of Executives so it cannot command, it cannot take direct power.

And interesting this cropped up of course in the House of Commons quite recently with the Brexit debate where Parliament was in a sense trying to take control of the negotiations with the European Unions. It was trying to prescribe to the Executive arm of the British government what it should or should not do in those negotiations and  
20 the Executive was pushing back very hard against it. Parliament say no that is our job we are the Executive.

But finally to complete this answer which could go on a lot longer so I will try and bring it to a conclusion at this point. Somewhere between these two poles there is an equilibrium point.

Now on either side of that equilibrium point on one side is what I would call the soft accountability power which is where Parliament looks at the issue, asks the right questions and then says, well what we want; what we advise, our guidance is as follows. And that is the persuasive power, the advisory power that Parliament has.

On the other side of that equilibrium point is the slightly harder form of accountability, Executive accountability where Parliament says, we want you to do X and Y and we asked you to do X and Y you have not done X and Y now we want to bring sanctions to bear on the situation. That is very, very hard. What are those sanctions available to Parliament because in the end there is nothing in the constitution that really permits sanction in those terms.

Other than the very, very hard rock of hard nut to crack which is to bring a vote of no confidence and to essentially remove the government. And that is a very drastic step.

So what sanctions are available and I think in the end there has to be about taking a stand to use Ms Rantho's expression. It has to be about the committee simple saying, we find the situation intolerable. We will continue to call you back Minister week after week until you take action, until you get this right. We will not

approve budgets until you take the steps necessary to bring proper public financial management to bear on the situation and so on.

In other words again borrowing from Ms Rantho's evidence she said you need to have the oomph was her expression to do the necessary oversight work and that oomph is really where that equilibrium point is. It is about a committee taking a stand, not tolerating lack of action or remedial action from Executive and really imposing its will  
10 as best it can.

**ADV FREUND SC:** And presumably when you talk about the committee you are talking also about the National Assembly which adopts the committees' reports and to which really the committee is accountable.

**PROF CALLAND:** Well I suppose so but the problem I think with that proposition theoretically accurate and true that it is that the National Assembly becomes a very unwieldy instrument for that.

Of course it does have its own mechanisms for  
20 accountability. It has Parliamentary questions which I think it is potentially the most useful device.

Often those questions particularly from opposition MP's fall into some kind of abess because Ministers fail to answer them or answer them properly and then it depends on the system particularly through the leadership of the

National Assembly, the Speaker ensuring that the rules of the National Assembly are adhered to and that the Executive does properly account. And then that takes us back then of course to political leadership, to the strength of that leadership and its independence and its own willingness to stand up to senior members of its own party.

So we had a period of time I do not want to dwell on this, it is not perhaps usually relevant but there was a period of time when the Speaker of the National Assembly  
10 was also the Chairperson of the ruling party and presenting to Mia a very clear conflict of interest.

How on earth was she supposed to find an appropriate strike an appropriate balance between those two sets of responsibilities? And I think that led her into some great difficulties.

**ADV FREUND SC:** Now I just want to...

**CHAIRPERSON:** Just one second Mr Freund.

**ADV FREUND SC:** Pursue this particular line slightly further. I do not ...

20 **CHAIRPERSON:** Just one second Mr Freund.

**ADV FREUND SC:** Yes Sir.

**CHAIRPERSON:** Professor Calland with regard to the limits of what Parliament or a committee, Portfolio Committee may do when it is unhappy with the inaction of the Executive say a Minister or some actions of a Minister



obviously it is quite clear that they cannot actually take over and do what belongs to the Executive domain. But I think that – I think you and I agree that Mr Vincent Smith's understanding of persuasion might not be enough to the extent that I understood him to talk about what I would think is kind of soft persuasion.

Would you accept that Parliament should be able to pressurise the Executive without instructing them what to do? Well what do you say about that? Obviously the forms  
10 of pressure might differ and we can look at what would be available to Parliament. I think you have mentioned the idea that maybe Parliament might say well we will not approve your budget.

**PROF CALLAND:** So Chair

**CHAIRPERSON:** Yes.

**PROF CALLAND:** Yes.

**CHAIRPERSON:** Could you hear me? Did you hear me?

**PROF CALLAND:** Thank you.

**CHAIRPERSON:** Were you able to hear me?

20 **PROF CALLAND:** I did hear you – I heard you until the very end.

**CHAIRPERSON:** Oh.

**PROF CALLAND:** In which I – so I could.

**CHAIRPERSON:** Oh okay, okay alright.

**PROF CALLAND:** No I do not – I heard – Chair I heard the

question I just could not quite hear you at the end so I was not sure if you had finished the question. My apologies for interrupting you but thank you for the question.

**CHAIRPERSON:** Oh yes.

**PROF CALLAND:** I think it is – it might – if I may say so it is exactly one of the best and right questions to be asking and I indeed agree with you in respect of what Mr Smith said yesterday.

He appeared to be saying that our power as  
10 Parliament is only or merely advisory. All we can do is offer advice and then we have to leave the stage, sit back and if the Executive does not take our advice so be it.

I think that goes even further along that spectrum I was referring to. It is south of soft accountability in the sense it is with respect superficial accountability because it is essentially saying we have no power in this relationship. All we can do is advise and you know what you can call our bluff because if you do not do what we advise we are not going to take action.

20 Now clearly if that is your attitude as a Parliamentary committee or as an MP or as Parliament as a whole then all that will do I think is encourage the executive to think well Parliament is very weak and we can essentially do what we like.

So taking a stand to once again adopt Mr Rantho's

neat phrase taking a stand means as you suggest Chair taking action that would be not instructions but would be sanctions which would be saying to Parliament – saying to the Executive excuse me if you do not take remedial action, if you do not change course in the way that we have suggested having conducted our oversight then there are consequences and those consequences may be budgetary, they may be that we pass new resolutions in the National Assembly and we may continue to call the Minister  
 10 or the GG back before this committee every single week until such time that we are satisfied that the Executive has listened to what we have to say and heeded what we have to say.

After all the Executive is in a Parliamentary system such as South Africa's. The Executive is elected by the National Assembly. The National Assembly elects the President. The President then appoints his or her cabinet and the constitution makes it clear that the President and his or her cabinet are directly accountable to Parliament.

20 **CHAIRPERSON:** What about in quotes “reporting” such a Minister to the President. I am saying in quotes. So you have Parliament that is hugely dissatisfied with a Minister who maybe year in year out fails to correct a certain situation. What about Parliament so to speak escalating the issue to the President and say, President in effect you

were elected by this Parliament, Executive power rests primarily with you. You choose your own cabinet, your own Ministers we are very unhappy with Minister so and so. This is what has happened. He or she is doing nothing, has done nothing over an extended period or is insisting on something that in our view is really totally untenable and that in that way then Parliament gives the President the opportunity either to talk sense to his or her Minister or replace him or to side with him and say, I actually think it

10 is right. So back off Parliament. What do you think of – of that? I do not know – I do not think that Parliament does a lot of that at least publicly. Maybe they do it privately. What do you think of that? Do you think them it might work or what do you think?

**PROF CALLAND:** Chair thank you again for the question. The short answer the risk of being facetious as a 00:27:26 which is to say it depends and I am afraid it depends I suspect very much on the character of the President involved.

20 So will it be a President who takes seriously that message that comes from Parliament or will it be a President who says, well I will ride that storm out, I have got a thick skin I control enough power within my party, the caucus is loyal to me, I have nothing to worry about politically, we recently won an election with a good

majority, I will ride it out.

Or will it be a President who says, no this is a very serious matter. Parliament is the elected assembly representing the people. It is taking a very dim view of the actions or inactions of several members of my cabinet that reflects poorly on my choice, my leadership and I am going to take action.

But to break down my answer a little more I think there are three elements or three levels to perhaps  
10 thinking about how to strengthen Parliament's capacity in this regard.

The first is the more technocratic element of tracking and monitoring oversight which we spoke about a little bit yesterday which found favour in two of the reports we referred to yesterday as being a technocratic element that is probably a necessary but not sufficient condition for good oversight. So you track and monitor all of the oversight recommendations and advise you give as Parliament and maybe then secondly as a second level you  
20 need an institutional vehicle to gather all of those recommendations together and I think one of the reports suggested having a – a sort of cross cutting oversight committee within Parliament that would receive all of those oversight recommendations track them and then communicate the success or otherwise of the Executive in

responding to Parliament's wishes and then to table an annual report or a six monthly report or whatever so that Parliament as a whole and the public most importantly can receive that information and act upon it.

And then thirdly on your very point Chair one of the things that has always struck me as interesting is that while Parliament in the '90's in that First Parliament as I said yesterday took this extraordinary and really positive step of setting up a series of Portfolio Committees. A  
10 Portfolio Committee for every single government department, to shadow the work of that particular ministry. What it did not do and has not ever done is to set up an equivalent Portfolio Committee for the President and the presidency.

And I think that one of the things that that parliament in applying its mind to how to strengthen its oversight capacity, would be to think about establishing a committee whose sole objective is to look at the work of the presidency because a great of important executive  
20 work takes place within the presidency and to directly hold the President to account.

**CHAIRPERSON:** Of course, in dealing with oversight matters and being dissatisfied with lack of action or lack of proper action on the part of the Executive on a number of members, Parliament would have to be alive to the fact

that it must still be seen to respect the separation of powers but at the same time not be superficial in the execution of their oversight functions.

It is a striking of that balance that might be difficult but the aim must be to strike the right balance. And of course, in the process, they would have to accept that there may be a number of matters where a Minister would disagree with their solution and have a different solution.

10           And just because the Minister's solution is different from theirs, it does not mean that they have got to try and push the Minister to adopt their solution. Of course, sometimes somebody can say they are coming with a solution but actually you see it just going to make the situation worse. [laughs]

          But where the Minister seeks to do something and there is difference of opinion between Parliament and the Executive as to what the Minister seeks to do will be effective, that might be a more difficult area to handle for  
20 Parliament, I would imagine, generally speaking.

          Than a situation where a Minister is not doing anything or refuses point blank to do something. So there the Parliament may have a stronger case, even to pressurise the Minister or even go to the President.

          And maybe the idea going to the President might

not be necessary if one has regard to the role of the Deputy President as leader of Government Business.

Maybe if the matter is communicated to the Deputy President, that is sufficient because he or she can be expected to share the information to the President but at least he or she would be the Deputy President.

But Parliament would have to choose in what circumstances they would say: Look, we disagree with the Executive and let us leave it at that. Allow the Executive  
10 what believes it will work. We disagree but let us leave it at that. We will not pressurise. We will not do anything. That is one category.

Then there would be categories where they say: No, we should put some pressure. And then it is a question of how much pressure. And then there will be other categories where they say: No, on these types of issues, we will put maximum pressure including escalating it to the President. And whatever.

So it seems to me that Parliament would need to  
20 so to speak pick-me-up-battles. And see which matters deserve to be dealt with in what way. What is your view on that?

**PROF CALLAND:** Well, I broadly and largely agree sir with your analyses Chair. And in the end, although there is a good deal of technocracy and law in this. These are



political matters and in the end, politics being the art of the possible.

You are right, Parliament would need to pick its battles. And that then becomes of a question of judgment, political judgment of the chair of the committee in particular.

And we have touched on it yesterday but did not really get into it but the role of the chair of the committee, and I think you have seen this from some of the evidence  
10 you have received, positive and negative, if I can say so, in the last week.

It shows how pivotal the chair is to whether or not the committee functions well and whether or not the committee is able to make the sort, though subtle, but very significant choices in political judgment. You just decide  
Chair.

And in the end, once again, I think that there will be occasions where the Minister is right and where the Minister is – and his or her staff in the department have  
20 more information available to have more resources.

So they are able to say to Parliament: Well, thank you for that suggestion or thank you for those questions but we disagree for these reasons.

And of course, when oversight works well it is a real conversation. It is not superficial. It is a profound

conversation between branches of government. Well, the then Chief Justice, Sandile Ngcobo describes as a dialogic, a dialogue between branches of the bylaw.

But sadly, that kind of constructive bylaw has been conspicuous by its absence in much of the last decade, I would say, of Parliament's life. Growing through the 2000's but increasing markedly since 2009.

So the scope for Parliament to really have that meaningful conversation with the Executive has been very rare. And it does also takes us back to the resources available to Parliament and its own willingness to get out and about as we discussed yesterday, to actually see for itself what is happening on the ground.

Because if all the Parliamentary Committee does is sit in Cape Town and wait for the Executive to come to it, and if it does not have research resources in the search resources serving the committee, the chances are that the committee would not be in a position to second guess what the Executive says to it.

And if the Executive says: Well, that is a bad idea. We know better than you for these reasons. Unless the committee has the with all the knowledge and a political will to stand up to that, then the Executive will generally role over, the legislature. And that oversight function will be, in a sense, will be crushed.

**CHAIRPERSON:** Thank you. Mr Freund.

**ADV FREUND SC:** Thank you Chair. Mr Calland, you will recall that although we are all interested in these issues in abstract but examining them in the present particular context of the Commission of Inquiry into alleged State Capture and alleged corruption at a high level.

And I presume that when you said a moment ago that there are issues on which Parliament should, as it were, be differential and there are issues on which it  
10 should not.

But if there apparently credible or plausible allegations of corruption in State Capture that would fall in the end at which there would be a higher constitutional duty on the overseeing body to properly investigate.

Would you agree with that?

**PROF CALLAND:** Yes, I would.

**CHAIRPERSON:** Now there is a great deal in your report but I am very conscience of the time constraints. And one of the features of your report is an analysis of the  
20 changing political culture in certain periods.

So if you could very briefly deal with that but the object being to come to try – ultimately to answer the question. If it should be the case that Parliament failed in this instance to do what should have been done in respect of allegations of State Capture and corruption.

What in the political history and the political dynamics is of relevance in explaining and understanding that?

**PROF CALLAND:** So a number of factors are relevant. I think the two that I would pick on today in my answer to your question Mr Freund would be firstly. The political leadership and political climate and culture within the ruling party.

And this is not necessarily a point that is specific  
10 to your specially made in respect of the ANC but inevitable it is directed at the ANC because they have had the majority in every single Parliament since 1994.

But many of the things that one could say about the political conundrum or dilemma that faces a ruling party in a parliamentary system where there is this overlap between the personnel in Parliament and personnel in the Executive arm of Government and Cabinet.

You could say about probably most if not all majority parties around the world. So it is not unique to  
20 the ANC. I think Mr Selfe mentioned it in one of his answers but several considerations would probably apply if the DA was in office or another opposition party was in government.

But having said that. The particular political climate and balance of forces to use the language that is

often use within the ANC has mattered a great deal to the way that Parliament has been exercise its oversight.

The second factor which we touched on earlier this morning was the quality calibre and political heft and cloud of the individual members of Parliament and particularly the committee chairs.

Now take those two factors together and keep them in mind. What one saw during the first Parliament was a high level of talent, political heft and cloud within  
10 the ANC ranks in Parliament.

So you would have backbenches who are now well-known political figures. Some of them in Cabinet who were chairs of committees and who strongly defined that role for their committees during the early part, during the 90's during that first time.

During the next two parliaments. How can one put it? And one must be careful with it because the Mbeki administration was of a really different character to what came later, the Zuma administration.

20 But I do not think that President Mbeki, with all due respect, that some of his political operators were huge enthusiasts for parliamentary oversight. I do not think they welcomed it with open arms. I think they found that a nuisance rather than something to be cherished.

And I think it was partly because although the

early 2000's were a time of relative economic prosperity and stability. On the other hand, the administration was really having to wrestle with these deep, deep and difficult challenges of government.

And as I said yesterday, government is difficult and you are bound to make mistakes. There are bound to be a mire of failings and failures. And Parliament's job if it is doing it properly, will be to inevitably expose those failures, to ask questions that reveal them and which then  
10 direct attention as to how the Executive should do better.

So I think that during the 2000's that was the prevailing rule and it became I think even more apparent during the window at the end of Mbeki's time in government when he was removed by the change in political forces within the ANC. He was compelled to resign in September of 2008.

And there was this little window between September 2008 and about a year later, September/October of 2009 when – I think there was a  
20 looseness to the political arrangements.

And I set the detail out of this in my report. I will not dwell on it now. It is not necessary, I do not think. But what happened during that period was that Parliament was able to stretch its legs a little bit and it was able to get involved with the most important issues of the day in a way

that perhaps been somewhat limited in the previous years.

And to, I think, to a large extent it is because the new power brokers and powerful actors in the ANC were, in a sense, had taken their eyes off Parliament. They had other concerns.

For example, during that time, that I have just referred to, Thuli Madonsela was appointed by an ad-hoc committee of Parliament to become the new Public Protector, something that, no doubt, Mr Zuma and his close  
10 allies were later – were later to regret very deeply I would think.

So Parliament stretched its legs during that period but the truth of the matter is, the new Parliament the 3<sup>rd</sup> Parliament in 2009 to 2014 really marked to see change. From there on, I think, Parliament became weaker and weaker until that moment in 2017 when, once again, the whims of change blew through the corridors of the ANC, the balance of forces shifted remarkable.

And as Ms Rantho described very well, I think,  
20 reading, certainly, between the lines of her evidence. Suddenly it became permissible to take the steps as a committee to begin to ask the real questions and to play the role of oversight in a much more meaningful way.

And of course, one should not lose sight of the fact that the sequences of events is important there because

Mr Gordhan and other fierce critics of President Zuma had been dismissed by some of his from his cabinet late at night on the 30<sup>th</sup> of March 2017.

And it is no coincidence that two months later one sees the start of this process of that committee, at least, the Portfolio Committee of Public Enterprises, taking out its cajoles, taking up its responsibilities of the Constitution and taking a stand then having the Eskom Inquiry that you have heard about.

10           And of course, the second fact that year that was extremely relevant and I heard Deputy Chief Justice put this in a point to Ms Rantho although she could not particularly willing to accept it.

          But in my view, the fact of the matter was that the fact of a National Executive, the National Elective Conference of the ANC at the end of 2017 be on the horizon and knowing that there had been a real shift in the balance of power in the ANC, knowing that people were positioning themselves strongly to back a reformed  
20 candidate in the form of Cyril Ramaphosa, knowing that there was a reasonable good chance that there will be a shift in power at the top of the ANC.

          Then, again, the cajoles that were controlling Parliament and the ANC caucus were loosened remarkable and people like Ms Rantho were able to being to do their



job. Too little too late, I would say strongly.

Parliament failed in its duty in the preceding years. It was sleeping or it was deliberately asleep or it had been put to sleep on watch but it failed in its oversight and responsibilities. I have no doubt of that.

**ADV FREUND SC:** Well, that is the very point that I wanted to take you to. I appreciate the what you have sketched but of course a great deal of the work of this Commission concerns alleged offences in the period that  
10 you have described during which the cajoles controlling, as it were, exercised the restraining influence on Parliamentary oversight.

Let me just elaborate a little bit more in details. What is explains as you understand it, as it were, at the end of what you referred to in your pieces, the Prague Spring and up to the time that you have just described where in the middle of 2017 some light seems to shine in again on parliamentary oversight.

**PROF CALLAND:** What explained the positive, the  
20 ...[intervenes]

**ADV FREUND SC:** What explains the negatives that preceded that?

**PROF CALLAND:** Well ...[intervenes]

**ADV FREUND SC:** That you say was the failure.

**PROF CALLAND:** Well, it was a failure of political

leadership. So it was a failure by the political leadership of the ANC to take Parliament seriously and it was – and one of the many examples that one can bring to bear, it would have been – and deal with this of many cases in my report. The Nkandla matter.

So the Public Protector's report comes before Parliament. Instead of taking it seriously and do what the Constitutional Court later said it should have done which was to support as it is constitutionally required to support  
10 the Public Protector, attracting the body, in ensuring that the Executive heeded the remedial action but the Public Protector report steps should have been taken instead of which the majority party put down and shut it and point blank refused to do so.

It took a highly adversarial position in respect of the Nkandla report from the Public Protector. An ad-hoc committee was set up and in a remarkable display of unity, the like of which I do not think I have ever seen of watching Parliament, the opposition parties on bank, all of  
20 them together walked out from that process because they recognised it to be what it was, a major and grave usurpation or failure on part of the majority party to respect their constitutional duty.

It was a very cynical act and it does not matter who in particular the actors were. I am not going to name

them. But they were, for whatever reason, you would have to ask them, they felt beholden to the leadership of the ANC at that time, Mr Zuma.

They felt required to remain loyal to him and they were doing his bidding in terms of preventing Parliament from doing its job.

**ADV FREUND SC:** Right. Now I want to start drawing to a conclusion and you deal with this from page 30 of your report in the bundle and I see that you highlight in the  
10 middle of page 30 in bold print, probably in bold print the entire report, what you see to be the primary challenge. If you can then just deal with that, please.

**PROF CALLAND:** So the word that I use in my report which is the conclusions and recommendations is the word insulate.

So throughout my time watching Parliament and watching politics in general what strikes me is the inevitable is that members of Parliament who stand up to the leadership of their own party will always face  
20 pushback. That is the nature of politics.

So the question is how can one as an institution find ways to insulate that individual from those pressure points so that they can continue to press on do what is required of them and to honour their responsibilities under the Constitution.

And there is a range of answers to that. We have traversed quite a few of them already in my evidence but they range from taking practical solutions within the rules of Parliament, the system of Parliament. It becomes an issue of training, which by the way, I think should include ethics training.

Before I forget I have to mention that I spoke to a very senior ANC member, a former member of Parliament, last week who persuaded me that ethics training in general  
10 but perhaps training related to oversight functions in particular should be legislated.

And if I can come back Mr Freund briefly to what we have discussed yesterday in relation to the Corder Report and Professor Corder's recommendations that there that legislation should prescribe the oversight function and how it should be carried out.

As I said yesterday, the time is probably not right for that legislation back in the early 2000's. I think it was a good argument by which I accepted it at the time that the  
20 better course is to try and create the convention of practice of accountability as a form of insulation.

Because if the convention is the backbench MP's can and should ask difficult questions for MP's and not suffer career limiting consequences as a result. And that convention is one form of insulation.

But if that convention in practise is not present and it has not been present and has not been created, then maybe we do need to return to the Corder idea of legislation that would require as a matter of law MP's to do certain things in performing that oversight function.

And then of course, the – as I said the culture and climate within the institution, within the ruling party matters tremendously.

10 So all of the money in the world, all of the investments and time, energy and resources to fix rules, to create systems. All of that would count, I suspect very little unless the leadership is one that says it is permissible to ask difficult questions.

It is permissible to take a stand. In fact, we welcome that and you will not only not suffer negative consequences but you will be celebrated as a MP of excellence, of quality, somebody is deserving of the nation and is doing the right thing for the country and for the political process.

20 Of course, there is a touch on naivety, I suspect, in that proposition and in which case I plead guilty but in the end it requires leadership to give that political space to people to take that sort of stand.

**ADV FREUND SC:** And you touch very briefly yesterday and you touch again briefly at this point of your report on

the reform of the electorate system. Just in short, as I understand it, you believe that the time has come to relook at the recommendations of the by the Commission, not as a - but as a part of a reformed package.

**PROF CALLAND:** Yes, I do. Some people regard electorate form as a – I think see it as a silver bullet that will solve many of our political problems. I do not see it in that way.

