

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

26 FEBRUARY 2021

DAY 351



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Recording & Transcriptions

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TRANSCRIBERS:

B KLINE; Y KLIEM; V FAASEN; D STANIFORTH



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PROCEEDINGS RESUME ON 26 FEBRUARY 2021

CHAIRPERSON: Good morning Mr Seleka. Good morning everybody.

ADV SELEKA SC: Good morning Chair.

CHAIRPERSON: Yes, are you ready?

ADV SELEKA SC: We are ready Chairperson.

CHAIRPERSON: We have Mr Tsotsi again?

ADV SELEKA SC: Indeed chairperson.

CHAIRPERSON: Well, Mr Tsotsi you must not start
10 threatening us with sending us invoices for appearances
because I think one of the witnesses, I think Mr Popo
Molefe, was saying, no, he is going to start sending
invoices now because he has been coming to the
Commission so many times. [laughs]

ADV SELEKA SC: [laughs]

MR TSOTSI: [laughs]

CHAIRPERSON: Okay. Yes, Mr Seleka.

ADV SELEKA SC: Thank you Chair. Chairperson,
Mr Tsotsi is represented by his attorney. He may want to
20 place himself on record.

CHAIRPERSON: Mr Ngcebetsha?

ADV NGCEBETSHA: Ngcebetsha, indeed yes.

CHAIRPERSON: Yes. Thank you very much. Thank you.

ADV NGCEBETSHA: Thank you Chair.

CHAIRPERSON: Yes.

ADV SELEKA SC: Chairperson, Mr Tsotsi is coming back to deal with some of the allegations that have been made against him or about him by some of the board members who have appeared before the Commission, as of recent and he has filed two supplementary affidavits which I will refer the Chairperson to shortly.

In the first affidavit he explains particularly the issues regarding the composition of the board sub-committees in 2015 and the second supplementary affidavit
10 that is where he responds to some of the allegations that are made about him.

The bundle in which those affidavits are contained Chairperson is Eskom Bundle 7(B). Eskom Bundle 7(B) and the page reference is 1222.

CHAIRPERSON: [No audible reply]

MR TSOTSI: Before I say anything. Chair, am I speaking under oath today or...?

ADV SELEKA SC: Yes, before... Yes.

CHAIRPERSON: No, we will get to that.

20 **ADV SELEKA SC:** Yes, we will get that that.

CHAIRPERSON: Ja, we will get to that. Thank you. I just want to check some things. Is that nine – did you say 912?

ADV SELEKA SC: 1222.

CHAIRPERSON: 922?

ADV SELEKA SC: 1222.

CHAIRPERSON: 1222?

ADV SELEKA SC: Yes.

CHAIRPERSON: Okay. That is where the first
...[intervenes]

ADV SELEKA SC: The first supplementary affidavit is
contained.

CHAIRPERSON: Oh. Now I see on the spine of this file
that it got his name.

10 **ADV SELEKA SC:** Yes.

CHAIRPERSON: And that may give the impression that
one will get – that this file contains all his affidavit which
might not be the case.

ADV SELEKA SC: Yes.

CHAIRPERSON: If it just contains supplementary
affidavits, I think the spine should reflect that.

ADV SELEKA SC: Yes, Chair.

CHAIRPERSON: So that a few months from now, if I pick
up this file, I should not think that this is where I would
20 find all his affidavits.

ADV SELEKA SC: Yes, yes.

CHAIRPERSON: Ja.

ADV SELEKA SC: Yes. It is – that is correct Chair
because that is the continuation of his first...

CHAIRPERSON: H'm.

ADV SELEKA SC: Yes.

CHAIRPERSON: Okay I found where they are. Okay do you ...[intervenes]

ADV SELEKA SC: The ...[intervenes]

CHAIRPERSON: Do you want to explain for the benefit of the public what his evidence will deal with today?

ADV SELEKA SC: Yes.

CHAIRPERSON: And maybe also tell us which other witnesses you are going to call today.

10 **ADV SELEKA SC:** Yes-no, indeed. Thank you Chair. Mr Tsotsi will deal with an issue that arose on his first appearance, I think both on his first and second appearances, which was in relation to the composition of the sub-committees.

He had exchanged emails with the Minister, exchanging the list of how he sought to compose the sub-committees and we showed him in his last appearance that there were certain spelling mistakes in the list that he conveyed to the Minister, whether he could explain that.

20 The – he then took the time after to that questioning to prepare the supplementary affidavit to address that issue and he will testify on that, about that list. That is the first thing.

CHAIRPERSON: In that regard. Has the investigators ever been able to subject to whatever computer he may

have used at the time to some technical analysis to check whether there could be evidence of Mr Salim Essa having sent him a list of the composition of the committees of the board?

ADV SELEKA SC: Yes.

CHAIRPERSON: Remember, he gave evidence that he – Mr Salim Essa sent him an email?

ADV SELEKA SC: That is correct.

CHAIRPERSON: Where he was saying how the various
10 committees of the board should be composed.

ADV SELEKA SC: Yes.

CHAIRPERSON: And he was not in agreement with that. He prepared his own.

ADV SELEKA SC: Yes.

CHAIRPERSON: Which he sent to the Minister.

ADV SELEKA SC: H'm.

CHAIRPERSON: But he said that when the Minister sent him her list, it was exactly the same as the one he had received from Mr Salim Essa.

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

CHAIRPERSON: Every time I had said, attempts should be made, if possible, to try and see whether this could be conclusively established.

ADV SELEKA SC: H'm.

CHAIRPERSON: Or whether we could find some way in

terms of technology to get that.

ADV SELEKA SC: Yes. Yes, Chair.

CHAIRPERSON: He did receive from somewhere ...[intervenes]

ADV SELEKA SC: Yes.

CHAIRPERSON:from outside of Eskom. And the proposed composition. I do not know if it was a proposed or if it is ...[intervenes]

ADV SELEKA SC: Final.

10 **CHAIRPERSON:** [laughs] It was – this is the composition. [laughs]

ADV SELEKA SC: [laughs]

CHAIRPERSON: You must implement it. I think I was told that there could be difficulties because I think the computer that he may have used might no longer be there or whatever.

ADV SELEKA SC: Yes.

CHAIRPERSON: But I have never got a report back to say: We have tried. We did not succeed.

20 **ADV SELEKA SC:** Yes. What... That is correct. The Chair has not got a report back. The position, as I understand, it is not the difficulty with the computer as such but with the fact that Mr Tsotsi might have received that communication from Mr Salim Essa on his private email address which – and I think Mr Tsotsi will remind me

of his explanation, that he closed that account, that email account some time back. But he also did an exercise to see whether he could retrieve any emails from that account.

And I think Mr Tsotsi you will tell us in due course that you said you could not find any of the emails. So that is the extent to which the investigation has gone that far, on that point Chair.

CHAIRPERSON: Of course, what we do know if his
10 evidence is correct ...[intervenes]

ADV SELEKA SC: Yes.

CHAIRPERSON: ...is that, he is able to say he did receive an email from Mr Salim Essa. He is able to say its contents were exactly or substantially the same as the context the Minister sent to him with regard to how various committees of the board should be composed. It is just that I cannot remember whether he said, exactly saying or substantially the same.

ADV SELEKA SC: Exactly.

20 **CHAIRPERSON:** But I do recall that the spelling errors appeared to be the same.

ADV SELEKA SC: Yes.

CHAIRPERSON: I am under the impression that Mr Tsotsi did – that we had the email which he said he got from Mr Salim Essa or do we not have it? He just knew that he

had received it?

ADV SELEKA SC: Ja, that one we do not have.

CHAIRPERSON: Ja, we do not have.

ADV SELEKA SC: Do not have.

CHAIRPERSON: But he knew some of the spelling errors which were in it and he knew that what the Minister sent to him was exactly the same or substantially the same.

ADV SELEKA SC: Exactly the same, according to him.

CHAIRPERSON: Ja, ja.

10 **ADV SELEKA SC:** Yes.

CHAIRPERSON: So. Ja, that will be ...[intervenes]

ADV SELEKA SC: Yes.

CHAIRPERSON: ...something that is some evidence. It might not be conclusive but it is evidence.

ADV SELEKA SC: Yes.

CHAIRPERSON: That he knows what he received and who he received it from and he knows that when the Minister sent him the composition of the committees it was exactly the same thing.

20 **ADV SELEKA SC:** Ja.

CHAIRPERSON: Okay alright. So he will give evidence about that part of his previous evidence.

ADV SELEKA SC: That is right Chair.

CHAIRPERSON: And also give evidence – respond to some of the evidence given by Mr Koko.

ADV SELEKA SC: Yes.

CHAIRPERSON: And by Ms Viroshini Naidoo.

ADV SELEKA SC: Correct.

CHAIRPERSON: Is that right?

ADV SELEKA SC: That is correct.

CHAIRPERSON: Okay.

ADV SELEKA SC: And Mr Pamensky.

CHAIRPERSON: And Mr Pamensky?

ADV SELEKA SC: And Mr Pamensky.

10 **CHAIRPERSON:** Ja, okay alright.

ADV SELEKA SC: Yes.

CHAIRPERSON: No, that is fine. Please administer the oath or affirmation.

ADV SELEKA SC: Thank you. And in the afternoon Chair, we are scheduled to proceed with the testimony of Ms Suzanne Daniels. It will be again via video link because she is still overseas.

CHAIRPERSON: That is fine.

REGISTRAR: Please state your full names for the record?

20 **CHAIRPERSON:** Please switch on the mic.

MR TSOTSI: [No audible reply]

CHAIRPERSON: Yes.

MR TSOTSI: Zola Andile Tsotsi.

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

WITNESS: No.

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

WITNESS: Yes.

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.

WITNESS: So help me God.

10 **ZOLA ANDILE TSOTSI:** (d.s.s.)

CHAIRPERSON: Thank you Mr Tsotsi. Maybe we can just get, you know, dispose of that part of the emails.

ADV SELEKA SC: Yes, emails.

CHAIRPERSON: Ja.

EXAMINATION BY ADV SELEKA SC: That is right. Chair, let me then have the affidavits, the supplementary affidavits submitted and confirmed by Mr Tsotsi. Mr Tsotsi, please turn to Eskom Bundle 7(B) on page 1222. We follow the black pagination.

20 **MR TSOTSI:** [No audible reply] [microphone not switched on]

ADV SELEKA SC: That is right.

CHAIRPERSON: Keep your mic on Mr Tsotsi. Somebody who has come to the Commission as many times as you have, should know that. [laughs] So maybe you have not

come back enough. [laughs]

MR TSOTSI: [laughs]

ADV SELEKA SC: [laughs]

CHAIRPERSON: Okay alright. Let us continue.

ADV SELEKA SC: 1222.

MR TSOTSI: I am there.

ADV SELEKA SC: You are there. Thank you. The supplementary affidavit runs up to page 1228 with the signature above the deponent. Do you see that? Do you
10 confirm that to be your signature?

MR TSOTSI: Yes.

ADV SELEKA SC: The affidavit – I see there is a date stamp on the – police stamp is 11/12/2020. You confirm the contents of the affidavit?

MR TSOTSI: Yes, I do.

ADV SELEKA SC: Thank you. Chairperson, I will beg leave to have this supplementary affidavit be admitted as Exhibit U-17.2.

CHAIRPERSON: As exhibit...?

20 **ADV SELEKA SC:** U-17.2.

CHAIRPERSON: I see that it looks like the commissioner of oaths did not initial every page.

ADV SELEKA SC: Ja.

CHAIRPERSON: Ja.

ADV SELEKA SC: Mr Tsotsi... I think he...

CHAIRPERSON: Okay.

MR TSOTSI: I thank you.

CHAIRPERSON: Not the best scenario but he will give evidence and confirm that.

ADV SELEKA SC: Yes.

CHAIRPERSON: What is... He will give under oath and confirm that that is true.

ADV SELEKA SC: Yes, Chari.

CHAIRPERSON: Okay. This supplementary affidavit of
10 Mr Andile Zola Tsotsi starting at page 1222 will be admitted
and marked as Exhibit U-17.2.

**SUPPLEMENTARY AFFIDAVIT OF ANDILE ZOLA TSOTSI
FROM PAGE 1222 IS ADMITTED AND MARKED AS
EXHIBIT U-17.2**

ADV SELEKA SC: Correct Chair. Mr Tsotsi, the initials at
the bottom of the page, is that yours or the
commissioner's?

MR TSOTSI: They are mine Chair.

ADV SELEKA SC: Is it only you?

20 **MR TSOTSI:** I beg your pardon?

ADV SELEKA SC: Is it only your initials?

MR TSOTSI: Yes.

ADV SELEKA SC: And then the second supplementary
affidavit is on page 1229. You see that Mr Tsotsi?

MR TSOTSI: Yes.

CHAIRPERSON: Mister... Oh, okay. I think I see what is happening here. This was confusing me. The minutes of the meeting of 8 February 2017, that appear on page 1220. But it is not the 1220 that belongs to his bundle. I think that has been uplifted from another bundle.

ADV SELEKA SC: Oh.

CHAIRPERSON: And put here. They were confusing me.

ADV SELEKA SC: Oh, 1220?

CHAIRPERSON: Yes. But I think let us do the second
10 supplementary affidavit.

ADV SELEKA SC: Yes.

CHAIRPERSON: And then... I think – I do not know if there is an annexure to that supplementary. Maybe there are not but they have to be put in here. What attracted me was what appeared to be a wrong pagination but that may be because they have been taken from another bundle.

ADV SELEKA SC: Ja.

CHAIRPERSON: But I think let us do the ...[intervenes]

ADV SELEKA SC: The second.

20 **CHAIRPERSON:** ...the second supplementary affidavit and then we can take it from there.

ADV SELEKA SC: Yes. Mr Tsotsi, that one is on page 1229.

MR TSOTSI: [No audible reply]

ADV SELEKA SC: Are you there?

MR TSOTSI: Yes.

ADV SELEKA SC: It runs up to page 1239.

MR TSOTSI: Correct.

ADV SELEKA SC: You confirm that to be your signature
...[intervenes]

MR TSOTSI: Yes.

ADV SELEKA SC: ...above your name. I see this
affidavit, you also did not date it. So we pick up the date
from the stamp, 25 February 2021.

10 **MR TSOTSI:** [No audible reply]

ADV SELEKA SC: Is that the date?

MR TSOTSI: Yes.

ADV SELEKA SC: And can you confirm the contents of
the affidavit?

MR TSOTSI: I do.

ADV SELEKA SC: To be correct?

MR TSOTSI: Yes.

20 **ADV SELEKA SC:** Thank you, Chair. I beg leave to have
this supplementary affidavit dated 25 February 2021 be
admitted as Exhibit U-17.3.

CHAIRPERSON: Yes, I think the police officers who acted
as commissioners of oaths let Mr Tsotsi down. They did
not fill in where they are supposed to fill in the dates and
the place of the – where the affidavit was opposed to and
initial every page.

The supplementary affidavit of Mr Andile Zola Tsotsi is which starts at page 1229 will be admitted and marked as Exhibit U-17.3.

**SUPPLEMENTARY AFFIDAVIT OF ANDILE ZOLA TSOTSI
FROM PAGE 1229 IS ADMITTED AND MARKED AS
EXHIBIT U-17.3**

ADV SELEKA SC: Thank you Chair.

CHAIRPERSON: What I was talking about is the document that comes after that affidavit.

10 **ADV SELEKA SC:** After the first one?

CHAIRPERSON: After the second one.

ADV SELEKA SC: The second one.

CHAIRPERSON: Ja. it is minutes of a meeting, Eskom. And then at the top it says Eskom, 18, 2020. Do you not have such a document?

ADV SELEKA SC: I do not have it in mine.

CHAIRPERSON: Well, I have got it here and I am supposed to have the same thing that you have.

ADV SELEKA SC: Yes.

20 **CHAIRPERSON:** It is minutes of the Eskom Board Tender Committee Meeting, 12-2016-17 held at Hugo Board Room. It is 8 February 2017. So it must be bundle – Eskom Bundle 18.

ADV SELEKA SC: Yes, that is in the wrong bundle Chair.

CHAIRPERSON: Yes.

ADV SELEKA SC: File, ja.

CHAIRPERSON: So...

ADV SELEKA SC: Yes. Ja, he is apologising. [laughs]

CHAIRPERSON: I wonder who would have put it here because is not to belong.

ADV SELEKA SC: Yes-no, that ...[intervenes]

CHAIRPERSON: It must go to the right bundle.

ADV SELEKA SC: That is right.

CHAIRPERSON: Okay.

10 **ADV SELEKA SC:** The apology has been tendered.

CHAIRPERSON: [No audible reply]

ADV SELEKA SC: Mr Tsotsi, let us go to your first supplementary affidavit.

MR TSOTSI: Yes.

ADV SELEKA SC: Now that is – you heard the conversation earlier between me and the Chairperson about these emails regarding the composition of the sub-committees of the Eskom Board Committee, committees of the board.

20 The exchange of emails is on – it starts on page 1213 of the same bundle. 1213. So as we go there, Mr Tsotsi. Can you assist us in regard to your recollection?

Because you do say in your first affidavit that - talking about your second occasion when you engaged with

Mr Salim Essa but the other occasion was when the board came into being where:

“I was required to place board members in sub-committees of the board.

Salim Essa sent me his configuration and asked that I pass it on to the Minister as my submission ...[intervenes]

CHAIRPERSON: I am sorry. Where are you reading from?

10 **ADV SELEKA SC:** It is in Mr Tsotsi’s first affidavit. Sorry Chair. That will be Eskom Bundle 7(B).

CHAIRPERSON: Oh, okay. In another bundle?

ADV SELEKA SC: It is... Yes, it is in the...

CHAIRPERSON: Ja.

ADV SELEKA SC: 7(A) of...

CHAIRPERSON: Okay, no I might not need to look at...

ADV SELEKA SC: Ja.

CHAIRPERSON: If you will read the relevant portions.

ADV SELEKA SC: That is right.

20 **CHAIRPERSON:** H’m.

ADV SELEKA SC: So:

“...Salim Essa sent me his configuration and asked that I pass it onto the Minister as my submission.

I quietly ignored the submission and sent mine

to the Minister where upon the Minister responded with the exact submission I had received from Mr Salim Essa...”

Now if I pause there for a moment because we are going to go into your meeting, the Minister's call to a meeting. The picture is exactly as the Chairperson and I were talking.

You received a list from Mr Salim Essa and we have been trying to find out how did you receive that list.

10 So he sent it to you. Is it by email?

MR TSOTSI: Yes, by email.

ADV SELEKA SC: And we have not been able to locate that. You have taken steps to do the same to find it, that list or the email, at least, from him to you.

MR TSOTSI: Yes, Chair I tried to find it but that – the mail does not exist anymore. So I was not able to find anything.

CHAIRPERSON: H'm, h'm.

ADV SELEKA SC: But then you do say that the Minister
20 also – the Minister responded with the exact submission.
So... He says the exact submission Chair.

CHAIRPERSON: Oh.

ADV SELEKA SC: Yes.

CHAIRPERSON: That is important, ja.

ADV SELEKA SC: Yes.

“The exact submission I have received from Salim Essa.”

MR TSOTSI: Correct.

CHAIRPERSON: H’m, h’m.

ADV SELEKA SC: So how ...[intervenes]

CHAIRPERSON: So it was not substantially the same, it was exact?

MR TSOTSI: Well, exactly the same Chair.

CHAIRPERSON: Yes. Including spelling errors?

10 **MR TSOTSI**: Correct.

CHAIRPERSON: Ja. Okay.

ADV SELEKA SC: If you are looking for the page reference. It is page 31 of that Eskom Bundle.

CHAIRPERSON: Ja, I would like to have a look again.

ADV SELEKA SC: Yes, I think ...[intervenes]

CHAIRPERSON: Just to refresh my memory.

ADV SELEKA SC: Page 31.

20 **CHAIRPERSON**: And this was on the same day Mr Tsotsi or on another day when you sent yours – when you received Mr Salim Essa’s composition, then you sent yours to the Minister and then the Minister sent Salim Essa’s composition to you, effectively? Did this happen on the same day or over a few days?

MR TSOTSI: I would suspect Chair that it would have been a few days.

CHAIRPERSON: Ja.

MR TSOTSI: Because I recall that the Minister was on holiday in Mozambique at the time.

CHAIRPERSON: Oh, okay.

MR TSOTSI: So she was not in her office.

CHAIRPERSON: H'm. Okay.

MR TSOTSI: Yes.

ADV SELEKA SC: Yes. So that is paragraph 20.3, 20.4, 20.5 on page 31.

10 **CHAIRPERSON:** Yes.

ADV SELEKA SC: So it is 20.4 where he says:

“The Minister responded with the exact submission I have received from Salim Essa.”

CHAIRPERSON: H'm. Prior to this occasion when Mr Salim Essa sent you his proposed composition of the committees of the board, had you had interactions with him? I probably asked you this question before. But did you know each other, you and Mr Salim Essa?