I am seeing the opposite political system or  
10 electorate system, I should say, in the United Kingdom when I was a young professional, a young political activist.

I saw it there. It has certain advantages. It also, by the way, comes with certain disadvantages such as the unfairness, you know, in a purely first class pro-system where is no proportional representation.

But the think the report is notable because it seems – it seeks to strike a balance between the principle of proportionality and proportionate representation in the Constitution and the upside that comes from direct  
20 constituency representation.

And as I described yesterday from my own experience with the British constituency system. What a constituency system can do is help provide the individual member of Parliament with some degree with insulation because he or she can say to the chief whip, can say to

the party leadership: Yes, of course I agree with you. Yes, of course I want to remain loyal but back in my constituency people are unhappy about this.

They are unhappy about the state of schools, public service delivery or whatever. And they are requiring, they are demanding that I take a stand in Parliament and if I do not do that, they will probably choose somebody else to represent them next time and indeed we even may lose the seat.

10           Now that political process an individual MP with some degree of political insulation and I think it is why it is high time that the Van Zyl Slabbert Report is brought out of the dusty drawer where it sits. It is given proper consideration.

Of course, the New Nation decision of the Constitutional Court require Parliament to consider how best to change the law to permit independent candidates to stand, is perhaps the hook and the ideal timing in a sense for that review of the electorate system as a whole.

20           And that in turn would allow Parliament to revoke Section 37(3)(c), the one we had discussed. This, I think really, problematic provision which really – not so much chills, but sends a vast icicle through the institution of Parliament in terms of limiting the scope, the political space that individual MP's may have to take a stand

against their own party and their own seniors and the Executive.

**ADV FREUND SC:** Now I understood you to be stressing the importance of political culture particularly within a majority party. The importance of leadership and the stance it adopts *visa vie* the question of oversight.

But you do an addition under the section that you call the rules of engagement and broadly speaking, would it be correct to say that you are encouraging the relooking  
10 of the Van Zyl Slabbert Report, the OVAC Report], the rules revision.

You feel that there is a room for Parliament itself perhaps to reconsider the adequacy of its institutional arrangements as regards to oversight?

**PROF CALLAND:** Yes, and I choice this Mr Freund in my – not to go through the OVAC report and independent channel(?) reports and cherry pick what I thought was the best recommendations.

I think that requires a much more considered  
20 review by Parliament itself. Parliament, if it is serious about remedy their failures and is serious about ensuring there is no repeat of its failure with regard to State Capture, it has to look at this, it has to take all of those reports seriously and it then has to come up with a new package, a new system within the institution to strengthen



its hand and to enable to play its role more effectively.

**ADV FREUND SC:** Professor Calland, there is a great deal more material in your report but I am watching the clock. I have now taken the hour that was allocated. And perhaps let me just ask you one general question and that is this.

What would you say is your core message and your core argument?

**PROF CALLAND:** So, I guess my core point is that we  
10 need to find a way to insulate parliamentary committees and the members of parliamentary committees particularly in the majority party to give them political space, the institutional space to do what the Constitution requires of them.

That requires, no doubt, some tinkering with the system of Parliament, with the rules, with capacity, with resources, with training. All of those things.

But this is not a technocratic fix. This requires a wholesale review of the whole system including the  
20 electorate system. This is not, in cryptic terms, about replacing the off spinner with a leg spin.

This is about looking at who the captain is, who the coach is, the culture within the team, the selection process, youth development, training, preparation. The whole package.

**ADV FREUND SC:** Yes, perhaps if we change some of our spinners we would not have been where we are in Pakistan. Mr Chairman, that is as far as I want to take it. I do not know whether from the Chair whether there are further issues that you would like to raise with Professor Calland.

**CHAIRPERSON:** Yes, Professor Calland really what one is trying to do here is to think about protection of members of Parliament from any adverse consequences for  
10 genuinely performing their oversight functions or...

Ja, that is what one is doing. You use the term insulation. That is fine as well. But I suspect that one could have a law that says no party may prejudice or discipline of Parliament or performing its – or his or her oversight functions but you may have a situation which is different from what Dr Makhosi Khoza told me where she said well, charges were brought against me by the ruling party for voting in support of the motion of no confidence even though the Speaker had assured members of  
20 parliament that there would be no adverse consequences and even though the judgment of the Constitutional Court seemed to say if there is a conflict between a member's loyalty to his or her party and his or her loyalty to the Republic then the loyalty to the public should prevail but charges were brought against her that, as I understood her

evidence, unashamedly were about the fact that she had voted in favour of the motion of no confidence. A number of – in many cases it might not happen like that, in many cases it may be that a member who is performing his or her oversight functions too well, if I can put it that way, too well, for the ruling party or a ruling party might be managed out of parliament without her exit from parliament being said by the ruling party to be in any way connected with how she or he has performed his or her oversight  
10 functions but in the end people would get to know that, you know, if you look at what has happened over the past x number of years people who have acted in a certain way have somehow found themselves not coming back to parliament or something like that.

What can be done to either encourage a ruling party or a ruling party, any ruling party in the future either encourage them to allow their members of parliament to perform their oversight functions the way they should or what can be recommended or put in place that would  
20 discourage a ruling party or any ruling party in the future from taking adverse decisions against or having a negative attitude towards member of parliament, its member of parliament who seek to do really nothing more than do the job that they are there to do as parliament to the best of their ability? Do you have any ideas in terms of what can

be used as incentives for the ruling party or any ruling party to not to act against people who do their job or just something that could act as a disincentive?

**PROF CALLAND:** Chair, thank you. I probably pulled my punches somewhat earlier when I answered Mr Freund's question about the shift in the prevailing climate in the fifth parliament from 2009 onwards. There is no doubt that there was throughout the body politic and the ruling party a climate of fear. I experienced many occasions where  
10 individual members of parliament expressed - ANC members of parliament expressed that to me, people I had known for a long time who were anxious about even talking to me, who refused to discuss matters on cell phone, who, when one met them for tea, removed the battery of their cell phone . I do not want to be melodramatic about it but the point is that during that period it became increasingly difficult even for thick-skinned, experienced politically savvy politicians within the ruling party to operate in a way that even begun to suggest that they were taking a stand  
20 or resisting the leadership and in any way threatening the new political economy that was building up around the President of the ANC.

There were huge stakes involved and of course this Commission is focused on those and I think in answering your question what can be done, the first thing that can be

done, because I have no doubt that the report of this Commission will be one of the most important documents in the life, the first hundred years of this new democracy because it will, I have no doubt, examine the institutional failures that allowed state capture to take its hold on the body politic and to threaten the constitutional democracy and continues to do so.

So what this Commission in its final report says about this topic I think will be very important, will carry  
10 weight. In itself it will help remind everybody of the responsibilities of MPs and to remind to remind the political leadership of this country that no individual MP should ever suffer negative consequences or reprisals as a result of having asked the right questions taken a stand and stood up against wrongdoing or against inept conduct by the executive.

Secondly, I think legislation prescribes the way in which oversight is performed, may help to some extent, it may at least provide a safety blanket for an individual to  
20 say well, I am doing what the law requires of me. Of course, in a sense the constitution already does that, but legislation that sets out as [indistinct] 07.07 sought to do, the detail of that oversight function could prove to be useful.

Ultimately, though, Chair, I am afraid it is

dependent upon the good leadership of a political party and a political system to take that stand and to actively demonstrate and showcase that when an individual does the right thing, speaks out, takes the stand, that he or she will be rewarded. Too often in the past, and Ms Rantho is of course a good example, having too late in the day perhaps but having finally done her job as Chair as the Public Enterprises committee from mid-2017 onwards, her reward was be removed from parliament whereas others, 10 some of whom have been very gravely implicated by evidence in this Commission, came back to parliament, not only came back to parliament but found themselves as chairs of committee in the new parliament and that sends completely the wrong message out and I think it is something, if I may say so, that this Commission should not and comment on and recognise that it was extremely unhelpful. What that does is cementing the ideas in the minds of MPs the idea that such behaviour will not be well taken by the leadership, it will in fact be career-limiting, to 20 use the euphemism.

And lastly, fourthly, I think back to the electoral system there is no doubt that individually elected, directly elected members of parliaments will have more strength, they will have the legitimacy and the direct power that comes from direct election or gives them a little bit more

political muscle in find a new balance between the executive and the legislature. Thank you.

**CHAIRPERSON:** Is there merit in – would there be merit in considering the possibility of creating room for a member of parliament who is able to say that the only reason why I have been managed out or dismissed – maybe, you know, managed out, the only reason why I have been managed out of parliament is – or not been brought back, is either solely or dominantly because I have  
10 sought to ensure that I do my job as a member of parliament in terms of parliamentary oversight properly. Is there any – would there be any merit in thinking about whether there should be a possibility of a member of parliament who can show that to be – to have the possibility of being granted some monetary compensation. I mean, if – and, of course, if one is thinking about that, the next thing is who must pay, you know? And maybe the party that manages him or her out must pay so that over time it can realise that there is cost to managing people  
20 out of parliament just because they are doing their job properly, you know?

Because for many MPs, I would imagine, who may wanting to do the right thing but see the threat of losing their job as MPs and not any alternative or viable alternative. The one thing that would be uppermost in their

minds is I will not be able to put bread on the table for my family, what about my children at school and whatever, whatever, but maybe, just maybe, if they know that well, I am not assured of compensation but there is a forum and there is a possibility and I think I can improve my case that in terms of performance I have really done nothing wrong other than that was is considered to be wrong by my party is proper performance of my duties as a member of parliament. Is there – would there be any merit in  
10 considering whether something like that should be even thought?

**PROF CALLAND:** Chair, although I respect the sentiment that lies behind your thought, I am afraid I do not see merit in it, I see only problem in terms of both the law and the politics of it. Causation would be just one of many I think challenges.

**CHAIRPERSON:** Yes, yes.

**PROF CALLAND:** In the end we represent a – I am sorry.

**CHAIRPERSON:** No, no, continue.

20 **PROF CALLAND:** In the event – forgive me DCJ, I am sorry.

**CHAIRPERSON:** No, I am sorry please go ahead.

**PROF CALLAND:** Well, I am simply going to say in the end who is chosen to represent a political party is an innately inherently a political choice for that political party



and in the end for stronger safeguard in relation to poor choices in that regard is through the election process where the electorate decide whether or not a wise choice was made and I think the institutional answer to your question maybe in the form of that tracking and monitoring system earlier and the ability of committees to publish reports that are strong in terms of saying we took a stand, we asked the executives y, x and z, it has not responded in the way that it should have done, here is our report and  
10 signed by the members of that committee and then that report has to be the testimony, as it were, the legacy of that piece of work by that committee and the electorate and the media and social civil society observers can then see that, see parliament has done its job and then in the political discourse that should wash through and be weighed in the balance.

**CHAIRPERSON:** I guess part of your answer maybe takes one to the proposition that whatever one does with regard to the issue of parliamentary oversight and what a ruling  
20 party might do or might not do and so on, somewhere one has got to say the electorate, the voters must take a view of how every political party is doing, what they are doing and, so to speak, punish it if it is doing something that the electorate disapproves of and that is one of the things that must be taken into account, namely we cannot provide

concrete solutions for all problems that are, you know, guaranteed to work but also we must – because remember that this is politics, this is a political area and the voters, you know, have a very important role. If they disapprove of something that a political party is doing, if they – when they want to show their disapproval they do and so maybe in a way part of what that says is we must just, whatever we do, we must maybe not be too ambitious and we must accept that there are certain things that just cannot be

10 guaranteed.

**PROF CALLAND:** Yes, I agree, Chair, there are certain things where a law can possibly have a positive impact or not rule, I should say, can have a positive impact because the choices would have been made, the issues that are in on the table are inherently political. Where it comes to the question of the electorate, I agree with you that the issue must be to what extent is the electorate able through the information available to it to make an informed considered judgment about the performance of the people that it has

20 elected and one of the defects I would argue of the current system is because of the list system and the control of the list system by political parties and their leadership.

The electorate has almost no say in who is on that list and therefore has a very difficult choice to make election time choosing just between parties.

Even if having looked at the list it is unhappy with the fact that certain individuals may be on that list. The direct representation and again I caution, it is not the solution to everything, but it at least provides the electorate with the knowledge of who it has chosen, an individual that it can name, see and directly hold to account and that in individual, in theory at least, and often in practice from my experience, the electorate will then hold that individual directly to account making sure that he or she raises the issues in parliament that that community and that geographically contained constituency want him or her to raise in parliament and that, I think, would be an improvement or could be a significant improvement.

**CHAIRPERSON:** So I think one can say based on your evidence and maybe the evidence of others that this is not a situation where one can come up with one proposal to say this is what needs to be changed and that fixes the whole problem, it is a situation where probably a number of things might need to be done, each one of which is not on its own enough but it contributes, to a certain degree, to changing the situation. I mean, you have made the point that the constituency system is not a panacea but it has a role to play and then I think – I think you may have said yes but maybe another witness said this to say well, certainly Ms Mazzone, I think, that there may be a need for

certain portfolio committees to be chaired by a member of parliament who does not belong to the majority party. That is one.

Of course, when one looks at SCOPA which has been chaired by member of parliament who does not belong to the ruling party, its check record appears to be that it is doing very well or it has done very well over the years. There may be different views of success but there seems to be some consensus that, you know, it has done  
10 reasonably well compared to some portfolio committees and when Mr Godi was giving evidence I asked him what he attributed that to, you know, then he told me about how he, as Chairperson, you know, made a decision to go out of his way to try and get the committee to work as a team.

So it may be that one, the fact that it is somebody from a different political party has something to contribute plus the personality and leadership skills of a particular individual – but you may have mentioned other possible measures as well.

20 **PROF CALLAND:** Mr Chair, thank you, I think you are right, I agree with your initial point, your analysis, and you ended up by speaking of the role of the committee chair, I would submit that the role of the committee chair is pivotal, it is perhaps the most important set of positions in the whole of parliament bar the Speaker.

The quality, calibre independence and leadership skills of the committee chairs determines almost 90%, I would say, of whether that committee is able to function effectively and do its job under the constitution and so, in some respects, it does not matter whether that chair is an opposition or ANC or ruling party chair, what matters is whether they have those skills.

Often the membership of the committee will matter a lot, so I saw some committees, most effective over the  
10 years were the ones where the membership of the committee was very consistent over a long period of time, so the Justice meeting, for example, Justice and Constitutional Affairs committee was one of the best committees in parliament for a very long time over several parliaments because although it had a very robust ANC chair, he had leadership skills and he was willing to listen to the opposition and the opposition and ANC benches were able to operate as a team with a level of trust and respect that ensured that yes, the ANC's majority was respected and  
20 understood, as it needs to be, they have the majority and we should not ever lose sight of that.

So I am very careful to reach for counter majoritarian fixes, fixes that actually in a sense fail to recognise or respect the fact that one party has won a majority at an election. We should be very careful of that.

What we need to do is find institutional solutions and remedies that strengthen the ability of majority party members in parliament to honour their duties under the constitution, as I have said, and to take a stand where necessary against more senior members of their own party. That is the nub of this.

**CHAIRPERSON:** Thank you very much, Professor Calland, I do not know, Mr Freund, whether there is anything arising that you would like to ask?

10 **ADV FREUND SC:** Chair, if I might.

**CHAIRPERSON:** Yes.

**ADV FREUND SC:** Professor, there is just an issue that I think is not brought to the fore although I know Professor Calland would be sensitive to it, so I would just like to bring to the fore. The question of party discipline and the legitimacy of party discipline is a factor that I think you recognise, am I correct, Professor Calland, and the discussion that we are having is not about the subversion of that principle but rather about recognising that there  
20 must be scope for an exception in fairly limited circumstances against pressure from a political party, from a member of parliament, not to follow conscience, not to follow constitutional values but I just want your commendation on the legitimacy of party discipline particularly in the context of a PR list system constitution that we have and

just to indicate that you are sensitive to this issue and what its implications are.

**PROF CALLAND:** Mr Freund, I am sorry, you cut out right at the beginning of your question. What was the principle that you are referring to?

**ADV FREUND SC:** The principle is that I understand that you are aware of and I think that you also accept the legitimacy of, the core principle of party discipline in our system but I am putting to you that even though that is the  
10 case, we are really arguing that in certain limited circumstances some type of exception must be recognised to protect the *bona fide* MP following conscience and particularly when there is this conflict between conscience - constitutional values on the one hand and party instructions on the other hand. If we could just get a comment on that?

**PROF CALLAND:** Well, of course, political parties can only be effective political creatures if there is a sufficient discipline within them, they require a level of discipline  
20 otherwise they fall apart and parties that fall – that are ill-disciplined rarely succeed and so the desire of party political bosses and managers to instil a sense of loyalty and discipline is not only unavoidable but probably entirely appropriate.

What is not appropriate is where an individual

member of parliament is put under pressure, legal or illegal, where they are intimidated, where they are threatened and where they are pushed into a position where they feel they cannot raise an issue even though it may be an issue of great significance and importance such as corruption, such as maladministration, such as gross negligence or incompetency in the state and if they are in a position where they feel they cannot raise those issues, either within the ANC, within the ruling party or in  
10 parliament then of course that, I would argue, if a failure of leadership, a failure of political culture and so when I think it was sent by senior members of the ANC after one of the no confidence votes that individual MPs who had voted against President Zuma would be sought out and disciplined, then of course that is a problem.

Where you a maverick MP who decides to dishonour the political manifesto, policy manifesto and ambitions of a ruling party, if he or she then steps out of line they must accept the consequences, but that is an entirely different  
20 proposition, it is an entirely different situation. I hope that helps.

**ADV FREUND SC:** Yes, thank you.

**CHAIRPERSON:** Thank you very much Professor Calland, thank you for coming, availing yourself to assist the Commission, we appreciate it very much.



**PROF CALLAND:** Thank you very much.

**CHAIRPERSON:** I will now excuse you and if we need to ask you to supplement your submission and deal with certain questions I am sure if we approach you, you will make time for it.

**PROF CALLAND:** Very well. Thank you very much indeed, Deputy Chief Justice.

**CHAIRPERSON:** Thank you, you are excused.

**ADV FREUND SC:** Thank you. Chair, I presume at this  
10 stage I too shall be excused and I will leave you to matter related to Eskom.

**CHAIRPERSON:** Yes, that is what we will do and it is eleven o'clock so I think I will take the tea adjournment now. That will give them the work stream team time to set up and then thereafter when we resume we will then continue. So you are also excused, Mr Freund.

**ADV FREUND SC:** Thank you, Chair.

**CHAIRPERSON:** Thank you. Mr Seleka?

**ADV SELEKA SC:** Morning, Chairperson.

**CHAIRPERSON:** I am alive to the fact that we have eaten  
20 a lot into your time. We will do the best we can to compensate you for it.

**ADV SELEKA SC:** No, in order, Chair.

**CHAIRPERSON:** Yes, if I take the tea adjournment now and we resume at quarter past eleven will that give you

enough time to set up or should I add more time?

**ADV SELEKA SC:** Until twenty past, Chair.

**CHAIRPERSON:** Twenty past?

**ADV SELEKA SC:** Twenty past, yes.

**CHAIRPERSON:** Ja, okay, alright, we will take the tea adjournment now. We adjourn.

**INQUIRY ADJOURNS**

**INQUIRY RESUMES**

**CHAIRPERSON:** Good morning once again Mr Seleka,  
10 good morning everybody.

**ADV SELEKA SC:** Morning Chairperson.

**CHAIRPERSON:** Yes, are you ready?

**ADV SELEKA SC:** We are ready Chairperson.

**CHAIRPERSON:** Yes.

**ADV SELEKA SC:** Dr Nteta is our next witness.

**CHAIRPERSON:** Good morning Dr Nteta.

**DR NTETA:** Good morning sir.

**CHAIRPERSON:** Thank you. You will have to administer  
the oath or affirmation again because of the lapse of time,  
20 registrar please administer the oath or affirmation.

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

**DR NTETA:** Ayanda Komotso Lindiwe Nteta.

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

**DR NTETA:** I do not.

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

**DR NTETA:** I do.

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

**DR NTETA:** So help me God.

**AYANDA KOMOTSO LINDIWE NTETA:** [duly sworn,  
10 states]

**CHAIRPERSON:** Thank you, you may then proceed Mr Seleka.

**ADV SELEKA SC:** Thank you, Chairperson. Dr Nteta, you can you hear me clearly?

**DR NTETA:** Yes, I can hear you clearly, thank you.

**ADV SELEKA SC:** Thank you. Just by way of introduction to Dr Nteta's evidence Chairperson or continuation of the evidence...[intervene]

**CHAIRPERSON:** Oh yes, if you can just help the public to  
20 remember what we were dealing with and where we left off and what you seek to cover with her evidence as well as with the evidence of other witnesses of the work, Eskom work stream district.

**ADV SELEKA SC:** Yes, okay thank you Chair. The Eskom work stream let me start with that one Chairperson. The

Eskom work stream this week is scheduled to present evidence over a period of three days from today, tomorrow, and Thursday.

Dr Nteta is the first of the six witnesses who will be testifying on the Eskom work stream this week. We will have Ms Venete Klein after Ms Nteta, Dr Nteta. Tomorrow we have Dr Pat Naidoo and Ms Viroshini Naidoo and on Thursday, we are scheduled to be lead the evidence of Mr Mark Pamensky and if time permits Chairperson Ms  
10 Suzanne Daniels as well. Starting with today's witness, Dr Nteta is a former employee of Eskom. She was in the department or division called fuel sourcing as a senior manager in that division. She has testified previously about a couple of aspects which include her interaction with Mr Tony Gupta, her involvement in the Brakfontein contract that was concluded between Eskom and Tegeta.

And today, she will go into the details of the submission that was prepared in regard to the R659million pre-payment. We had started with it but we could not  
20 finish because we had Mr Molefe that came to testify last time. Dr Nteta you had followed; you have followed that introduction?

**DR NTETA:** Correct.

**ADV SELEKA SC:** Yes. Chairperson the bundle we are using is Eskom Bundle 14, one four, Dr Nteta's affidavit is

found in Exhibit U28.

**CHAIRPERSON:** Is or her affidavit is actually should be Exhibit U28.1.

**ADV SELEKA SC:** Correct Chairperson.

**CHAIRPERSON:** Ja.

**ADV SELEKA SC:** It has been admitted as Exhibit U28.1.

**CHAIRPERSON:** Ja, what page were we on when you...[intervene]

**ADV SELEKA SC:** We are on page 71.

10 **CHAIRPERSON:** Okay, thank you.

**ADV SELEKA SC:** Thank you Chair, my microphone is too loud in my ears Chair.

**CHAIRPERSON:** Sorry?

**ADV SELEKA SC:** I said, my microphone is too loud on my ears but I suppose it is meant to assist for Dr Nteta to hear me. Dr Nteta you can hear me?

**DR NTETA:** Yes, I can hear you.

**ADV SELEKA SC:** Yes, thank you I think they have adjusted it so I can hear myself.

20 **CHAIRPERSON:** Ja, okay.

**ADV SELEKA SC:** Dr Nteta we are going to lead your evidence on what is or what was a submission made to the Board, the Board Tender Committee in April 2016. That submission motivated for a pre-payment decision by the BTC of an amount of R659million to Tegeta. We can see

from your affidavit and the brief testimony you gave last time that you took part in the drafting of that submission.

I would like you to explain to the Chairperson, how did the drafting of that submission come about? In other words, go to the beginning of what caused the drafting of the submission to be made. So just as you start, remember that we are, from a time point of view, we are on the 8<sup>th</sup> of April 2016 and you are going to take us through either to before that and going forward after the 8<sup>th</sup> of April  
10 2016.

**CHAIRPERSON:** I am sorry before Dr Nteta says, is the submission you are talking about Mr Seleka the one that is referred to at page 73, that heading preparation of the submission to the Board Tender Committee.

**ADV SELEKA SC:** Yes, it is thank you Chairperson.

**CHAIRPERSON:** Or you can just tell me where I find it.

**DR NTETA:** May I commence?

**CHAIRPERSON:** No just one second Mr Seleka is still trying to answer my question or you can take me to the  
20 page where the submission appears.

**ADV SELEKA SC:** Okay Chairperson, but in terms of the affidavit, I mean, in terms of the evidence Chair I am still in the affidavit, the submission...[intervene]

**CHAIRPERSON:** Just be careful not to speak too far away from the mic.

**ADV SELEKA SC:** Yes, page 190 Chairperson, one nine zero, or Chair were you asking about in her affidavit where she is dealing with it?

**CHAIRPERSON:** Well, I think your question you asked her I think to tell me how a certain submission was, how it came about that it was heard and so on. So, and then I looked at the affidavit to see where that is then I saw that heading but I think that what you have just told me means that you are asking about the submission that appears at  
10 page 190.

**ADV SELEKA SC:** One nine zero, that is correct Chairperson.

**CHAIRPERSON:** Ja, in the affidavit is it dealt with somewhere just so that I can link the two but if it is not it is okay.

**ADV SELEKA SC:** No it is Chair. She will - she deals with the draft from paragraph 8.2 onwards.

**CHAIRPERSON:** Okay, maybe paragraphs 8.2 to 8.11 is how it came about and then 8.12 and following is the  
20 actual preparation.

**ADV SELEKA SC:** Yes, for instance Chair on page 74 of her affidavit paragraph 8.18. The submission she is referring to, the last paragraph which is an exchange between herself and Ms Daniels.

**CHAIRPERSON:** Yes, 8.19 she says:

“While preparing the submission documents to be I realised that.”

Blah, blah, blah, blah. Okay no, that is fine. Let us - but at least you are talking about the document that starts at page one nine zero.

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:** Okay, Dr Nteta if you still remember the question, you can go ahead and answer. If, in the meantime, with all the questions from me you have lost  
10 track of the question then Mr Seleka can repeat it.

**ADV SELEKA SC:** Indeed, Chairperson maybe what I should do for the Chairperson is to refer the Chairperson to the signed submission. That is in the Tegeta reference bundle because what Dr Nteta is going to testify about is how the submission was drafted but she did not touch the signed one. So the signed one it is in the Tegeta reference bundle, which is Eskom Bundle 18, one eight and that is on, I think it is 18, 18A Chairperson on page 292.

**CHAIRPERSON:** Yes, okay. Is that the same document  
20 as the one at page 190 in the other bundle but the difference is that this one is signed.

**ADV SELEKA SC:** Indeed, the one on page 90, it's a draft, it ends up being that is the final version of the draft.

**CHAIRPERSON:** Oh, the final, okay.

**ADV SELEKA SC:** So they will not be exactly the same.



**CHAIRPERSON:** Ja.

**ADV SELEKA SC:** It just shows you the evolution of the document.

**CHAIRPERSON:** Ja, okay. But at this stage, you are asking about the one at 190?

**ADV SELEKA SC:** Correct Chairperson.

**CHAIRPERSON:** Ja, okay.

**ADV SELEKA SC:** How she drafted it, how it came about.

**CHAIRPERSON:** Okay, I guess you might wish to just  
10 repeat your question.

**ADV SELEKA SC:** Yes. Dr Nteta, if I may repeat the question. I was saying having started with the evidence regarding the Board's the submission to the Board for a pre-payment of R659million, could you please explain to the Chairperson, how the drafting of that submission came about? And from a timing point of view, we are on the 8<sup>th</sup> of April 2016 you can take the Chairperson to the events prior to the 8<sup>th</sup> of April 2016 and onwards.

**DR NTETA:** Thank you. So with regards to the drafting of  
20 the submissions that went to the Board of 11<sup>th</sup> April 2016. I am going to take you to before the 8<sup>th</sup> of April and in fact, what I would also like to do before I start is also just refer to – I am going to give a few definitions because I am going to assume that when I do talk I am going to be using – I am going to say Eskom language.

So I am going to be referring to the procurement procedure which we call the 3210/34. And this is was available in Mr Mabelane's affidavit where he talks about the different roles in terms of people within procurement and within the organisation and he speaks specifically in reference to the document.

The roles of, for example, the group executive for group technology, the divisional executive for primary energy, he speaks of a cost centre manager and end user  
10 and the procurement.

**ADV SELEKA SC:** Sorry Dr Nteta.

**DR NTETA:** Yes.

**ADV SELEKA SC:** I would like you to tell the Chairperson even before that, when you are approached by Mr Ravindra Nath of Tegeta because I think that is where the whole story starts.

**CHAIRPERSON:** I think before we...[intervene]

**DR NTETA:** Yes, I am getting there.

**CHAIRPERSON:** Yes, before Dr Nteta your mic is too far  
20 away from you, Mr Seleka yes so I could not hear for example, the name of somebody you mentioned in what you were saying to Dr Nteta.

**ADV SELEKA SC:** Yes, that is Mr Ravindra Nath.

**CHAIRPERSON:** Okay, thank you. Dr Nteta.

**DR NTETA:** Okay. So, prior to the 8<sup>th</sup> of April, Mr

Ravindra Nath who is the CEO of Tegeta had approached me and indicated to me that they have an ability to provide us with coal for some several months. He had approached me because they currently had a contract with Eskom for the similar supply and that particular contract was due to end around the 13<sup>th</sup> to the 15<sup>th</sup> of April, by them providing all the coal that is required.

So I would say approximately end of March, in that period, he then approached me and said that he had coal  
10 to offer and we engaged in terms of that particular coal to offer. And subsequent - and I am going to say perhaps there may be one or two engagements that happened in that time but I cannot be sure of the exact number.

**CHAIRPERSON:** Yes, I am sorry Dr Nteta.

**DR NTETA:** Leading up to around...[intervene]

**CHAIRPERSON:** I am sorry. When he said he had coal to offer was he speaking in the context of seeking an extension of the contract that was about to expire or was he talking about a different contract that he had in mind, if  
20 you were interested in his coal?

**DR NTETA:** Chairperson it is difficult to say because we actually just would assume it is similar coal and we were looking to extend the current contract and because that is one of the mechanisms that we can, rather than getting into a new contract. I am not sure if I have answered your

question.

**CHAIRPERSON:** Okay no, that is fine. Okay, you may continue.

**DR NTETA:** So, the discussion initially was purely in terms of, we have coal, we would like to offer it to Eskom and engagements in terms of the period and the volumes. As we move closer to the 8<sup>th</sup> of April, I would say perhaps the 7<sup>th</sup> or the 6<sup>th</sup> but in that quite close to the 8<sup>th</sup> of April, if not on the 8<sup>th</sup> of April itself. Mr Nath then indicated to me  
10 to say that, while we have the particular coal to offer we would require that Eskom pre-pays for this coal and that is where the discussion then starts in terms of a pre-payment of coal. Now, when I made reference to the procurement policy, my role in terms of procurement is in terms of fuel sourcing as a procurement manager. So, I indicated to Mr Nath that now that he is bringing in an element of payment terms for the particular coal and it is not specifically in my ambit and I am not fully sure in terms of how to go about in terms of the payment aspect and it not within the ambit, it  
20 would be something that finance would have to talk to.

So I indicated to him that I would have to get back to Him with regards to the particular pre-payment. Once I knew that he wanted a pre-payment for the coal, I then went to look for my immediate manager, which at the time was the senior general manager for primary energy Mr

Mbuyani. I was not able to find him but I was then able to find Mr Edwin Mabelane who is the - at the time was the chief procurement officer.

And I indicated to him that while we have been - there is an offer for particular coal from Tegeta they have now put in a pre-condition for a pre-payment of this particular coal. And I sought his guidance in terms of how would - how should I go about this particular transaction, bearing in mind that as the procurement manager within a  
10 primary energy, I am used to the - I will call it the vanilla procurement of coal.

He then advised me...[intervene]

**ADV SELEKA SC:** Sorry Dr Nteta.

**DR NTETA:** I would pause.

**ADV SELEKA SC:** Yes, thank you sorry if I may. I would like you to explain to the Chairperson when in his approach to you, Mr. Nath, does he make a pre-payment request because as we recall from the evidence last time Tegeta had two short term contracts with Eskom already at this  
20 stage by the 8<sup>th</sup> of April 2016.

So there was a short term contract in January 2016, another short term contract concluded in February 2016, which was about to expire in April 2016. Those contracts were for Tegeta to supply coal to our north power station. If you agree speak to the mic?

**DR NTETA:** Yes, there were two previous requirements. So my understanding of your question is that when exactly did he then indicate that there was a pre-payment requirement for the coal.

**ADV SELEKA SC:** Ja.

**DR NTETA:** The pre-payment that - the requirement for pre-payment was, I would say, probably between the 6<sup>th</sup> and the 8<sup>th</sup> of April, I cannot say exact date, just to indicate that prior to that we had been communicating, but  
10 we have only been communicating on the acquisition of coal without discussing the payment terms.

**ADV SELEKA SC:** Yes, that is important to...[intervene]

**DR NTETA:** Have I answered your question Advocate?

**ADV SELEKA SC:** Yes, that is important to note because you would have seen Mr Khoza also says that when the request came to them, to the BTC or to - in his initial discussions with Mr Edwin Mabelane he understood the request only to relate to the acquisition of coals and not to a pre-payment request.

20 **DR NTETA:** I have seen the affidavit of Mr Khoza with regards to and you are highlighting his conversation with Mr Mabelane. I would rather suggest that you speak to either Mr Khoza or Mr Mabelane with regards to that because the initial discussion that I had with Mr Mabelane was in the period between the 6<sup>th</sup> and the 8<sup>th</sup> of April.

And it was prior to me beginning to draft the document because my conversation with him was where I then sought the advice in terms of how to go about and including the prepayment in a submission for coal.

**ADV SELEKA SC:** I see.

**DR NTETA:** So I find it hard to believe that Mr Khoza did not know that there was a pre-payment requirement.

**ADV SELEKA SC:** I see; by way he was the Chairperson of the BTC.

10 **DR NTETA:** Yes, he was the Chairperson of the Board Tender Committee and the document indicates on the first page second resolution pre-payment. So I find it hard to believe that he did not know.

**ADV SELEKA SC:** Okay, just proceed where you ended you are approaching Mr Mabelane.

**DR NTETA:** So I approached Mr Mabelane and his advice to me was then to prepare a submission for the acquisition of coal because the acquisition of coal is not simply just the acquisition of coal but there are payment terms which  
20 are not the standard payment terms for coal and that it should rather than go to the Board Tender Committee.

So having had that discussion with Mr Mabelane I then commenced with the drafting of the submission document. As I indicated earlier is that why I had sought guidance and advice in terms of the submission is that as

the procurement manager within primary energy, I personally had not dealt with a pre-payment for coal. So I then in terms of the drafting began to engage and send several versions and drafts to Mr Mabelane.

Included in that my interactions and my engagements, I also then engaged with Ms Daniels with regards to the particular submission. The submission then was drafted and I am going to use the evidence that was provided to me by the investigators, that in terms of the  
10 timeframe, that the submission was then drafted from about the 8<sup>th</sup> up until the 11<sup>th</sup>, in terms of April.

In that period, I engaged both telephonically as well as via emails, which is where you see various drafts of the document on the particular submission and I engaged with my superiors, which would be specifically Mr Mboweni, Mr Mabelane, Ms Daniels and Mr Koko.

**ADV SELEKA SC:** Yes, sorry just pause there for a moment.

**DR NTETA:** There were...[intervene]

20 **ADV SELEKA SC:** Just pause there I beg your pardon. I think we should also indicate to the Chairperson that the 8<sup>th</sup> is actually a Friday and that this draft in which takes place during this period is being pursued over the weekend and the 11<sup>th</sup> is a Monday when the submission is ultimately placed before the BTC. Correct?



**DR NTETA:** Correct.

**ADV SELEKA SC:** So you would have worked over the weekend, exchanging the draft submission between yourself and Ms Daniels and the officials and the executives that you have mentioned.

**DR NTETA:** Yes, I would have done that, as I indicated to you I had to look at it in terms of the evidence that the investigators provided to me and I think most of the drafting looks like it was on the Sunday based on the email  
10 exchanges that happened. But I do believe the [audio froze]

**ADV SELEKA SC:** The line is frozen. Chair, while we wait for her depending on the Chairpersons preference.

**CHAIRPERSON:** Ja, if there is something you want to deal with.

**ADV SELEKA SC:** Yes, we could - when she comes back, we could go into those emails Chairperson, just for the Chairperson to follow what happened.

**CHAIRPERSON:** Yes, we can do that. I wonder whether  
20 we should adjourn or not.

**ADV SELEKA SC:** I was going to propose that, Chair.

**CHAIRPERSON:** Ja, okay let us adjourn to enable the technicians to attend to the problem.

**ADV SELEKA SC:** Thank you Chair.

**CHAIRPERSON:** We adjourn.

**INQUIRY ADJOURNS**

**INQUIRY RESUMES**

**CHAIRPERSON:** Okay let us continue.

**ADV SELEKA SC:** Thank you.

**CHAIRPERSON:** I understand that there is a risk that there might be a repetition but let us hope for the best.

**ADV SELEKA SC:** Yes Chair.

**CHAIRPERSON:** Yes. Okay alright.

**ADV SELEKA SC:** Dr Nteta was apparently experiencing  
10 load shedding but they are now be it set towards their using  
the generator.

**CHAIRPERSON:** Oh okay. No thank you Dr Nteta. Let us hope everything will go well.

**ADV SELEKA SC:** Yes. So Dr Nteta.

**DR NTETA:** (Not audible).

**ADV SELEKA SC:** You recall where you were – that is the drafting of the submission.

**DR NTETA:** Yes.

**ADV SELEKA SC:** The drafting is done.

20 **DR NTETA:** Yes.

**ADV SELEKA SC:** Over the weekend and I think if you - if you can please you need to take the Chairperson through the evidence so if you could go to the annexures show the Chairperson this is the email that was sent from yourself to Ms Daniels or Mr Mboweni. I think you should do so. Thank

you.

**DR NTETA:** Okay. I will try my best.

**ADV SELEKA SC:** If you need the – if you need the page references I will assist you.

**DR NTETA:** So – okay. Thank you. So I was at the – in terms of the drafting of the submissions I also just omitted to indicate as well on the 8<sup>th</sup> April and in fact in the times leading up to it we also within Primary Energy we have a division – so we have an activations called the Primary  
10 Energy Tactical Command Centre. And this Primary Energy Tactical Command Centre the evidence leader will then want me to take you to the – the – it is actually in one of the submissions I got it is U27 MMK860.

**CHAIRPERSON:** Oh I think Mr Seleka will assist.

**DR NTETA:** 861. Okay 866.

**CHAIRPERSON:** Is that the page – is that the page number?

**DR NTETA:** I am referring you to it just as a reference point as well for this Primary Energy Tactical Command Centres.

**CHAIRPERSON:** Okay.

20 **DR NTETA:** So when there is

**CHAIRPERSON:** Okay hang on.

**DR NTETA:** An issue in terms of...

**CHAIRPERSON:** Hang on just – Dr Nteta. You have made – you have referred us to a certain page.

**DR NTETA:** Yes.

**CHAIRPERSON:** I think you are referring to some memo in that page if I am not mistaken. Do you want us to go there or it is not necessary?

**DR NTETA:** I do not think it is necessary but I will allow for the evidence leader to guide if you...

**CHAIRPERSON:** Yes okay.

**DR NTETA:** If you need to look at it.

**CHAIRPERSON:** Alright. Okay.

**DR NTETA:** I am going to mention it in passing.

10 **CHAIRPERSON:** Ja okay. Okay. Just continue – just say again what it is I think you were mentioning what that document is?

**DR NTETA:** Yes. So the Primary Energy Department has what we call a tactical command centre which gets activated when there is an issue with regards to predominantly the supply of coal.

So I am referring to this particular meeting and I am also referring to this particular event because that particular event was happening on the 8 April.

20 So what was in terms of the leader we – there was a supplier that was wanting to provide coal. There was an issue in terms of we were not meeting the requirements for in terms of the expected requirements for coal and the Primary Energy Tactical Command Centre had indicated that we need to start looking for additional coal.

This particular division – this Tactical Command Centre is what we would then initiate in terms of the requirement or the need which the procurement person should the field sourcing person would then act on.

I provide that as just background. So now – so there was a requirement for coal. The Tactical Command Centre had also indicated that we require coal and the supplier was then looking in terms of coal and I approached Mr Mabelane in terms of guidance, in terms of how do we then take this  
10 transaction forward bearing in mind there are some conditions that relate to pre-payment.

Now leading to the exchange of emails that went over – happened over the weekend. So the submission document was initially drafted by myself and then it was then sent – and then it was then sent through to Ms Daniels, Mr Mabelane, Mr Mboweni and Mr Koko.

I would like to request and this is delegating upwards. I would like to request the evidence leader to just indicate the annexure with regards to the emails that were  
20 sent on Sunday.

**ADV SELEKA SC:** Yes. Chair that is – that is page – Eskom Bundle 14 page 189. Page 189.

**CHAIRPERSON:** Okay I have got it.

**DR NTETA:** So what you see before you is one of the emails that was then sent through – that had the attachment of one

of the – the versions of the submission document that – that  
a I am referring to in terms of the submission.

So in that period I was engaging both as I indicated  
via email as well as telephonically to get the submission  
prepared.

The morning of the 11<sup>th</sup> my principles had received  
the particular document and they had comments with regards  
to the various documents for which they would then call me  
and when I say principles I will speak about Ms Daniels, Mr  
10 Mabelane, Mr Mboweni and Mr Koko.

They would – they called me with regards to inputs  
for the particular submission. They also provided inputs via  
email in terms of track changes, comments with regards to  
the document.

The date is now the 11 April and it is during the day.

**CHAIRPERSON:** Just hang on one second Dr Nteta.

**DR NTETA:** Yes.

**CHAIRPERSON:** So the attachment to the email at page 189  
was the draft – was the Executive summary that starts at  
20 page 190, is that right?

**DR NTETA:** Yes.

**CHAIRPERSON:** Okay alright. And when you say by  
principal you refer to the people that you mentioned are they  
all – do you call all of them principal or what? Principles or  
what?

**DR NTETA:** No principle – so when I refer to the word principle what I am say – what I was trying to say that it is people who would – would be my seniors. I am not too sure what word I should use.

**CHAIRPERSON:** Oh okay, okay. Well seniors seems to be better because principle is – well I do not know if you said principles there we must just do just one – so that is the category of people you are talking about.

**DR NTETA:** Yes.

10 **CHAIRPERSON:** And when you say they called you did they all call you?

**DR NTETA:** So the four people that...

**CHAIRPERSON:** I am sorry when you say they called you did they all call you or they had a discussion among themselves and one of them called you on behalf of the whole group or what?

**DR NTETA:** So when I say called I do not know if they would have had a discussion among themselves. What I am referring to is that they would – for example Mr Mabelane  
20 would then pick up the phone and then indicate you have sent the document this is the change etcetera or Ms Daniels would do so. So I am just saying it was at different times. What I am trying to demonstrate here is that I was coordinating input from several different people.

**CHAIRPERSON:** Okay alright. You may continue.

**DR NTETA:** Thank you. The input that I was also coordinating was both via telephone, it was also via email in terms of comments that they sent through.

**ADV SELEKA SC:** Yes. Let us – let us look at...

**DR NTETA:** This was – this...

**ADV SELEKA SC:** Let us look at...

**DR NTETA:** Yes.

**ADV SELEKA SC:** Your email on page 189. You email on page 189 is from yourself to Ms Suzanne Daniels. It is sent  
10 on Sunday 10 April 2016 at 20:17. You see that? You see that?

**DR NTETA:** Yes I am getting there.

**ADV SELEKA SC:** Oh you getting there.

**CHAIRPERSON:** Mr Seleka I may have misunderstood you earlier on I had thought – I thought you had said the 11<sup>th</sup> was a Friday or was it...

**ADV SELEKA SC:** The 8<sup>th</sup>.

**CHAIRPERSON:** The 8<sup>th</sup> oh okay.

**ADV SELEKA SC:** Yes. The 11<sup>th</sup> is a Monday.

20 **CHAIRPERSON:** Okay alright.

**ADV SELEKA SC:** And they working over the weekend.

**CHAIRPERSON:** Ja.

**ADV SELEKA SC:** To land on Monday and submit the document ...

**CHAIRPERSON:** Yes.



**ADV SELEKA SC:** To BTC.

**CHAIRPERSON:** Okay alright.

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:** Huh-uh.

**ADV SELEKA SC:** You are there now Dr Nteta?

**DR NTETA:** Yes.

**ADV SELEKA SC:** Good. Chair she is using the electronic version so it takes a while for her to get to the right page.

**DR NTETA:** Yes I am on 14190 Executive Summary.

10 **ADV SELEKA SC:** Okay I wanted you to be on the page before that which is your email to Ms Suzanne Daniels and there you write:

“Hi, please see attached Executive Summary.

I have not addressed the pre-payment issue.

It is in the resolution only. Regards Ayanda.”

You see that?

**DR NTETA:** Yes I see that.

**ADV SELEKA SC:** Yes. Can you explain to the Chairperson what you – you meant by that statement.

20 “I have not addressed the pre-payment issue. It is in the resolution only.”

**DR NTETA:** So that particular statement in the email was to highlight to Ms Daniels that the – the resolution in terms of the requirement – the request for a pre-payment is in the resolution.

Now the general document it is about a four to five page document. So it was just to highlight to her that I have put it in the resolution, make her aware that it is in the resolution and then just to gain guidance if it needs to be added elsewhere within the particular document.

**ADV SELEKA SC:** Okay now go to page 190. Go to page 190.

**DR NTETA:** 190?

**ADV SELEKA SC:** Yes the next page.

10 **DR NTETA:** Yes.

**ADV SELEKA SC:** Just please guide us as to where...

**DR NTETA:** Yes.

**ADV SELEKA SC:** What is the resolution in this document?

**DR NTETA:** It is...

**ADV SELEKA SC:** Where the pre-payment is incorporated?  
So I see on page 190 you have paragraph 1.

**DR NTETA:** So the resolution is in ...

**ADV SELEKA SC:** Ja carry on.

20 **DR NTETA:** Ja. So where it was highlighting that is in  
paragraph 2 in terms of resolution required and it is 2.2  
where it says:

“To provide a pre-payment of the R500million  
for coal to be supplied.”