MR TSOTSI: Yes, he knew me Chair.

20 **CHAIRPERSON:** Oh, you knew each other.

MR TSOTSI: Yes, I knew him too. Yes.

CHAIRPERSON: Oh, okay.

MR TSOTSI: Yes.

CHAIRPERSON: Okay. But he – you make the point that he said you must send to the Minister as your own?

MR TSOTSI: That was his idea, yes.

CHAIRPERSON: Yes, yes. Okay alright.

MR TSOTSI: Yes.

CHAIRPERSON: You may continue Mr Seleka.

ADV SELEKA SC: Thank you Chair. And then Mr Tsotsi, you – did I ask you, how did the Minister respond?

MR TSOTSI: The Minister responded by email.

ADV SELEKA SC: Oh, email?

MR TSOTSI: Yes.

10 **ADV SELEKA SC:** Ja, but that too we do not have.

MR TSOTSI: No, I did not...

ADV SELEKA SC: In terms of the exact same list of submission.

MR TSOTSI: [No audible reply]

ADV SELEKA SC: You see, when you on page 1213... Sorry, Chair I am going back to the first bundle. ON page 12...[intervenes]

CHAIRPERSON: Okay... uhm ...[intervenes]

ADV SELEKA SC: I will come back to this one.

20 **CHAIRPERSON:** Yes. I am just... So you – so this was soon after your – after the appointment of the new board, right?

MR TSOTSI: That is correct Chair.

CHAIRPERSON: These email exchanges happened.

MR TSOTSI: [No audible reply]

CHAIRPERSON: Okay.

ADV SELEKA SC: Yes.

CHAIRPERSON: Can I put this away?

ADV SELEKA SC: Ja. But not – maybe just next to you
Chair.

CHAIRPERSON: [laughs]

ADV SELEKA SC: [laughs]

CHAIRPERSON: We will come back to it?

ADV SELEKA SC: I am going to come back to it because
10 ...[intervenes]

CHAIRPERSON: Okay.

ADV SELEKA SC: I just want to exhaust this one point
with Mr Tsotsi. Mr Tsotsi, on the one that we are looking
at, the first bundle we have been looking at, 7(B), 1213.
1213, page 1213.

MR TSOTSI: Yes.

ADV SELEKA SC: So that is an email from you to the
Minister, 16 December 2014.

MR TSOTSI: Yes.

20 **ADV SELEKA SC:** You see that?

MR TSOTSI: Yes.

ADV SELEKA SC: Yes. And you say:

“Dear Minister. I trust you are well. Please
find below the preliminary deployment of non-
executive board members to board

committees.

The Audit Committee has always been chaired by a CA...”

Then let us leave that. Then you have what you call the preliminary deployment of non-executives. You have the names under various sub-committees.

MR TSOTSI: Yes.

ADV SELEKA SC: Have you gone far from it?

MR TSOTSI: [No audible reply]

10 **ADV SELEKA SC:** So that is what you have sent to the Minister.

MR TSOTSI: Yes.

ADV SELEKA SC: Yes.

“I would be happy to discuss this deployment with you should you so wish...”

That is 16 December and you do say:

“I trust you are enjoying your, some rest...”

You say the Minister was away?

MR TSOTSI: Yes.

20 **ADV SELEKA SC:** Now turn to the next page, page 1214.

MR TSOTSI: [No audible reply]

ADV SELEKA SC: Now that is further emails ...[intervenes]

CHAIRPERSON: Just one second.

ADV SELEKA SC: Yes, Chair.

CHAIRPERSON: Will somebody talk to somebody to make sure, if possible, that that group that is – does not disturb us. Yes, okay.

ADV SELEKA SC: Thank you, Chair. So there is a trail of emails Mr Tsotsi, and I think it starts on page 1215. On the 26 Jan there is an email from you to the minister, Minister Lynne Brown send from iPad. But at the bottom of the page I think you are forwarding the one at the bottom of the page to the minister. Can you see the one right at
10 the bottom of the page? It says Dear Minister.

MR TSOTSI: At 1214. yes.

ADV SELEKA SC: Yes, it says Dear Minister, 12.15, page 1215.

MR TSOTSI: 1215?

ADV SELEKA SC: Yes, the trail of emails starts there.

MR TSOTSI: Yes.

ADV SELEKA SC: You see there, it says Dear Minister and then you say:

“Please find...”

20 Go to the next page.

“Please find the revised board subcommittee deployment as follows.”

MR TSOTSI: Yes.

ADV SELEKA SC: So in December it was your preliminary deployment.

MR TSOTSI: Sorry?

ADV SELEKA SC: In December 2016 – if '16 or '15? '14, sorry, December 2014 you send a preliminary deployment list.

MR TSOTSI: Yes.

ADV SELEKA SC: And now it is January 2015, you send the Minister a revised board sub-committee deployment list.

MR TSOTSI: Yes.

10 **ADV SELEKA SC:** And what you see on the first list of the December – well, I am looking at the spelling mistakes of the names, I see some of them are still incorrectly spelt, particularly Mr Zethembe Khoza is spelt as Zathembe Khoza.

MR TSOTSI: H'm.

ADV SELEKA SC: But I know you have an explanation in your affidavit now. Then we have the minister's response to you on the 26 Jan, if you go back to page 1215 but the message is simply another minister writing – sorry, it is a
20 forward by the minister by the officials in the department. She responds to you on page 1214 on the 28 January 2015 at 8.21, from Lynne Brown to Zola Tsotsi and others are copied there. It says:

“Dear Mr Tsotsi, thank you the email below regarding the composition of board committees.

Given that this is a newly appointed board, it is my responsibility as shareholder representative to formally consider the composition of the committees. I would therefore appreciate it if the composition of both committees is submitted under formal cover letter of the following supporting information.”

And she tells you a copy of the board resolution, on the composition, the draft resolution and gives you a list.

10 What she does not do, however, is to provide you with her own composition.

MR TSOTSI: Yes.

ADV SELEKA SC: You remember this email?

CHAIRPERSON: I am sorry, Mr Seleka, I have been going ahead with looking at these emails and left you behind.

ADV SELEKA SC: Oh.

CHAIRPERSON: So I will not say anything about what I have seen ahead of you but I will go back to where you are. Okay, what page are you now?

20 **ADV SELEKA SC:** 1214.

CHAIRPERSON: 1214?

ADV SELEKA SC: Yes, 1214.

CHAIRPERSON: Okay, alright. Of course the fact that your next witness will only be after lunch does not mean we do not need to finish with Mr Tsotsi as soon as

possible. Ja. Okay.

ADV SELEKA SC: Thanks, Chair, thank you.

CHAIRPERSON: Alright.

ADV SELEKA SC: We will do the best to the issues – just stick to the issues.

CHAIRPERSON: Ja.

ADV SELEKA SC: So Mr – we are at the email which is in the middle of the page on page ...[intervenes]

CHAIRPERSON: Well, I just say that – or as far as I am
10 concerned, we should not take more than two hours from ten o'clock.

ADV SELEKA SC: Yes, Chair. Okay, thank you, Chair. So, Mr Tsotsi, there is no – you remember this email?

MR TSOTSI: I do recall the email, yes.

ADV SELEKA SC: Ja. What is evident from here is that the minister does not communicate her own composition there but she does show an interest in the composition of all the committees.

MR TSOTSI: Yes. When you say the minister does not
20 communicate her own list, she I think indirectly had done that because you will recall that she at one point called me to her residence.

ADV SELEKA SC: Oh yes, you can go there, ja. Yes.

CHAIRPERSON: Ja, will maybe it will help, where is the email from the minister from her composition which you say

was the same as Mr Salim Essa's composition? I thought we did have that. Did we not have?

MR TSOTSI: I am not aware that it is there, Chair.

CHAIRPERSON: Oh, is that so?

MR TSOTSI: I do not know whether investigating has found any...

ADV SELEKA SC: No they have not.

CHAIRPERSON: The email that had spelling errors and so on, was it not from her? I think that your one to her
10 also seemed to have some spelling errors. I do not know if it is the same spelling errors but, for example, Khoza was written as Xhosa.

ADV SELEKA SC: Yes.

CHAIRPERSON: Ja, was that not the email from her?

MR TSOTSI: I think what she had done was simply to just reflect what she had been sent because I sent that same email as it was to her and it would have come back looking exactly the same.

CHAIRPERSON: Okay, you got an email from Mr Salim
20 Essa.

MR TSOTSI: Yes.

CHAIRPERSON: With the composition. I am under the impression that what you sent to the minister was your own composition which was different from Mr Salim Essa's composition.

MR TSOTSI: I did do that, Chair.

CHAIRPERSON: Yes, but are you saying you also sent Salim Essa's email to the minister or you say you do not ...[intervenes]

MR TSOTSI: Yes, I did sent Salim Essa [inaudible – speaking simultaneously]

CHAIRPERSON: Oh, so you sent your own plus the one from Mr Salim Essa?

MR TSOTSI: Yes.

10 **CHAIRPERSON:** Okay and then what she then sent to you was effectively the Salim Essa composition.

MR TSOTSI: That is correct.

CHAIRPERSON: But that one that came from her why do we not have it? Why do we not have that composition?

ADV SELEKA SC: The one that came from the minister.

CHAIRPERSON: I thought we did have.

ADV SELEKA SC: The one that came from the minister, Chair?

CHAIRPERSON: Yes, the composition.

20 **ADV SELEKA SC:** No.

CHAIRPERSON: Do we only have Mr Tsotsi's one?

ADV SELEKA SC: We have Mr Tsotsi's one in the email.

CHAIRPERSON: Ja. How do we not have that one? I assume that the investigators looked at the ...[intervenes]

ADV SELEKA SC: Mr Tsotsi's emails.

CHAIRPERSON: At even the minister's emails and her PA Ms Kim Davids. Did they do that? I was under the impression that previously we did have the email from the minister and we had the email from Mr Tsotsi to the minister

ADV SELEKA SC: Yes.

CHAIRPERSON: What I was not sure about was whether we had Mr Salim Essa's email but I thought the one that Mr Tsotsi sent to the minister we did have and the one that the
10 minister sent back to Mr Tsotsi, I thought we did have but if Mr Tsotsi says he is not aware of it, it must be that I was mistaken because he would know if that the bundle that he has used did have it.

ADV SELEKA SC: Yes.

CHAIRPERSON: And you also do not seem to remember that we had it.

ADV SELEKA SC: No, I know we do not have the minister's.

CHAIRPERSON: Ja, so I must be mistaken then but how
20 come we do not have it?

ADV SELEKA SC: Ja, so he is finding out from the investigators because I see the minister is using what appears to be her private email address. Mr Tsotsi, the first one is Eskom's email account, the one in December, Mr Tsotsi.

CHAIRPERSON: I mean, if we have Mr Tsotsi's email...

ADV SELEKA SC: We should have the minister's.

CHAIRPERSON: We should have the minister's one at least.

ADV SELEKA SC: Yes. Because we do have the minister's response to you.

CHAIRPERSON: And actually, we should have Salim Essa's one as well.

ADV SELEKA SC: As well, ja, ja.

10 **CHAIRPERSON:** So how come we do not have those?

ADV SELEKA SC: We make note of that, Chair.

CHAIRPERSON: Would you junior maybe in the meantime speak to the investigator? I assume the investigators are not here.

ADV SELEKA SC: They are not.

CHAIRPERSON: Speak to them to try and get an answer on how come we do not have these emails.

ADV SELEKA SC: Yes, Chair, yes.

20 **CHAIRPERSON:** And what efforts were made to try and get them.

ADV SELEKA SC: Yes.

CHAIRPERSON: Is that they have tried everything, they could not get them or what is the position. I mean, that would include looking at Mr Tsotsi's Eskom that he used at the time, that would include looking at the minister's

computers and her PA, Ms Davids' computers at the Department of Public Enterprises and so on. Okay.

ADV SELEKA SC: Yes, Chair, thank you.

CHAIRPERSON: Alright.

ADV SELEKA SC: Ja, just to then go to your affidavit, Mr Tsotsi, as you deal with it, this aspect in your affidavit. I think you have now answered – already tendered the answer to the Chairperson whether you sent that email which had made mistakes or spelling mistakes to the
10 minister. Your first supplementary affidavit answers that question.

MR TSOTSI: Correct.

ADV SELEKA SC: Which is on page 1222.

CHAIRPERSON: Well, can we just maybe quickly go through the emails.

ADV SELEKA SC: Yes, Chair.

CHAIRPERSON: Even without going to the affidavit just to complete this thing.

ADV SELEKA SC: Yes.

20 **CHAIRPERSON:** Mr Tsotsi, at page 1213 there is an email there from you to Ms Lynne Brown, the minister, is that correct?

MR TSOTSI: Yes.

CHAIRPERSON: And the subject is Deployment of Non-executive Board Members to Board Committees. That is

the email that Mr Seleka has already read into the record. Now that is the composition that you say you sent to the minister, that composition of the committees of the board.

MR TSOTSI: As I have received it from Mr Salim Essa, yes.

CHAIRPERSON: Okay. Are you saying that the composition of the committees of the board as reflected in this email that you sent to the minister was taken as it was from the email from Mr Salim Essa?

10 **MR TSOTSI:** Yes, Chair.

CHAIRPERSON: So, In other words, this composition was not yours.

MR TSOTSI: No, it was not my formulation.

CHAIRPERSON: It was Mr Salim Essa's composition.

MR TSOTSI: Yes.

CHAIRPERSON: But you presented it to the minister as yours?

MR TSOTSI: That is what I did initially and I subsequently then sent mine, the one that I had [inaudible – speaking
20 simultaneously]

CHAIRPERSON: Yes because the email there says:

“Dear Minister, I trust you are well and enjoying some rest. Please find below the preliminary deployment of non-executive board members to board committees. The audit committee at Eskom

has always been checked by a CA. We may have to deal with media reaction to this change. Are you contemplating limiting the board to 13? The previous board had 14 members. For those serving on three committees depending on their day jobs, the workload may be quite taxing.”

And then you say:

10 “Audit and risk committee, the members would Chwayita Mabude and her or she would be the Chair, it is just that I do not know if it is a he or a she. Then the other members of the audit and risk committee would Ms Viroshini Naidoo, Nadia Carrim, Romeo Kumalo, Norman Baloyi.”

Then you had the tender and procurement committee. You said the Chair would be Ben Ngubane, the other members would be Mark Pamensky, then you wrote Z-a-t-h-e-m-b-e, Zathembe, X-h-o-s-a Zethembe, Xhosa. The next member was Nazia Carrim, the next member was Chwayita Mabude. Now I stop there. There was no member of the board who
20 was Zathembe Xhosa, is that correct?

MR TSOTSI: Yes, correct, yes.

CHAIRPERSON: There was a member of the board who was Zethembe, which is Z-e-t-h-e-m-b-e Khoza, K-h-o-z-a, not Xhosa.

MR TSOTSI: Yes.

CHAIRPERSON: So this was to the extent that it may have been intended to be a reference to Mr Zethembe Khoza, it was a very conspicuous spelling error, certainly for his surname. But also, it is not Zathembe, it is Zethembe.

MR TSOTSI: Yes.

CHAIRPERSON: Okay. Then we go to the IFC, that is the Investment and Finance Committee. Then you said it should be composed in this way. The Chairperson should
10 be Mark Pamensky, the other members would be Viroshini Naidoo, Zola Tsotsi, Pat Naidoo, again Zathembe Xhosa, Z-a-t-h-e-m-b-e Xhosa, X-h-o-s-a, again same mistake as in the reference to Zethembe Khoza under the tender and procurement committee.

And then you said under the People in Governance Committee the Chair should be Nazia Carrim and the other members should be Ben Ngubane, Zola Tsotsi, Romeo Kumalo, Venete Klein and then under the Social, Ethics and Sustainability Committee you said the Chair should be
20 Venete Klein, the other members should be Pat Naidoo, Viroshini Naidoo and Norman Baloyio, Baloyio is B-a-l-o-y-i-o. Now you confirm that there was no member of the board who had that surname of Baloyio.

MR TSOTSI: Yes.

CHAIRPERSON: There was a member of the board whose

surname was Baloyi.

MR TSOTSI: Yes.

CHAIRPERSON: B-a-l-o-y-i. So you then say after giving this composition:

“I would be happy to discuss this deployment with you should you so wish. Kind regards, Chairman”

So you presented this composition of these committees, five committees, as your suggestion.

MR TSOTSI: Initially, yes.

10 **CHAIRPERSON:** Initially, yes. Why did you do that? Were you happy with this composition or did you do it because Salim Essa made this suggestion that you should present it as yours to the minister?

MR TSOTSI: Essentially that was the reason, Chair, I did it the first time.

CHAIRPERSON: Yes, yes. And then what happened later on?

MR TSOTSI: Thereafter, I ...[intervenes]

CHAIRPERSON: You say you sent another one later on?

20 **MR TSOTSI:** Yes because I realised that this would not work because a lot of them were not in correspondence to their profession that the people had at the time.

CHAIRPERSON: Yes.

MR TSOTSI: And also there were some committees that I, as Chairman, should not be involved.

CHAIRPERSON: Yes.

MR TSOTSI: The IFC, for example.

CHAIRPERSON: Yes.

MR TSOTSI: So I certainly had to revise what was here.

CHAIRPERSON: Yes.

MR TSOTSI: And then I subsequently then sent the revision to – this is what we do not have.

CHAIRPERSON: Yes. No, now at the time you sent this email to the minister did you appreciate the spellings
10 errors that we have talked about in the surnames of the two members of the committee and the name in regard to one or did you not pick them up or did you have a reason to say you do not want to spelling, let it go as it is?

MR TSOTSI: Chair, I just decided to take what I got and just simply put it – and just passed it on the minister essentially. So I was not – I did not have any intent of changing anything, that – as I had received it initially.

CHAIRPERSON: Yes but my question is whether you did pick up the spelling errors and decided to leave them as
20 they are.

MR TSOTSI: I certainly did pick up the spelling errors, yes.

CHAIRPERSON: Yes, ja, and decided to leave them as they were.

MR TSOTSI: I decided to leave them as they were, yes.

CHAIRPERSON: Yes. No special reason to say let me leave them as they are or was there a special reason?

MR TSOTSI: I would not say there was a special reason, Chair, except to say I just wanted what I had received to appear exactly the way it had come.

CHAIRPERSON: Ja, okay, alright.

MR TSOTSI: Yes.

CHAIRPERSON: Okay, alright. Now do we have your subsequent email to the minister where you then sent
10 another composition or an amended composition?

MR TSOTSI: That is the email that I do not see here.

CHAIRPERSON: Yes.

MR TSOTSI: And that is the one that we have just had a discussion about earlier.

CHAIRPERSON: Yes.

MR TSOTSI: That you asked that... I see they are looking.

CHAIRPERSON: Yes. We do not have that, Mr Seleka?

ADV SELEKA SC: We do have it here, Chair. Just before
20 we move on, Chair, I should also point out the other spelling mistake in regard to Nadia Carrim, Nazia Carrim.

MR TSOTSI: Nazia, yes.

ADV SELEKA SC: So under audit and risk.

CHAIRPERSON: Yes.

ADV SELEKA SC: She is spelt Nadia and under tender

procurement she is Nazia.

CHAIRPERSON: And the correct one is which one, Nadia or Nazia?

ADV SELEKA SC: Nazia.

MR TSOTSI: Nazia.

CHAIRPERSON: Oh, okay. Okay, then I think if we have got Mr Tsotsi's subsequent email with a different composition or an amended composition let us go to that one.

10 **ADV SELEKA SC:** Yes. That is the bottom of page 1215, it starts there and goes to the next page.

CHAIRPERSON: Yes, okay. So the first one was sent on the 16 December 2014 at eight minutes past two by Mr Tsotsi to Ms Lynne Brown and then on 26 January at 13.42 Mr Tsotsi sent to Ms Lynne Brown another email and the subject is:

“Deployment of Non-executive Board Members to Board Committees”

ADV SELEKA SC: Yes.

20 **CHAIRPERSON:** And it says:

“Dear Minister, please find the revised board subcommittee deployment as follows. Audit and risk and tender and procurement and IFC.”

So I think that is the committees you are going to deal with. And then it says:

“Chwayita Mabude, Chair.”

Then it says:

“Ben Ngubane, Chair. Mark Pamensky, Chair.
Viroshini Naidoo, Chwayita Mabude, Pat Naidoo,
Nadia Carrim, Zathembe Khoza...”

Now Khoza is spelt correctly, but I think the A after Z is not correct but Khoza is spelt correctly.

“Romeo Kumalo, Nazia Carrim...”

So Nazia is written correctly.

10 “Venete Klein, Norman Baloyi.”

I am not sure that I follow there. What is the position?
There are too many chairs there.