That particular resolution.

**ADV SELEKA SC:** Yes. Now I think you need to tell the

Chairperson also who came up with the amount of R500million?

**DR NTETA:** So with regards to the R500million it would have been an estimate in terms of the calculation of the rand value versus – times the – the rand per gigajoule at the time. So you would

**ADV SELEKA SC:** It is frozen again.

**CHAIRPERSON:** It is the problem again.

**ADV SELEKA SC:** Yes. Was it the (not audible).

10 Apparently it is on her side Chairperson. It has been disconnected again.

**CHAIRPERSON:** Hm.

**ADV SELEKA SC:** We will have to suggest now.

**CHAIRPERSON:** It is going to give us a problem

**ADV SELEKA SC:** Ja.

**CHAIRPERSON:** And actually – but now there is a generator. Why – why is it giving us the problems? I guess it is not – nobody knows what...

20 **ADV SELEKA SC:** Ja they are trying to communicate with her.

**CHAIRPERSON:** Ja.

**ADV SELEKA SC:** Okay she has sent a text message she does not know what to do.

**CHAIRPERSON:** What could be the problem?

**ADV SELEKA SC:** Just ask her what the problem is.

**CHAIRPERSON:** Okay let us – let me adjourn. Let us see what happens in the next ten minutes.

**ADV SELEKA SC:** Yes Chair.

**CHAIRPERSON:** And then we will take it from there.

**ADV SELEKA SC:** Yes Chair.

**CHAIRPERSON:** I think we may have to ask those who – who are...

**DR NTETA:** I am back.

**CHAIRPERSON:** Okay she is back. I will - may have to ask  
10 her ...

**ADV SELEKA SC:** Ms Klein.

**CHAIRPERSON:** A witness is particularly who are within Gauteng to come to the venue.

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:** Physically rather than the video link because with load shedding it looks like it could give us problems. Most of the time it has worked quite well. Last week it worked quite well for the whole week. There are only minor glitches here and there.

20 **ADV SELEKA SC:** Hm.

**CHAIRPERSON:** Dr Nteta I think it has happened again.

**ADV SELEKA SC:** No I believe ...

**CHAIRPERSON:** Dr –

**ADV SELEKA SC:** No unfortunately she is not in Gauteng.

**CHAIRPERSON:** Ja I know I understand that she is KZN?

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:** Ja. Okay. Okay. Maybe she is not...

**DR NTETA:** I am back.

**CHAIRPERSON:** Okay alright. Okay let us use the time we have fruitfully okay? Mr Seleka continue.

**ADV SELEKA SC:** Thank you Chair. Dr Nteta you were explaining how the R500 million came about. You say it is the rand value times the volume of coal which is gigajoules.

10 **DR NTETA:** Yes it is – ja so that R500 million was an estimate.

**ADV SELEKA SC:** Yes.

**DR NTETA:** In terms of – it was just – it was really a rough calculation it had not been verified fully.

**ADV SELEKA SC:** But who made that calculation? Who had made that calculation?

**DR NTETA:** I am going to – I am going to – I am going to say that I would have made that calculation. It is – it would have just been a general figure. I am going to say I would have made that calculation.

20 **ADV SELEKA SC:** Yes.

**DR NTETA:** As an estimate.

**ADV SELEKA SC:** The reason I am asking that...

**DR NTETA:** To ask you I do not recall – I do not recall ja. Let me just say I do not recall.

**ADV SELEKA SC:** Ja because this is on a Sunday. This is

the reason why I am asking this because when you look at your affidavit you go to page 70 – back to page 71 of your affidavit paragraph 8.4.

**DR NTETA:** Can you please provide me with the page number?

**ADV SELEKA SC:** Page 71. 71.

**DR NTETA:** 71 thank you.

**ADV SELEKA SC:** Ja Eskom Bundle 14 page 71 paragraph 8.4.

10 **DR NTETA:** Eskom. Yes.

**ADV SELEKA SC:** In that paragraph you say that Mr Nath indicated that Tegeta wished to supply coal from OCM to Eskom.

“I cannot recall whether Mr Nath and I had talked about any quantities or process at this stage.”

So it is volumes which is quantities.

**DR NTETA:** Yes.

20 **ADV SELEKA SC:** You cannot recall whether or not they were talked about how would you have made the calculation to arrive at the R500 million?

**DR NTETA:** So in my affidavit I am – my attempt is to provide – to provide a narrative in terms of the discussions that we had. So at the very beginning of the discussions all I was trying to just put across is that he had indicated

initially that they have coal.

In our subsequent conversations there would have been a figure and also a quantity that is – that is an indicative quantity that is provided as well as an indicative cost that is provided.

So by the time that we were talking on the 8<sup>th</sup> then there would have been some sort of an indicative pricing and quantity as well as you know a duration and that – you know in terms of the period as well.

10 So in my affidavit I was just simply trying to say in the beginning it – we – the first conversations that we had I cannot recall if ...

**ADV SELEKA SC:** Yes.

**DR NTETA:** You know what we had settled in terms of the volumes and the – and the gigajoule price.

**ADV SELEKA SC:** Yes the – there is a question I have I think you did touch on this last time as we were beginning to go into this aspect.

20 By this time just confirm to the Chairperson – by this time of the negotiations or Mr Nath approaching you and you drafting the submission over the weekend he has not given you in writing the offer that he is making to Eskom.

**DR NTETA:** Correct. So in the initial discussions we – it was – it was literally discussions.

**ADV SELEKA SC:** Hm.

**DR NTETA:** So he had not given a written – a written document to say this is the exact cost, this is the exact volumes. It – it was – it was discussions that we had. Correct.

**ADV SELEKA SC:** Yes. Now we know that and we will take you step by step your estimation which you say it is for R500 million it ended up being R659 million pre-payment to Tegeta.

**DR NTETA:** Correct.

- 10 **ADV SELEKA SC:** Can you tell the Chairperson how did the amount move from R500 million estimation to R659 million exact payment to Tegeta?

**DR NTETA:** Okay. So with regards to the...

**CHAIRPERSON:** Wait I am sorry.

**DR NTETA:** Moving from R500 million to R659 million.

**CHAIRPERSON:** I am sorry Dr Nteta.

**DR NTETA:** As I indicated to you earlier is that the R500 million...

**CHAIRPERSON:** I am sorry Dr Nteta.

- 20 **DR NTETA:** Pardon I thought I heard somebody speaking.

**CHAIRPERSON:** Yes I am sorry.

**DR NTETA:** Yes.

**CHAIRPERSON:** The question that Mr Seleka is asked is quite important but I think before that I may have missed something as to how the initial amount came about – the



R500 million. How did that amount - how was it arrived at?

**DR NTETA**: What – what – so in terms of the R500 million it – it was a guesstimate. Mr Seleka has asked me in terms of who – who exactly gave the figure of the R500 million and I have indicated that I cannot recall if Mr Nath gave me that R500 million or it would have been a guesstimate in terms of coming from my side for the – for the figure based on the discussions that we had.

**CHAIRPERSON**: I saw that in your affidavit.

10 **DR NTETA**: So that the next..

**CHAIRPERSON**: I saw that in your affidavit.

**DR NTETA**: Yes.

**CHAIRPERSON**: You said I think that in the first – in the initial discussions I think you said but you must correct me if I have misunderstood your affidavit. In the initial discussions with Mr Nath there was no discussion of quantities and the costs. Did that change before the – the 11<sup>th</sup> or before the first draft – before the draft of the Executive summary that is at page 190 did that change?

20 **DR NTETA**: Yes. So my affidavit I was trying to relay because one of the questions in terms of that came from the investigators was that so when exactly did you speak about the quantities that are required? And what I was trying to relay in my affidavit was an attempt to respond to that question was to say that when he first approached me he

indicated that they do have coal that they would like to supply.

Now we have subsequent conversations because at the time when I had said it around about end of March I would say they were still supplying coal so like Doctor you have coal and we begin to say yes there will be an interest for the coal.

The conversations then you know would have happened intermittently up until the 8<sup>th</sup> where then there is a  
10 discussion how much coal is available in terms of the rand value exec – the rand per gigajoule cost in terms of the coal and then that is where we then put the figure in terms of the estimate in terms of the R500 million. Whatever figure it is in this case it would be R500 million. But that particular figure would – would then be verified before we finalise the document.

**CHAIRPERSON**: Okay no thank you.

**DR NTETA**: I have tried to answer both the Chairperson and the evidence leader's questions.

20 **CHAIRPERSON**: Well the evidence leader nods with how...

**DR NTETA**: Can I continue?

**CHAIRPERSON**: So you must have answered both.

**ADV SELEKA SC**: Not the last one Chair.

**CHAIRPERSON**: But when I have had that – that is what I was thinking that I did not [speaking over one another].

**DR NTETA:** So should I continue.

**CHAIRPERSON:** How the figure moved from R500 million to the ultimate figure. Did you want to address that question?

**DR NTETA:** Okay. So in terms of getting to the R500 million to the ultimate figure. So at the point where the evidence leader is indicating in terms of that particular page 190 at that point I had really in terms of the submission just grounded a number and I will tell you there was no scientific relevance – basis of it in terms of just an estimate. My  
10 subsequent email when I then sent it through to the – with agreed my seniors indicates that – and that would be the next evidence so the next annexure.

My document indicates – my email indicates that I would need to then verify these particular numbers with finance and that – and that really just to talk to what is the volume, what is the rand per gigajoule to get to that – the figure of the R659 million.

So the – that final figure would have been – would have come from whatever volume that is finalised and then  
20 the rand per gigajoule.

So that change happened during the course I think and I am saying this based on the documentation not necessarily based on my recollection so that – that changed from R500 million to R650 would have then come – I was going to say within the day of the 11<sup>th</sup>. Once again I am

saying I am basing it on the documentation.

**ADV SELEKA SC:** Oh. So you – you do not have an independent recollection?

**DR NTETA:** Pardon.

**ADV SELEKA SC:** You do not have an independent recollection of what transpired?

**DR NTETA:** I do not have an independent ...[intervenes]

**ADV SELEKA SC:** There is a question I had but before I ask you that question.

10 **DR NTETA:** Yes.

**ADV SELEKA SC:** Which email are you referring to as your next piece of evidence?

**DR NTETA:** So the email that I am referring to is the email that starts with good evening. I just have not – I am getting to it. It starts with good evening but it is sent on the morning of the 11<sup>th</sup> at 07:22. I am trying to get to the – to that particular document. Evidence Leader, if you are able to get the page number, I would greatly appreciate it.

20 **ADV SELEKA SC:** Well, I see there are a couple of emails on the 10<sup>th</sup>. If the first email that I see on the 11<sup>th</sup> is on page 209.

**DR NTETA:** H'm.

**ADV SELEKA SC:** But that is not an email from...

**DR NTETA:** Okay.

**ADV SELEKA SC:** Well, there are two emails. One – the

bottom one is from yourself to Mr Edwin Mabelane and then his response to you, page 209, Eskom Bundle 14.

**CHAIRPERSON:** Do you see ...[intervenes]

**DR NTETA:** Page two... Sorry?

**ADV SELEKA SC:** 209.

**DR NTETA:** Is it two?

**ADV SELEKA SC:** Two, zero, nine.

**DR NTETA:** Two, zero, nine. Okay.

**ADV SELEKA SC:** Because I think ...[intervenes]

10 **DR NTETA:** Apologies. I just take some time to get to this. Yes. Yes?

**ADV SELEKA SC:** Ja, I think you were referring to an email in your explanation of how the figures were arrived there.

**DR NTETA:** Yes. So I was – what I was just trying to relate to the Chairperson and to the Evidence Leader was just in terms of the – I was trying to relate the movements in terms of the R500 million to the R 659 million and saying that – just recalling – my recollection which is not  
20 independent, is based on the documentation and saying that particular compactisation[sic] of the figure would have come based on the mandate. It is just what I was just trying to explain.

I had recalled going through the evidence, one of the emails that was shown to me, was one where I was

saying I am going to do so. I am going to check in terms of finance as to the particular number. But to us indicate and still remember that move, I do not independently do so. I am relying on the evidence.

**ADV SELEKA SC:** Ja. You see there is evidence before the Commission that at the same time as Eskom is doing this exercise. Yourself involved and in particular in what you call an estimated figure of R 500 million. There is parallel information of what transpires at the same time  
10 when this is happening.

And that relates to this. That Tegeta and Oakbay were in the process of acquiring Optimum at the time. You can hear me?

**DR NTETA:** Yes, I can hear you Evidence Leader.

**ADV SELEKA SC:** Yes. And you know, for you – I do not know – you do not have the advantage of the first leg of the process. We are now in the second leg of the process. The first leg relates to the board making an approval of R 1.68 billion.

20 This is now the second leg of the process where a figure is came – you came up with a figure which is so surprisingly close to the figure that Tegeta requires in order to make the final payment of the purchase price to acquire OCM.

And what happens is... Well, I will give you a

chance to comment. The evidence before the Commission... Chair, it seems we are going to be ...[intervenes]

**CHAIRPERSON:** Oh. She is gone again.

**ADV SELEKA SC:** Ja.

**CHAIRPERSON:** Except for Ms Daniels, are there any other witnesses in the next two days that intend to testify via the streaming?

**ADV SELEKA SC:** No, Chair.

10 **CHAIRPERSON:** Okay.

**ADV SELEKA SC:** I think there was a request from Mr Pamensky's legal representatives.

**CHAIRPERSON:** H'm.

**ADV SELEKA SC:** But I was also told that Mr Pamensky is keen to come in person.

**CHAIRPERSON:** Ja.

**ADV SELEKA SC:** I am not sure whether that was pursued.

20 **CHAIRPERSON:** Ja. It is - if they can come in person that gives us some assurance.

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:** That we will not have interruptions. I wonder whether we should not just take lunch now. It is quarter to one. Then at quarter to two, hopefully, when we come back it will not be so bad.

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:** Because if we adjourn for another five or ten minutes, when we come back it will be ...[intervenes]

**ADV SELEKA SC:** It will be lunch time.

**CHAIRPERSON:** Ja. So I think we will adjourn and then somebody can just inform her and then we will resume at quarter to two.

**ADV SELEKA SC:** Yes. Thank you.

**CHAIRPERSON:** We adjourn.

10 **INQUIRY ADJOURNS**

**INQUIRY RESUMES**

**ADV SELEKA SC:** We are Chair.

**CHAIRPERSON:** Okay alright. Let us continue.

**ADV SELEKA SC:** Dr Nteta, can you hear us?

**DR NTETA:** Yes. Thank you. I also moved location.

**ADV SELEKA SC:** No, that is fine. So you – yes, I was explaining to you that at the same time that this was happening, the acquisition process of OCM by Tegeta was also ongoing.

20           And from the evidence of one of the witnesses before the Commission, Mr Piers Marsden, who was the Business Rescue Practitioner of OCM at the time.

          We understand that on the 8<sup>th</sup>, he had been approached by Mr Howa, Nazeem Howa, with an explanation that Tegeta had a shortfall of R 600 million



towards the purchase price of OCM.

And he requested Mr Marsden to approach the banks as a consortium of banks to either defer the payment of R 600 million or afford Tegeta a bridging loan. The banks, when approached, refused their request. Were you aware of that?

**DR NTETA:** No, I was not aware of that.

**ADV SELEKA SC:** And that in fact, it was around 15:00 on the 8<sup>th</sup> of April 2016 that Mr Marsden communicated the  
10 banks' refusal to Mr Howa. And it seems to us, and I refer to the Commission, emanating from that evidence ...[intervenes]

**CHAIRPERSON:** You want to say the Legal Team?

**ADV SELEKA SC:** The Legal Team.

**DR NTETA:** Ja.

**ADV SELEKA SC:** Thank you. [laughs]

**DR NTETA:** [laughs]

**ADV SELEKA SC:** Thank you, Chair. It seems to the Legal Team that emanating from that evidence that the  
20 prepayment we are now talking about which forms the – which is at the centre of your submission, would have come about. Your comment?

**CHAIRPERSON:** I am not sure that you completed the point. You just want to start again? I think you did not complete the point properly.

**ADV SELEKA SC:** Okay.

**CHAIRPERSON:** Ja. I think what you are suggesting is that – what you are suggesting to her is that it seems that the prepayment that she is talking about in her submission is connected with the amount that Tegeta was looking for which they could not get from the banks.

**ADV SELEKA SC:** Correct Chair.

**CHAIRPERSON:** Yes. What – did you hear the point Dr Nteta?

10 **DR NTETA:** Yes, I do.

**CHAIRPERSON:** What do you say to the suggestion that it is just seems too coincidental that initially around the end of March, Mr Nath did not talk to you about the prepayment but somewhere around, as I understand your evidence, 7, 8 or 8, 9 or there about of April the – he introduced the idea of a prepayment.

And Mr Seleka is saying it so happens that attempts by them to find a bank to give them that amount or to defer an amount that they owed to the bank had failed  
20 and the amount that became the prepayment was roundabout the same amount that they needed.

Mr Seleka, tell me if I have misrepresented your point.

**ADV SELEKA SC:** It is not misrepresented Chairperson.

**CHAIRPERSON:** Yes.

**ADV SELEKA SC:** The Chairperson is correct.

**CHAIRPERSON:** What do you say to that Dr Nteta?

**DR NTETA:** Thank you. I must say there is little that I can make comment because I was not aware of the information that you are saying to me there were attempts at that time, they were looking to get the – I think you just said the R 600 million and it was declined.

So at the time when I was discussing with Mr Nath, you are quite correct in saying that the initial discussion  
10 that we did have, which was before the 8<sup>th</sup>, was purely about provision of coal and there was no indication with regards to the prepayment.

So the investigators and the evidence leaders in them having an understanding of what was happening in the background, that may be the case but I really cannot comment on it.

What I can comment on is that Mr Nath indicated to me roundabout the – between the 6<sup>th</sup> and the 8<sup>th</sup> that there is a precondition for the coal, whether it is linked to,  
20 you know, their requirement for funding, et cetera. I cannot comment because I did not know that background, you know, at the time.

**ADV SELEKA SC:** Thank you, Chair.

**DR NTETA:** Yes.

**ADV SELEKA SC:** I want to quickly cover certain points

with you then that you can move on in your evidence Dr Nteta. Dr Nteta, the paragraph that you read from your affidavit which explicitly says Mr Nath indicated that Tegeta was going to buy coal from OCM to supply to Eskom. Do you know why Eskom did not procure coal directly from OCM?

**DR NTETA:** So we did not get it directly from OCM because the Business Rescue Practitioner had indicated that they were not going to supply us with coal.

10 Secondly, they had the year before had actually stopped in terms of the production of coal. So that is why we did not specifically go directly to OCM. And then thirdly, Tegeta offered that particular coal.

**ADV SELEKA SC:** Ja, but are you saying that you did not know the facts the Business Rescue Practitioners on 20 August 2015, they communicated that they will stop the supply. But thereafter, and more specifically ...[intervenes]

**DR NTETA:** Yes.

20 **ADV SELEKA SC:** More specifically from the 3<sup>rd</sup> of September, they continued to supply coal. Even in April 2015 they were supplying coal. In 2016, they were supplying coal to the Hendrina Power Station. Are you saying that you did not know that?

**DR NTETA:** Yes. I knew that they were supplying coal to the Hendrina Power Station. My understanding - and I will

say that I am not a mining engineer – my understanding is that the coal that they were supplying to Hendrina was for a CV and the coal that they were looking to supply us for – Arnot was of a higher CD, which was due to beneficiation to come through – so it would become a higher product from the export mine.

**CHAIRPERSON:** I am sorry Mr Seleka. Can I go back to the issue of Tegeta offering coal, this particular coal? I may have asked this question before and if I have, please  
10 forgive me but I would like to be reminded what the answer as.

Is it not the position that the coal that Tegeta was offering Eskom did not at that stage belong to Tegeta?

**DR NTETA:** So my understanding that is my understanding from the evidence of the transaction, that the transaction was due to – I think it was – yes, I did not answer your question directly. No, it did not belong to Tegeta. They had taken over the operations of the mine only.

20 **CHAIRPERSON:** Could they offer coal to Eskom that did not belong to them?

**DR NTETA:** So yes, they could offer coal that did not belong to them. In my discussions with Mr Nath in or around January or so, he did indicate that they had taken over the operations of the mind.

So that – only I understood it to mean that they would then indicate where the coal goes, et cetera. But in terms of offering coal that does not belong to a mine. Yes, a supplier can do so.

**CHAIRPERSON:** Well, I do not understand the concept of them being able to offer Eskom coal that did not belong to them just because they had taken over the operations of the mine unless the arrangement was such that the owner of the coal allowed them to offer coal to somebody.

10           Are you able to clarify that for me? Is it something that used to happen as a practise of a custom in the coal section as far as Eskom is concerned?

**DR NTETA:** So correctly so that you will get somebody who does not actually own the asset, offering the coal. So what would happen in other instances as well. You would have what we call a Marketing Agent who will then be the individual that is marketing the coal and they do not necessarily own that coal but they offer the coal.

**CHAIRPERSON:** But I take ...[intervenes]

20           **DR NTETA:** In some instances, yes.

**CHAIRPERSON:** But I take it that if they are a Marketing Agent, either when you conclude a contract concerning the coal, you conclude it with the owner. Or if you concluded it with the Marketing Agent, the contract of the coal being offered to you, that the agent would be doing so with the

authority, authorisation of the owner.

I may be missing something but if I give you my taxi for you to drive, you cannot start selling it. That is where I am coming from. But I may be missing something because I have never worked at Eskom and I have never worked in the coal sector.

You understand what I am talking about? The driver – as a driver of my taxi, if I employ you, it may well be that you can conclude an arrangement with somebody  
10 who says tomorrow please take me Durban. We will come back in the evening and I will pay you. How much will it cost? You do that.

That money is supposed to come to me, the owner. But you cannot start selling the car. You understand?

**DR NTETA:** If I try and use that particular example.

**CHAIRPERSON:** H'm.

**DR NTETA:** And it is going to be an attempt to use an example.

**CHAIRPERSON:** H'm.

20 **DR NTETA:** It would be that if you ask me to take me from Johannesburg to Durban in a taxi that the driver does not own but I will pay the driver for taking me there. So the driver would then have to pay the taxi owner in terms of ...[intervenes]

**CHAIRPERSON:** To hand over the money.

**DR NTETA:** For the usage of the car of the taxi.

**CHAIRPERSON:** To hand over the money that you have paid over to the driver?

**DR NTETA:** Yes.

**CHAIRPERSON:** Yes. No, no. I accept that. But it just seems to me that the selling of the coal seems to be something different but maybe I miss something. So because I just want to understand why you were to waiting until Tegeta had concluded its transaction with OCM.

10           Then they would be the lawful owners of the coal, I would imagine. But in the meantime, why not negotiate with the owners as far as the coal is concerned?

**DR NTETA:** Yes. As I indicated, the direct owners were not offering in terms of the coal to Eskom. And I am also providing this response in hindsight, obviously. So the direct owners were not and Tegeta was offering the particular coal.

20           They had offered it in January as well as in February, as the Evidence Leader had said. And so they had demonstrated the ability to provide us with the coal. So which is why we were then getting coal from them.