MR TSOTSI: Okay. Let me just explain how this – this unfortunately taking the – this would have been a table but I think by the time it got – it got somehow corrupted, I do not know, but I can follow it. What it is, is that you have got audit and risk. If you imagine in a tabular form ...[intervenes]

CHAIRPERSON: So because you have audit and risk first.

20 **MR TSOTSI**: Ja, let us say audit and risk is one table, tender is another table and procurement is the third table. Chwayita Mabude goes into the first table, Ben Ngubane goes into the second table as tender and Mark Pamensky goes into the third, that is IFC.

CHAIRPERSON: Yes.

MR TSOTSI: Then you follow the same sequence. Viroshini Naidoo goes under audit and risk , Chwayita Mabude then goes under tender, Pat Naidoo goes under IFC. The same thing again, the third line, Nadia Carrim goes under audit and risk, Zathembe Khoza goes under tender and again Zathembe appears under IFC.

CHAIRPERSON: So Mr Zethembe Khoza would be in two committees?

MR TSOTSI: Those two committees, yes.

10 **CHAIRPERSON:** Okay.

MR TSOTSI: Yes. And then again you have Romeo Kumalo audit. Nazia Carrim is the tender, Venete Klein in the IFC and then Norman Baloyi would then be an additional member in the audit and risk committee. So that is how it would have worked out.

CHAIRPERSON: Yes, yes, okay. And then ...[intervenes]

MR TSOTSI: The same thing with the following one.

CHAIRPERSON: And then you have got People in Governance, Social, Ethics and Sustainability.

20 **MR TSOTSI:** That is right.

CHAIRPERSON: And then under that heading you have got Zethembe Khoza and the spelling for both the name and the surname is correct.

MR TSOTSI: Correct.

CHAIRPERSON: Chair. Then you have got Venete Klein,

Chair. Ben Ngubane, Pat Naidoo, Zola Tsotsi, Viroshini Naidoo, Venete Klein, Norman Baloyi, then you have Chwayita Mabude, Zola Tsotsi. Just explain it here they way you explained the first one again?

MR TSOTSI: Right. Again People in Governance, Zethembe Khoza is the Chairperson and the Social, Ethics and Sustainability, Venete Klein is the Chairperson.

CHAIRPERSON: Okay, I am sorry, I think if you do one committee and complete it.

10 **MR TSOTSI:** Right, okay.

CHAIRPERSON: So, Chair so and so, then the other members.

MR TSOTSI: Okay. The way it would be then, Chair, is the People in Governance Committee members would be Zethembe, who is the Chairperson. Ben Ngubane is a member of the committee. Zola Tsotsi, member of the committee. Venete Klein a member of the committee. Chwayita Mabude a member of the committee.

CHAIRPERSON: Okay.

20 **MR TSOTSI:** And then Social Ethics and Sustainability, Venete Klein is the Chairperson. Pat Naidoo is a member of the committee. Viroshini Naidoo a member of the committee. Norman Baloyi, member of the committee. Zola Tsotsi, member of the committee.

CHAIRPERSON: Yes, okay. And then you say Emergency

Task Team and New Build and then you have Ben Ngubane, Chair. Zola Tsotsi, member. Viroshini Naidoo, member. Nazeem (sic) Carrim and Romeo Kumalo, member. And then you say Kind regards, Chairman, sent from my iPad.

So now this was sent on the 26 January 2015, sixteen minutes to 4 p.m. Was this your real genuine suggestion of how the committees of the board should be composed?

MR TSOTSI: That is correct, Chair.

10 **CHAIRPERSON:** And when one compares this composition with the one you sent to the minister by way of your email of 16 December 2014 there are, I would assume, a number of differences, is that correct?

MR TSOTSI: There are some differences.

CHAIRPERSON: Yes.

MR TSOTSI: The important difference have to - got to do with me in particular.

CHAIRPERSON: Sorry?

20 **MR TSOTSI:** The important difference have got to do with the Chairperson because of the need for the Chairperson not sit in some of the committees.

CHAIRPERSON: Maybe what should happen, Mr Seleka...

ADV SELEKA SC: Yes.

CHAIRPERSON: If your junior could – because I do not think this is done anywhere but you will tell me if it is

done.

ADV SELEKA SC: Yes.

CHAIRPERSON: If you could work out the differences between the two lists.

ADV SELEKA SC: Yes.

CHAIRPERSON: I assume – I take it she was following how Mr Tsotsi explained who would be in which committee in terms of his own composition.

ADV SELEKA SC: Yes I have done that Chair.

10 **CHAIRPERSON:** And compare and then – because she can prepare her document just by hand.

ADV SELEKA SC: Yes.

CHAIRPERSON: Which she can give to you later on before Mr Tsotsi leaves the witness stand then he can just confirm that the following are the differences between the two compositions.

ADV SELEKA SC: Ja.

CHAIRPERSON: Okay.

ADV SELEKA SC: Thank you.

20 **CHAIRPERSON:** Alright, okay so you confirm Mr Tsotsi that this email of the 26th of January that you sent to Lynn Brown represents your suggestions in the true sense, and that the one of the 16th of December, although you presented it to the Minister as your suggestion, but actually, you just took Mr Salim Essa's composition and

you sent it to her as his as well.

MR TSOTSI: Yes.

CHAIRPERSON: Okay, alright. I think this is important because what it means is that you are saying, even if we might not be having the email from the Minister, that where she sent you her composition, you are saying that once you had received it, you compared it with the composition of Mr Salim Essa and you realised that they were exactly the same.

10 **MR TSOTSI:** Yes.

CHAIRPERSON: That is what you are saying?

MR TSOTSI: Yes.

CHAIRPERSON: Ja, okay you may continue Mr Seleka, I thought it is important to get this right, but it might be important to go to the emails that were exchanged in connection with this but I just wanted to make sure this is clarified.

ADV SELEKA SC: Well, that is fine Chair.

20 **CHAIRPERSON:** So I leave it to you, I know they are in front of you. You might have wanted to refer and it may be important to refer to the contents of the emails exchanged, as well, but I leave it to you.

ADV SELEKA SC: Yes, no that is fine. I think what the Chairperson...[intervene]

CHAIRPERSON: And of course previously they may have

been covered.

ADV SELEKA SC: Yes.

CHAIRPERSON: But there may have been some things to highlight, for example, what we have covered now we may have covered before, but I do not think as clearly as it now emerges.

ADV SELEKA SC: Yes, indeed.

CHAIRPERSON: Ja, so it may well be that in the emails there are things that we should highlight such.

10 **ADV SELEKA SC:** I suggest, Mr Tsotsi. I think the one thing that you seek to correct is what was stated previously in your first affidavit that you had ignored Salim Essa's submission to you, can you tell the Chairperson.

MR TSOTSI: Yes.

ADV SELEKA SC: So you in fact did not ignore it, you did send it to the Minister in December 2014.

MR TSOTSI: Yes, I think ignored in the sense of that being the final - ignore it in a sense of it not being the final document that would represent the actual formulation, but
20 not ignored in the sense of not having passed it on to the Minister. Maybe that is the clarification to make.

ADV SELEKA SC: Well the other thing I mean, the other thing you might want to explain is you when you send the email to the Minister in December...[intervene]

CHAIRPERSON: Well, I am sorry, Mr Seleka I thought

you would question Mr Tsotsi further on the evidence about ignoring but Mr Tsotsi there are not two meanings about ignoring something.

MR TSOTSI: Yes.

CHAIRPERSON: There is only one meaning, ignoring something is to do nothing about it, is it not?

MR TSOTSI: Yes.

CHAIRPERSON: Here you did not do nothing about it Mr Salim Essa's composition, you did exactly what he asked
10 you to do, you presented it to the Minister.

MR TSOTSI: Yes.

CHAIRPERSON: As your own, is it not?

MR TSOTSI: Yes, that is correct.

CHAIRPERSON: Therefore, it is not correct to say you ignored it, it cannot be correct.

MR TSOTSI: Yes.

CHAIRPERSON: Ja, you may later on have decided that no, no you thought that composition was wrong and then sent another composition but cannot be correct to say you
20 ignored it.

MR TSOTSI: I think that is what I meant when I initially wrote what that.

CHAIRPERSON: Yes, but what I am putting to you is it was not true to say you ignored it when you knew that you did actually do what Mr Salim Essa asked you to do about

it, namely present to the Minister as yours.

MR TSOTSI: Yes.

CHAIRPERSON: You accept that?

MR TSOTSI: Yes.

CHAIRPERSON: Okay, Mr Seleka.

ADV SELEKA SC: Thank you, Chair, that takes care of -
I was going to follow it up, it takes care of it Chair.

CHAIRPERSON: Okay, I am sorry, well it shows that we
did not collude, so I did I did not know you were still
10 coming back to it. I thought you were leaving it and maybe
you – ja, okay but ja, you may continue.

ADV SELEKA SC: No, because the submission in the
affidavits Mr Tsotsi is quite clear he says:

“I quietly ignored it.”

CHAIRPERSON: Sorry?

ADV SELEKA SC: What Mr Tsotsi said in his affidavit, he
says:

“I quietly ignored his submission.”

CHAIRPERSON: Yes.

20 **ADV SELEKA SC:** “And sent mine to the Minister.”

CHAIRPERSON: Yes, so it does not suggest that you
sent it, yes well continue, deal with that.

ADV SELEKA SC: So, I think it is very clear, Mr Tsotsi it
does not admit of another interpretation.

MR TSOTSI: Yes.

ADV SELEKA SC: But after you sent this to the Minister, you do say in your email:

“I would be happy to discuss this development with you, if you should so wish.”

Between your - after this and the sending of the next email in January 2015 was there a discussion of the Minister that led to the revision of this list?

MR TSOTSI: No, there was no discussion with the Minister itself, no.

10 **ADV SELEKA SC:** Chair, you may want to know the Minister's version of this.

CHAIRPERSON: Yes, no that is important, yes, that is important but I do not know whether – ja let us hear the Minister's version and obviously, we need to look at that email from her to Mr Tsotsi on the 28th of January.

ADV SELEKA SC: Yes, that is right.

CHAIRPERSON: And I take it that that particular email, which is at 12:14 the bottom one from the middle of the page from the Minister to Mr Tsotsi is a response to his, Mr
20 Tsotsi's of 26 January, would that be correct?

MR TSOTSI: Yes sir.

CHAIRPERSON: We have a response from the Minister to you, in response to your email of 16 December that is the one where you sent her Mr Salim Essa's composition. Did she respond to that, as far as you remember?

MR TSOTSI: On there on the 16th of December?

CHAIRPERSON: Yes.

MR TSOTSI: She, like I said Chair she responded with the same version there.

CHAIRPERSON: Yes, but that response, do you know, whether it was after you had sent the second one, your composition on the 26th of January or was this before you sent your own suggestion of the composition?

MR TSOTSI: It would have been before.

10 **CHAIRPERSON:** It would have been before?

MR TSOTSI: Yes.

CHAIRPERSON: Okay. Do you remember whether in response to what she sent you, you said anything or the next thing you did was to send her your own composition of the 26th of January?

MR TSOTSI: Yes, that is what I did, yes.

CHAIRPERSON: Ja, okay alright.

ADV SELEKA SC: Yes, so then, Mr Tsotsi while still there when does the Minister call you to meet with her?

20 Where you found her in the presence of Salim Essa and Mr Tony Gupta.

MR TSOTSI: I do not remember exactly the sequence but obviously, it would have been I think sometime in January, because she would have been gone for a good part of December and this would have happened sometime in

January.

ADV SELEKA SC: Okay, this is the impression in one's mind that you would have sent the first email of the composition in December 2014. You would have followed that up, or prior to you following it up, you say the Minister would have sent a composition which match that of Salim Essa.

MR TSOTSI: Yes.

ADV SELEKA SC: But then why would she do that, if it is
10 the same as Salim Essa's because she should actually respond to yours, which differs from Salim Essa's.

MR TSOTSI: I - she would have had responded to mine, for sure. Which is what I had said in my affidavit, her response would have been, from what I had - the changes that I had made in in what I sent her.

ADV SELEKA SC: Yes, then it makes sense if it is like that.

MR TSOTSI: Yes.

ADV SELEKA SC: Ja, do you follow then it makes sense
20 if it is like that.

MR TSOTSI: Yes, because if I had not made any changes, she would not have any reason to respond with what had come from Salim Essa.

ADV SELEKA SC: Yes. Chair, what Mr Tsotsi is explaining here is the sequence because he was saying to

you, the Minister would have responded to him, after his email of December with the Minister's own composition. But then my question to him was if...[intervene]

CHAIRPERSON: After his email of?

ADV SELEKA SC: December 2014, the first...[intervene]

CHAIRPERSON: Ja, the 16 December one.

ADV SELEKA SC: Correct, he was saying to you the Minister would have responded with the Ministers composition, which was the same as Salim Essa's. So I
10 was asking, but what would be the point because the Minister had the same composition in mind, she did not have to respond to you.

So what he is explaining is, well, the probability is that the Minister would have responded with Salim Essa's, same composition only after his revised composition of January 2015.

CHAIRPERSON: Oh.

ADV SELEKA SC: Yes.

CHAIRPERSON: But is that something you remember as
20 having happened in that sequence, or you are speculating as to how it happened, namely, when in relation to your email to the Minister of 16 December 2014, and your email to her of 26 January 2015, in other words...[intervene]

MR TSOTSI: Chair, there is a communication that is not here.

CHAIRPERSON: Yes.

MR TSOTSI: And that is between myself and the Minister, following my sending her what Salim Essa says, sent me. So I then sent her what I then reformulated from what...[intervene]

CHAIRPERSON: I am sorry, I did not hear, following your?

MR TSOTSI: Following my having sent her what Salim Essa had sent me.

10 **CHAIRPERSON:** Okay, yes there was some interaction subsequent to the corrections.

MR TSOTSI: Correct, yes.

CHAIRPERSON: Before you sent the one, you're one the composition on 26th January.

MR TSOTSI: Yes, definitely.

CHAIRPERSON: During that period.

MR TSOTSI: Yes.

CHAIRPERSON: On the same subject the interactions were on the same subject?

20 **MR TSOTSI:** Yes, Chairman you see that email that I have sent to her which differed from what Salim Essa had sent is what caused her to call me to her residence where Salim Essa and Tony Gupta were present, and then said to me, that the composition of the Board will be as she had sent it to me.

CHAIRPERSON: Yes, now I did see that when I looked at your affidavit earlier on that in relation to that you said exactly that.

MR TSOTSI: Yes.

CHAIRPERSON: You say in your affidavit that she called you.

MR TSOTSI: Yes.

CHAIRPERSON: And at that meeting, both Mr Salim Essa and Tony Gupta were there.

10 **MR TSOTSI:** Correct.

CHAIRPERSON: That is what you say and you do say in your affidavit, she said that the composition of the committees of the Board would be as she had sent them to you.

MR TSOTSI: Yes.

CHAIRPERSON: I did see that, ja. So but I think the unfortunate thing is that in your affidavit, you do not give dates for that meeting or an estimate. But what is your recollection, if you do have any recollection as to around
20 about when that meeting happened in relation to the 16th of December when you sent her the Salim Essa composition and the 26th of January, when you sent her what you say was your real composition. Did it happen before, between the two dates or did it happen after the 26th of January?

MR TSOTSI: No, it happened between the two days.

CHAIRPERSON: Between the two days?

MR TSOTSI: Yes, sometime in January, it would have been early January.

CHAIRPERSON: It would have been early January?

MR TSOTSI: Yes.

CHAIRPERSON: You see, if it happened after the 26th of January, it may well be that she would have called you to a meeting to make this point because she realised that you were not going along with her composition, okay. If you
10 met before, between the 6th of January with her then you must have communicated with her in one way or another, that you were not going along with her list, with her composition otherwise, why would she call you.

MR TSOTSI: That is exactly what I am saying.

CHAIRPERSON: You did communicate that?

MR TSOTSI: I did communicate to her subsequent to, like I said, subsequent to what I had sent initially as having been Salim Essa's, I sent her my version, and then she came back and said, no I must stick to the one that is the
20 same as what Salim Essa had sent.

CHAIRPERSON: Yes.

MR TSOTSI: So then this is all happening before the 26th to my recollection.

CHAIRPERSON: So are you therefore saying, when you sent her the composition of the 26th of January, it was not

the first time that you were sending her a composition that was different from the Salim Essa composition?

MR TSOTSI: It was not the first time, yes.

CHAIRPERSON: And are you sure about that because I do not think we have an email that that reflects that you sent her a composition prior to the 26th of January, are you sure about that?

MR TSOTSI: I seem to recall as such Chair because that is the email I am saying we do not have here.

10 **CHAIRPERSON:** Yes.

MR TSOTSI: Remember initially, I said there is an email that is missing.

CHAIRPERSON: Yes.

MR TSOTSI: And that is the one which I believe would have reflected the changes that I initially proposed to the Minister.

20 **CHAIRPERSON:** Yes, how different if you are able to remember you might not remember, is your composition of the 26th of January how different was it from the composition that you sent her at some stage between the 16th of December, and the 26th of January?

MR TSOTSI: To my recollection, Chairman, the only thing that I can clearly remember is that I had taken myself out of – in particularly IFC.

CHAIRPERSON: Yes.

MR TSOTSI: The other thing I would have done if it was not I do not recall by looking at this, but I would have liked to have used the experience of Chwayita Mabude in one of the – to Chair one of the committee. I do not remember which one, I suspect it could have been the Audit Committee, or maybe people in governance, I cannot remember. But I do not remember the details on it.

CHAIRPERSON: Okay, but also in the meantime, thank you for giving me probably the correct pronunciation for Mr
10 Mabude is it Chwayita Mabude?

MR TSOTSI: Chwayita.

CHAIRPERSON: Ja, no I think I have been saying Dhwayita Mabude and I am embarrassed to that, I thought it cannot be Chwayita maybe probably Dhwayita so it is Chwayita.

So you say you have taken out yourself out of the Investment and Finance Committee that is one thing you remember.

MR TSOTSI: Yes.

20 **CHAIRPERSON:** Okay, alright. So but if that meeting happened, somewhere between 16 December 2014 and 26 January 2015. It means that despite the Minister having insisted to you in that meeting that the composition of the committees would be, as in effect Salim Essa had given them, of course, she was saying, as she had given them to

you, it would mean that you persisted in coming up with a different composition. Is that right?

MR TSOTSI: That is correct, Chairman.

CHAIRPERSON: Is that what happened?

MR TSOTSI: Yes, that is exactly what happened.

CHAIRPERSON: Yes, and now I see that the revised or the composition of committees of the Board that you sent on 26 January 2015. The one that is at page 1215, you sent at 13:52, 13 hours 52, but there is another one, which
10 appears at page 1218 it is of the same date, that is 26th January 2015 and it is sent at 18:53, do you see that one? Do we know whether it is exactly the same as the other one? The - it appears to have been the email to have been redone, I am not sure.

ADV SELEKA SC: It is from the duplication.

CHAIRPERSON: Mr Seleka, have you checked whether the two are the same the composition or you had not looked at that? I think your junior can look as well as to whether there is a difference in the composition between
20 the email at page 1218 and the emails starting at page 1215 at the bottom and continuing at page 1216.

So because if there is a difference between the two then we need to know and that might be the reason why it may have been sent the latest one was sent a minute or two after the other one. What is your recollection Mr

Tsotsi, is it that you may have sent on one day two different compositions or what? They seem to be...[intervene]

MR TSOTSI: I would have thought they would have been the same, I do not recall quite honestly Chairman.

CHAIRPERSON: Yes.

MR TSOTSI: I would have - my initial reaction would have been that they would have been the same.

CHAIRPERSON: But I see that is the – or the
10 composition in the one or at 1218 in terms of how you
arrange it needs the same explanation that you gave in
regard to the other one as to who, if you want to find out
who was going to be in what committee. Okay, so I think
your junior will check that so that we can - we would be
able to say the first one of 16 December was like this. The
second one of 26 January, if you compare the two what you
find and then if you compare the one at 1218 with the one
at 1215 what are the differences.

ADV SELEKA SC: Yes.

20 **CHAIRPERSON:** So that we know that okay, alright.

MR TSOTSI: I have just gone through them Chairman they are the same.

CHAIRPERSON: They are the same?

MR TSOTSI: Yes.

CHAIRPERSON: Okay, alright but the, Mr Seleka's junior

will just confirm because she will have a little bit more time to look at it than you have to, okay alright. I think Mr Seleka if I am not mistaken, you were going to look at the content of the emails but you are also going to put Ms Lynn Browns version.

ADV SELEKA SC: Yes, Chair.

CHAIRPERSON: So feel free to proceed as you want to.

ADV SELEKA SC: And Chair her affidavit.

CHAIRPERSON: Oh, I see we have gone past the tea
10 break.

ADV SELEKA SC: I thought – no I let it go Chair because I thought when we take a break, we will take a long time break, I was aware of it.

CHAIRPERSON: I suspect you probably still need more time than you have between now and twelve.

ADV SELEKA SC: Yes, indeed.

CHAIRPERSON: Because there have been lots of discussion on the issues.

ADV SELEKA SC: Yes.

20 **CHAIRPERSON:** No, let us take the tea break so that when - you can use the tea break also to just rearrange how you want to deal with issues.

ADV SELEKA SC: Thank you, Chair.

CHAIRPERSON: Ja, okay let us take a tea break. We will return at, it is nearly twenty to, we will return at ten to

twelve. We adjourn.

REGISTRAR: All rise.

INQUIRY ADJOURNS

INQUIRY RESUMES

CHAIRPERSON: Okay you may proceed Mr Seleka.

ADV SELEKA SC: Thank you Chair. Let me go to – let me start off with the version of the Minister. It will take us back to the emails. The Minister's affidavit, Chair, is found in bundle – Eskom Bundle 7(A).

10 **CHAIRPERSON:** Eskom Bundle 7?

ADV SELEKA SC: 7(A)

CHAIRPERSON: Ja, okay.

ADV SELEKA SC: And I want to go straight to the page which is page 444.

CHAIRPERSON: What is the page we should go to?

ADV SELEKA SC: 444.

CHAIRPERSON: Okay.

ADV SELEKA SC: Eskom Bundle ...[intervenes]

MR TSOTSI: Which one is it?

20 **ADV SELEKA SC:** 7(A).

CHAIRPERSON: Is it 444?

ADV SELEKA SC: Yes. Yes, Chair 444.

MR TSOTSI: Okay.

CHAIRPERSON: Ja, there is written on top of the numbers there.

ADV SELEKA SC: Yes. The previous page is 443.

CHAIRPERSON: Ja.

ADV SELEKA SC: That one, everyone can see. And 444 is hidden by the letters of the affidavit but paragraph 43 of it. And I am going to skip some of the paragraphs Chair. It says:

“Legally, I was only responsible for the appointment of members of only two board committees at Eskom.

10 These are the Audit and Risk and the Social and Ethics Committees...”

Now you saw in the email, the Minister actually wanted you to account to her in respect of all the sub-committees. So you have to keep... Ja, that page 1214 open in the other file Mr Tsotsi, those emails exchange with the Minister.

MR TSOTSI: [No audible reply]

ADV SELEKA SC: So 1214, page 1214, where the Minister says: Dear Mr Tsotsi.

20 **MR TSOTSI:** Yes.

ADV SELEKA SC: ...Thank you for the email. Then she says:

“Given that this is a newly appointed board, it is my responsibility as shareholder representative to formally consider the

composition of the committees...”

So she did not limit it to the Audit and Risk and Social and Ethics Committees.

MR TSOTSI: Yes. She, actually, had no... I am saying – what is said here Chair is correct that her responsibility would be those two sub-committees. The rest of the committees, really, did not acquire her authorisation.

CHAIRPERSON: Yes.

MR TSOTSI: But I see here that she states she would like
10 to be informed of the composition of all sub-committees.

ADV SELEKA SC: Ja. Because even the next paragraph in her email she says:

“I would, therefore, appreciate it...”

In the email.

“I would, therefore, appreciate it if the composition of board committees is submitted under formal cover letter with the following supporting information...”

So she wanted all the board -sub-committees.

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

ADV SELEKA SC: Did you respond – did you provide her with the information as requested in this email?

MR TSOTSI: I would have. I would, in the normal course of things Chair, I would have provided her with the information that she required.

ADV SELEKA SC: Well, let us see what... Chair, there are other significant things there in the Minister's affidavit but I want to go to where she deals directly with Mr Tsotsi's version and that is on the next page 445 from paragraph ...[intervenes]

CHAIRPERSON: Yes.

ADV SELEKA SC: ...paragraph 56. Mr Tsotsi, you are there?

MR TSOTSI: Wait.

10 **ADV SELEKA SC:** [No audible reply]

MR TSOTSI: Yes, I...

ADV SELEKA SC: Ja. She says:

“I cannot comment on a list that allegedly was sent by Mr Essa to Mr Tsotsi as I have never seen it.

Mr Tsotsi never specified, at any stage, the composition of this list, nor did he ever indicate what was his own drawn-up list look like.

20 It is inexplicable to me that in the execution of the board's task of appointing members of board committees Mr Tsotsi would not generate his own list but would rather work from a list, allegedly compiled, by a strange to Eskom...”

She says:

“I persist and deny that any ...[intervenes]

CHAIRPERSON: Ja, now she is dealing with the meeting there.

ADV SELEKA SC: Yes.

CHAIRPERSON: What ...[intervenes]

ADV SELEKA SC: The first two paragraphs.

CHAIRPERSON: I am sorry?

ADV SELEKA SC: I said the first two paragraphs.

10 **CHAIRPERSON:** Yes.

ADV SELEKA SC: Yes.

CHAIRPERSON: But she says nothing about, where one would have expected to say something, about – this is paragraphs 66 and 67 but she says nothing about is the evidence by Mr Tsotsi that the composition that he sent her on the 16th of December was from Mr Salim Essa and that the composition that she returned to – she sent to Mr Tsotsi was exactly the same.

20 But of course, she was responding here to Mr Tsotsi’s affidavit, not to the evidence that we have just heard. So it might be important to check whether the part where Mr Tsotsi says the composition of the committees that was sent to the Minister on the 16th of December was Mr Salim Essa’s composition.

ADV SELEKA SC: Yes.

CHAIRPERSON: I do not know if he makes that clear in the affidavit. Do you recall whether you made that clear in your earlier affidavit, not this one, the recent ones?

ADV SELEKA SC: Yes.

MR TSOTSI: I would have made it clear chair. I am sure I did.

CHAIRPERSON: But I think you did. You would have made it clear that the composition she sent you was the same as Mr Salim Essa's one.

10 **ADV SELEKA SC:** Yes.

MR TSOTSI: Yes.

CHAIRPERSON: You would have made that clear?

ADV SELEKA SC: Yes, that is clear Chair.

CHAIRPERSON: What I am not sure about is whether is clear that Mr Salim Essa's composition is the one reflected in Mr Tsotsi's email to the Minister of 16 December.

ADV SELEKA SC: Yes. Well, right now, Mr Tsotsi says, yes, it is.

CHAIRPERSON: Ja.

20 **ADV SELEKA SC:** He says that is the list he received from Mr Essa.

CHAIRPERSON: H'm.

ADV SELEKA SC: But that is only now Mr Tsotsi because in the first affidavit the message that one picks up from your affidavit is that, what you received from Salim Essa,

you did not pass on to the Minister.

CHAIRPERSON: H'm.

ADV SELEKA SC: Instead, you sent your own and ignored Mr Salim Essa's.

CHAIRPERSON: H'm.

ADV SELEKA SC: That is the submission in the first affidavit.

CHAIRPERSON: H'm.

ADV SELEKA SC: So then, if the Minister says: The
10 letter you say you received from Salim Essa, I never saw it.

CHAIRPERSON: H'm.

ADV SELEKA SC: She will be right in saying that because in the first affidavit you said you never passed it onto her.

CHAIRPERSON: H'm.

MR TSOTSI: Yes.

ADV SELEKA SC: Ja.

CHAIRPERSON: H'm.

20 **ADV SELEKA SC:** But now, obviously, she has to respond... Well, that is she going to know whether or not it is Salim Essa's list of the 16th of December 2014. One would have to do a comparative analysis.

CHAIRPERSON: H'm.

ADV SELEKA SC: But what is curious in the response by

the Minister, Chair, which is clear from Mr Tsotsi's version is that there was an exchange of emails.

CHAIRPERSON: H'm.

ADV SELEKA SC: "I sent my list to the Minister."

CHAIRPERSON: H'm.

ADV SELEKA SC: The Minister does not seem to answer that part.

CHAIRPERSON: H'm.

ADV SELEKA SC: In fact, she is saying, it is strange that
10 Mr Tsotsi would have relied on somebody else's list and not created his own list.

CHAIRPERSON: H'm.

ADV SELEKA SC: And does not say whether or not she received the list from Mr Tsotsi.

CHAIRPERSON: H'm.

ADV SELEKA SC: She... Well, she seems to indicate that she did not.

20 "Mr Tsotsi never specified, at any stage, the composition of this list [which is supposedly Mr Salim Essa's list], nor did he ever indicate what his own drawn up list look like..."

Now that, obviously, there is an email where you sent your revised list.

MR TSOTSI: Yes. Chair, if – the more I look at this email that I sent to her, the more it seems to me that there is a

suggestion that I was bribing the Minister, that I would make some changes.

CHAIRPERSON: There is a suggestion that?

MR TSOTSI: That is was bribing the Minister that I would be making some changes in this...

CHAIRPERSON: Ja, h'm.

MR TSOTSI: ...in this composition.

CHAIRPERSON: H'm.

MR TSOTSI: So I just think that it is a pity that there is
10 not that communication which I subsequently sent to her.
On the issue of ignoring. I think the – my original affidavit
was really dealing with the idea of ignoring the content of
what Mr Essa had sent me, knowing that I would be
refusing my own content in terms of the composition.

I mean, that is still in my mind at the time I wrote the affidavit because I am now saying to myself I am not going to bother with this guy's submission. I am going to do my own submission.

CHAIRPERSON: Yes.

20 **MR TSOTSI:** So that, I think that is – I am now to interpret what I think what was really in my mind at the time.

CHAIRPERSON: Yes and ...[intervenes]

MR TSOTSI: It is not reflected like that. I did send his ...[intervenes]

CHAIRPERSON: Ja, but you see. You – what we do know now because you have said you did send Mr Salim Essa's composition to the Minister. Is that – you did not ignore it?

MR TSOTSI: That is correct.

CHAIRPERSON: You see?

MR TSOTSI: Ja.

CHAIRPERSON: So saying you ignored it was incorrect.

MR TSOTSI: Yes.

CHAIRPERSON: Even if you were going to know you were
10 going to send your own later, by sending it to the Minister,
you were not ignoring it.

MR TSOTSI: Yes.

CHAIRPERSON: You see? So that part of your previous affidavit where you may have said you ignored it, could not be correct. Well, I see that in paragraph 40 of the Minister's affidavit, she does say she rejects Mr Tsotsi's accusation, that is 40.1, 40.2.

ADV SELEKA SC: Yes.

CHAIRPERSON: Yes.

20 "In particular, I reject the accusation that I was
in collusion with the Gupta's or any other
person in executing my duties as a Minister..."

She puts 'was in collusion' in quotation marks.
So one must take it that she is therefore saying... Unless
she would be able to explain how come she came up with

exactly the same composition that Mr Salim Essa came up with. Unless she could explain that, it would appear that they may have been working together.

Unless, Mr Tsotsi, you are wrong to associate his or her, that is the Minister, the Minister's composition of the committees with Mr Tsotsi's(sic) composition because she would say: Why do you not associate it with the composition you sent me?

You sent me a certain composition by way of
10 your email of the 16th of December. I sent you exactly the same composition. Why do you not say the composition that the Minister sent to me was the same as the composition that I sent him – I sent her?

In other words, the fact that she sent you composition of the committees of the board that is the same as the composition that Mr Salim Essa sent you, might not necessarily mean that there was collusion between herself and Mr Salim Essa if she simply said:

I am taking Mr Tsotsi's composition. He sent me
20 this. Here is the email of the 16th of December. I was happy with that. I did not say I am happy with your composition. I did send him a new document but it was exactly the same.

Why – what would you say to that?

MR TSOTSI: Like I say Chair, she has – she had two.

CHAIRPERSON: Two what?

MR TSOTSI: Two compositions that I sent her.

CHAIRPERSON: Oh.

MR TSOTSI: That is what I said earlier and ...[intervenes]

CHAIRPERSON: Oh, I did not hear that. She sent you two compositions are different times?

MR TSOTSI: No ...[intervenes]

CHAIRPERSON: Or on the same time?

MR TSOTSI: No, Chair. After I have sent her what I have
10 received from Salim Essa as is, the ...[intervenes]

CHAIRPERSON: Presumption?

MR TSOTSI: Yes, the composition. I, subsequently, sent her my own that I had.

CHAIRPERSON: Before the 26th of January?

MR TSOTSI: Before the 26th, yes.

CHAIRPERSON: Yes.

MR TSOTSI: Then she responded to say the composition that she accepts is the one that I first sent her which is the one I have received from Salim Essa, as is.

20 **CHAIRPERSON:** Yes. But that is the question I am putting to you. She would say: Mr Tsotsi, why do you not say to the Commission I sent you a composition of the committees of the board that was the same as the one you sent me? Why do you say I sent you the composition of the board, board committees that was the same as Salim

Essa's one?

Because you do not know whether Salim Essa communicated with me but you do know the composition you sent me on the 16th of December. Why are you not saying the Minister sent me a composition of the committees of the board that was the same as the one I have sent to her?

You want to paint her as cooperating with Salim Essa in circumstances where there is a document from you
10 to her which has this composition and in that email you did not say to her: I got this composition from somebody else. You represented it as your own one.

So what do you say to that?

MR TSOTSI: She may have reason to say so Chair.

CHAIRPERSON: H'm.

MR TSOTSI: Because she does not know that I have received – she has not got proof that I received the composition from Salim Essa which I then passed on to her.

20 **CHAIRPERSON:** H'm.

MR TSOTSI: She does not have the benefit of that information.

CHAIRPERSON: Yes.

MR TSOTSI: Unfortunately, I did not indicate to her that that is the case ...[intervenes]

CHAIRPERSON: Yes.

MR TSOTSI: ...that I sent her.

CHAIRPERSON: Would you then not agree, therefore, that you are being unfair to her to say she sent you a composition of the board committees that was the same as Salim Essa's.

Therefore, creating the impression that she had worked together with Salim Essa in circumstances where, one, you do not know whether she had ever seen Salim
10 Essa's email or composition as coming from Salim Essa but you know that she had seen yours.

MR TSOTSI: Chairman, it would not make – that might have been the case had it not been for the fact that she called me to her residence where upon I found her sitting with Tony Gupta and Salim Essa.

CHAIRPERSON: Yes.

MR TSOTSI: And then she said to me that the version of the composition of the board's sub-committees is what she had sent me. That is the version that she...

20 **CHAIRPERSON:** So your answer is. On the face of it, she may be right if she says – if she was simply looking at the emails, the email you sent her and her response.

MR TSOTSI: Yes.

CHAIRPERSON: She may be right to complain that you are being unfair to her.

MR TSOTSI: Yes.

CHAIRPERSON: To say she sent you a composition of the board committees that was the same as Salim Essa's one, instead of saying that was the same as the one you sent her on the 16th of December but you are saying if that is where the matter had ended, she could have had a point.

MR TSOTSI: Yes.

CHAIRPERSON: But you say the matter did not end there.

10 **MR TSOTSI:** Yes.

CHAIRPERSON: She, subsequently, called you to a meeting at her residence, is that right, or was it at the office?

MR TSOTSI: At her residence.

CHAIRPERSON: At her residence, where you found her in the company of Mr Salim Essa and Mr Tony Gupta.

MR TSOTSI: Yes.

CHAIRPERSON: And she raised the issue of the composition of the board committees and told you in clear
20 terms that the composition of board committees would be the way she had sent it to you.

MR TSOTSI: Correct.

CHAIRPERSON: And because of that, your suggestion is that the – and you must tell me if I misunderstand your evidence – your suggestion is that there was some working

together between her and Mr Salim Essa.

MR TSOTSI: That is the reason I came to that conclusion, yes.

CHAIRPERSON: Yes. Okay alright. Mr Seleka.

ADV SELEKA SC: Thank you Chair. Yes, Chair, I – I think the point may have been exhausted now. Ja. I could move on to ...[intervenes]

CHAIRPERSON: Yes, you can move onto something else.

ADV SELEKA SC: Ja.

10 **CHAIRPERSON:** Of course, you – I presented to you earlier on when you wanted to deal with her version about the meeting.

ADV SELEKA SC: Yes.

CHAIRPERSON: So I think you might – you must deal with that. What does she say about the meeting where Mr Tsotsi says she said that the composition of the board committees would be as she had sent them to him.

ADV SELEKA SC: Ja. She does not say much. Mr Tsotsi, that is on page 445, paragraph 58 where the
20 Minister says:

“I persist in denying that a Mr Tony Gupta and a Mr Salim Essa were not together or individually visited at my official residence in Pretoria...”

Ja, then she goes on to explain something else.

CHAIRPERSON: But does she admit that a meeting took place and between herself and Mr Tsotsi when she made this – she insisted and she only denying that Mr Salim Essa and Mr Tony Gupta were there or, what is the position?

ADV SELEKA SC: The meeting between her and Mr Tsotsi is not specifically dealt with Chair.

CHAIRPERSON: She does not deal with it?

ADV SELEKA SC: No.

10 **CHAIRPERSON:** That is strange.

ADV SELEKA SC: No, she does not specifically deal with the meeting. I mean, it is equally strange that she denies seeing Mr Tsotsi's list of the composition, that it was not given to her.

CHAIRPERSON: Does she – which list does she deny seeing?

ADV SELEKA SC: She denies seeing, what Mr Tsotsi says is Salim Essa's.

CHAIRPERSON: On the 16th of December?

20 **ADV SELEKA SC:** Ja, whichever date it was.

CHAIRPERSON: Ja, the date is 16 December, the one that – for the composition that Mr Tsotsi says was Mr Salim Essa's composition.

ADV SELEKA SC: Yes.

CHAIRPERSON: That is the 16th of December.

ADV SELEKA SC: Yes.

CHAIRPERSON: And then Mr Tsotsi's one is
26 January 2015.

ADV SELEKA SC: She also denies ...[intervenes]

CHAIRPERSON: She denies both?

ADV SELEKA SC: ...that Mr Tsotsi showed her his list.

CHAIRPERSON: Sent her his list?

ADV SELEKA SC: Yes, which is paragraph 57.

CHAIRPERSON: Oh.

10 **ADV SELEKA SC:** Yes, paragraph 57 Chair.

CHAIRPERSON: Yes.

ADV SELEKA SC: That:

“Mr Tsotsi never specified, at any stage, the
composition of this list...”

That is the one Salim Essa.

“...nor did he ever indicate what his own
drawn-up list looked like...”

So the ...[intervenes]

CHAIRPERSON: But at page 1214 of Eskom Bundle 7.

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

CHAIRPERSON: There is an email from her to Mr Tsotsi
on 28 January 2015 at twenty-one past eight in the
morning... No, no. I am sorry. Ja, in the morning.

ADV SELEKA SC: Yes.

CHAIRPERSON: And the subject is: Deployment of Non-

Executive Board Members to Board Committees.

ADV SELEKA SC: Yes.

CHAIRPERSON: Now, two days before, on the 26th of January, Mr Tsotsi had sent her what he regard as his composition.

ADV SELEKA SC: Correct.

CHAIRPERSON: So she says in that email:

“Dear Mr Tsotsi. Thank you for the email below regarding the composition of the board committees...”

10

ADV SELEKA SC: Yes.

CHAIRPERSON: And I do not know whether below, the email below is the... Well, the email below from Mr Tsotsi is, I think, the one at page 1215 of Eskom Bundle 7.

ADV SELEKA SC: Correct.

CHAIRPERSON: Sent on the 26th of January 2015 at 13:52.

ADV SELEKA SC: Yes.

CHAIRPERSON: And we read that, earlier on, starting with Dear Minister. Sent to lynnebrow5@me.com.

20

ADV SELEKA SC: Correct.

CHAIRPERSON: And that is the composition. So there is an email where that appears to respond to Mr Tsotsi’s composition.

ADV SELEKA SC: Correct.

CHAIRPERSON: At least, as far as that one is concerned.

ADV SELEKA SC: Yes, Chair.

CHAIRPERSON: That there might not be an email from her, I am not sure, that relates to the one of the 16th of December.

ADV SELEKA SC: H'm.

CHAIRPERSON: But there seems to be a response to this one. And she says in that email at page 1214:

10 “Given that this is a newly appointed board, it
is my responsibility as shareholder
representative to formally consider the
composition of committees.

I would, therefore, appreciate it if the
composition of the board committees is
submitted under formal cover letter with the
following supporting information...”

ADV SELEKA SC: Yes.

CHAIRPERSON: So it seems that Mr Tsotsi had sent the
proposed composition of committees ...[intervenes]

20 **ADV SELEKA SC:** Yes.

CHAIRPERSON: ..in a manner that she did not regard as
the right one. And she says it should be send under formal
cover letter. And then she says it should be accompanied
by a number of things that she sets out there.

ADV SELEKA SC: Yes.

CHAIRPERSON: And then she says, after setting out a list of six items that should be included:

“If it can be avoided, I would caution against the same membership for the Audit and Risk and the Tender Committees...”