          The question as to why not wait until the transaction is concluded. One of the reasons why it was not waiting. At the time, we were looking for coal. There was, as I have indicated at the very beginning, we had



what we have as our – a primary energy, tactical command centre that was meeting quite regularly because of an issue for coal.

So the option of waiting until the transaction was concluded was limited and I would say not as attractive because we from the skill sourcing side had pressure to acquire coal.

And the last interaction that we did have in terms of that we needed to acquire coal was at the tactical  
10 command centre on the 8<sup>th</sup> of April where they instructed myself and the team to secure coal.

**CHAIRPERSON:** Of course ...[intervenes]

**DR NTETA:** I have tried to answer you as best that I can.

**CHAIRPERSON:** Yes. No, no, no. That is fine. But of course, the moment you say to me the owner of the coal was against giving you the coal. That seems to make your situation worse because it means you know that the owner of the coal does not want to give the coal to you for whatever reasons, valid or not valid.

20 And somebody else who is not the owner of the coal, comes to you and offer somebody else's coal and you know that that somebody else does not want this coal to be offered to you.

Does it not make it worse? It looks like collusion between Eskom and Tegeta to do something, that on the

face of it appears to me, to say the least, strange.

**DR NTETA:** So Chairperson it is not unusual and it is an unfortunate situation that Eskom – we find ourselves in. Where you would have an owner of coal indicating that they do not want to directly transact with Eskom.

Some of the owners might have said to us: Well, you as Eskom are looking in terms of power based Black Economic Empowerment and I as the owner of the asset and who invested.

10 So therefore, you would deal with our Marketing Agent or they just do not want to deal with our – sorry, Eskom's reasons.

So it is not so - unfortunately, it is not uncommon that that happens when the asset owner just says that I do not want to deal with Eskom. I will give my coal to somebody and they will deal with it.

**CHAIRPERSON:** But in this case was this your situation? I mean, the scenario that you tell me, seems to me that it is a scenario where the owner may, for whatever reason, not want to deal with Eskom but actually when the Marketing Agent or whoever deals with Eskom, they do so with the blessing or permission of the owner in the sense that the owner knows that the third party or the Marketing Agent will actually be doing this.

20

They may just have some other reasons why the

owner does not want to deal with that but it seems that the owner has no objection. But in this particular case, are you able to say the Business Rescue Practitioners had no objection to Tegeta offering you OCM's coal at that time?

**DR NTETA:** I would say at the time, I would assume they had no objection because they were supplying that coal from OCM. So which – they would have done so on two previous agreements.

So I would say that at the time I would assume that  
10 they do not have an objection. I would also assume and I am saying so based on at the time that the Business Rescue Practitioner was aware where that coal was going. To answer you.

**CHAIRPERSON:** Just ...[intervenes]

**DR NTETA:** The...

**CHAIRPERSON:** No, no. Complete your answer Dr Nteta

**DR NTETA:** Yes. So when I was providing you with the example to say that that happens at other situation because you asked me if it is not unusual. So I was just  
20 indicating that no it is not unusual where you will deal with somebody and not the asset owner.

**CHAIRPERSON:** H'm. Okay. Mr Seleka.

**ADV SELEKA SC:** Yes. Thank you, Chair. Dr Nteta, I am not sure whether your answers are given on the basis of a factual fairness from what happened at that time. Or are

you simply trying to reason out the actions of Eskom?

One of the things you mentioned is that you had been instructed to go out and look for coal but we know that in this factual situation you did not go to Tegeta. Tegeta came to you with an unsolicited offer.

So the two do not connect that you were instructed to go out and look for coal but what we see here is the other way around and that is what Mr Khoza expresses as a point of concern in this affidavit that this was not  
10 Eskom's initiative, it was Tegeta coming to Eskom unsolicited. Your comment?

**DR NTETA:** Okay. I am going to comment and drew my comment, I am going to ask if I can refer to certain documents. The first document that I am going to ask to refer to because I want to then just try and create the timeline in terms of this particular transaction that we are looking at.

The first document, and I am going to really try and refer to it correctly. It is in the Eskom Bundle 18, page  
20 891. Eskom Bundle 18, page 891.

**ADV SELEKA SC:** It seems to be 18(B) Chairperson.

**DR NTETA:** Oh, god. Okay we had... Can I continue?

**CHAIRPERSON:** Not yet. Let us find the document first.

**DR NTETA:** Okay.

**ADV SELEKA SC:** It is page 891.

**DR NTETA:** Eight, nine, one. Yes.

**CHAIRPERSON:** Yes, I am at page 891, Bundle 18.

**DR NTETA:** Okay. So to answer the question in terms of, you know, looking for coal and the supply coming through. Tegeta, yes came through and indicated that they had coal and I indicated earlier that probably from about March, they said that our current supply is coming to an end and we have availability to provide you, you know, continued coal.

10           And that is when I referred to saying that the supply came to me. That is what they would do. The supplier would do that in the normal course because if they have got coal, they always to want to extend in terms of their particular offering

          Now I have referred to this particular page and I am going to refer to another page to then indicate that when you look in terms of this, it was an email that was written from what we would call our coal operations – coal demand side.

20           So from a fuel source's perspective, the demand or the requirement for coal then comes from the coal demand side. And we received this coal. Now when – so we received this email. When we get this email – and I am just going to try to provide context.

          The highlight of the email there it – she indicates:

“ Good morning and please find attached the status report.”

And she underlined in that particular email the power station in terms of Arnot because it was a concern in terms of us being able to secure coal for Arnot.

And she indicated that there the deliveries that were due to come to the power station – I am just going to use – round it up – because it says 14 kilo tons – against a plan of 22.

10           What that translates is that we are not delivering the required amount of coal to that particular power station.

The second element and that is a concern because we need to ensure that we are meeting whatever is planned. So we are under – we – the primary energy is underperforming.

Her next sentence indicates that the burn is 15 kilo tons in terms of their burning 15 kilo tons against what the power station had indicated to us so that they should  
20 rather burn 14 kilo tons.

But also then – so the picture that is – that she is highlighting in those statements, is simply saying that we are getting too little coal into Arnot and we are burning what we are supposed to against a burn that is even more.

So then it creates an issue in terms of supplying.

You will notice that this particular email is sent at 08:00(?) in the morning. I am not going to refer...

So this is on the 8<sup>th</sup>. I have been discussing with Mr Nath correctly so, predominantly about just supplying coal because one, in that period of time, we do understand that we need coal for Arnot because we are being advised of this quite often that we need to ensure this particular coal.

So he offers me this coal and I then looked and  
10 noting that the organisation in the primary [indistinct – word cut off] have an issue that in terms of getting coal, so that is sort of when – I am trying to answer one, Mr Khoza's indication that when if there was a problem then why did we not go to them. Well, the problem intensified on and about the 8 April and so we know that we do have potential for receiving the coal from this particular supply is one of the elements that myself and my team on.

I then want to refer you to on the same day, so we have this email coming at about eight and there is a  
20 concern within the department. They then call that TED tactical command centre. I am now going to refer to Mr Koko's affidavit and that is MMK53 which is the Eskom bundle 15 of 864, page 864, and I will pause.

**ADV SELEKA SC:** Chair, I do not think you will have that. I do not think the Chairperson will have ...[intervenes]

**DR NTETA:** Pardon?

**ADV SELEKA SC:** No, I am speaking now to the Chairperson.

**DR NTETA:** Oh, okay.

**ADV SELEKA SC:** Eskom bundle 15, I do not think the Chairperson will have it.

**DR NTETA:** I can read it out. Not? Sorry, evidence leader.

**CHAIRPERSON:** Okay, you can do that. Have we got it  
10 somewhere?

**ADV SELEKA SC:** I have it, yes.

**CHAIRPERSON:** Yes, okay. She can read it out in the meantime if it is not too long.

**ADV SELEKA SC:** Yes, just give us the reference again, page number?

**DR NTETA:** MMK53 and then it is in the bundle 15, page 864.

**ADV SELEKA SC:** Page 864.

**DR NTETA:** I am unclear as to whether I should read.  
20 Yes.

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:** You may read it.

**ADV SELEKA SC:** Ja, let me just identify the document for the Chairperson. Page 864, bundle 15, Chairperson, are minutes of a meeting Primary Energy Division, Tactical



Command Centre held on the 8 April 2016. Ms Nteta, you may read the portion you want draw to the Chairperson's attention.

**DR NTETA:** Okay, so the first element is, it is noted the email that was sent at about 8.39 in the morning and it creates a concern in terms of the department and a tactical command centre meeting is then convened. The time there indicated one o'clock and this because the division within Primary Energy that activates the demand notice a concern  
10 and then says let us try and – let us convene and try and address the concern. I want to then refer you to in that same documents, I have referred you to the time in an effort just to share with you how we get to the submission and things like that as well.

I then look to then refer you to the next page which is 865 and then we go to the last page which was 865, at the bottom it then talks to some of the issues and the concerns that are raised. Sorry?

**CHAIRPERSON:** No, I wanted to confirm that you are still  
20 on the same bundle.

**DR NTETA:** Sorry?

**CHAIRPERSON:** I wanted to confirm that you are still on the same bundle.

**DR NTETA:** Yes, I am still on the same bundle.

**CHAIRPERSON:** How come I do not have that bundle is it

because it was not expected that bundle to be referred to?

**ADV SELEKA SC:** It was – we thought Chair would refer to the affidavit of Mr Koko, Chair. The Chairperson, we can sanitise 9 for the Chairperson.

**CHAIRPERSON:** No, no, no, no, it is fine, I am just trying to understand so that we can make sure next time we do not find ourselves in the same situation. No, that is fine, let us continue, as long as we do not find ourselves in the same situation.

10 **DR NTETA:** I apologise.

**CHAIRPERSON:** No, no, it is fine. Okay, you may continue.

**DR NTETA:** Okay, okay. So in terms of that there are certain aspects that in terms of the minutes and it is – I think perhaps I am just trying to show the turn of events. So on this day the discussions with regards to Mr Magelani about the submission, there is discussions with regards to the supplier about the submission. There is also this requirement in terms of the coal that has been indicated to  
20 the field sourcing department.

One of the key actions that comes out of there is that if you look at bullet point 3 – so if you look on item 4, bullet point 3, it then talks to the Arnot RFP, once again just indicating that there is a concern and we discussed it at this particular meeting and it indicated that there is

shortfall from May which needs to be addressed and DM, which is the Chairperson of the tactical command centre, advised that AN, which is myself, now needs to develop a proposal for the shortfall call and agree this with Mr – Vusi and Matshelo, which is Mr Mboweni and Mr Koko.

**ADV SELEKA SC:** Dr Nteta?

**DR NTETA:** Yes?

**ADV SELEKA SC:** Okay, the Chairperson needs to follow what you are saying.

10 **DR NTETA:** Okay.

**ADV SELEKA SC:** So can you again indicate where you are reading from in terms of on that page 8 ...[intervenes]

**DR NTETA:** Oh, okay.

**ADV SELEKA SC:** Are you reading from page 865?

**DR NTETA:** I am reading on page 865, there are items that are there, I am looking at item 4.

**ADV SELEKA SC:** Yes.

**DR NTETA:** And in item 4 there is – I am going to call it bullet point number 3.

20 **ADV SELEKA SC:** Okay, it is written number 3.

**DR NTETA:** Which starts – yes, it is written number 3.

**ADV SELEKA SC:** Yes.

**DR NTETA:** And it starts Arnot RFP.

**ADV SELEKA SC:** Yes, just read it then to the Chairperson, read it on record.

**DR NTETA:** Okay.

“Arnot RFP went through MCK process.”

MCK was standing for McKinsey.

“Will take coal delivery to March 2017.”

So that is the Arnot RFP. The next sentence:

“The shortfall from May 20 ...[intervenes]

**ADV SELEKA SC:** sorry, just before you proceed there.

**DR NTETA:** Yes.

**ADV SELEKA SC:** Explain to the Chairperson that first  
10 sentence. Arnot RFP, that is a request for proposal, going  
through McKinsey process, you say MCK stands for  
McKinsey process.

**DR NTETA:** Yes.

**ADV SELEKA SC:** Will take coal delivery to March 2017.

**DR NTETA:** Correct.

**ADV SELEKA SC:** Can you explain that to the  
Chairperson please? What does that mean?

**DR NTETA:** So during this period one of the – yes, I am  
trying to explain the sentence in context.

20 **ADV SELEKA SC:** Yes, proceed?

**DR NTETA:** Should I continue?

**ADV SELEKA SC:** Yes, please.

**DR NTETA:** Okay. So during the process of – I am going  
to say from the 1 January 2016, Arnot power station, which  
was previously supplied coal by Exxaro as well other

suppliers, that Exxaro contract had been terminated. We discussed it before, but I will remind you it was terminated and there was a dispute between Eskom and Exxaro which we discussed before.

So we had issued a request for proposal to replace the coal that would have – replaced the allocation of Exxaro with this RFP as well as the other suppliers that were currently supplying Arnot and that is what is in relation to the Arnot RFP.

10 Now the MCK process is that it was in terms of the – we had McKinsey within Eskom also within Primary Energy that were looking in terms of assisting on negotiations, looking in terms of costing and things like that. So that is when we sort of – we call it the MCK process.

**ADV SELEKA SC:** Yes?

**DR NTETA:** Yes, I was trying to explain that sentence.

**ADV SELEKA SC:** Yes, proceed. There are questions regarding the Exxaro.

20 **DR NTETA:** Okay, alright, sorry.

**ADV SELEKA SC:** Yes. Proceed?

**DR NTETA:** Okay. So then the next sentence reads:

“The shortfall from May 2016 needs to be addressed.”

And then:

“DM...”

Which is the Chairperson tactical command centre

“...advised that AN...”

Which is myself.

“...now needs to develop a proposal for the shortfall coal and agree this with Vusi and Matshela.”

**ADV SELEKA SC:** Yes?

**DR NTETA:** I will then take you also to the next page which is page 866 which then ...[intervenes]

10 **ADV SELEKA SC:** Just before you do that – sorry, before you do that, explain to the Chairperson the last sentence you read.

**DR NTETA:** Okay, not a problem. So the last sentence that I read was that I would need to engage with Mr Mboweni and Mr Koko with regards to – in essence what it is saying is that to address in terms of the shortfall for Arnot because there was a concern about it and they indicated that I was instructed to engage with them on it.

20 **ADV SELEKA SC:** Is there a reason why you did not mention this document in your affidavit.

**DR NTETA:** To be very honest with you I did not have it, I did not see it, it is actually when I was going through Mr Koko’s affidavit that I saw this particular – the actual minutes, so I did not – what I did recall in my discussions with the investigator, I did say that we had a tactical

command centre where, you know, the demand is raised and – sorry, the demand is raised and then we would act on it but I did not have access to the minutes.

**CHAIRPERSON:** Mr Seleka, I understood Dr Nteta to be referring to these – I think it is now two documents or is it one?

**ADV SELEKA SC:** It is one.

**CHAIRPERSON:** I understood her to be referring to that document or those documents in order to answer a  
10 question that you had put to her based on what Mr Khoza had said.

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:** Do you want to just repeat that question because I am not sure that I get the connection between what is in the document based on what Dr Nteta is saying and that question.

**ADV SELEKA SC:** That is correct, Chair. Dr Nteta you will recall that Mr Khoza finds it surprising and he says the approach here to offer coal was not done by Eskom, it was  
20 not Eskom's initiative approaching Tegeta, it was Tegeta approaching Eskom. So his point is – and I think it deals exactly with what you are trying to say now which if you say there was a shortfall, why did Eskom not take that initiative to address the shortfall? Instead Tegeta was the one that approaches you with this prepayment request.

**DR NTETA:** I am trying to answer that particular question in giving context and maybe it is – I am losing the context.

**CHAIRPERSON:** Maybe we should ...[intervenes]

**DR NTETA:** So all I am trying to say ...[intervenes]

**CHAIRPERSON:** Dr Nteta, I am sorry. Maybe let us do this way.

**DR NTETA:** Yes.

**CHAIRPERSON:** Make your – give me your answer to what Mr Khoza is saying about your version and then once  
10 you have given me the answer you can say in support of this answer, if we go to this document or that document you will find that it supports my answer by saying a, b, c, d. Maybe it will be easy to follow it like that.

**DR NTETA:** Okay, alright.

**CHAIRPERSON:** In other words give your answer without going to the document first to say this is my response and then you say this document here, there is a document that supports what I am saying and this is the document and this is how it supports me.

20 **DR NTETA:** Okay. So my response to Mr Khoza saying that if there was a requirement for coal he finds it strange that Tegeta would then come and offer us coal and we would not be looking for coal. My response is that we were looking for coal and looking for coal is in different forms. Some of it is where a supplier will come and say I have



coal. Particularly if their contract is expiring and there is a need to – and they have coal available. So we were looking for coal.

**CHAIRPERSON:** Yes, oaky.

**ADV SELEKA SC:** Thank you.

**CHAIRPERSON:** Well, I guess that Mr Khoza's point – and I say nothing about its merits, I am just saying his point seems to be not necessarily that you were not looking for coal generally speaking but that you were not  
10 the ones who went to Tegeta and said have you got coal for us? So but based on what you are saying I think your answer would be yes, we are not the ones who approached Tegeta, they approached us.

**DR NTETA:** Correct.

**CHAIRPERSON:** Yes, I am not – I have not looked at Mr Khoza's affidavit, I am not sure that his point connects properly because if we are in need of coal and somebody happens to be in need of a contract with us, we are looking for coal, we are looking for somebody who can sell us coal,  
20 somebody is looking for a – somebody who needs coal and they approach us, why is it a big issue but I maybe missing something because I have not looked, refresh my memory on his affidavit but he might be able to say that there is something that I may be missing in his point.

**ADV SELEKA SC:** Chair, I think the emphasis in his

affidavit is about what was communicated to them or to him in person prior to the submission being made to the BTC and he says we were approached on the basis that Tegeta wants to supply coal but it turns out that they wanted a prepayment, so he makes this two points that on the one hand, if you say there was a shortfall, you do not seem to have taken the initiative to approach them, they are the ones who came to you and, on the other hand, we were told it is for coal but now the submission says it is for prepayment and he distinguishes between the two. So we were on the first leg of it and I hear what the Chairperson is saying. I may have to read from his affidavit, Chair.

**CHAIRPERSON:** Yes. You see, I can understand if he has a concern that they were not told about the prepayment requirement.

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:** Up t whatever time or they were never told at all, that I can understand, but I think that is separate point.

20 **ADV SELEKA SC:** Yes.

**CHAIRPERSON:** The one about it was not Eskom who approached Tegeta, I am not sure that I follow it. But if maybe later on you have a look and you think there is something in it then maybe you could try again, you could revise it.

**ADV SELEKA SC:** Yes, Chair.

**CHAIRPERSON:** You may have refreshed your memory recently and you – but I am just saying that, I mean, if you have need for coal and somebody needs a buyer of coal you might, you know, it is easy to see how it could happen. You know, somebody phones you and say I have got coal, you say oh, you know, it is as if you knew my situation, I actually need coal right now, I need it yesterday, let us talk about money, you know?

10 **ADV SELEKA SC:** Ja. I think, Chairperson, we should look at it against the backdrop of what was happening at a time, Dr Nteta, because Tegeta was already having short term contracts with Eskom from January 2016 and the second one in February 2016 which was going to expire is it the 15 or the 18 April 2016?

**DR NTETA:** I actually think it is either the 13 or the 16 April, so let us settle on the 16<sup>th</sup>, that is on common date that we have but...

**ADV SELEKA SC:** Yes.

20 **DR NTETA:** I am not sure. I think it is the 16<sup>th</sup>, ja, because you think it is the 18<sup>th</sup>.

**ADV SELEKA SC:** So these were contracts that were short term, already Tegeta buying from OCM to supply to Eskom at Arnot power station, correct? Speak out, if you can speak out?

**DR NTETA:** Yes, so those were already the two contracts that they had, yes. I am not sure I heard the question.

**ADV SELEKA SC:** Yes, those were the two contracts that Tegeta had with Eskom and then you have this time around - and, you see, there are various reasons given why Tegeta made the approach. One of the reasons is that Tegeta wanted an extension of the contract.

**DR NTETA:** Correct. I am not sure if you are frozen or if you asked me a question that I did not understand.

10 **CHAIRPERSON:** Do you want to comment on that?

**ADV SELEKA SC:** Yes, you confirm that that is one of the reasons why Tegeta – or was given, as Tegeta approaching Eskom.

**CHAIRPERSON:** Was given by whom?

**DR NTETA:** Ja, so one of the reasons for...

**ADV SELEKA SC:** Okay, you in your submission ...[intervenes]

**DR NTETA:** Can I ask you to repeat the question please?

20 **ADV SELEKA SC:** Yes, we are repeating it. The technology is too slow. In your submission to the BTC you gave as a reason for the submission that Tegeta wanted to extend the existing contract.

**DR NTETA:** Yes.

**ADV SELEKA SC:** So on the one hand that is the reason given and on the other hand, which is now a different

aspect altogether, the focus of our inquiry as well is that you requested that the prepayment be made to Tegeta in that submission.

**DR NTETA:** So the supplier was looking to – I think there is a delay, sorry.

**CHAIRPERSON:** Sorry, we – the technology is giving us a problem but I want to say, Mr Seleka, where what you say to her is not in the form of a question, you want her to comment, just make it clear that you are asking her to  
10 comment.

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:** Because sometimes she is not sure whether you expect her to say anything or whether you are still continuing.

**ADV SELEKA SC:** Thank you, Chair. Dr Nteta, I will make it clear to you. So the submission also included the issue of a prepayment request by the supplier. Can you comment on that or shall I say you confirm that?

**DR NTETA:** Yes. Yes, the submission also spoke to a  
20 prepayment.

**ADV SELEKA SC:** Yes, yes.

**CHAIRPERSON:** May I just ask this question, not about your evidence, are you able to see the evidence leader from where you are, Dr Nteta? Because that might be causing the problem because ...[intervenes]

**DR NTETA:** Yes, I am.

**CHAIRPERSON:** Oh, you are able to see him?

**DR NTETA:** Yes. So what happens which maybe we can solve is that I see him after a while. Like, for example, I see my screen of myself talking and then if you talk it would move to you and then it slowly gets to him.

**CHAIRPERSON:** Oh, so it takes some time so you cannot always tell whether he is done with the question of comment, then you have to wait until there is some silence,  
10 then you think, okay, he is done then you start answering but in the meantime that can be quite a delay.

**DR NTETA:** Correct.

**CHAIRPERSON:** The technicians, do they hear that, can they try and sort that out please? Okay, alright, let us continue, I am hoping the technicians heard that.

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:** And that they try and sort it out.

**ADV SELEKA SC:** Thank you, Chair. Dr Nteta, I just want to read these passages from Dr Khoza's affidavit so that I  
20 can expedite the process. Chairperson, it is in Eskom bundle 14, 14(A) on page 422.13.

**CHAIRPERSON:** Just repeat the page?

**ADV SELEKA SC:** 422.13.

**CHAIRPERSON:** Okay.

**ADV SELEKA SC:** And I would like to read from

paragraph 57 to 59.