And one can look at Mr Tsotsi’s composition of 26 January whether one is able to see what concern she is referring to there.

ADV SELEKA SC: H’m.

10 **CHAIRPERSON:** And then she says:

“However, I am cognisant of the need to maximise the capacity of the board in assigning membership to committees.

However, I can recall that approval was granted to collapse the Audit and Risk with the procurement and would appreciate a briefing on the rationale for the committee, while noting that there is also a tender it would be appreciated if you can provide the formal submissions by Friday 30 January 2015.

20 Further, I am yet to receive Eskom’s 2015 board annual calendar highlighting amongst days the proposed AGM stakeholder engagement [indistinct – dropping voice] and road show linked to actual annual and interim results. I would appreciate if you could expedite within the same timeline as

above.”

Those paragraphs of her email seem to suggest that she had seen a composition of the committees from either the Chairperson or the board [indistinct – dropping voice] and she was commenting as to what – she was making certain observations based on those.

MR TSOTSI: Chair, can I just comment?

CHAIRPERSON: Yes.

MR TSOTSI: On here on page 445 of bundle 7

10 ...[intervenes]

CHAIRPERSON: What page?

MR TSOTSI: 445.

CHAIRPERSON: 445?

MR TSOTSI: Yes.

CHAIRPERSON: Ja?

MR TSOTSI: Item 57 – item 56 and 57.

CHAIRPERSON: Yes.

MR TSOTSI: Item 56 where she talks about not having seen what was sent by Mr Essa, allegedly sent by Mr Essa
20 to me. Now on 57 – because I want to say – because she never specified at any stage the composition of this list, nor did he ever indicate what his own drawn up of this looks like. Now does this imply that she in fact is denying having received the email of the 16 December because that is where he would have then seen what would purportedly

have been, according to me, what Mr Essa had sent me.

So I do not know whether this item refers – the fact that she is saying that she has not at any stage received composition of any list.

CHAIRPERSON: Well, she says she has never seen a list that you allegedly may have received from Mr Salim Essa and then she says you never at any stage specified the composition of that list which means she, by implication, denies having seen that list or composition of the 16
10 December that you sent, that is the one you said is a Salim Essa composition. She says she has never seen that and then she goes on – or she did not see that one of Salim Essa and then she says:

“Nor did you ever indicate...”

Or drawn up your own that you sent to her. That is what she says.

ADV SELEKA SC: She denies both, Mr Tsotsi.

CHAIRPERSON: Ja. She seems to deny both, but the email that I have just read is there.

20 **ADV SELEKA SC:** Ja, she has to deal with that.

CHAIRPERSON: Ja, she would have to explain how she reconciles that version with her email to you that I just read earlier.

ADV SELEKA SC: Yes.

CHAIRPERSON: Yes, continue?

ADV SELEKA SC: Thank you, Chair. Chair, my junior has done a table, a comparative table to show the commonalities and differences between the two lists. We need to give Mr Tsotsi [indistinct – dropping voice]

CHAIRPERSON: While you are looking that, Mr Tsotsi I note that in your email to Ms Lynne Brown, in your email of 26 January 2015 which you sent at 13.52, after saying Dear Minister, you say:

10 “Please find the revised board subcommittee deployment as follows.”

Which suggests that you – you write on the basis that suggests she is aware of a previous composition, that is why you say please find the revised.

MR TSOTSI: Yes.

CHAIRPERSON: Because if she was not aware of a previous one there would be no need to say it is a revised one.

MR TSOTSI: Yes, correct.

20 **CHAIRPERSON:** On the face of it, it appears that you were saying – you were writing to her on the basis that she was – I was aware of a previous composition and now you are sending a revised one.

MR TSOTSI: Yes.

CHAIRPERSON: And her in email, that seems to be a response to that email, she does not say what are you

talking saying it is revised, I have never received any previous composition of board committees. Okay. Mr Seleka? Do you want to place on record what your junior has...

ADV SELEKA SC: Has done then. The left hand column ...[intervenes]

CHAIRPERSON: Well, the way it would – I think you can just say that these appeared to be the differences and Mr Tsotsi can confirm if that is so either now or if not, he can
10 take this away and do a supplementary affidavit where he says I have now had a chance to examine this and I agree that this reflects the differences between the different compositions.

ADV SELEKA SC: I think the latter, Chair.

CHAIRPERSON: Mr Tsotsi would you prefer the latter or would you feel ready to confirm whether Mr Seleka's junior got it right in terms of the differences?

MR TSOTSI: Chair, I think we can deal with it as is.

CHAIRPERSON: Okay.

20 **MR TSOTSI:** From what ...[intervenes]

CHAIRPERSON: From what you can see.

MR TSOTSI: What I have before me, yes.

CHAIRPERSON: Yes, okay. Mr Seleka, go ahead and if subsequently he thinks there is a mistake he can send a supplementary affidavit.

ADV SELEKA SC: Yes.

CHAIRPERSON: But if he thinks there is no mistake then he does not have to send a supplementary affidavit.

ADV SELEKA SC: Yes, thank you, Chair. So, Mr Tsotsi, you will have to have 7B, Eskom bundle 7B in front of you, page 1213, where the emails are.

CHAIRPERSON: I am sorry, I note that – and this question is really for your junior.

ADV SELEKA SC: Yes.

10 **CHAIRPERSON:** Column 1 at the top – I thought – did the composition that had – did the composition not of the 16 December reflect who the Chairperson of the audit and risk committee was going to be?

ADV SELEKA SC: Yes, it does.

CHAIRPERSON: Ja, you see, this one does not.

ADV SELEKA SC: Yes, no, it does, Chair.

CHAIRPERSON: And the one of 26 January that she has put up also does not and yet we know that Mr Tsotsi did indicate.

20 **ADV SELEKA SC:** Yes.

CHAIRPERSON: So I do not think this is correct. So I do not think it is correct. Did you pick up what I am talking about, Mr Tsotsi?

MR TSOTSI: The second one I picked up, I did not pick up the first one.

CHAIRPERSON: Sorry?

MR TSOTSI: I picked up the second point you made about the ...[intervenes]

CHAIRPERSON: Oh, the first one was, if you look at this document, you have got 16 December 2014 there.

MR TSOTSI: Yes.

CHAIRPERSON: If you look at that committee there, there is no indication of who the Chairperson was going to be. I take it that that first line relates to the audit and risk
10 committee. So it does not indicate actually also on the one under 26 January 2015, it does not indicate who was going to be Chairperson, nor the one of the 6 March 2015. So I am saying it does not reflect the composition as you had indicated in the two emails, the one being the one of the 16 December because I believe that you indicated who the Chairperson of the audit and risk was supposed to be there.

MR TSOTSI: Yes.

CHAIRPERSON: And in the one of the – in your email of
20 26 January 2015 I believe you had also indicated who the Chairperson of the audit and risk was supposed to be but this document does not reflect that. So those are the two points I was making.

MR TSOTSI: Okay.

CHAIRPERSON: And in the light of that I was saying let

us not deal with it, let it get proper attention and maybe you might have to just do a supplementary affidavit and confirm.

MR TSOTSI: Yes.

CHAIRPERSON: But Mr Seleka will need to get a chance to double-check that the document is correct.

MR TSOTSI: Thank you, Chair.

CHAIRPERSON: Ja. Okay, alright. So you will be given another one so that one can be thrown away. You will be
10 given another one once there is a correct one.

ADV SELEKA SC: Thank you, Chair, I think that opens the door for us to move on. I have got 30 minutes, Mr Tsotsi. Okay...

CHAIRPERSON: Because he might, like Mr Popo Molefe, start threatening us with invoices.

ADV SELEKA SC: He also did threaten us, Chair. His last appearance he did.

CHAIRPERSON: Ja, you see... At least we have got to avoid any costs.

20 **ADV SELEKA SC:** Which we do not have, Chair.

CHAIRPERSON: We do not have money. Ja.

ADV SELEKA SC: Mr Tsotsi, then there are matters arising from what board members are saying about you and the first of those is that the averments of misdemeanours against the executives were in fact brought out by you – I

mean, you came up with the allegations of misdemeanours against board members. Mr Koko says the same and he specifically refers to the aide memoire which Mr Nick Linnell had drafted for you which incorporates an allegation against him relating to this Sumitomo matter and by reference to that he says only Mr Tsotsi could have told Nick Linnell about that Sumitomo matter.

We can take it step-by-step regarding the board members who were saying you were the one who came up
10 with allegations of misdemeanours, they relied on you to make the decision for the suspension of the executives. Your comment or response to that?

MR TSOTSI: Thank you, Chair, I have made a submission in my most recent affidavit dealing with this matter.

CHAIRPERSON: Ja, you can repeat what you say.

MR TSOTSI: As soon as I can find it. Oh, yes.

ADV SELEKA SC: I can give you the page reference.

MR TSOTSI: Yes, I have got it now, Chair, page 1222. The matter in relation to the alleged misdemeanours arose
20 at the Durban meeting. This matter was brought to the fore by Mr Maswanganyi and it is Mr Maswanganyi who informed Mr Linnell that there were these allegations of misdemeanour and ...[intervenes]

ADV SELEKA SC: Sorry, Chair. Sorry, the page reference is 1230, is actually 1230, Mr Tsotsi.

MR TSOTSI: I am sorry.

ADV SELEKA SC: Ja, the second supplementary affidavit which is EXHIBIT U17.3.

MR TSOTSI: Oh. Oh yes, sorry, I was looking at the wrong document. Yes.

ADV SELEKA SC: Perhaps you can summarise it.

MR TSOTSI: Yes. Basically, Chair, I am quoting from Mr Linnell's affidavit to the parliamentary portfolio committee where he states exactly that that Mr Maswanganyi provided
10 the information about the alleged wrongdoing. So that, I think, is the first point we made and that that is that information was not provided by me to Mr Linnell.

CHAIRPERSON: I think you need to deal in connection with that point with the allegation that in effect irrespective of who, where you may have got the information about those allegations from, at the meeting of the 11th you spoke – you raised the issue of alleged misdemeanours by certain people including Mr Koko and I think it has been said also about the other executives, I think Mr Molefe, I
20 am not sure.

ADV SELEKA SC: Yes, Chair, yes.

CHAIRPERSON: Ja somebody else, Marokane, I am not sure.

ADV SELEKA SC: Yes.

CHAIRPERSON: But part of the point that was made by

Mr Koko and I think and a few other board members was that at the meeting of the 11th you raised the issue of alleged misconduct or misdemeanours by these executives and – ja, what do you say about that? Even if they had emanated from somebody else.

MR TSOTSI: Chairman, what happened at that meeting on the 11th was that Mr Linnell had circulated the aide memoire, the board members had this document in their hands and it is there that they dealt with the alleged
10 misdemeanours in that document.

So the board members were wanting to know what are these all about, what is going on here? That is the context under which I then talked about this issue indicating to them that there were these allegations about the board members.

CHAIRPERSON: About the executives.

MR TSOTSI: About the executives, sorry. The executives who were to be suspended. So that is how the discussion itself arose.

20 **CHAIRPERSON:** So is the position that you are saying yes at the meeting of the 11 March you did speak on the alleged misdemeanours by some of the executives or the executives.

MR TSOTSI: Yes.

CHAIRPERSON: But you are saying you did so when

members of the board wanted to know what this was all about based on a document that they had which had been prepared by Mr Linnell.

MR TSOTSI: Yes.

CHAIRPERSON: That is what you are saying?

MR TSOTSI: That is what I am saying.

CHAIRPERSON: Mr Seleka will tell me if my recollection is correct, I seem to recall that one – either Mr Koko alone or Mr Koko plus some or other member of the board gave
10 impression that you were speaking very passionately on these alleged misdemeanours with a view to saying these executives must be suspended because of these allegations. Is my recollection correct?

ADV SELEKA SC: Yes, Chair, that would have been Ms Venete Klein and Ms Viroshini Naidoo.

CHAIRPERSON: Yes.

ADV SELEKA SC: Who emphasised the point.

CHAIRPERSON: Yes, what do you say about that? In other words, saying you were very keen on the suspension
20 of the executives, there is an issue about whether you were also keen on the issue of the suspension of the Financial Director. There are some minutes or transcripts that suggest that you may not have been keen on the suspension of the Financial Director, I think, but they say that – or some of the witnesses said you spoke kind of

passionately about the need to suspend the executives because of the alleged misdemeanours.

MR TSOTSI: Chairman, I see and I have heard that evidence from some of the board members who were at that meeting. I do not know what their interpretation of my being passionate about the suspension of executives is about but I was trying to point out the reason why there was a discussion in this document by Mr Linnell of misdemeanours and at the end of the discussion about
10 twenty, twenty five minutes into the discussion, I then summarised what I understood to have been the thrust of what we were discussing and in my summary I indicated very clearly that the discussion is not about suspending executives because of misdemeanours.

We talked about the inquiry and the need for the inquiry, we talked about what the way forward ought to be in relation to the inquiry and that the individuals whose portfolios were impacted by the inquiry, having names them, were in fact not associated – their suspensions
20 would not be associated with any wrongdoing on their part and this is a clearly – if I can – I do not know if I can just read the extract.

CHAIRPERSON: Ja, you can read it.

MR TSOTSI: That speaks of this. I am saying here:

“The meeting began with board members seeking

clarity about ...[intervenes]

CHAIRPERSON: Just tell us what you are reading from.

MR TSOTSI: Sorry, this is from the ...[intervenes]

CHAIRPERSON: Is it minutes or is it an affidavit?

MR TSOTSI: It is an affidavit, my affidavit.

CHAIRPERSON: Your affidavit.

MR TSOTSI: Page 1231, Chair.

CHAIRPERSON: Okay, alright.

MR TSOTSI: Yes. I am making the point by saying that:

10 “This meeting began with board members seeking
clarity about the authenticity of the misdemeanour
allegation. The discussion soon moved away from
ascribing wrongdoing as part of this exercise
because I pointed out that the understanding at the
Durban meeting was that the executives were not
being suspended for any wrongdoing. Instead, Nick
Linnell had organised his approach to dealing with
the matter on the basis of how he had set out the
aide memoire.”

20 I think what needs to be understood, Chairman, is that Nick
had prepared – he is the only person who had enough time
and background to have spent time looking at how to
approach this whole issue of suspension. None of us had
that opportunity.

So I think he framed the whole thinking around the

issue of the inquiry and what to do with the people whose portfolios are impacted on a certain approach and his approach had to do with there needs to be some rationale why these people should be removed.

Now the discussion at the board dispense with that rationale because that is not what the board had intended and that was not what was the understanding from the meeting in Cape Town, so I now read ...[intervenes]

CHAIRPERSON: In Durban. The meeting in Durban, not
10 Cape Town.

MR TSOTSI: I am sorry, in Durban, yes. And then I go on to say, Chairman, as part of that meeting:

“As the meeting progressed I decided that I should bring clarity as to what this whole exercise is about as follows.”

And I am quoting what I said in the meeting.

“Okay, so my understanding is quite clear. First of all, this exercise is to be termed an inquiry into the status quo of Eskom, right? Number one.

20 Number two, this inquiry, for it to be effective, requires us to ask specific executives to take forced leave or whatever you call it, to be removed from the situation. This is not an investigation into individuals or wrongdoing by individuals, so that the media has to get it right. It is the status quo of

Eskom because there are definitely situations that one has to look into, what is actually happening in the organisation and what we are asking that this be done by non-Eskom entity, an independent inquiry, right? And then we are then saying that the specific executives who are directly involved here would be Group Capital Executive, Group Commercial Executive and the Chief Executive.”

It then goes on to say:

10 “Well, we said the FD. His situation is different, it is not...”

And then that is when somebody else comes in.

CHAIRPERSON: Ja, okay.

MR TSOTSI: So, in essence, what I am saying, Chairman, is that the reason ...[intervenes]

CHAIRPERSON: You are saying you spoke to the alleged misdemeanours of certain executives but you were just speaking to clarify what Mr Linnell’s document was saying because board members wanted know what this was about.

20 **MR TSOTSI:** Precisely.

CHAIRPERSON: But you say later in the meeting you made it clear that the suspensions were not to be based on alleged misdemeanours.

MR TSOTSI: Yes.

CHAIRPERSON: And you have just read the – quoted the

relevant part in your affidavit. That is what you are saying.

MR TSOTSI: That is what I am saying, Chairman.

CHAIRPERSON: Okay. Mr Seleka?

ADV SELEKA SC: But then what do you say to Mr Koko's allegations that to the extent that the aide memoire included the Sumitomo matter, that could only have come from you.

MR TSOTSI: That is not correct, Chairman. Once again ...[intervenes]

10 **ADV SELEKA SC:** Sorry, sorry, Mr Tsotsi and let me add so that you can deal with it.

MR TSOTSI: Yes.

ADV SELEKA SC: And, by the way, he is referencing to that aspect, is to say that you have always wanted at least in the lead-up to the 11 March wanted him to be suspended for that reason.

MR TSOTSI: Okay. Chairman, let me just paint the picture in terms of what actually happened. At the Durban meeting there was no substantive discussion about the
20 merits or otherwise of doing this inquiry nor was there any discussion as to the merits or otherwise of choosing which areas inquiry should be looked into.

The reason is quite simple and that is that nobody there knew enough about Eskom's business to be able to engage in that discussion, so that would not have been

possible, highly improbable.

But more importantly for me, the fact that names and portfolios of people who were to suspended were mentioned without any reference to anything other than the fact that there was a technical problem with Eskom and that there was a financial crunch in the organisation could only have meant and on reflection that there was an intent to have certain people suspended and this, to me, was why I was taken aback and I was objecting to the idea that this should happen because it had no merit whatsoever in terms of what one would have expected.

There was no discussion at all about misdemeanours in that meeting. There was no discussion whatsoever in relation to that. And secondly ...[intervenes]

ADV SELEKA SC: Is that the meeting of the 9 March?

MR TSOTSI: Excuse me?

CHAIRPERSON: 8 March.

ADV SELEKA SC: Oh, the meeting of the 8 March.

MR TSOTSI: So what I am saying, Mr Koko ...[intervenes]

20 **CHAIRPERSON:** Mr Koko?

MR TSOTSI: Mr Koko doing yes. Is he insinuating that there was some value judgment that occurred in terms of which areas of the business should be looked into, which then would give me the opportunity as he is alleging to be able to say no I think also this area of the business needs

to be looked into because of whatever evaluation I would have proposed or that would have been discussed in the meeting, and I am saying names just came up. Ms Myeni simply stated the names of the people who she said needed to be suspended.

CHAIRPERSON: H'm.

MR TSOTSI: And that was the ...[intervenes]

CHAIRPERSON: But she mentioned the names, that is Ms Myeni, or the portfolios.

10 **MR TSOTSI:** She mentioned the names of the people.

CHAIRPERSON: Yes.

MR TSOTSI: She did not mention the portfolios.

CHAIRPERSON: Okay.

MR TSOTSI: The portfolios were then mentioned by me because I was the one who knew the portfolios, she simply mentioned the names.

CHAIRPERSON: Okay yes. Now did the meeting in Durban say that the suspensions would not be based on allegations of misconduct or did it say they would be based
20 on allegations of misconduct or did it say nothing about the basis for the suspensions, the proposed suspensions?

MR TSOTSI: No the meeting in Durban was clear, Ms Myeni was very clear to say we are not saying that these people have done wrong.

CHAIRPERSON: H'm, so what was the context within

which Mr Maswanganyi at the Durban meeting started mentioning allegations of misconduct against some of the executives?

MR TSOTSI: Mr Maswanganyi did not mention allegations of misconduct.

CHAIRPERSON: Oh, I thought you said in your affidavit and in your evidence he was the one who, from whom Mr Linnell got information about alleged misdemeanours of certain executives?

10 **MR TSOTSI:** That is correct Chairman, but that issue was not raised in the meeting as a substantive issue of discussion. In fact – in fact I did not know that Mr Maswanganyi had stated the issue of misdemeanours to Mr Linnell until I saw Mr Linnell's document, which incidentally he produced on the morning of the series of meetings that we had, to the extent that I really did not have time to really peruse that document, and lo and behold there were the issues of misdemeanours. If I had my way I would have told him to excise those issues out of the document,
20 because it had nothing to do with what we were there about. I would not have, if I had the opportunity I would prevented him from, I would have told him to take those out of his document.

CHAIRPERSON: So are you saying that at the Durban meeting Mr Maswanganyi did not raise the allegations of

misconduct against certain executives.

MR TSOTSI: No Chairman he did not raise any allegation of misconduct.

CHAIRPERSON: So why then – or what is the context within which you say in your affidavit, because I think you say so, when you seek to say the allegations of misdemeanours by the executives did not come from you, they came from Mr Maswanganyi I thought that you say they came from Mr Maswanganyi at the Durban meeting.

10 **MR TSOTSI:** No Chairman.

CHAIRPERSON: You don't say that in your affidavit?

MR TSOTSI: Okay if I may Chair let me just clarify what I meant.

CHAIRPERSON: Yes.

MR TSOTSI: What I meant was there was no discussion whatsoever at the Durban meeting about misdemeanours of the executive.

CHAIRPERSON: Yes.

20 **MR TSOTSI:** Instead what Ms Myeni said was that we can handle the fallout about suspensions of the executives by simply saying that all they are doing is asking them to step aside, so they don't interfere and that they have not done anything wrong, there is nothing wrong that they have done. I don't know exactly how I put it in my affidavit, but it is something to that effect.

CHAIRPERSON: Ja, you see in your affidavit at paragraph 5 at page 1230 of Eskom Bundle 7 you quote Mr Linnell there in your affidavit you say:

“In his affidavit that is the matter of the alleged misdemeanours.”

That is the heading in your affidavit, then you say in his affidavit to the Parliamentary Portfolio Committee on Public Enterprises Mr Nick Linnell states in Bundle U17-AZT-149, paragraph 16 and then you quote him:

10 “Although Ms Myeni’s son took no part in the meeting, Jabu [Maswanganyi] provided information about the state of Eskom including allegations of wrongdoing and reasons for business failure, some of which was in the public domain.”

Now there he is talking about – it seems to me what happened at the meeting on the 8th, because he says though Ms Myeni’s son took no part in the meeting, I think he is talking about the meeting of the 8th, Jabu Maswanganyi provided information the state of Eskom
20 including allegations of wrongdoing, so you quoted Mr Linnell in your affidavit which seemed to say this is how the allegations of misconduct surfaced.

MR TSOTSI: Correct Chairman.

CHAIRPERSON: Yes.

MR TSOTSI: And the way they surfaced was Jabu giving

documents to Nick Linnell, which I was not aware of. I did not know that Jabu actually had documents which had anything to do with the reasons for business failure at Eskom. I did not know that, nor did I know that he had documents which stated that there were allegations of wrongdoing.

CHAIRPERSON: Are you saying that – are you saying that Mr Maswanganyi according to Mr Linnell are you saying that the provision of this information by Mr
10 Maswanganyi according to Mr Linnell did not happen at the meeting publically. In other words are you suggesting that he might have given Mr Linnell this information without the information being discussed at the meeting.

MR TSOTSI: That is what I am suggesting.

CHAIRPERSON: Or maybe that after the meeting or between breaks he might have given the information, in other words are you saying as part of the meeting no such information was discussed. If Mr Linnell got information about allegations of misdemeanours on the part of the
20 Executives from Mr Maswanganyi the two must have exchanged that information between themselves without involving the whole meeting.

MR TSOTSI: That is exactly what I am saying Chairman.

CHAIRPERSON: Okay.

MR SELEKA SC: Yes Chair.

CHAIRPERSON: Mr Seleka?

ADV SELEKA SC: Yes, ja.

CHAIRPERSON: Well we have taken much longer than I thought but I think nevertheless matters are getting clarified that needed to be clarified.

ADV SELEKA SC: Indeed Chair.

CHAIRPERSON: Of course the other witness I am sure she won't mind if we start later than two o'clock.

ADV SELEKA SC: She will appreciate that Chair.

10 **CHAIRPERSON:** Huh?

ADV SELEKA SC: She will very much appreciate that.

CHAIRPERSON: Yes, so we can start later with her.

ADV SELEKA SC: Yes.

CHAIRPERSON: Maybe at three. What we need to do is whether we continue maybe until we have finished with Mr Tsotsi anytime between now and two and then take the lunch break or whether we should take the lunch break now and then come back and continue.

ADV SELEKA SC: And continue, yes.

20 **CHAIRPERSON:** What is your assessment, I know with my intervention you cannot be sure how long you will take, but what's your assessment of how much?

ADV SELEKA SC: About 40 minutes

CHAIRPERSON: About 40 minutes?

ADV SELEKA SC: 40 minutes yes.

CHAIRPERSON: Okay, maybe let's take the lunch break and then we come back.

ADV SELEKA SC: Ja, Chair, sorry Chair I am interrupting, I wanted the Chair to read directly from Mr Linnell's affidavit before we take the lunch adjournment. Because that will help you understand what Mr Linnell himself is actually saying.

CHAIRPERSON: Do you want to read that into the record?

10 **ADV SELEKA SC:** Yes, that is ...[intervenes]

CHAIRPERSON: The relevant part?

ADV SELEKA SC: That is – yes Chair. It is Bundle 7A, page 154.

CHAIRPERSON: Page 154.

ADV SELEKA SC: Ja, 3154.

CHAIRPERSON: Ja. Yes?

ADV SELEKA SC: So at the top of the page, it says:

20 "I attended a meeting in Durban Sunday 8 March 2015. When I arrived at the Presidency Mr Tsotsi and Dudu Myeni were there. In attendance was also Ms Myeni's son."

16 says, which is what is quoted in Mr Tsotsi's affidavit:

"While Ms Myeni's son played no active role in the meeting Jabu provided information about the state of Eskom including allegations of wrongdoing and

reasons for business failure, some of which was in the public domain.”

And then he says:

“To the best of my recollection Jabu had a number of documents that dealt with alleged events at Eskom. These were largely from unidentified sources, and unverified content. These were things that an investigation would identify and were background in context but in part some of the
10 allegations did provide some value in scoping an approach through the investigation.”

I don't know whether that elucidates the point we – Mr Tsotsi is trying to make here. On page 153 ...[intervenes]

CHAIRPERSON: I am trying to understand whether there is any particular point that Mr Linnell makes about this other than that he got the information or document from Mr Maswanganyi.

ADV SELEKA SC: Yes.

CHAIRPERSON: Whether it clarifies whether he got it at
20 the meeting in Durban or subsequently.

ADV SELEKA SC: I think it is at the meeting.

CHAIRPERSON: Ja.

ADV SELEKA SC: I think the information is exchanged at the meeting. Yes, while Ms Myeni's son played no active role in the meeting Jabu provided information about ...

CHAIRPERSON: Yes. In any event whether they were discussed or not discussed at the meeting the allegations what Mr Tsotsi says is that ultimately the meeting in Durban was clear that the suspensions were not really to be based on any allegations of misconduct, or did I misunderstand that?

MR TSOTSI: Yes Chairman that is correct, that is quite correct.

CHAIRPERSON: Ja, okay, alright.

10 Okay let us take the lunch adjournment and then we will continue at two.

ADV SELEKA SC: Thank you Chair.

CHAIRPERSON: We adjourn.

REGISTRAR: All rise.

INQUIRY ADJOURNS

INQUIRY RESUMES

CHAIRPERSON: Okay let us continue.

ADV SELEKA SC: Thank you Chair. Yes. Now Mr Tsotsi, I was putting the version of the other witnesses to you
20 regarding allegation of misdemeanours. One of the versions is that of Ms Viroshini Naidoo in which she says that you had asked – allegedly you had asked Mr Linnell to meet with the union in order to obtain information of wrongdoing from the unions against the executives. Your comment on that?

MR TSOTSI: Thank you Chair. I think in the discourse that that took place in the beginning of the meeting where we were talking about the alleged misdemeanours. One of the issues that arose there was what actually took place at Eskom in regards to Mr Matshela Koko in particular.

And what I had stated there was that not only did I ask Mr Matshela Koko himself directly about the allegation I also asked the chief executive regarding this allegation.

10 And Mr Matshela Koko did not deny that he had anything to do with that and Mr Montana, the Chief Executive, did not have an explanation or a report to the effect of that transpired and he must come in because there was then an allegation ...[intervenes]

CHAIRPERSON: This is when? Was the – the step the time right? Are we talking about what happened around the 8th – around the 11th of March, after that or much earlier?

MR TSOTSI: The incidents that I am recounting now.

20 **CHAIRPERSON:** H'm.

MR TSOTSI: No, Chairman this happened the previous year. Sometime in ...[intervenes]

CHAIRPERSON: 2014?

MR TSOTSI: 2014, yes.

CHAIRPERSON: And Mr Seleka, is your understanding

that the board member who said that, was talking about things that happened before March 2015 or is it not clear?

MR TSOTSI: No, my understanding is that Ms Viroshini Naidoo is talking about the time when Mr Nick Linnell was engaged in March 2015.

CHAIRPERSON: H'm.

MR TSOTSI: Unless, if you are an answering a broader issue which is not directly related to the unions.

CHAIRPERSON: So I think what Mr Seleka says is that
10 Ms Naidoo said something to the effect that you made arrangements or you had a role to play in terms of which Mr Linnell was going to obtain information from trade unions about allegations of misdemeanours by the executives.

ADV SELEKA SC: Correct.

CHAIRPERSON: Do you know anything along those lines?

MR TSOTSI: No, Chairman I did not play any part in Linnell – Mr Linnell getting any information from the union.
No.

20 **CHAIRPERSON:** Did you know whether he ever obtained such information from unions or is that something you do not know?

MR TSOTSI: I do not know Mr Chairman. I could not say.

CHAIRPERSON: Ja.

MR TSOTSI: I really do not know.

CHAIRPERSON: Is – could she be mistaken and confusing some other event with this which might be similar? Could she be talking about a different time? But if she was talking about another – the previous year, Mr Linnell was not there. He was not involved in Eskom before 2015, is it not?

MR TSOTSI: Yes. I think she – well, she is certainly talking about the incidents of that period when Linnell was not there.

10 **CHAIRPERSON:** Yes.

MR TSOTSI: For some reason, it would appear as if she got the impression that I informed Linnell that he can talk to the unions if he wants to know about misdemeanours that occurred at Eskom.

CHAIRPERSON: H'm.

MR TSOTSI: And I am saying that is not the case.

CHAIRPERSON: You say you did not do that?

MR TSOTSI: No.

CHAIRPERSON: Okay. Mr Seleka.

20 **ADV SELEKA SC:** Yes. To the allegations that Mr Koko has made or the version that he has made about you seeking to get rid of him. You have set out a response in your affidavit to the element of you intending to get him suspended. Now would you quickly relate that to the Chairperson, your version as a response to this allegation

of Mr Koko against you?

CHAIRPERSON: You have already said part of it when you talked about where the allegations of misdemeanours came from.

MR TSOTSI: Yes.

CHAIRPERSON: But I think Mr Seleka wants you to deal with – give evidence with regard to the other parts which I knew after which you have not dealt with. Why you say Mr Koko's evidence that you wanted him suspended
10 because of disagreements between you and him regarding the suspension of Mr Sekasindi. Why you say that has not validity.

MR TSOTSI: Yes. Well, let me first of all deal with the issue of the allegation that I suspended him because of Mr Sekasindi. Chairman, there is an affidavit which was – which has been deposed by Mr Montana.

If you recall, Mr Matshela had made some allegations – Mr Koko made an allegation that Mr Montana had – it is said to him that if – that I spoke to Mr Montana
20 and told Mr Montana that if Mr Koko does not unsuspend Mr Sekasindi, I would in turn suspend both him and Mr Koko.

Mr Montana has then responded and categorically denied that I ever said anything like that to him. And incidentally, where Mr Matshela Koko deals with

Mr Montana having shown him evidence of ...[intervenes]

CHAIRPERSON: SMS's ...[intervenes]

MR TSOTSI: SMS's ...[intervenes]

CHAIRPERSON: Or Whatsapp messages. I am not sure.

MR TSOTSI: That is right.

CHAIRPERSON: SMS's, ja.

MR TSOTSI: Where I am, supposedly, complaining to him about and talking about suspending Mr Matshela. He denies that as well. So that I think is essentially the first
10 clarity that I would like to put on this issue.

There is also – Chairman, this whole idea that Mr Koko has that he and I have an – or had an antagonistic relationship. And I just decided here, Chairman, to just to reflect a bit on my experience *visa vie* him at Eskom and try to understand where this – either manifested itself or where it emanates from or whether, in fact, there has been any clear indication that this been happening.

To that extent, I have recalled Chairman that I had a lot to do with Mr Matshela's promotion, Mr Koko's
20 promotion. Mr Koko was – the first time I had anything to do with that was during Mr Brian Damas' time.

And Mr Damas wanted someone to act in the position of Group Executive for Technology and Engineering as it was called at the time, which is now Commercial Technology...

And Mr Koko was the candidate who was most likely and who was closest to that position because he was already a Division Executive in Technology.

And when I mentioned Mr Koko to him, he categorically stated to me that he does not believe that Mr Koko is ready to pursue that responsibility. So he is not going to support that.

So it did not happen during Mr Damas' time. It then happened soon after Mr Damas had left and
10 Mr Matshela was then acting. And the motivation went to the People in Governance Committee of which I was sitting and I remember very clearly having supported that promotion. Mr Matshela Koko came to me and he thanked me for it.

And then fast forward now, several months later. This is now when Mr Montana just became Chief Executive at the beginning of October and in November, Mr Matshela came to me – Mr Koko came to me and said to me will I support his promotion into that position as a substantive
20 Group Executive and I said yes.

And Mr Montana, obviously... Mr Matshela Koko came to me unofficially, obviously, but Mr Montana as Chief Executive came to me formally to say he is going to make this proposal and would I support the proposal on – in the committee. I said to him, yes, I would support it.

And indeed that is what happened. And once again, Mr Koko came and thanked me for it.

This incident and it happened quite some few months after the so-called, of this incident of Sumitomo together with Mr Sekasindi.

So when I put these – the totality of these things together Chairman, I said to myself I think Mr Matshela is being very indigenous by eluding to some, you know, conflict or something between us.

10 I think it is designed to achieve whatever his intentions are. I think he wants to polarise the situation so that it becomes clear that I am pursuing him in a basis of personal vendetta which is not the case.

CHAIRPERSON: H'm.

ADV SELEKA SC: Thank you Chair.

CHAIRPERSON: Yes, Mr Seleka?

ADV SELEKA SC: You are done Mr Tsotsi?

MR TSOTSI: Yes.

20 **ADV SELEKA SC:** Anything further you wish to say on averments of misdemeanours before I move on, either made by other board members?

MR TSOTSI: Chair, I maybe – I might recall something as we go along.

ADV SELEKA SC: Okay.

MR TSOTSI: Ja.

ADV SELEKA SC: No, that is alright. Now let us deal with – look briefly at the reasons why because the reasons why the board members then decide to have you removed from your position as a chairperson of the board because this is linked to the turn of events on the 11th of March, the suspension of the executives.

And eight days later, which is on the 19th of March, you have a meeting. In this meeting, the board members are opening out to you about their
10 displeasure with what they say is your conduct, in the conduct, on the basis of which they decided to take the decision to suspend the executives.

And you are being, for a lack of a better word, accused or singled out – let me use that word – you were singled out as the person who caused the board to make this decision, one of which is, that there was a report from the Presidency which you did not produce, the engagement of Mr Linnell and the terms of reference.

And you may want to take the Chairperson step
20 by step in dealing with those aspects, particularly ...[intervenes]

CHAIRPERSON: I think it might be better if you put them step by step to him.

ADV SELEKA SC: If I put it step by step?

CHAIRPERSON: Ja.

ADV SELEKA SC: Yes, Chair.

CHAIRPERSON: I think, let us start with this one. One of the things that the board members who have given evidence here have said as to why they say they have lost confidence in you, is that they said that you said, either on the 11th of March or on the 9th of March or both, on the 9th and the 11th of March, in those meetings, that the – that, one, Mr Linnell had been appointed by the Presidency to assist the – assist Eskom, I think.

10 And that he had been involved – he had done quite a lot of work already and that there was a report that, as I understand it, must – that you must have been implying was in the Presidency which was relevant to the inquiry that was being discussed or that was being proposed.

 As I understand the evidence of these board members, you referred to the existence of such a report as indicating that that report shows that there was a need for this kind of inquiry. That is my understanding of what they
20 are saying.

 But they say you were being untruthful because later on you did – either you could not produce the report or you did admit that there was no such report or something to that effect.

ADV SELEKA SC: Yes, yes. That is correct that he

admitted.

CHAIRPERSON: So that is what they said. Did you ever say Mr Linnell had been doing a lot of work or had been appointed by the Presidency to assist Eskom in regard to the inquiry? So we take that then step by step.

ADV SELEKA SC: Yes.

MR TSOTSI: Yes. Yes, Chairman in respect of the first question you asked. Yes, I did tell the board that Mr Linnell had been asked by the President to assist us.

10 **CHAIRPERSON:** Yes.

MR TSOTSI: On this inquiry.

CHAIRPERSON: Yes.

MR TSOTSI: Mr Linnell himself made exact – that exact statement in a meeting where board members were present.

CHAIRPERSON: Yes.

MR TSOTSI: I will just have to find it somewhere. I did actually quote that statement.

CHAIRPERSON: In your affidavits?

20 **MR TSOTSI:** Somewhere in my affidavit, I believe, where he states categorically, where I say he is in fact – he has in fact been doing substantial amount of work ...[intervenes]

CHAIRPERSON: Ja.

MR TSOTSI: ...in preparation for this.

CHAIRPERSON: Yes.

MR TSOTSI: So board members knew that Mr Linnell had been tasked to assist and he been the one who had done all the work.

CHAIRPERSON: H'm.

MR TSOTSI: In fact, I can quote you what I said in that meeting.

CHAIRPERSON: What page and ...[intervenes]

MR TSOTSI: This would be page 1237 in my affidavit.

10 **CHAIRPERSON:** 1237?

MR TSOTSI: 1237, yes.

CHAIRPERSON: Okay. I have got that page.

MR TSOTSI: Yes. I put it to the board that – this is now 26.2. I say to the board:

“Nick can put... Can I put this straight? Nick was asked to do this exercise and he had to do a lot of background work because of the instruction he got to do the exercise.

20 Now what is left before him to be commissioned formally by Eskom to get into the chief of what needs to be done.

So he has been onboard on this for quite a while. I think he is having difficulty trying to say that...”

So what ...[intervenes]

CHAIRPERSON: Yes.

MR TSOTSI: So Chairman from the standpoint of board members understanding where Nick came from and that he had been engaged in this matter for some time, in terms of background work, was very clear.

CHAIRPERSON: What was the basis for saying he had been appointed by the Presidency? What did you base that on?

MR TSOTSI: Chairman, I based it on a very clear
10 indication by the President when the President said this gentleman will assist the board.

CHAIRPERSON: H'm. Is that at the meeting of the 8th?

MR TSOTSI: At the meeting of the 8th. The President very, very clearly said this gentleman will assist ...[intervenes]

CHAIRPERSON: The board.

MR TSOTSI: Yes.

CHAIRPERSON: Okay.

MR TSOTSI: And that he would then help the board in
20 getting this inquiry going.

CHAIRPERSON: Yes.

MR TSOTSI: Yes.

CHAIRPERSON: Is that something you did say before that the President said that this gentleman would – will assist the board?

MR TSOTSI: I am not sure Chairman. I – before the statements I have made, I would have to check.

CHAIRPERSON: Ja.

MR TSOTSI: I do not quite recall.

CHAIRPERSON: Mr Seleka?

ADV SELEKA SC: Ja?

CHAIRPERSON: Any recollection?

ADV SELEKA SC: I do not recall him - this in those word, but I know from Mr Nick himself – I hope I am not mudding
10 the waters. Mr Nick himself had said when he went to Pretoria, the first meeting ...[intervenes]

CHAIRPERSON: Ja, ja.

ADV SELEKA SC: Dudu... Ms Myeni.

CHAIRPERSON: He was talking about Ms Myeni that the ...[intervenes]

ADV SELEKA SC: You are the right person.

CHAIRPERSON: ...President. He was supposed to meet the President.

ADV SELEKA SC: Yes.

20 **CHAIRPERSON:** And he may have said, Ms Dudu Myeni said the President wanted him to conduct the inquiry or something like that.

ADV SELEKA SC: Ms Myeni said she had recommended him to the President.

CHAIRPERSON: Yes.

ADV SELEKA SC: As the right person to do...

CHAIRPERSON: Yes.

ADV SELEKA SC: Ja.

CHAIRPERSON: Yes.

ADV SELEKA SC: Uhm...

CHAIRPERSON: Okay.

ADV SELEKA SC: Ja, I am not sure whether Mr Tsotsi had put it in the way he is doing it now.

CHAIRPERSON: Ja.

10 **ADV SELEKA SC:** But I know that I have picked it up from the transcript.

CHAIRPERSON: Ja.

ADV SELEKA SC: That he has told the board that Mr Linnell is been given to us by the Presidency.

CHAIRPERSON: Yes.

ADV SELEKA SC: Ja.

CHAIRPERSON: Yes. Okay. So, but as far as you recall, you did say something to that effect that he was appointed by the Presidency or he was given to Eskom by the
20 Presidency.

ADV SELEKA SC: Yes.

CHAIRPERSON: Yes. And you say, you – you said that because of the fact that President Zuma had said this gentleman would assist the board.

ADV SELEKA SC: H'm.

MR TSOTSI: Correct.