**CHAIRPERSON:** Ja, go ahead if Dr Nteta is ready. Have you found it Dr Nteta?

**DR NTETA:** You can go ahead, I am getting there but I will listen to what you are saying.

**CHAIRPERSON:** Okay.

**ADV SELEKA SC:** Yes. So in his affidavit Mr Khoza writes, paragraph 57:

10 “I have taken note of Nteta’s affidavit and I wish to point out that at paragraph 8.3 of her affidavit she states that she was approached by Tegeta in early April 2018 with an offer to supply coal to Eskom from OCM.”

He then goes on to state that:

20 “In subsequent discussions with Tegeta she was advised that Tegeta would require a prepayment for the coal. This version must be contrasted with the board submission which I received which essentially indicated that there was an urgent need to secure coal to avoid load shedding. From Nteta’s affidavit it is clear that the request for a prepayment followed the unsolicited bid which Tegeta made to Nteta. It was not Eskom which required coal and then approached Tegeta which stated coal can only be extended if a prepayment is made. It appears

that it is Tegeta that approached Nteta. Nteta's affidavit suggests a series of events leading up to 11 April 2016 which differs from the submission which Daniels and Nteta prepared for the board which they sent to me and other board members on 11 April 2016."

So what he is saying is, what you are stating in your affidavit, it is a version different from what was contained in the submission to the board, I mean to the BTC.

10 **CHAIRPERSON:** Before Dr Nteta answers, in what way does Mr Khoza say the two versions are different?

**ADV SELEKA SC:** Paragraph 57, Chairperson.

**CHAIRPERSON:** Ja.

**ADV SELEKA SC:** He says he has read the affidavit, paragraph 8.3 of Dr Nteta, she then goes on to state that in the subsequent discussions with Tegeta she was advised that Tegeta would require prepayment. Then he says this version must be contrasted with the Board submission which I received, which essentially indicated that there was  
20 an urgent need to secure coal. So ...[intervenes]

**CHAIRPERSON:** Ja, but it is the same point we – I think I raised earlier on, I don't see the point ...[intervenes]

**ADV SELEKA SC:** Well, he is dealing with two aspects here Chair.

**CHAIRPERSON:** Ja.



**ADV SELEKA SC:** One is the issue of the prepayment and the other is what the Chairperson has in mind which is who approaches – who approached who first, which is what comes in paragraph 58.

**CHAIRPERSON:** Yes, about the one about who approaches who first.

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:** I'm not sure that I see what's important about who approached who first unless there is something  
10 else, otherwise it's taken us too much time to try and figure out what his point is on that, and what is the other point he is making?

**ADV SELEKA SC:** Yes, which is what I want to move on to, the prepayment requirement.

**CHAIRPERSON:** Ja.

**ADV SELEKA SC:** And...[intervenes].

**CHAIRPERSON:** Okay, I think move on to that one.

**ADV SELEKA SC:** Yes, so there – in the end the prepayment requirements, Ms Nteta, which Mr Khoza says,  
20 that request should be contrasted with what had been given to them as the BTC and you will recall in one of the paragraphs, he says, the prepayment was, in fact, underplayed, it was kind of hidden away from the Board and not made the dominant feature of that submission. So, Chairperson, if I may, that's paragraph 46 of his affidavit,

so you'll go to page – let's do pages backwards...[intervenes].

**CHAIRPERSON:** He suggests that the submission that Dr Nteta prepared for the BTC made no reference to a pre-requirement of a pre-payment?

**ADV SELEKA SC:** No, that it was diminished, so it was made an insignificant aspect of the submissions. You'll see in the paragraph I'm about to refer to Chair.

**CHAIRPERSON:** Well, let's go to – let's go to the  
10 paragraph and the submission.

**ADV SELEKA SC:** Paragraph 46, Chair.

**CHAIRPERSON:** I mean that is of his affidavit?

**ADV SELEKA SC:** Correct, Chairperson.

**CHAIRPERSON:** It says what you have told me already, isn't it?

**ADV SELEKA SC:** Yes, Chair.

**CHAIRPERSON:** Ja, let's go to the submission, let me see this point of Dr Nteta hiding the issue of the prepayment.

20 **DR NTETA:** I take exception to that Chair, that I was hiding it.

**CHAIRPERSON:** [Laughter], well, maybe I'm attributing to Mr Khoza, a verb that he did not use – the submission, was it page 190 of which Bundle?

**ADV SELEKA SC:** It's in the Tegeta reference Bundle

Chairperson, not ...[intervenes].

**CHAIRPERSON:** If you find it, you can just read to me and tell me whereabouts it is and why anybody would say it's hidden if it is there, if it there in black and white.

**DR NTETA:** Chairperson, are they sanitising those documents before they give them to you?

**CHAIRPERSON:** Well, I sanitise them myself, but I think they do sanitise them too, I sanitise them myself as well, you're very concerned about that. No, I sanitise them  
10 quite a lot if you have noticed.

**ADV SELEKA SC:** Sorry Chair, Eskom Bundle 18(A) page 297.

**CHAIRPERSON:** Page 2?

**ADV SELEKA SC:** Page 297 – no, no those are the minutes, page 292.

**CHAIRPERSON:** Yes continue.

**ADV SELEKA SC:** Page 292, Chairperson.

**CHAIRPERSON:** Oh, 292?

**ADV SELEKA SC:** 292, yes.

20 **CHAIRPERSON:** Okay.

**ADV SELEKA SC:** The other one is the minutes.

**CHAIRPERSON:** Yes.

**ADV SELEKA SC:** Chair, I'm putting to Dr Nteta what the Chairperson of the BTC said, he understood the matter to be.

**CHAIRPERSON:** But we are coming to this document because I want to – we want to see where prepayment is mentioned of hiding it.

**ADV SELEKA SC:** Yes, the prepayment is dealt with.

**CHAIRPERSON:** Where is it mentioned?

**ADV SELEKA SC:** It is mentioned, Chairperson you're on page 292, turn to page 293, the paragraph just above 3.2 it starts with, both suppliers have indicated.

**CHAIRPERSON:** Now, why is that hiding it?

10 **ADV SELEKA SC:** That's not me Chairperson.

**CHAIRPERSON:** Well – but you are putting to Dr Nteta, Mr Khoza's point.

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:** And what's the ultimate point if she put it in a paragraph that he would not have put it at, is Dr Nteta's document not his, maybe he would have put it in the first paragraph, so really it doesn't seem to matter to me?

20 **ADV SELEKA SC:** Well, what he's saying is, Chair, in that paragraph I refer the Chairperson, he says,

“Significantly the information I received prior to 11 April 2016 meeting was that an extension to a contract was needed. Not that R659million was required to be prepaid to Tegeta. In hindsight, this appears to show that the significance of a

prepayment to Tegeta was diminished and hidden from the Board as it only appears as an ancillary an immaterial aspect in the resolution”.

That’s his version Chair.

**CHAIRPERSON:** Well, I don’t think we should spend too much time on that version, let’s move on. You really have to have very poignant reasons to say that somebody, you know, where they chose to mention a point in their document, they chose that part of the document because  
10 they had ulterior motives to hide the point or to lessen the chances that you’d see the point. You’d need to have, really very poignant.

**ADV SELEKA SC:** Ja and that seems to be the gist of these submissions in the affidavit.

**CHAIRPERSON:** What is your take on it?

**DR NTETA:** Is the question being posed to me or to the evidence leader?

**CHAIRPERSON:** No, no the evidence leader.

**ADV SELEKA SC:** It’s posed to me.

20 **DR NTETA:** Thank you.

**ADV SELEKA SC:** I have taken the view, Chairperson, that the request is not necessarily hidden but I think to some extent it is diminished as Mr Khoza says. So, it is not made the predominant feature of the submission and – but ultimately the BTC did talk about a prepayment in its

deliberation.

**CHAIRPERSON:** Ja, I would have thought that if you had five points you wanted to pursue in his version if that was going to be a point or it might be a last point. So, I think, please let's look at more important points that – ja.

**ADV SELEKA SC:** Yes, because, I mean, ultimately the – in the telephone conference members of the BTC did ask about the prepayment. So, even if the submission downplayed it, it ultimately became – it was brought to the  
10 fore. Now, Dr Nteta, you talk about the urgency of this matter, you deal with that in your affidavit there was a BTC meeting scheduled for the 13<sup>th</sup> of April 2016, why did this meeting have to take place at 9 o'clock at night on the 11<sup>th</sup> of April 2016?

**DR NTETA:** I will provide my opinion.

**ADV SELEKA SC:** Yes.

**DR NTETA:** But I think the Chairperson of the BTC will have to answer that question. In my opinion, and I've indicated in my affidavit, there is no reason why the  
20 submission could not have started on the 13<sup>th</sup> of April.

**ADV SELEKA SC:** Thank you, so you are saying to the Chairperson, you could comfortably have placed this thing on the agenda of BTC on the 13<sup>th</sup>?

**DR NTETA:** Correct.

**ADV SELEKA SC:** Thank you. Then, I would like

to...[intervenes].

**CHAIRPERSON:** Well, one of the points that I'm interested in that Mr Khoza made, if I recall correctly in his evidence, really was that, if I recall correctly, he suggested that Dr Nteta must have been involved with the arrangement of the meeting as well as the issues to be discussed at the meeting of 11, I think much more than he thought she makes it out to be. I can't remember the exact point but there was a suggestion – he implied that Dr Nteta  
10 must have been party to knowledge of what was being done. I think he suggested that Dr Nteta seems to have worked with Ms Daniels or something or somebody about the arrangements to have this BTC meeting on the 11<sup>th</sup>. I may be misrepresenting what he said, but I understood him to be saying, Dr Nteta has not handed in her evidence about what she knew about arrangement to have the BTC meeting take place in the evening of the 11<sup>th</sup>, she was working with Ms Daniels to achieve that. Do you have any recollection of something along these lines?

20 **ADV SELEKA SC:** I have and I'm at the paragraphs relevant to that point, Chair.

**CHAIRPERSON:** Yes, okay that's quite – on the face of it that is an important issue to look at ja.

**ADV SELEKA SC:** Thank you, that's on page – Eskom Bundle 14(A) page 422.14.

**CHAIRPERSON:** Thank you, I've got that.

**ADV SELEKA SC:** From paragraph 62 I will read it Chair,  
it says,

10 "I also raise – and it relates to this, whether the  
meeting could take place on the 11<sup>th</sup> or the 13<sup>th</sup> – I  
also raise issue with the fact that, Nteta innocently  
suggested, paragraph 8.14, that it is not clear to me  
the reason for the BTC sitting on 11 April 2016 as,  
in my opinion, the prepayment submission could  
have been deliberated at the BTC meeting on 13  
April 2016. This is extremely deceitful of Nteta to  
say since she was working on the 11 April 2016  
submission until the late hours of 10 April 2016 and  
the very same draft submission which she attaches  
to her affidavit which she emailed to Daniels,  
displays an 11 2016 BTC meeting date. Paragraph  
63 had there not been collusion between Daniels  
and Nteta, the company secretary, Daniels would no  
doubt have told her and the other BTC members  
20 that the matter could have been dealt with on 13  
April 2016 and not 11 April 2016 as they  
orchestrated. Furthermore, logically, had they not  
intended to cause the BTC to sit on 11 April 2016  
they would have prepared the submission document  
only from 11 April 2016 onwards and sent it to the



BTC via email as an addition to the 13 April 2016 submission”.

Then he goes on to deal with another point, I think that’s...[intervenes].

**CHAIRPERSON:** Yes, I think we should give Dr Nteta an opportunity to deal with the suggestion by Mr Khoza that he she was being deceitful.

**ADV SELEKA SC:** Alluded in August.

**CHAIRPERSON:** Yes, do you want to say something about  
10 what Mr Khoza is saying, Dr Nteta?

**DR NTETA:** Chairperson, thank you very much I actually have plenty to say about what Mr Khoza is saying but I will not go into the detail because I understand that – I would like this to be my last appearance. Mr Khoza has made some very sweeping un-based allegations with regards to me being instrumental in setting a date and time for a BTC meeting. Mr Khoza is the Chairperson of the Board Tender Committee, he’s a Board member. At the time I was a procurement official who is tasked with getting submissions  
20 – putting submissions together. Where I sat is a procurement official, I reported to one level, which is a Senior General Manager within TED, that Senior General Manager reported into a Group Executive, that Group Executive reported into a CEO and that CEO reported into the Board. I provide this context so that we can – to allow

you to see that the ability for me to then instruct Board Members of Eskom to sit and deliberate on a transaction is very unlikely, particularly in the hierarchical nature of Eskom, so that's one. I never engaged with Mr Khoza at any point with regards to the submission except for when I entered the room or the BTC. So, I'm not too sure how I would have convinced him to have that meeting. Secondly the instruction of BTC sitting, we receive it as procurement officials, we cannot indicate when it must be, we are simply  
10 told, your submission is going to be heard on this date and at this time. My affidavit indicates that, unfortunately, I am not sure if whether it was Mr Magelani or Ms Suzanne Daniels who then informed me as to when the BTC sitting is. They are the two people who would inform a procurement official as to when a sitting is at, so that's to answer his first sweeping unbiased – I mean very biased statements that he has made about me. The second element where he's talking about working with Ms Daniels, he is correct that I sought her assistance with this  
20 transaction. My affidavit indicates that because I was not sure in terms of prepayment and how to handle it, I requested my seniors to assist me in putting together the submission. So, I worked with her, I did not collude with her, I worked with her so that she can assist me. Similarly, I worked with Mr Magelani; similarly I worked with Mr Koko

and Mr Mbongo to get the submission together. So, I take great offence to his statement, I further take offence to his statement that he says that I hid the submission, it is resolution 2 that talks to prepayment. I'm going to stop here because my father raised me right.

**ADV SELEKA SC:** Thank you, Chair. Yes, Dr Nteta if we may please go through the submission quickly. The submission is in Eskom Bundle 18(A) page 292.

**DR NTETA:** Page 292?

10 **ADV SELEKA SC:** Yes, Eskom Bundle 18.

**DR NTETA:** Thank you, I'm getting to that page apologies for the delay, I'm at the submission.

**ADV SELEKA SC:** Yes, the submission – the summary of facts – salient facts, paragraph 3 you see that and 3.1?

**DR NTETA:** Yes.

**ADV SELEKA SC:** On the first page of the submission.

**DR NTETA:** Yes.

**ADV SELEKA SC:** Under salient facts it reads,

20 "The requirements for the supply of contract coal originates from the April 2016 supply plan...[intervenes]".

**CHAIRPERSON:** Mr Seleka, I suggest that – with regard to the submission if you just go to the points that you seek to make about it without reading substantial parts of it, obviously you can read a particular part, but I just think

that it's important to just go to the points that you seek to make, okay.

**ADV SELEKA SC:** Yes, this is one of them, thank you, I accept the Chairperson's guidance there. It says,

10 "The requirements for the supply of contract coal originates from the April 2016 supply plan as presented at the Primary Energy Technical Control Centre of 8 April 2016. It was identified that supply to Arnot will be inadequate to meet the burn requirements of the power station over the winter months and that there is an urgent need for additional coal. This identified requirement is as a result of the need to build up stock days over a short period while the RFP, request for proposal for Arnot is being finalised. This shortfall of supply amounts to approximately 2.1million tons",

20 And it goes on to talk about at present, the RFP's and – it's in the negotiation phase. Dr Nteta we – you were seeking to take the Chairperson through this Technical Control Centre meeting, could you tell the Chairperson, in regard to this paragraph that I've read about the urgent need for coal in the winter months, whether this statement was supported by the supply plan of April 2016?

**DR NTETA:** I'm going to take you through – yes, I was

going to take you to that particular Tactical Control Centre meeting and one of the elements I was going to take you through was the bullet point in terms of bullet point number 11 where I was requested, in terms of myself and my team to come up with proposals and plans by close of business on Monday. Now, in that particular Tactical Procurement meeting I'm going to relate to...[intervenes].

**ADV SELEKA SC:** Can I – yes because I'm asking a different question. My question is whether...[intervenes].

10 **DR NTETA:** I think I know what you're asking.

**ADV SELEKA SC:** Yes, okay, let me repeat it for the benefit of the Chairperson. The April 2016 supply plans, whether the statement made here that there would be a shortfall over the winter months, whether that statement was supported by the April 2016 supply plan?

**DR NTETA:** I'm going to say no, because I think I know where you are going.

**ADV SELEKA SC:** Okay, Chair I'm moving...[intervenes].

**DR NTETA:** Would you like me to elaborate?

20 **CHAIRPERSON:** Well, you know that – the fact that you say, you're going to say no doesn't mean it's not your answer, so it is your answer. To say, I'm going to say no doesn't change anything, your answer is no, is that – you understand that?

**DR NTETA:** I wanted to elaborate but I've opted not to

elaborate.

**CHAIRPERSON:** Okay, alright.

**DR NTETA:** Ja, continue evidence leader, as you lead my evidence.

**ADV SELEKA SC:** Thank you. Then it says – I’m reading the paragraph which reads,

“The current short-term portfolio consists of two suppliers namely Umzimbiti Mining and Tegeta Exploration and Resources”,

10 You see that?

**DR NTETA:** Yes.

**ADV SELEKA SC:** I understand it to be your evidence that there were more than – well many suppliers to Arnot Power Station, correct?

**DR NTETA:** Yes.

**ADV SELEKA SC:** It was not only Umzimbiti and Tegeta?

**DR NTETA:** Yes, there were other suppliers that were contracted already, so these were the two that were – pardon?

20 **ADV SELEKA SC:** And supplying coal – contracted and supplying coal to Arnot?

**DR NTETA:** Yes, there were others that we were looking at who were contracted and supplying coal some of them we hadn’t even done box counts.

**ADV SELEKA SC:** Now, can you recall how did Umzimbiti

get to be incorporated into this submission?

**DR NTETA:** Yes, I can.

**ADV SELEKA SC:** Yes, please tell the Chairperson.

**DR NTETA:** Okay, so in the course of the day of the 11<sup>th</sup> of April, I – as I indicated, I'd been consulting quite a bit with my seniors and Mr Magelani then – it got incorporate after the discussion that I had with Mr Magelani where he asked me about Umzimbiti Coal in terms of when their contract is coming to an end and then indicate that I  
10 should put Umzimbiti in the submission. I should get the volumes and – etcetera.

**ADV SELEKA SC:** So, Umzimbiti had not approached you for an extension?

**DR NTETA:** So, they hadn't approached me – ja they hadn't approached me directly for an extension, they had discussions with the – in terms of the coal operations team because they were concerned about – so the coal contracts look at period in terms of time period as well as volumes. So, their time period was going to expire before they had  
20 completed their volumes so they had indicated that to the coal operations team and so they had approached Eskom.

**ADV SELEKA SC:** Okay, is that your answer now, that they had approached Eskom for an extension?

**DR NTETA:** They had spoken to the coal operations yes if that makes sense. So, they hadn't approached myself they

were just being a concern that we are not going to make our volumes because they had issues, but they hadn't approached me directly.

**ADV SELEKA SC:** Ja I am not sure ...[intervenes]

**DR NTETA:** But – but when I say – when I say approach I do not want to make is similar to the Tegeta approach because that was directly as the coal. It was more in just in terms of I rather say it is their – they were engaging with the coal – with the contract's manager.

10 **ADV SELEKA SC:** Yes okay. Let me ask my question...

**DR NTETA:** Let me put it that way.

**ADV SELEKA SC:** Differently.

**DR NTETA:** In terms of the managing of the contract.

**ADV SELEKA SC:** Yes let me ask my question differently because you are saying it was Mr Edwin Mabelane who asked you to incorporate Umsimbithi in the submission.

**DR NTETA:** Yes.

**ADV SELEKA SC:** Yes.

**DR NTETA:** Yes.

20 **ADV SELEKA SC:** My question was do you know – you personally that Umsimbithi had asked for an extension of the contract?

**DR NTETA:** So when Mr Mabelane spoke to me at the time I did not know whether they had specifically asked when he asked me at the time. But in my way back because one of



the things that he had asked me to do is to get the volumes that they were currently supplying you know in just more detail about their contract.

So in my engagement where I would get that information would be from the coal operations person who is managing that particular contract. Have I answered your question?

**ADV SELEKA SC:** No, no you have not. But I want to move on. But you have not answered that question. Is it a yes or  
10 a no? Is it a yes or no?

**DR NTETA:** So I think?

**ADV SELEKA SC:** Did you know personally that they asked for an extension?

**DR NTETA:** At the time no. No.

**ADV SELEKA SC:** Okay I want to go to the next page of the submissions.

**DR NTETA:** Ja.

**ADV SELEKA SC:** Page 293. Page 293 under the sentence the benefits for extending these short term contracts include.  
20 Then you will recall that I said this was exactly one of the reasons given in the submissions that it was an extension of the existing contract. So you see they had the benefits for extending these short term contracts include...

**DR NTETA:** Yes.

**ADV SELEKA SC:** Include bullet 1.

“The coal is being mined and can be delivered without delay.”

You see that?

**DR NTETA:** Yes I do.

**ADV SELEKA SC:** Was this correct?

**DR NTETA:** So yes it was correct in the sense that the coal was being mined. I have reflected in terms of that particular statement and reflecting in terms of what is understood this is what I understood.

10           So in saying that the coal was being mined because the – I was trying to put in relation to that it is an – their operational mines and perhaps in hindsight I should have said these are operational mines. Because we always looked at in terms of just the contrast of an operational mine and not an operational mine.

          So it just means that if it is an operational mine we can then get the coal sooner than not. But in hindsight having looked in terms of what the statement says and what a person outside of coal operations would understand it – ja  
20 it is – it means something different.

**ADV SELEKA SC:** Yes okay. I was struggling to follow your answer there. The question is, you – it is stated here as one of the benefits. It says:

“The coal is being mined and can be delivered without delay.”

And my question was was that factually correct?

**DR NTETA:** So –

**CHAIRPERSON:** Well she said the ...

**DR NTETA:** My understanding.

**CHAIRPERSON:** The coal is being mined part is correct but I think...

**DR NTETA:** Mr Chairperson.

**CHAIRPERSON:** I think you said Dr Nteta that the part that says the coal is being mined is correct but you seem to  
10 concede that the second part that the coal can be delivered without delay you seem to concede that it was not correct. Is that – is my understanding correct?

**DR NTETA:** Yes in terms of that ja. There would be – there will be a delay.

**ADV SELEKA SC:** Yes.

**DR NTETA:** It would not be available the next. It is – ja so it would not be available the next day.

**ADV SELEKA SC:** Yes now...

**CHAIRPERSON:** Would it be available in a month's time?

20 **DR NTETA:** Yes it would be available in a month's time.

**CHAIRPERSON:** Okay in two weeks' time? Would it have been available in two weeks' time?

**DR NTETA:** Yes it probably would be available in two weeks' time yes.

**CHAIRPERSON:** Okay. Mr Seleka.

**ADV SELEKA SC:** Thank you Chair. Now if to the extent that you say that – okay let me deal with the first part. You saying the first part is correct that coal is being mined. Now let me read to you that paragraph regarding the pre-payment which is just above paragraph 3.2 key assumptions is above that Chairperson. It says:

10 “Both suppliers have indicated the willingness to extend current contracts however Tegeta has requested that Eskom considers some formal pre-payment to enable it to meet the production requirements from the export component of the mine in lieu of the fact that it subsidises the direct feed of Hendrina Power and this will enable it to meet the coal supply demands for the two power stations in the short term.”

20 Now the pre-payment is required as we read here in order for Tegeta to – to – you have said to reopen its export component of the mine. How do we reconcile that statement with what you say is a correct portion of that sentence the coal is being mined?

**DR NTETA:** So to reconcile the two on the – the reason why I said the coal is being mined I was speaking to in terms of the site of the operations. So the site in terms of where

Tegeta was getting the coal, coal was being mined. The site where Umsimbithi was getting the coal, coal was being mined.

They were having difficulty in the sense that they were not able to get to their hundred percent operation and we were getting trickles of coal from them. So that is why I am saying to you that the statement that I made was in terms of the coal is being mined it is correct.

The element in terms of the delay because the delay  
10 would then be because they would need to now start their production operation in terms of the beneficiation part of that particular coal that is being mined so that it meets our particular stack. So that is how I reconciled the two.

**ADV SELEKA SC:** Yes but we have to understand this in the way in which it was presented to the BTC and the Chairperson of BTC says.

**DR NTETA:** Yes.

**ADV SELEKA SC:** The Chairperson of BTC says we have been told unless we approve this deal there will be load  
20 shedding. Coal is required immediately. It is an urgent situation. But the pre-payment request is made in order to explore or reopen the export component of the mine that had been closed by OCM.

**DR NTETA:** Yes.

**ADV SELEKA SC:** So mining there is not taking place.

**DR NTETA:** Mining was taking place at OCM in terms of the – the mine operations mining was taking place. When the opening the export operations and my understanding was that there would be – it is opening up an export operations so that they can begin to beneficiate that coal so that then meets the grade that we are looking at.

So that – that part needed still to be opened. I am not sure if I am – I am coming clear. So that was my understanding of that one statement in the submissions.

10 **ADV SELEKA SC:** Ja well I have – I think you can sense it is not particularly clear or coming out particularly clear. Did Umsimbithi require a pre-payment?

**DR NTETA:** Yes. Pardon.

**ADV SELEKA SC:** Did Umsimbithi require a pre-payment?

**DR NTETA:** Umsimbithi did not require a pre-payment.

**ADV SELEKA SC:** And Umsimbithi could not deliver immediately?

**DR NTETA:** Umzimbithi's issues were different in terms of their ability to deliver immediately. They were not able to –  
20 when I talk about the delay is because they were having an industrial strike which was limiting their capacity to deliver the full volumes that they were due to deliver to us.

**ADV SELEKA SC:** Yes – ja just give a direct ...

**DR NTETA:** They did not – they did not require pre-payment.

**ADV SELEKA SC:** Yes but give a direct answer. Could they deliver immediately?

**DR NTETA:** Yes they could deliver immediately not the required volumes.

**ADV SELEKA SC:** Okay. Let us go – now tell the Chairperson how you – how do we reconcile the two? If you go to the first page of the submissions.

**DR NTETA:** Pardon sorry can I ask you to start – can I ask you to start your sentence again because I lost you? Thank  
10 you.

**ADV SELEKA SC:** Okay your – your answer is that they could deliver immediately but not the require volumes – Umsimbithi. Is that your answer to my question?

**DR NTETA:** Evidence leader can I respond? I have noted that you are taking me through line by line of the submissions and I want to also note to you that the submission was prepared based on a lot of inputs.

If looking at line by line it may not – in hindsight you can take it apart and say it is not clear and that I will – that I  
20 will concede to. My understanding of the submission and that line that we are looking at in the submission is talking to whether the coal can get there immediately or not immediately and I concede that that is – that particular line in the submission is not clear.

So Umzimbithi at the time was supplying coal but

very limited amounts and quite erratically. So it is correct that it was not – I should not have said without delay because it would depend on when the strike is over. So they were supplying but not the required amounts and yes that one line it is my understanding and someone else's is very different and I concede to that.

**ADV SELEKA SC:** Well I am not sure whether it is a question of it is unclear or not so clear. What I am testing with you it is a question of whether a statement made is  
10 factually correct. That is really what I am testing with you. When you say coal was being mined and it will be delivered immediately is it – that is to me so clear. I understand you to say what it means is clear to me but what I am saying to you is was that factually correct? That is a different question.

**DR NTETA:** The statement – I am saying in my opinion I felt it was correct where it was saying without delay. Now the issue is what is that delay? So I believe that it was correct but the question now we are asking in hindsight is that where  
20 was it? Tomorrow it is available and I am saying to you tomorrow, the next day the coal was not going to be available. But in a few weeks it would be available.

**ADV SELEKA SC:** But then the BTC would have been misled.

**DR NTETA:** And I am – and I am conceding.



**ADV SELEKA SC:** Yes.

**DR NTETA:** I do not think the BTC would have been misled and in the statement.

**ADV SELEKA SC:** I have...

**DR NTETA:** The second thing is that what I want to indicate – sorry.

**ADV SELEKA SC:** Let me finalise why my statement but before I finalise it you were about to say to the Chairperson you are conceding – just quickly on that finalise it?

10 **DR NTETA:** What I am conceding to is it – so what I was saying I am conceding to in terms of the delivery without delay in the sense that I am conceding that yes it was not going to be available the next day – the coal.

**ADV SELEKA SC:** Yes.

**DR NTETA:** That is what I am – I am conceding to and I am also conceding to that the statement there may not be clear which is very easy for us to look at in hindsight. It is one line in the submission.

20 **ADV SELEKA SC:** Yes. Now there were two aspects because if you concede that the coal was not going to be immediately available or available without delay if you concede that is not correct then I am saying to you when one reads the affidavit of Mr Khoza who says: we were being told urgently make this decision otherwise there will be load shedding then the BTC was misled by that statement that

coal will be made available without delay.

**DR NTETA:** Advocate Seleka.

**ADV SELEKA SC:** Yes.

**DR NTETA:** The BTC submission is a four page document.

**ADV SELEKA SC:** Yes.

**DR NTETA:** If you – if Mr Khoza is saying that because of one sentence in a four page document the BTC in totality was misled then I find that very difficult to say so – to agree to because in providing that particular document there are  
10 other statements that are in there that are correct.

And if there was a bit of issue in terms of like you were asking me now in terms of can you unpack the statement they are entitled and they do in the deliberation to ask us in terms of what does this statement mean and then we can provide clarity. So I – I have difficulty in saying that the BTC was misled because of one line in a four page document.

**ADV SELEKA SC:** Okay the second point.

**DR NTETA:** As Mr Khoza is implying.

20 **ADV SELEKA SC:** Yes. The second point.

**CHAIRPERSON:** Well just one second. I can understand your point Doctor Nteta when you say if the BTC wanted to make enquiries with you as to what is meant by a particular line like without delay you were available. Because I think that is the point you make, is that correct? That is one of

the points you make. Is that correct?

**DR NTETA:** Yes because the document sits and – yes it is correct.

**CHAIRPERSON:** Yes that point I can understand if that is factually correct even though they would obviously ask if they were not sure what it means a particular sentence. But if they believed that it was clear obviously they would not bother to ask and they would act on the – on their understanding of what it means.

10           If they understood without delay to mean the moment the contract is signed or the pre-payment is made the following day coal can be delivered that would be an understanding that is justified I would imagine by the statement that says without delay.

          But it may well be that within the context that was known to you and or Eskom or to the BTC it may well be that without delay could not or should not have been understood to be like the following day but maybe it should be understood to be certainly within a week or more than that I  
20 am not sure.

          That I can understand but with regard to the point you make that in effect you do not understand why they would be misled by one sentence in a four page document I am not sure that I understand that. One – one sentence in a four page document can be very important and can relate to

a very material point and it can be misleading.

But if you say to me if they read that sentence in the context of the whole document then they would not be justified in giving it a certain meaning then I can understand. But then you should be able to say but when you go to page 4 you can see that what was said in page 4 in effect qualifies what was said in that statement two pages earlier because if you read it – read what is said at page 4 it could not – the sentence could not mean – could not be understood to mean  
10 delivery of coal the following day then I would understand. You understand where my concern is?

**DR NTETA:** Yes Chairperson.

**CHAIRPERSON:** Yes you want to say something?

**DR NTETA:** And – and – I am in agreement with you yes Chairperson I am in agreement with you and in fact prior to you beginning to – to provide this context which I appreciate. I was also going to say that when you look in the context of the document – the full document there is a statement that is made as well that says on the page before talks about  
20 Umsimbithi. There is an industrial action and should the – I will read it to you it says:

“The current contract supply will then be depleted around June 2016 should the industrial action be stemmed and full mining operations resumes.”

So when you look at it in terms of the full context of the document for me I would then understand that they would – would – maybe would ask as to – but Ayanda you have made a statement in this document here that says without delay but you are telling me about an industrial strike. So what – what is the – how long and what is the delay? Or Ayanda you are saying to me that it is without delay but we then – Tegeta they need to start up their operations. So what do you mean? So for me I am – all I am saying is that they had  
10 the opportunity to ask these questions and these are very relevant questions but looking in terms of the full context of the document.

**CHAIRPERSON:** Mr Seleka.

**ADV SELEKA SC:** Yes. Thank you Chair.

**CHAIRPERSON:** I might say that I am keen that we move on.

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:** Because we have been on this submission for a very long time.

20 **ADV SELEKA SC:** Okay.

**CHAIRPERSON:** But obviously important points must be covered but I think.

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:** We need to – to move to – move on otherwise we spend the whole time to be on the submission.

**ADV SELEKA SC:** Yes, ja the submission Chair is really the last part of Dr Nteta's evidence. The ones we have com – finished the submission we will be reaching the end of her evidence.

**CHAIRPERSON:** Okay.

**ADV SELEKA SC:** Ja Dr Nteta indeed the paragraph you are referring to which is on page 1 of that submission document at the bottom of the page Chairperson that is Eskom Bundle 18 page 28 – 292 reads that:

10           “Umsimbithi is contracted to supply Arnot with 540 000 tons and is currently underperforming due to protracted industrial action. The current contract supply will then be depleted in and around June 2016 should the industrial action be stemmed and full mining operations resumed. The supplier indicated the willingness to extend from July 2016 until September 2016 on similar terms and conditions.”

20    So you see because I am looking at this with the – well I am looking at it but really putting to you the version of the Chairperson of BTC insofar as he says the impression they were brought under by the explanation is that unless you agree there will be load shedding. But I think you have traversed that. I can move on unless if you want to comment

on it before I move on.

**DR NTETA:** I have got no comment on that I think he must answer what does he mean by the impression that he – that he got and from whom did he get the impression. I have too many questions for that statement to provide a comment.

**ADV SELEKA SC:** Okay. Thank you. Now we know that in the – in the – well please tell the Chairperson you – when you starting drafting the submission you had not received a written offer from Mr Nath.

10 **DR NTETA:** Correct.

**ADV SELEKA SC:** I want you to – yes. I want you please to tell the Chairperson when do you – whether you ever received a written offer – when do you receive it and what were the terms of the written offer.

**DR NTETA:** So I received the written offer from Mr Nath on the 11<sup>th</sup> of April 2016. The reason why I received the written offer is because I contacted Mr Nath. I contacted Mr Nath either on the – that Monday or on the Friday I cannot recall which of those two but for me that is immaterial as to the  
20 particular date.

But I contacted Mr Nath and I indicated to him that I need a written offer for the supply of coal because I had noted that we had been discussing this coal transaction since March but there was not a written offer.

So I then asked him to please put the full written

offer and send it to me and which was really just a sort of a culmination of what we had been discussing. And that I received on the Monday. I say I received it on the Monday based on the investigators indicating when I received it.

**ADV SELEKA SC:** Well Chairperson if I may assist you Dr Nteta Chairperson Eskom Bundle 14 page 226. It is a – Bundle 14 – 14(A). Page 226.

**DR NTETA:** 226.

**ADV SELEKA SC:** It is an email from Ravindra Nath Monday  
10 11 April 2016 at 16:28 sent to you Dr Nteta a draft attachment document 1.

“Hello Madam FYI regards R Nath.”

Now this is in the ...

**CHAIRPERSON:** Did you say Bundle 14(A) page 269?

**ADV SELEKA SC:** Page 226.

**CHAIRPERSON:** Oh.

**ADV SELEKA SC:** Page 226 Chair.

**CHAIRPERSON:** I think I am at 269.226. I just need that first.

20 **ADV SELEKA SC:** 14(A) 226. It is an email from Ravindra Nath on Monday 11 April 2016 at 16:28 to Dr Nteta the subject is draft the attachment is document 1. The email reads:

“Hello Madam FYI regards R Nath”

You see that Dr Nteta?



**DR NTETA:** Yes I do.

**ADV SELEKA SC:** Yes. So by this time this is on Monday by this time you had engaged with your fellow colleagues that you have mentioned Suzanne Daniels, Edwin Mabelane, Mr Koko to put together a submission prior to you receiving a written offer from Mr Nath.

**DR NTETA:** Correct.

**ADV SELEKA SC:** So you have requested the written offer and you receive one but why – why did you not request it at  
10 a very first approach made to you by Mr Nath?

**DR NTETA:** Quite frankly I forgot and generally what happens is that when you get – when suppliers come to us and discuss coal we initially have a discussion to see the feasibility etcetera. And then when we do believe it is a little bit more feasible then we will then start putting documentation together.

So when he first spoke to me about it I did not ask him at the time for the – of a letter. It was an oversight from my side.

20 **ADV SELEKA SC:** Yes. Fine well is it not astounding that you set about to prepare a four page submission putting together the terms of a submission to BTC without having a written offer from the proposed supplier?

**DR NTETA:** It is – it is not unusual I will be frank with you it is not unusual but it is not best practice. So when I said to

you I am not sure if I spoke to him on the Friday or the Monday asking for the offer – the written offer it could have been that it was on Friday and he only sent it Monday, but as I indicated asking for it at the very beginning was an oversight from myself. We do put submissions together based on different offers, you know, in the discussion that may have had with suppliers. Often times we would do that but it was an oversight.

**ADV SELEKA SC:** H'm. Well, then the offer is on page  
10 227.

**DR NTETA:** Yes.

**CHAIRPERSON:** Well, before you go to page 227. I think when you gave evidence the last time Dr Nteta, I have raised the same question also and it continues to come back because it just seems to me that if somebody approaches you as Eskom or any entity and says: I would like to offer you coal.

Before you – if you are not the decision maker or at least you take it to the relevant decision maker in  
20 writing, that you would say: Please give me your offer. Let me – give me your offer in writing. Let me exactly what the terms and conditions are that you are looking at. Before you even begin to prepare something.

One of the reasons why you do that, you do not want to misrepresent anything about the terms and

conditions from the, you know.

But two, you want to consider this offer yourself because you probably would need to make a recommendation to somebody or the person who has the power to make the decision or the structure. And it does look awkward where you get to the trouble of preparing a four page submission without a written offer or at least a document from the supplier or potential supplier which just sets out some – the essential caps to say, to us these are  
10 the important terms.

If you have difficulty with any of these, then we can talk but these are the... But I guess there is not much that you can add. You have answered it the last time and you have just answered it now. Is that correct?

**DR NTETA:** It is correct.

**CHAIRPERSON:** Yes, okay.

**ADV SELEKA SC:** Thank you, Chair. Then the offer on page 227 Dr Nteta. It is quite – well, I should say something about the time which is 16:28.

20 And this is the time after Mr Howa, three o'clock roundabout, has now been told by Mr Nath that the consortium of banks have declined their offer to either defer the payment of R 600 million or to offer them a bridging loan.

Then you see this offer being made, 6:28. Did you

I fact request this offer to be made in writing?

**DR NTETA:** Yes, I did ask him to make the offer in writing because it is one of our requirements that you must the offer in writing.

**ADV SELEKA SC:** So it is in fact one of your requirements at Eskom?

**DR NTETA:** Ja, so – as I – so what I was saying to you that when I conceded I said it is not like this practise. So what we generally do and it is not this practice, that we will  
10 engage the suppliers in coal.

We would actually get them to detail in terms of their costing and their costing modules before we even get an offer on the table because we want to interrogate in terms of the supply, into the coal that has been considered.

**ADV SELEKA SC:** Yes.

**DR NTETA:** So we do that. It is not best practice but one of the things we must in terms of our file is that you put what was the offer that came in at and if there are changes in terms of subsequent negotiations, we also provide that  
20 as well.

**ADV SELEKA SC:** Yes, but if it is a requirement, as you say it is, a written offer, then it is no longer a matter of whether it is their practice or not, good or bad practise. It is a matter of requirement by your employer.

**DR NTETA:** So it is in terms of... Yes, because we talk

about an unsolicited offer. You must receive an unsolicited offer.

**ADV SELEKA SC:** Yes.

**DR NTETA:** So it is a requirement that we receive an offer.

**ADV SELEKA SC:** Yes.

**DR NTETA:** So that is why I am saying, it is requirement that we get an offer.

**ADV SELEKA SC:** Yes, but we are talking written offers.

10 **DR NTETA:** So. Yes. Well, to be frank with you. I do not have that particular section of the document with me whether it is written or it is not written.

But what I am saying to you that it is best practice, that it is something that you have in writing but I cannot offhand off the cuff tell you whether it should be written or not.

**ADV SELEKA SC:** Okay.

**DR NTETA:** But I know that for me I wanted a written offer. I just think it is best practise.

20 **ADV SELEKA SC:** Yes. The timing is remarkable. The timing of this email coming now with a written offer. Here is the offer on page 227. And the offer has a couple of points to it.

It says:

“Kindly refer to the discussion we had in this

regard.”

So this is Mr Nath writing to you. You and him had discussions prior to him sending this offer. Correct?

**DR NTETA:** Correct, yes.

**ADV SELEKA SC:** And his connection ...[intervenes]

**DR NTETA:** So as I indicated to you... Sorry. Yes?

**ADV SELEKA SC:** In this connection, Tegeta Exploration and Resources, offers Eskom to supply additional 1.2 million tons of coal from Optimum Coal Mine (Pty) Ltd over  
10 a period of five months. Ja, so we have traversed that issue about why could you not buy directly from OCM in buying from Tegeta.

And the Chairperson also added the fact that it had at this time in April, Tegeta did not have a contract to supply such an amount of coal to you. It did not have a contract with OCM to supply that amount of coal to Eskom.

I do not know whether you knew or did not know about that?

**DR NTETA:** Whether I knew or did not know that they did  
20 not have a contract at the time?

**ADV SELEKA SC:** With OCM to supply 1.2 million tons of coal.

**DR NTETA:** So at that particular time, I do not know – I do not think I knew.

**ADV SELEKA SC:** You do not think you knew?

**DR NTETA:** Ja, I do not think. I cannot recall to be honest with you. I am just trying to remember.

**ADV SELEKA SC:** It carries on.

“For increasing the production of the mine and beneficiation thereof, we need funds for smooth execution of this contract.”

But then you see the reason is different from your reason to the BTC of an urgency. These are ...[intervenes]

**DR NTETA:** My reason for the urgency of the BTC sitting?

10 **ADV SELEKA SC:** Tegeta says they want funds(?) and they say what the reason is:

“Increasing the production of the mine and beneficiation thereof.”

**DR NTETA:** Yes.

**ADV SELEKA SC:** Did you tell the BTC this is why Tegeta wants the funds?

**DR NTETA:** Yes. So if you look in terms of what I said to the BTC, I indicated to them it is for their operations. Let me just try and get to the submission. I am not sure if I am  
20 understanding the ...[intervenes]

**CHAIRPERSON:** Well, I think if I recall correctly. You said they wanted to revise their export operations.

**DR NTETA:** Yes.

**CHAIRPERSON:** That does not, on the face of it, seemed to be what they are saying here but you may take a

different view. I think in your submission to the BTC, you said they needed the money in order to revive their export operations.

And I think that was your evidence but I do not read what they say here to be saying the same thing but you might give a different understanding.

**DR NTETA:** So I had a conversation with Mr Nath that we would like a prepayment. He indicated that it is for the operations of the mine, you know, in the export portion of  
10 it. I had that conversation. Now in the letter it says from increasing the production of the mine and beneficiation there. With – now ...[intervenes]

**CHAIRPERSON:** Yes.

**DR NTETA:** ...in the construction of the mine and beneficiation is part of mine operations because the – so I am not sure if I understand the portion that you are highlighting. If you can just make that clear to me?

**CHAIRPERSON:** Well, one might not understand how the mine was but there seems to have been two sections in  
20 terms of the operations, at least. One for the export and one for the domestic. That is the impression that one gets.

And they had the export section had challenges to the extent that it needed to be revised but Eskom was not going to get coal from the export section, I would imagine. t was going to get coal from the domestic section, I would



imagine.

But that is the impression that I have but you might say: No, no. It is not a correct understanding. This is the position.

On the face of it, it looks like they wanted money from Eskom to do something that was just going to give them more profit to boost a different section that had nothing to do with Eskom.

**DR NTETA:** So I am really – it just a perspective. So the  
10 mine has an export – the mine is a mine – and this is my understanding and it is my understanding.

The mine has a mine. It is mining coal. The first coal that goes, it then goes to Hendrina and it is of a certain quality of coal. I am going to say the 22.

Now the export portion, that coal - what can happen is, to get it into a higher CV coal, it goes into a beneficiation so that it can then improve its calorific(?) value and things like that and then they would then export that coal.

20 And that coal is generally of a better quality than the Hendrina one. So when they are saying in their statement that it is for the increasing the production of the mine. It is to increase the production of the mine so that they have additional, you know, coal which they would then beneficiate.

So they have used the word production in their letter. I have used the word operations. So. But my understanding is that it is the same aspect of it. But maybe we are not hearing each other because I am not understanding it.

**CHAIRPERSON:** Yes, Mr Seleka wants to pursue.

**ADV SELEKA SC:** Ja.

**CHAIRPERSON:** Yes.

**ADV SELEKA SC:** Dr Nteta ...[intervenens]

10 **DR NTETA:** Yes. Thank you.

**ADV SELEKA SC:** The submission reads:

“However, Tegeta has requested that Eskom considers some form of prepayment.”

That is you writing before Tegeta has put this thing – the offer in writing. You are saying:

“Tegeta has requested Eskom to consider some form of prepayment to enable to it to meet the production requirements from the export component of the mine.”

20 **DR NTETA:** Yes.

**ADV SELEKA SC:** You wrote that in the submission.

**DR NTETA:** So what I... Yes, what I was saying to you is that we have had discussions. I have had discussions with Mr Nath.

So for example, when he first came to me and said

to me that we require a prepayment, I did ask him the question as to: Why do you require this prepayment?

And then he gave me the explanation as to: No, it is for the production, et cetera, for the mine.

I also indicated and he said: No, it is okay. And he continued and I said to him anyway, at the end of the conversation, I did say to him: I was just asking but when you are talking about payment terms and the reasons, et cetera, that is within the domain of finance.

10 So he had indicated to me why they needed it. You are correct. I received a written offer on the Monday but I had spoken to him before because when he first said to me that he needed a prepayment. My reaction was why and that is the reason that he came to me.

We had spoken about whether I should have received the offer letter before, before doing the submission and I conceded I should have gotten it before. I did not but I did not understand why they wanted it from Mr Nath.