CHAIRPERSON: Ja. And then the question of – you say there he has been onboard on this for quite a while. Was that correct?

MR TSOTSI: This is what Nick told the board himself.

CHAIRPERSON: Yes.

MR TSOTSI: Separately.

CHAIRPERSON: Yes.

MR TSOTSI: There is ...[intervenes]

10 **CHAIRPERSON:** But if I understand it, his evidence is that he was called to Mahlamba Ndlopfu on the 6th of March.

ADV SELEKA SC: Correct.

CHAIRPERSON: Effectively, he was asked to talk everything and left Cape Town and flew to Pretoria. He was called by Ms Dudu Myeni and they had a discussion about Eskom and Ms Dudu Myeni said she had recommended him to the President.

20 So on the evidence that is known to us, he would not have started to do anything prior to the 6th of March. It does not appear to me that that qualifies he has been doing some work for a while.

MR TSOTSI: Chairman, if we look at the transcript where Ms Naidoo is asking him the question in regards to whether he is doing this because he is looking to earn some money

or something to that effect. He then elaborates and answers that question about this very same issue, where he says he spent some time on working on this issue of the inquiry. Now I never – nobody asked him, on the board, you know about timeframes.

CHAIRPERSON: Yes.

MR TSOTSI: How long has this been.

CHAIRPERSON: H'm.

MR TSOTSI: So my statement is really based on what
10 Nick had said in the very same meeting that I made this – I addressed this issue.

CHAIRPERSON: H'm.

MR TSOTSI: I cannot recall exactly what page – where exactly in the transcript we can find this but there is definitely a point that Nick himself makes.

CHAIRPERSON: You see, what comes across, at least the impression I get from the evidence of the board members who spoke on this – testified on this.

The impression I get is that you referred to the
20 existence of a report and... Is that the reason why you referred to the existence of a report that they say did not exist and that you said Mr Linnell had been appointed by the Presidency and that you said he had been doing some work relevant to the inquiry for quite some time all because you were seeking to persuade them to agree to the

establishment of an inquiry, I think, and the suspension of the executives.

But it maybe that I am wrong about the suspension of the executive but certainly in terms of the inquiry that you were referring. All of these things to say to them, this thing is kind of – or this thing of an inquiry, if you make a decision to go ahead, it is something worthwhile but that is the impression I get that you were pushing, that is what they are saying.

10 **MR TSOTSI:** Chairman, you will recall that I have said in my testimony earlier – I cannot remember exactly which time – that I had said that I myself have had such impression even during the previous ...[intervenes]

CHAIRPERSON: Previous, ja.

MR TSOTSI: But I thought there is a need for an inquiry.

CHAIRPERSON: H'm, h'm.

MR TSOTSI: So without a doubt, I was convinced and hopefully I convinced them that there is a need to do an inquiry into Eskom's affairs and it is urgent because of the
20 situation that Eskom is facing at the time.

So if they understood me to say I am doing my best to ...[intervenes]

CHAIRPERSON: [Indistinct]

MR TSOTSI: ...upon them that there is need for an inquiry and it should be done, they are correct.

CHAIRPERSON: You have no quarrel with that?

MR TSOTSI: No, absolutely not.

CHAIRPERSON: Okay.

MR TSOTSI: Yes.

CHAIRPERSON: Well, that is important. Let us go back to where I said I may be wrong namely that they seemed to be saying – there seemed to be saying you were pushing for the establishment of an inquiry and the suspension of the executives. I said I may be wrong that they were
10 saying that in relation to the suspension of the executives as well.

But you are in a position to say whether at that stage you were pushing for both or not, the suspension and the establishment of the inquiry or the only thing you were really pushing for was the inquiry but the issue of the suspension you were not so really pushing but you would go along if that was the decision.

MR TSOTSI: Chairman, what I said to the board members and that is that the inquiry requires that those people who
20 are heading the areas that had to be looked into, should not be in their positions when this inquiry takes place so that you – in fact, I never talked about suspensions, interestingly enough.

CHAIRPERSON: H'm, h'm.

MR TSOTSI: I talked about step aside.

CHAIRPERSON: Yes, no, no, no. I am just saying suspension.

MR TSOTSI: Yes.

CHAIRPERSON: Simply because, at some stage in the past, either with you or other members, we came to an agreement that let us stop saying suspension or step aside or special leave because we know what we are talking about whether you call step aside or special leave or suspension. The fact is you are not going to get work.

10 **MR TSOTSI:** Right.

CHAIRPERSON: Ja, so you might have used the term step aside but basically we are talking about the same thing.

MR TSOTSI: So, Chairman, the consistency of it is quite clear from my mind. Support the inquiry, supporting the stepping aside of the executives and that stepping aside is not as a result of them having done something.

CHAIRPERSON: Something wrong, ja.

MR TSOTSI: Yes, that was my position.

20 **CHAIRPERSON:** Okay.

MR TSOTSI: And hence, as I said to you earlier, I summarised the position as such.

CHAIRPERSON: Yes. Yes, no finish?

MR TSOTSI: Okay, I thought now I can deal with the issue of this report that ...[intervenes]

CHAIRPERSON: Yes, no, that is what I want you to deal with, ja.

ADV SELEKA SC: Before he does that, Chair.

CHAIRPERSON: Yes.

ADV SELEKA SC: I think the passage that he might have wanted, Mr Tsotsi, it is in your bundle – let us see whether that is what you wanted, it is the transcript on page 726, that is Eskom bundle 7(A). 726. That is the bigger file, Mr Tsotsi

10 **MR TSOTSI:** Oh, this one here?

ADV SELEKA SC: Ja. So it is an engagement between Mr Linnell and board members and Ms Naidoo, that appears to Ms Naidoo, he is asking a question, 726. Ja, it says:

20 “Ja, Nick, I think that what you shared with us is very enlightening and I know that you have in your introduction shared with us that you have done quite a bit of work for other state owned companies. I must admit I was expecting that you would have been physically involved with some of the detail with. Where we find ourselves right now and not hypothetically, this is what you need to do. Now maybe I understand that brief incorrectly and then I will take responsibility for it but I thought that that is what you were going to bring to the table.”

Then Nick – well, Mr Linnell then answers;

“If I could answer that. It is a good point to answer it. The thing is, there is different scores here. I would say understanding of Eskom and the pre-research that I have had to do to be sitting here in front of you has been extensive and it has taken some months so I think I have an understanding but I think what I see a minute ago is the failing.”

The failing. So could that have been the passage you wanted because there he says he has done – the pre-
10 research he has done is extensive and it has taken some months but we know from his affidavit that, as the Chairperson has pointed out, he was called on the 6th to come on that day to the official residence of the Presidency in Pretoria. Is that the passage you had in mind?

MR TSOTSI: Not quite, there is another passage which is fairly similar.

ADV SELEKA SC: Oh, where he says he has done it.

MR TSOTSI: It is in that same bundle. The one that I
20 have in mind.

CHAIRPERSON: Yes, but I just wanted – because Mr Seleka’s junior could look for it while he is asking you other questions. Is it one where Mr Linnell talks about having done a lot of work? Is it a passage – what does the passage say, what is the point it advances?

MR TSOTSI: Yes, he is advancing the point that he has spent quite some time doing work.

CHAIRPERSON: Oh, okay. So maybe your junior can check in the meantime.

ADV SELEKA SC: Yes.

CHAIRPERSON: Okay, alright, so let us go to the report. Did you say to them there was a report in the Presidency that related to the inquiry that needed to be establish or that sought to justify the need for an inquiry or something
10 to that effect?

MR TSOTSI: Chairman, the answer to your question is correct, yes, I did. You will recall – I might have mentioned this I think during one of my previous appearances, there were three people who had documents – well, let me say two people who had documents in relation to the meeting that we had gone to attend, it was Ms Myeni and it was Nick himself and I am under the impression that from this that Jabu also had documents based on what we talked about earlier this morning.

20 Now it would seem to me that some of these documents had already contained some sort of background work that had been done at the Presidency. And this is what I understood in the course of the conversation there that some work had been done and I was not shown these documents, I did not ask for them and when I mentioned

them in the meeting – in fact I think at one point I even mentioned that I could get someone who has this information to bring it along and show it to us.

CHAIRPERSON: Did you say to bring the report?

MR TSOTSI: Ja, to produce the report, in other words. So I did not have it in my hand. So yes, the question is that – the answer to the question is that yes, I did speak of the report, I did not have the report in my hand.

CHAIRPERSON: But had you seen the report?

10 **MR TSOTSI:** No, I have not seen the report.

CHAIRPERSON: Had somebody said to you there was a report that was available.

MR TSOTSI: Yes, this is was discussed in the meeting.

CHAIRPERSON: And who was that who said that?

MR TSOTSI: This was mentioned by both Nick and Dudu. Now I do not know exactly who of them had this particular report.

CHAIRPERSON: Did they talk about a report or did they talk about some documents that they might have?

20 **MR TSOTSI:** Chairman, I cannot recall precisely whether the term report was used or the term document was used. I would suspect the term document was more likely to be used. I think the term report probably came in the discussion of board members.

CHAIRPERSON: So one, you had not seen any report.

Two, you think either Mr Linnell or Ms Dudu Myeni or both mentioned at the meeting of the 8 March in Durban that there were documents.

MR TSOTSI: Yes.

CHAIRPERSON: Relating to work that had been done which is connected with Eskom, it was connected with Eskom.

MR TSOTSI: Yes.

CHAIRPERSON: But if they had there were documents
10 why would you have talked about a report?

MR TSOTSI: As I say, Chairman, the word report probably came through in a discussion at the board level and it might have been one of the board members who raised the word report, it probably was not me, as such. So the word report would have then just came to the conversation in that manner but the idea was that the reference is to some document.

CHAIRPERSON: Ja. Because, you know, it is one thing to say there are some documents which may be shared if
20 the board members want relating to work that has been done but to say there is a report is quite something different. It seems to me something you would say if either you had seen the report or somebody had said to you there was a report but not if somebody talked about loose documents. What do you say to that?

MR TSOTSI: Chair, let us say I cannot really recall, I mean, precisely whether there was a statement, the fact of there having been a report or documents. But, as I say, I am inclined to think that they will probably refer to documents and I think the word report I think came up in the discussion among board members as, if you like, reference to a document.

CHAIRPERSON: Because my impression of what some of the board members will testify to as saying was that they
10 were suggesting that you were pushing so much for the establishment of the inquiry that you may have told them some untruths saying there was a report in the presidency when there was no report, saying Mr Linnell had been appointed by the presidency, that is the impression I get from what they said. The impression might be wrong but, I do not know, Mr Seleka?

ADV SELEKA SC: No.

CHAIRPERSON: In terms of the impression that you got from them in their evidence?

20 **ADV SELEKA SC:** It is consistent with yours, Chairperson, but I think that I know that, Mr Tsotsi, you mentioned a report.

MR TSOTSI: Yes.

CHAIRPERSON: Yes, he admits as well. I think you do admit that you talked about a report, ja.

ADV SELEKA SC: Yes. And it may well be – I am making an observation and you can – it may well be that it was an effort on your part to give the gravitas to what you were bringing before the board.

MR TSOTSI: Chair, certainly not on the basis of some untruths, no. Certainly not. Certainly not, I think if the other person who would have some knowledge of this clearly would be Nick.

CHAIRPERSON: Would be?

10 **MR TSOTSI:** Nick Linnell.

CHAIRPERSON: Yes.

MR TSOTSI: Yes, as to the existence of the documents that I am talking about.

CHAIRPERSON: Yes, you see, it is one thing if you say there are some documents which reflect some work that has been done but when you say a report it is weightier, I would think, than if you just talk about some reports. Would you not agree? A report seems to be – to say this is really something serious, that is, quite a lot of work that
20 has been done, so much work that a report has been prepared.

MR TSOTSI: Chair, you can extract a report from documents that have been prepared.

CHAIRPERSON: Yes, yes, but still...

MR TSOTSI: You know, so it could very well be that the documents existed and a particular focus was done on something.

CHAIRPERSON: Ja.

MR TSOTSI: Which was being reported upon.

CHAIRPERSON: But what you do concede is that as far as you know, there was no report, you are not able to say there was a report, all you can say is there may have been some documents, is that correct?

10 **MR TSOTSI:** What I am saying, Chairman, is that I was informed that there were documents.

CHAIRPERSON: Yes.

MR TSOTSI: Relating to work that had been done at the presidency.

CHAIRPERSON: Yes, yes.

MR TSOTSI: Yes. Now in terms of whether these documents represent a report or not, quite honestly I cannot say yes or no.

CHAIRPERSON: Ja, you do not know.

20 **MR TSOTSI:** Yes.

CHAIRPERSON: Yes. On reflection, would you not say that given what you knew then and what you know now it seems to be the same, namely you had been told there were some documents, nobody had used the word report to you, as I understand it, but of course it could be among

those documents there was a report, not so? But based on that, would you not say you probably should have talked about documents because that is what you had been told about?

MR TSOTSI: Chairman, if it was going to make things any clearer, I am more concerned, personally, to be honest, about the issue of misrepresentation.

CHAIRPERSON: Sorry?

MR TSOTSI: The matter of misrepresentation.

10 **CHAIRPERSON:** Yes.

MR TSOTSI: Of the facts.

CHAIRPERSON: The position, ja.

MR TSOTSI: I think for me that to them is really what they focused, that I misrepresented. Hence the charges that they brought against me were on the basis of my having misrepresented myself to them.

CHAIRPERSON: Yes.

MR TSOTSI: So the issue of the report or not a report, I do not want to quibble about that.

20 **CHAIRPERSON:** Ja, ja.

MR TSOTSI: I am not in a position to do that.

CHAIRPERSON: Ja, ja.

MR TSOTSI: But I just want to make sure that, you know, there is no impression of misrepresentation of what transpired and what I reported.

CHAIRPERSON: Yes, you see, as I understand it, the point – part of the point – and I do not know, I do not remember that in the charges they included the issue of the report.

ADV SELEKA SC: It is not included.

CHAIRPERSON: Ja, it is not included in the charges.

ADV SELEKA SC: Yes.

CHAIRPERSON: But one or more of the board members who testified said part of the reason why they lost
10 confidence in you is because you had told them on the 11 March that there was a report. Came out later on that there was no report and I do not know whether he or she said you admitted that there was no report at a later – when the charges were put on the day where you were supposed to answer to the charges but he or she was saying part of the reason why they lost confidence in you is because you told them something that was not true in order to get them to make a certain decision namely that there was a certain report in the presidency and they said
20 it looks like there was no such report.

MR TSOTSI: Chairman, I think we should make this thing very clear. What the board members complained about was the fact that I – they say I failed to produce the report that they say I mentioned earlier in the board meeting previously which is not the same thing as saying that I said

there was a report and there was no report in the sense of there was never a report or a document in the first place, so ...[intervenes]

CHAIRPERSON: So, okay, maybe that is what they – maybe that is the point they make, okay? So if that is the point they make, what do you say?

MR TSOTSI: I am saying it is correct I did not produce the report that they wanted because I did not have it with me. What I said earlier is that I could make someone
10 available who would have the report or the document if board members wanted to – in fact, this is a statement that I think – question or a statement which was made by either Norman or I cannot remember but at some point I did indicate to them that I could make available or I could I bring some – get someone to bring the report or to show the board the report. At some point I also indicated during this meeting now on the 19th that I did not – I do not remember exactly how I put it but the idea was that I did not consider myself privy to the report that was spoken
20 about. I think that is a statement that I think I made on the meeting the 19th.

ADV SELEKA SC: Did you did not what, consider...?

MR TSOTSI: I did not consider myself entitled to or privy to the report.

ADV SELEKA SC: Chairperson, we have an extract from the transcript of the meeting of the 19 March .

CHAIRPERSON: Yes?

ADV SELEKA SC: And Mr Tsotsi has it there. We have made copies.

CHAIRPERSON: Ja.

ADV SELEKA SC: Because it is not incorporated in the bundle yet.

CHAIRPERSON: Yes but you can read the relevant part.

10 **ADV SELEKA SC:** Ja. Mr Tsotsi, I think you are referring to page 35 of that. I can hand up a copy for the purposes of this session.

CHAIRPERSON: Well, if you are going to read it, that is fine.

ADV SELEKA SC: Is it fine, Chair?

CHAIRPERSON: Ja, I will manage.

ADV SELEKA SC: So the report was being asked about here on page 35 of the transcript of the meeting of the 19 March and Ms Naidoo says:

20 “You advised us that these people did wrongdoings and on the basis of that we need to hold this inquiry and that they would interfere in the investigation and on that basis I believe you but now you say you never saw that report, so did anybody around this table see the report?”

Then Mr Tsotsi responds.

“No, no, no, no, no, when I was at the presidency I was told quite clearly that there is a problem at Eskom and a problem that is known to the President and I was not going to ask him what is the problem. He said to me I want to assign this man to go and help you with this investigation. Now I do not believe that I was at liberty to ask him what was the problem. Quite honestly, I could not do that. I had
10 to accept what he was telling and as I say to you, the problem really comes from the fact that I did not introduce this guy properly.”

Is that the part you want to communicate to the Chairperson?

MR TSOTSI: Yes.

ADV SELEKA SC: Chair, may I read from the transcript of the 9 March? That one is in the bundle.

CHAIRPERSON: Ja.

ADV SELEKA SC: There is a couple of important aspects,
20 one of which is this, Mr Tsotsi, page 256, Eskom bundle 12, you say:

“I have been summoned by the President three times and the most recently was yesterday where he has finally made up his mind about what he wants to do about the situation with Eskom. Both

Minister and I have been summoned by the President separately.”

You said that and then later in the meeting you say:

“In actual fact what has happened is that the Presidency has already given us a particular individual who they want to lead this particular inquiry and that individual will then engage and liaise with us and work with us and as the resources are required for these specific issues that maybe
10 have to be looked into and then that individual will have to deem to source those specific resources.”

And then you say:

“So, in a nutshell, I think, to be quite frank about it, the Presidency has gone out of its way to do all of the governance investigation as to what is possible under the circumstances. I was given a complete document which was prepared by the legal people at the Presidency which suggests – which actually says that what the role of the shareholder and the
20 board would be in this kind of thing. So they have covered all the basics in terms of the requirements of all of the documentation that governs the company’s work.”

So it is not the quite the report you are talking about but is the documentation to govern the company’s work and then

you go on to the MOI and so on. So what we see here is, you did tell the board Mr Nick Linnell has been assigned to assist.

MR TSOTSI: Yes.

ADV SELEKA SC: Then you are given a complete document by the Presidency which deals with the role of the shareholder and the board. So what I was looking for was the mention of a report, of an investigation at the presidency. It is alluded to there, I think if we look for the
10 passage where you specifically deal in it.

MR TSOTSI: Yes.

ADV SELEKA SC: So, Chair, I think that answers him having said to the board Mr Nick Linnell was assigned where he says ...[intervenes]

CHAIRPERSON: Yes, no, he admitted that.

ADV SELEKA SC: Yes.

CHAIRPERSON: On the report, I think we are no wiser than we were before.

ADV SELEKA SC: Yes.

20 **MR TSOTSI:** Ja.

CHAIRPERSON: Because the passage that Mr Seleka has read suggests that you told the board that the Presidency had done some investigation and they gave you a complete document about the shareholder and the board or Eskom but we do not know whether you were referring to that

document but based on your earlier evidence it is unlikely that you were referring to it because you said your notion of a report is connected with documents that you were told about at the Durban meeting, if I am not mistaken, is that correct?

MR TSOTSI: Yes.

CHAIRPERSON: Ja. Okay, Mr Seleka, I think you may proceed.

ADV SELEKA SC: Yes, thank you, Chair. I must say that,
10 Mr Tsotsi, I have said to the board members who have told the Chairperson, the Commission, about the report, that they have nonetheless when Mr Baloyi asked repeatedly about that report associated themselves with the – and that is exactly what the board ultimately did with the comment or the position, the view articulated by Dr Ngubane that there might a report out there but that is not our report, we must make our own decision.

MR TSOTSI: Yes, I recall.

ADV SELEKA SC: Do you remember that?

20 **MR TSOTSI:** Yes.

ADV SELEKA SC: And so I have asked them if they ultimately made the decision in this regard complete disregard of what may have been presented to them as a report – I mean, articulated to them as a report, why did they turn around and want to blame you again for a report

they said they do not need in order to make the decision.

You follow that?

MR TSOTSI: Yes.

ADV SELEKA SC: Now why did you not tell them that on the 19 March?

MR TSOTSI: Chairman, that meeting of the 19 March was incredibly stressful. When I reflect on that meeting now I have to say that I was under a lot of stress because by that time I was aware that the board was pursuing me so I was
10 not really at my best in terms of being able to deal with – myself in that – the whole meeting was accusatory. That was – it was clear it was the purpose of the meeting. And so I – there were a lot of things which I could have recalled that had happened earlier that I actually not – because my whole frame of mind was not correct.