20 **ADV SELEKA SC:** Yes, but your submission does not say anything about beneficiation of the coal that is mined.

**DR NTETA:** Sorry? My submission does not say?

**ADV SELEKA SC:** Your submission to the BTC does not say anything about beneficiation of the coal that would be supplied.

**DR NTETA:** Okay so I did not put the word beneficiation in the submission.

**ADV SELEKA SC:** No, it is not just a ...[intervenes]

**DR NTETA:** I just have to ...[intervenes]

**ADV SELEKA SC:** It is not just a word. That is their reason why they want a prepayment.

**DR NTETA:** Okay. I am trying to get to the submission so that we can read it, exactly what it says.

**ADV SELEKA SC:** The submission is in Eskom Bundle 18  
10 on page 239.

**DR NTETA:** 2239?

**ADV SELEKA SC:** Two... I beg your pardon. 293.

**DR NTETA:** Yes.

**ADV SELEKA SC:** 293.

**DR NTETA:** Yes.

**ADV SELEKA SC:** Yes. That paragraph which says:

20 “But suppliers have indicated their willingness to extend the current contract. However, Tegeta has requested that Eskom considers some form of prepayment to enable it to meet the production requirements from the export component of the mine.”

Then it carries on:

“In view of the fact that it subsidises the direct feed to Hendrina power and this will enable it

to meet the coal supply demands for the two power stations in the short term.”

And the two power stations referred to is Hendrina and Kriel? I am not sure. You can tell. Arnot and Kriel Power Stations. I beg your pardon.

**DR NTETA:** Yes. And you are contrasting that statement to?

**ADV SELEKA SC:** Their own written offer to you.

10 **DR NTETA:** Yes? The top of production and beneficiation?

**ADV SELEKA SC:** Yes.

**DR NTETA:** Yes.

**ADV SELEKA SC:** That ...[intervenes]

**CHAIRPERSON:** Well, I wonder whether when they say they need the funds for increasing the production of the mine. Well, if they wanted to revive the export section and if the domestic section and the export section are on the same mine, it may well be that one could talk about increasing the production of the mine.

20 It is just that the export section that they are talking about but they may have refrained in their written offer from making that clear.

Maybe because it might have weakened their case for a prepayment but they have refrain. But when they were speaking to Dr Nteta, they – just before they decided:

No, let us just say production of the mine. Without talking about the export section and the internal or domestic section.

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:** But if one looks at it that way, would one not be able to say they just refrained from being clearer than they could have been? They just put a general phrase and said: Well, nobody would say we are lying if we say we want to increase the production of the mine. Of course  
10 we want to increase the production of the mine because we want to revive the export sections.

**ADV SELEKA SC:** Yes, Chair.

**CHAIRPERSON:** I am just taking that ...[intervenes]

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:** ...that as a step to say, maybe that is - to that extent, maybe that is not untrue but once one has Dr Nteta's evidence about what they told her, then one may well say: Well, in effect it was not – it might not have been increasing the production of the internal or domestic  
20 section of the mine. It was maybe for increasing the reviving the production of the export section of the mine.

And then the beneficiation may be applies either way but towards the end of that sentence, they say: We need funds for smooth execution of this contract. And this contract was about the domestic section and not the export

section.

And I wonder whether that is not where the sentence, the statement might be clearly misleading if what they told Dr Nteta was true, namely that they actually wanted to revive the export operations.

**ADV SELEKA SC:** And Chair that is ...[intervenes]

**CHAIRPERSON:** You wanted to say something?

**ADV SELEKA SC:** That is the problem we have.

**CHAIRPERSON:** H'm.

10 **ADV SELEKA SC:** As the Legal Team. Because Dr Nteta... If Chair as you say, maybe they thought mentioning it explicitly reopening the export section of the mine would weaken their offer or their request for prepayment, then Chair it would not have found its way into the submission.

**CHAIRPERSON:** H'm.

**ADV SELEKA SC:** Because that seems to be a point explicitly made in the submission by the Eskom officials, that this is what Tegeta intends to do.

20 **CHAIRPERSON:** H'm.

**ADV SELEKA SC:** And we are trying to see but is that what Tegeta thought.

**CHAIRPERSON:** H'm.

**ADV SELEKA SC:** Because the impression created Dr Nteta is that you within Eskom were helping Tegeta to

come up with a reason that would justify a decision for a prepayment. That is the impression created. Are you able to comment on that?

**CHAIRPERSON:** I think you must indicate that is the – you must indicate to her – enable her to comment properly. You need to say what it is that gives rise to that impression.

**ADV SELEKA SC:** Yes. Thank you, Chair. So what – ja, what we were going through now, the exercise is that we  
10 see that there is one reason in your submission that the prepayment is sought for the purposes of Tegeta and I will paraphrase, reopening its export section of the mine.

That reason is in the submission during the drafting process before Tegeta makes you a written offer. The written offer comes late afternoon on the 11<sup>th</sup> of April 2016 and the written offer seems to have a different reason given for why Tegeta itself wants a prepayment.

So my submission – what I was putting to you is  
20 this. That if one looks at the actions taken by Eskom's executives, Friday night, over the weekend, drafting that four page document without even having a written offer from Tegeta, coming up with reasons why Tegeta wants a prepayment.

It would seem that you within Eskom in drafting



that submission, you were seeking to assist Tegeta to come up with reasons that would justify the BTC making a prepayment decision.

**CHAIRPERSON:** Well ...[intervenes]

**ADV SELEKA SC:** Not quite clear.

**CHAIRPERSON:** Well, I want to say something because I want us to finish her evidence if this is where her evidence was supposed to finish, namely, if you contrast the two, namely the reason that she gave in her submission to the  
10 BTC as to why Tegeta needed the prepayment, you contrasted with the reason given by Tegeta in their written offer.

The reason that she gave is – was unlikely to strengthen the case for justification. Maybe this one – if she had put this one that might have been – one might have said well maybe she was trying to not reveal the true reason. That is my thinking.

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:** But let her answer and she might say:  
20 No, no, no. Actually, this is the position. Dr Nteta?

**DR NTETA:** So. Thank you, Chairperson. I must say that I am feeling a little bit confused. But what I am going to tell you is what happened. The supplier indicated to me as to why and they indicated this to me verbally as to why they want the prepayment.

I then took that reason and put it within the document and wrote it in the document. Correctly so, I should have waited for them to put in writing and put it verbatim what they said in the document. I did not do that.

I put in the document what I understood their reason for the prepayment. I did not delve into the detail of that because I believed that when you discussed payment and payment terms it is something that I would then expect the people who make the decision as to  
10 whether or not to make a prepayment, they will then look into the justification for that. So that is what I did.

In understanding the difference between the two and which is stronger or not, I do not know but I do know is what I put into the document based on what the supplier had said and what I understood it to be.

**CHAIRPERSON:** Ja.

**ADV SELEKA SC:** Yes. Thank you.

**CHAIRPERSON:** Did you plan another witness after her?

**ADV SELEKA SC:** Yes, Chair.

20 **CHAIRPERSON:** Who is that?

**ADV SELEKA SC:** It is Ms Venete Klein.

**CHAIRPERSON:** Oh.

**ADV SELEKA SC:** The technology was interrupted. So.

**CHAIRPERSON:** Ja, I think ...[intervenes]

**DR NTETA:** May I make a comment?

**CHAIRPERSON:** Yes.

**DR NTETA:** [No audible reply]

**CHAIRPERSON:** Yes?

**DR NTETA:** Deputy... DCJ?

**CHAIRPERSON:** Yes?

**DR NTETA:** I am not coming back. I refuse to come back.

**CHAIRPERSON:** [laughs]

**DR NTETA:** So I rather you stay and finish.

**CHAIRPERSON:** [laughs]

10 **DR NTETA:** This has been a very exhausting experience. I have been with the investigators and your evidence leaders for very long.

**CHAIRPERSON:** No, no ...[intervenes]

**DR NTETA:** So whilst you deliberate, please remember that.

**CHAIRPERSON:** No, no. It is not about you. It is more about the next witness. [laughs] I think if her evidence was really about the submission, I think we must wrap this, but you are the Evidence Leader.

20 **ADV SELEKA SC:** Yes.

**CHAIRPERSON:** I don't know if there is something else important that you still wanted to – but we have been on this submission since she started.

**ADV SELEKA SC:** Ja, Chair the entire evidence turns on it. There are certain things in regard to the offer that we

might need to touch upon quickly, and ...[intervenes]

**CHAIRPERSON:** Ja, what will they lead to, what is the point they will assist in making?

**ADV SELEKA SC:** Yes, well Chairperson, Dr Nteta you are listening as well ...[intervenes]

**CHAIRPERSON:** Well you can tell me if you would like me to wait until you asked those questions.

**ADV SELEKA SC:** No I think, I mean I have consulted with Dr Nteta, she knows exactly – Dr Nteta will – there are  
10 certain things about the prepayments, the discount that was given by Tegeta, you will have to tell the Chairperson about that, and how that issue was dealt with, because you see in the evidence the BTC was told the CFO, Mr Anoj Singh will negotiate the discounts.

**CHAIRPERSON:** Ja, well you will wrap that up in ten minutes?

**ADV SELEKA SC:** No that should take shorter than that. Dr Nteta I am sure you can take shorter than that, isn't it?

**CHAIRPERSON:** Well I think ...[intervenes]

20 **DR NTETA:** If it means I leave sooner I will.

**CHAIRPERSON:** Ja she doesn't give long answers so I think just ask her the questions.

**ADV SELEKA SC:** Yes, just tell the Chairperson Dr Nteta I mean Tegeta here offered – made an offer of a 3.5% discount, and you know that that offer in your response

was taken off, if you go to page 229, so you took off that offer and then BTC was told that now Mr Anoj Singh is going to negotiate the offer of 3.5 discount, I mean – ja, a discount of 3.5. But the point was Tegeta had in fact already made that offer to you, so you get – can you please explain to the Chairperson, you understand the proposition I am putting to you?

**DR NTETA:** Yes, so with regards to the payments and the discount when I asked – when I spoke – when I engaged  
10 with the supplier as I indicated to you that I was coming to them from a sourcing and an acquisition of assets position, in terms of looking for coal. Now when you talk to the segregation of duty within Eskom, and in fact there's Tetris, the person who deals with acquiring the assets should not be the same person who deals with payment and that needs to fall somewhere else. Within Eskom that falls within the finance right, so when I spoke to Mr Nath and also when we talk about our offer letters the offer letter talks to how much are they offering for coal. I opted  
20 because I thought it was the best thing to delink the payment to the offer, because my understanding was that the BTC was going to deliberate in terms of whether they even think that a prepayment is required, is necessary, should be done. If the BTC had come back and said we are not willing to do that and then remained maybe at that

amount, so I then felt that we need to delink and I also told Mr Nath that the payment issue will be discussed with – will be negotiated with finance, because I did not want to get into that element, so when we got into the BTC they deliberated in terms of that and then the BTC decided that, one, the prepayment is something that they will consider, and two, that they believed that the finance, head of finance, the CFO, should negotiate that.

Whether it was going to be 3.5, 5%, 10%, 1% he  
10 had the tools to be able to ascertain as to what [no audio] and that is how it got – my suggestion to the supplier that he removes it, because I am talking to only the coal but you will note that in the letter, but it was within the domain of finance.

**ADV SELEKA SC:** Ja, well that response doesn't necessarily answer the proposition, but it has an aspect in it of what I am trying to – I am trying you to show the Chairperson, because the evidence of the Parliamentary Portfolio Committee, and which is what we see here again,  
20 is that the BTC was told that Mr Singh will negotiate a discount, and I think it was expressly stated that it will be 3.5% to the BTC. What the BTC was not told is that in fact Tegeta had already offered a discount, so there was no negotiation to be made, because the offer had already been made up front. That is the one thing, and I wanted

you to explain that to the Chairperson, that is one.

Number two is that this payment, the prepayment was made on the 13<sup>th</sup> of April 2016 there is no indication and in fact Mr Anoj Singh was asked about this other Parliamentary Portfolio Committee, there is no indication that he in fact negotiated any discount and he was asked who did you negotiate with and he could not remember.

So those are the aspects I had thought you would tell the Chairperson about, because the BTC was not told  
10 that Tegeta had made an offer, correct?

**DR NTETA:** So the BTC was I beg to differ in terms of whether the BTC was told about 3.5%, I do not think so, however I am going to provide you with my perspective, the figure of 3.5% is something that at the point that we are at BTC we would not know whether it is the right number or not, so when I then talk about the offer and I am going to say it again, I am looking at it as saying that the supplier has said to us it is going to be this amount, the figure, the number, the figure, whatever it is, and that is what it is, so  
20 if there is no prepayment, because I would not know whether the BTC is going to say yes to a prepayment or no to a prepayment, so that is why it is not indicated there.

The BTC deliberated in terms of who must do this negotiation. I am not sure they actually spoke to a percentage discount, because I am assuming that the

finance people will do what they wish to do, so that is to answer the first one.

The second one was where you said to me the payment was made within three days. I am not going to go into comment in terms of the payment aspect, because I will take us back to [distorted] and it was the responsibility of the CFO to negotiate an acceptable discount and whether he did or he did not I am not going to go into that one, but for me I was really focusing on the acquisition of  
10 the coal.

**ADV SELEKA SC:** Yes, but ...[intervenes]

**CHAIRPERSON:** Was the written offer of Tegeta placed before the BTC on the 11<sup>th</sup>?

**DR NTETA:** It wasn't, Chair it was not.

**CHAIRPERSON:** Yes, how come?

**DR NTETA:** The written offer came in at about half past four, if my memory serves me correctly I was working on the submission and I only really engaged that particular written offer as it is the next day, so it was not put to the  
20 BTC at the time.

**ADV SELEKA SC:** Yes thank you Chairperson. And – ja I hear you saying that you don't want to go to the issue of payment but were you not – did you not play any role in ensuring that payment is executed, did your role here end on that night of 11 April 2016 or did it carry on?



**DR NTETA:** Yes, so the only role that I played, so yes my role ended the night of the BTC submission. The role that I played the next day was Mr Nath sent me a pro-form invoice, the evidence will tell what time he did so and – for payment and what I did is I forwarded it to the people who were delegated in terms of the – sorry – not delegated, I forwarded it to Mr Magelani and I think it is Suzanne, and I am just recalling from the evidence. What I do know for sure and I recall is that I contacted Mr – the Head of  
10 Finance and asked him whether he was aware of this prepayment, he said no and I suggested that he speak to the CFO and then I also forwarded him the document and that is where my – it ended, because I go back again and talk about a segregation of duty.

**ADV SELEKA SC:** Chairperson the email that forwarded the pro forma invoices on Eskom Bundle 14 page 236, page 236 that is again an email from Ravindra Nath Tuesday 12 April 2016, the next day after the night of the decision to make a prepayment. It is at 14:07, it is addressed to you  
20 Dr Nteta, Eskom pro forma invoice, Eskom pro forma invoice is the attachment:

“Hello Madam

Please find attached pro forma invoice for prepayment.”

And the invoice is on page 237, exactly 659 – just about

R659million.

Right Dr Nteta you had said you don't get involved in the payment but here you are calling the finance person to find out whether they have received this invoice.

**DR NTETA:** Correct.

**ADV SELEKA SC:** Are you going to tell the Chairperson that was also not unusual?

**DR NTETA:** No, so when I received the invoice from the supplier I thought it was unusual, unusual for a few  
10 reasons, one, the BTC had deliberated the night before, so I was – it was unusual because now it is two o'clock and now they are sending a pro forma invoice, so it is unusual. Secondly I don't received invoices, so once we negotiated the coal supply agreements the invoices etcetera are sent to finance etcetera so I don't receive it, so that was also unusual to me.

So in calling the finance person and alerting him that I have received this invoice, one, have they negotiated this prepayment you know what is the situation and he then  
20 said to me he knew nothing on it. So yes it is unusual for me to receive an invoice, and I don't get involved in the payment aspects, and I should not get involved in the payment aspects.

**ADV SELEKA SC:** Yes, page 238, Eskom Bundle ...[intervenes]

**CHAIRPERSON:** That has taken more than ten minutes  
Mr Seleka, I thought you were going to wrap up within ten  
minutes.

**ADV SELEKA SC:** Well let me wrap with this. Page 238  
are those two emails, one to you with the pro forma invoice  
and you forward that email to Mr Edwin Magelani and Ms  
Suzanne Daniels at 14:26. You received it at 14:07, you  
forward it to them at 14:26. Do you see that?

**DR NTETA:** Yes I do.

10 **ADV SELEKA SC:** Herewith pro forma invoice, please  
note it includes VAT. So why didn't you leave it to them to  
process payment, phone whoever they need to phone, why  
did you personally phone the finance person?

**DR NTETA:** Why did I phone the finance person?

**ADV SELEKA SC:** No, after you sent the email to Mr  
Edwin Magelani and Ms Suzanne Daniels, why didn't you  
leave the matter there? Why did you have to phone the  
finance person?

20 **DR NTETA:** So the question is once I forwarded that  
invoice, pro forma invoice to Mr Magelani and Ms Daniels  
why did I take up the phone and phone the finance  
department?

**ADV SELEKA SC:** Yes.

**DR NTETA:** Is that the question?

**ADV SELEKA SC:** Yes, why didn't you leave the matter

up to them, Mr ...[intervenes]

**CHAIRPERSON:** Yes but Mr Seleka what point will this really make, if you send something, a document to somebody you can pick up the phone and say did you receive it.

**ADV SELEKA SC:** Chair she is not sending it to the finance person here.

**CHAIRPERSON:** Who is that?

**ADV SELEKA SC:** She is sending it to Mr Edwin Magelani  
10 and Ms Suzanne Daniels.

**CHAIRPERSON:** Yes, and what is she sending?

**ADV SELEKA SC:** The pro forma invoice.

**CHAIRPERSON:** Yes, but where will that take us if it is Mr Magelani or somebody in the finance department, what will it – what point will it be?

**ADV SELEKA SC:** When – or let me say this Chair, if I send – I receive this email and I send it to the Chairperson, who is not in finance, but the Chairperson is my superior, I then should stop there, and that is what I am  
20 asking Dr Nteta, why did you take another step of phoning a finance person when my superior could have done ...[intervenes]

**CHAIRPERSON:** Yes, but what point does it advance in terms of what we are trying to establish?

**ADV SELEKA SC:** It is the very impression Chair of the

efforts made within Eskom by Eskom's own official to assist in this process. You take the extraordinary means to assist in this process. So we are trying to correct that impression maybe Dr Nteta will explain why she took that step.

**CHAIRPERSON:** Ja, I mean after we have spent as much time as we have spent on this submission, I don't think that I want to spend more time on those minor points, that is a minor point. I really would like us to move on.

10 **ADV SELEKA SC:** Ja, well that comes to the end of it Chair because well ja.

**CHAIRPERSON:** You want her – you would like her to discuss that one at least. Okay, Dr Nteta just answer that one last question.

**DR NTETA:** So the last question was why did I to quote Advocate Seleka, take extraordinary steps, what I want to say it is not extraordinary steps, I pick up the phone and call the finance business partner because what I had received was an invoice, so I don't think it is an  
20 extraordinary extra step, I felt it was – I should inform them before I sent them the pro forma invoice cold.

**ADV SELEKA SC:** Ja.

**CHAIRPERSON:** You are not satisfied?

**ADV SELEKA SC:** She has not created the impression, that is your evidence Dr Nteta, that is your evidence. You

see Mr Zithembe Khoza is alleging collusion, he is alleging you interacting with the Guptas and you are saying to the Chairperson although I send this invoice to my superiors I still went to the finance people and told them about this invoice.

**CHAIRPERSON:** You see if you were referring to her making some communication to the Guptas that may have been unnecessary then maybe the point would be clearer, unless there is something you don't tell me with regard to  
10 Mr Magelani, or that I am missing. Wasn't Mr Magelani her superior?

**ADV SELEKA SC:** He was.

**CHAIRPERSON:** He was, so ...[intervenes]

**ADV SELEKA SC:** These are the principals or senior staff.

**CHAIRPERSON:** Yes, so she may have wanted to update him to say we have received an invoice, isn't it?

**ADV SELEKA SC:** Let me make it clear to the Chairperson. Dr Nteta tell the Chairperson who is the  
20 finance person you phoned?

**DR NTETA:** Mr Snell Naga, he is the head of finance is primary energy division, he is the gentleman who processes payments for coal transactions.

**ADV SELEKA SC:** Yes, so it is not Mr Magelani who is phoned.

**CHAIRPERSON:** Ja.

**DR NTETA:** There is no need to phone Mr Magelani because he was involved in the transaction, Snell was not. That is why I phoned him.

**CHAIRPERSON:** Mmm, okay.

**ADV SELEKA SC:** That is fine Chair, ja because the payment gets to be made ...[indistinct] and Chair I don't know whether you would recall the evidence of Mr Gert Opperman who gets this invoice much later for him to  
10 authorise the payment and he says at that time, I think it is the 19<sup>th</sup> of April, he thought that the payment had not been made, and that he was authorising a payment that would be made as opposed to one already made.

And I think Dr Nteta also had some interaction there with Mr Opperman.

**CHAIRPERSON:** Okay, alright, but you said you have made your last question.

**ADV SELEKA SC:** Ja, that is in her affidavit.

**CHAIRPERSON:** Yes, thank you Dr Nteta for availing  
20 yourself to assist the Commission, you are now excused.

**DR NTETA:** Thank you.

**CHAIRPERSON:** Let us take an adjournment, let's take a short adjournment.

We adjourn.

**INQUIRY ADJOURNS**

**INQUIRY RESUMES**

**CHAIRPERSON:** Mr Seleka and counsel for Ms Klein I indicated to Mr Seleka that I have some commitment that would need us to take a break maybe for an hour and then I would be back to start with Ms Klein's evidence and I apologise that we were going to have that break, but I understand that your preference would be that if we are not going to finish this evening with her evidence you would prefer that we move her to a date when she could start and  
10 finish her evidence, and Mr Seleka says in terms of the line-up of witnesses tomorrow and looking at the time that they will take he thinks that we could hear Ms Klein's evidence tomorrow and finish and in the light of that I am inclined to say let's go along with that.

I understand that there is a request also for her to give her evidence via video link because of some situation and I am able to allow that as well.

So I just want both of you to confirm whether my understanding is correct and that it is fine if we do it this  
20 way?

**ADV SELEKA SC:** Yes Chairperson that is the communication during the adjournments that took place between my learned friend and I, Mr Mahan representing Ms Venete Klein, I confirm what the Chairperson has said, Mr Mahan can do likewise.



**ADV MAHAN:** Thank you Chairperson I do confirm and may we also express our thanks.

**CHAIRPERSON:** Yes, thank you very much. Okay then we will adjourn for the day and then tomorrow Ms Klein will appear via video link and we will then have her evidence.

**ADV MAHAN:** Thank you Chairperson I will liaise with my learned friend as to ...[intervenes]

**CHAIRPERSON:** Yes, in terms of what time it is likely to be. Okay thank you, we then adjourn for the day.

10 We adjourn.

**INQUIRY ADJOURNS TO 10 FEBRUARY 2021**