CHAIRPERSON: You see, why these issues are important is in part because they may be relevant to the question of what the reasons were for the board to push you out to the extent that that is the impression that is [indistinct], did
20 they push you out without – because maybe somebody outside of Eskom as part of some agenda wanted you out because you were not cooperating with the Guptas or is the position that indeed there were some grounds for your colleagues on the board to feel – for them to lose

confidence in you and therefore to seek your removal. So that is where these issues have become important.

MR TSOTSI: Yes.

CHAIRPERSON: As I say, one or more board members say part of the reason why we lost confidence is that he told us there was a report when there was no report or when he was asked to produce the report he could not produce the report so therefore suggesting that the reason why he could not produce is because it did not exist, he
10 had told us something that was not true, that is the impression I get from the evidence of some of the board members who have testified, therefore we were entitled to lose confidence in him or whether you, because you may not have been cooperating with the Guptas, some members of the board or the board was influenced from outside of Eskom to get rid of you. You see, that is where the relevance is.

MR TSOTSI: Yes.

CHAIRPERSON: But I think you have said what I think
20 you wanted to say on it. Ja. Okay, Mr Seleka.

ADV SELEKA SC: Yes, the other point, Mr Tsotsi, I think we could take it also as covered to a large extent is the engagement of Mr [name cut-off] because that was one of the issues the board members raised with you.

MR TSOTSI: Yes.

ADV SELEKA SC: You got this man, engaged him. You did not follow procurement procedures and you engaged him without informing the board.

CHAIRPERSON: I think that was covered.

MR TSOTSI: That was, yes.

CHAIRPERSON: With him and with the board members.

MR TSOTSI: Yes.

CHAIRPERSON: That was covered.

ADV SELEKA SC: Correct.

10 **CHAIRPERSON:** Ja.

MR TSOTSI: We actually did inform the board members then.

CHAIRPERSON: Ja.

MR TSOTSI: Yes.

ADV SELEKA SC: And then the last thing on this was the terms of reference. And the media statement had got leaked. They also took you to council on that ...

CHAIRPERSON: We did deal with that as well. I don't know about the terms of reference. But ...

20 **ADV SELEKA SC:** Yes.

CHAIRPERSON: Didn't it deal with the leaking of the, the alleged leaking of – he dealt with that, you dealt with that last time Mister ...

MR TSOTSI: We spoke about charges.

CHAIRPERSON: You dealt with all the charges as well as

I recall or am I mistaken?

MR TSOTSI: Dealt with the charges, yes.

CHAIRPERSON: And they included the allegation that you had leaked the media statement to, to the media that had not been approved by the board.

MR TSOTSI: Mr Chairman that is what the allegation was.

CHAIRPERSON: Yes. What I'm saying is you have dealt with it in your evidence, we have asked you about it. Isn't it?

10 **MR TSOTSI:** Yes, you have asked me about it. Yes.

CHAIRPERSON: Ja. So we don't need to repeat that.

ADV SELEKA SC: So we moving on.

CHAIRPERSON: Ja.

MR TSOTSI: There is, there is an aspect Chairman which I guess you, you – it will be covered under the terms of reference. Is that where you want to, wanted to go now because ...

ADV SELEKA SC: Because I've seen that the two are interlinked.

20 **MR TSOTSI:** Yes.

ADV SELEKA SC: Having visited the meeting of the 19th of March 2015, the communication within the board, that they have linked the two. I know that I haven't linked them with you before. And maybe you can touch on that briefly for the Chairperson's ...

CHAIRPERSON: What was the allegation about the terms of reference? That he put himself in the committee that was going to do the investigation?

ADV SELEKA SC: No.

MR TSOTSI: No Chair.

CHAIRPERSON: What was the allegation about ...[indistinct]?

ADV SELEKA SC: The charge was that he commissioned the drafting of the terms of reference. And ...

10 **MR TSOTSI:** Yes.

ADV SELEKA SC: That were not consistent with what the board had in mind.

CHAIRPERSON: Was that part of the charge or that's just an allegation?

ADV SELEKA SC: It was part of the charge and the debate on the 19th of March.

CHAIRPERSON: Yes okay. And he didn't deal with it. He didn't deal with it before?

20 **ADV SELEKA SC:** We didn't go into the details Mr Tsotsi. We did with Ms Klein.

CHAIRPERSON: Okay, let's deal with it.

MR TSOTSI: Yes.

ADV SELEKA SC: And let me just tell the Chairperson how the two – because the media's statement that gets to be leaked Chair reports on the terms of reference.

So it says these are the terms of reference and inquiry and so on and the complaint is that, that what this media statement is communicating to the public as the terms of reference for the inquiry, is incorrect.

CHAIRPERSON: Okay.

ADV SELEKA SC: It's inconstant with the board's own terms of inquiry.

CHAIRPERSON: Okay. Thanks.

ADV SELEKA SC: So that's how the two connect. And Mr
10 Tsotsi then – you can deal with it.

CHAIRPERSON: Ja, what do you say about that?

MR TSOTSI: Ja. Chairman during that meeting of the 19th when the issue of these terms of reference was being discussed there, there was an allegation that I instructed Nick you know to prepare a terms of reference, which were a variance with were the terms of reference that the Arc had prepared.

And at one point there was a question which says, did I or did Nick have access to the terms of reference that
20 Arc had prepared? And quite clearly he saw them and he infused his own view on them.

Which is what, which is the document which they alleged was the one that was leaked. So in other words, the view of the Arc Committee *vis-a-vis* the view of Nick and I were now were ...[indistinct] divergence.

Now what transpired in the meeting was that one of the board members, I can't remember exactly who it was, had made an indication, a statement to the fact that the source of the problem is that the terms of reference which Nick had prepared are in fact quite at variance with the terms of reference that the Minister spoke of at the meeting on the Wednesday.

That would have been the, the 11th of March.

ADV SELEKA SC: The 11th.

10 **MR TSOTSI:** Now that's a curious statement because I don't recall the Minister dealing with terms of reference in her meeting. And it seems as though there was some information or some knowledge that some of the board members had in respect of what should go into the terms of reference.

Which I certainly did not have. Nor did Nick have. So you recall also Chairman at that time there were allegations of that meeting on the 16th, that supposed that the Minister had with some of the board members.

20 And it was immediately after that meeting when Nick Linnell was informed to cease to get engaged on this, on this issue. So I am, I don't know whether it is possible to connect somehow the whole rationale about the objection to Nick's terms of reference as against what, what was required by Arc and Arc haven't been informed from

elsewhere as to what terms of reference they should adopt.

I think the whole attitude towards Nick about the work he'd done in terms of reference and simply just dumping him from, from doing the hard work seems to be informed by something that occurred.

And in Nick's statement he also makes the point that it is his terms of reference that has caused a rift between him and the board. It is as though these terms of reference were not in accordance with some, some interest
10 of some sort.

Now I'm – it's difficult for me to, to be able to adduce anything beyond what I am saying because I'm just basing myself on, on the observations that, that I've made a result of the issue around the terms of reference.

So I think there is a – I don't know whether they have it and shows anything more, more than this.

ADV SELEKA SC: Ja, let me read to the Chairperson, just to the record as well – the, because I think we need to get correct what the member of the board said in this regard.
20 Chair is there, it's a transcript again of the 19th of March and I'll read quickly from that.

The members are debating March 2015. The board members are debating about Mr Linnell getting involved and getting involved at the behest of Mr Tsotsi. Well Ms Naidoo says:

“Nick can be fired and he could leave.”

And she carries on.

“But if we get these terms of reference incorrect, we do not do the right thing on this inquiry, this board is going to be a laughing stock. Going to be like a laughing stock.”

Then she carries on.

10 “And right now there is no document in black and white that said any of these people have done something seriously wrong. We, the terms of reference that this guy put out there is not what we have got.”

He’s referring to Mr Linnell.

“Or what we have drafted. And it is not in terms with what the Minister said to us on Wednesday. So that is our bigger problem. This consultant can go because he has acted unethically already.”

I think what Mr Tsotsi is drawing attention to is the fact that the terms of reference drafted by Mr Linnell were
20 said to be inconsistent with what the Minister had told the board or told us it is said, on Wednesday. But miss – and that’s the bigger problem. Mr Tsotsi you say you were not aware.

MR TSOTSI: I don’t even know what the Minister said.

ADV SELEKA SC: I think Ms Naidoo is coming back and

we will ask her about that. But do you know what the Minister had said which would have made the terms of reference prepared by Mr Nick to be inconsistent with that?

MR TSOTSI: No, there's nothing I know that the Minister said to that effect in that meeting Chairman. Well, I'm at a loss as to why that statement is being made.

ADV SELEKA SC: Ja.

CHAIRPERSON: We've covered the allegation, allegations by Mr Koko as to what he alleges or was Mr Tsotsi's role in
10 his suspension.

ADV SELEKA SC: Yes.

CHAIRPERSON: We've covered the allegation about that Mr Linnell, that Mr Tsotsi said that Mr Linnell had been appointed by the Presidency.

ADV SELEKA SC: Yes Chair.

CHAIRPERSON: We've covered the allegations that Mr Tsotsi said there was a report in the Presidency and then you have just covered the terms of reference. But I don't know whether there is anything more Mr Tsotsi just wanted
20 to say on the terms of reference. I think you are, you are done with them.

ADV SELEKA SC: Yes.

CHAIRPERSON: You, if you still have some questions on them that's fine, but I'm trying to remember whether how much else is left in terms of matters of substance that were

raised by board members and Mr Koko and maybe whoever else.

ADV SELEKA SC: Yes.

CHAIRPERSON: [Indistinct].

ADV SELEKA SC: Chair, can I raise another issue?

CHAIRPERSON: Mr Tsotsi may need to deal with.

MR TSOTSI: Yes.

CHAIRPERSON: Before that Mr Tsotsi, yes Mr Seleka.

ADV SELEKA SC: We ...

10 **CHAIRPERSON:** Do we have a fresher recollection?

ADV SELEKA SC: Yes.

CHAIRPERSON: Of the issues we needed to cover with him?

ADV SELEKA SC: Yes. I think Chair he's covered. You have, he's covered those aspects. I mean he's covered them in his affidavit as well. Mr Pamensky. I mean the last page of your affidavit ...

CHAIRPERSON: What, what was Mr Pamensky's allegations against Mr Tsotsi?

20 **ADV SELEKA SC:** It's the same that Mr Tsotsi motivated for the suspension of the four executives, including the FD.

CHAIRPERSON: Oh.

ADV SELEKA SC: Ja.

CHAIRPERSON: Ja here is ...

ADV SELEKA SC: And allegations of misdemeanours.

CHAIRPERSON: Ja. So there is, is nothing different from what we have dealt with already.

ADV SELEKA SC: Yes. No, it's, it's all in the same ...

CHAIRPERSON: Ja.

ADV SELEKA SC: Broad things.

CHAIRPERSON: But what I wanted to check was whether there is anything, there are any issues outstanding that you intended to raise with Mr Tsotsi that have not been covered. Or whether we have covered them.

10 **ADV SELEKA SC:** We have covered, though there was one issue of interest. It doesn't, does not relate to an allegation against him.

CHAIRPERSON: But you'd like him to deal with it?

ADV SELEKA SC: Ja, I would like to ask him that question ...

CHAIRPERSON: Yes.

ADV SELEKA SC: To see if he can answer it.

CHAIRPERSON: Before ...

ADV SELEKA SC: Yes.

20 **CHAIRPERSON:** He wanted to say something. Mr Tsotsi you wanted to say something on this?

MR TSOTSI: Yes Chair.

CHAIRPERSON: On what I was saying?

MR TSOTSI: No, not on what you are saying. I just wanted to amplify something that has come to light, which

has not been raised in the Commission before in regards to this matter.

CHAIRPERSON: Yes, do that.

MR TSOTSI: And that is that it has come to light that Mr Linnell was actually paid by Eskom for his services that he provided from the 11th to the 18th of March 2015.

CHAIRPERSON: I thought, I thought Mister – I'm sorry. I thought when he gave evidence, I thought Mr Linnell said he had not been paid. I may be mistaken. So you say he
10 has been paid for those, for those days?

MR TSOTSI: [Indistinct]

CHAIRPERSON: For the work that he did for Eskom during that time?

MR TSOTSI: That's correct Chairman.

CHAIRPERSON: Okay.

MR TSOTSI: Ja.

CHAIRPERSON: But apart from, apart from making the statement is there some point you seek to drive with the statement with the fact that he was paid by Eskom?

20 **MR TSOTSI:** Well all I'm really is driving at Chairman is that, that to me seems to be at the very least a tacit you know acceptance of the fact that the board considered him, having him been employed.

It's a tacit admission that he has been remunerated because he had provided a service to the board. Which,

which service the board would want to you know disavow at some point.

CHAIRPERSON: Based on your experience, I mean you were Chairperson of the board for a number of years. I don't know whether three or four before the 2015 board. Would that kind of payment have had to be approved by the board?

In other words can one say that because he was paid, the board must have approved that he be paid?
10 Because if he submitted an invoice and some official paid, the board might say, well that issue never came to us. If it had come to us we would have said no.

MR TSOTSI: Chairman the, the short answer is definitely the board would have had to approve for the simple reason that Mr Linnell was not engaged by any of the executives, by any executive or order or authority. He was engaged directly by the board.

And the services provided were not provided as a result of some executive requirement. There's nothing in
20 the books of the executive, the management at Eskom which says Mr Linnell was asked to do this and therefore he needs to be remunerated for it.

It's clearly coming from the board, it has to.

CHAIRPERSON: Well what about the, the fact that you told the board that he had been appointed by the

Presidency, shouldn't one expect that he would be paid by the Presidency, why was he paid by Eskom?

MR TSOTSI: Well I don't know where the word appointed was use. I don't recall but I do recall saying the President had asked that this man assist.

CHAIRPERSON: Well I thought you used the word appointed and I thought same.

MR TSOTSI: I – maybe ...[indistinct].

CHAIRPERSON: You also said the Presidency gave, gave
10 Mr Linnell to you or this gentleman to Eskom to help them.
Help Eskom. How can they give without paying? Yes.

MR TSOTSI: Well that would have been an observation that Eskom themselves would have made.

CHAIRPERSON: Ja, okay.

ADV SELEKA SC: Chair.

CHAIRPERSON: Ja.

ADV SELEKA SC: The clear response regarding the
request for payment by Mr Linnell shows that it's an email
from him, 16 December 2015. And its addressed to Mr
20 Khoza.

CHAIRPERSON: [Indistinct].

ADV SELEKA SC: [Indistinct].

CHAIRPERSON: Was he acting CEO at the time? You don't know.

ADV SELEKA SC: December 2015 ...

MR TSOTSI: No.

ADV SELEKA SC: No, Mr Molefe would have been the acting. While Molefe would ...

CHAIRPERSON: Well you would have been appointed permanently actually by December, I think, isn't it?

MR TSOTSI: Yes.

CHAIRPERSON: Mr Brian Molefe.

MR TSOTSI: As the CEO, that's correct.

CHAIRPERSON: Ja.

10 **MR TSOTSI:** So Mr Khoza then became a normal board member.

ADV SELEKA SC: Or was he the Acting Chairperson?

MR TSOTSI: No, he was not the Acting Chairperson.

ADV SELEKA SC: No, he was not at that point.

CHAIRPERSON: Oh.

ADV SELEKA SC: So he, ja the email is to him. He thanks for following up, I have attached the invoices. And then Mr Zithemba Khoza forwards the invoices to Mr Anoj Singh.

20 This, the next day, the 17th of December 2015. Then the invoices or there's a reply from Ms Maja Bhana to Mr Zithemba Khoza, said we will sort the payment by next week.

CHAIRPERSON: Ja, okay.

ADV SELEKA SC: Ja, I haven't placed ...[indistinct].

CHAIRPERSON: Let's leave it at that. I think ask your last question to Mr Tsotsi.

ADV SELEKA SC: Yes. My, my next question is this Mr Tsotsi, on the - I mean it has now become common cause before the Commission, I put it at that level, I hope it is at that level, that on the 9th of March 2015 no – the suspension of the executives was not mentioned.

Mr Pamensky has said that. You have said that. The executives have said that. Mr Matona and Cyril
10 Ramolefe. Now when you look at the transcript you pick up comments by two board members.

One Dr Ngubani and the other, by Mr Pamensky. And his comments to this effect, you have introduced the idea of the inquiry from the Presidency and so on. Firstly Dr Ngubani, Eskom Bundle 12, page 263. Just for the purposes of the record, he says:

“Now we are being asked to form a sub-committee, committee, commit our fiduciary duty to this thing. And then the sub-committee takes very serious
20 steps that will involve cost that we might involve in restructuring the organisation, etcetera, probably in firing some people.”

And he says:

“No Chairman. I mean we cannot work like this, I'm sorry.”

And I was curious on the comment that this might involve firing some people. Did this occur to you at that stage?

MR TSOTSI: Chairman, I know there's nothing that, of that nature that occurred to me at that time. To go with firing some people.

ADV SELEKA SC: No what I'm saying, what I'm asking you is, did you pick this up that he had said the inquiry might probably involve firing of some people?

10 **MR TSOTSI**: The statement was not significant to me at the time. I mean I did not attribute anything of significance to the statement at the time, absolutely. I had no basis whatsoever to, to think that there could be such a proposition at any point in the process.

ADV SELEKA SC: In, in similar vein, I want to read to you what Mr Pamensky says, again Eskom Bundle 12, page 270. He says:

20 "Yes, thank you Chair. Some of my concerns are first of all I really think we should all as a board meet with the stakeholder. My biggest concern is that we, is that we going down on this report and it is going to take up a lot of management time and as what we know it is the skill set at the high extra level that is a massive problem. If we lose top, top staff members during this critical time, it really puts

the business at a huge risk. And that is my biggest concern. You know skills are very hard to find within this level and I think we really need to understand that, like in a normal process I understand that an investigation wants to happen. And I'm very, and I am very for an investigation should it happen, but it is all about the timing of the investigation."

But he says, if we lose top, top staff members
10 during this critical time. But there hasn't been any mention of that. And once again my question is, did you take note of this at that stage, on the 9th of March 2015?

MR TSOTSI: I did not take it as something that could have imply any consequences, that might you know occur down the line. An inquiry versus vis-à-vis loss of top skills in the business, that relationship I did not make anything of it, at all.

At the time when Mark was saying it, Mark Pamensky. So on reflection Chairman it may, it may mean
20 something more than meets the eye, but right now at the time I was, we were dealing with this matter at that meeting, no there was no significance in my mind.

ADV SELEKA SC: Ja, isn't that surprising? Because at least if anybody knew about the pending, the idea to suspend it would have been you.

MR TSOTSI: Correct.

ADV SELEKA SC: Even though you did not articulate or communicate it to the board on the 9th?

MR TSOTSI: Yes.

ADV SELEKA SC: So when you said there and you hear one says, some people might be fired, and you haven't introduced the idea, top staff management might be lost and you haven't introduced that idea, you say you didn't, it didn't strike you as something strange?

10 **MR TSOTSI**: Certainly not at the time.

ADV SELEKA SC: Not at the time?

MR TSOTSI: No.

CHAIRPERSON: Mr Seleka, just – I missed something. Who said what about top people being fired and when?

ADV SELEKA SC: That, the last one is Mr Mark Pamensky Chair.

CHAIRPERSON: As speaking when?

ADV SELEKA SC: On the 9th of March 2015.

CHAIRPERSON: Ja, what did he say?

20 **ADV SELEKA SC**: He says to Mr Tsotsi talking about the inquiry. He responds, he says:

“My biggest concern is that we going down on this report and it is going to take up a lot of management time as we won't – as we know it is the skills set at the high extra level. There is a

massive problem. If we lose top, top staff members during this critical time, it really puts the business at a huge risk. And this, that is my biggest concern.”

CHAIRPERSON: He is, you are reading from his affidavit?

ADV SELEKA SC: No, I’m reading from ...

CHAIRPERSON: Talking about what he said at the meeting of the 9th.

ADV SELEKA SC: I’m reading from the transcript Chair.

10 **CHAIRPERSON:** Of? Of the meeting of the 9th?

ADV SELEKA SC: Of the meeting of the 9th.

CHAIRPERSON: So does it amount to him saying at some stage, some top people at Eskom would be fired? What does it say about firing?

ADV SELEKA SC: The, the ...

“If we lose top, top staff members during this critical time.”

He seems to, to express either ...

20 **CHAIRPERSON:** A fear or concern that the Eskom could lose top people?

ADV SELEKA SC: Yes.

CHAIRPERSON: And from the context of the transcript, does it indicate where he was coming from with this idea? From the transcripts?

ADV SELEKA SC: That’s the point Chair. No.

CHAIRPERSON: Now was that the ...

ADV SELEKA SC: Now that's the point.

CHAIRPERSON: Point you were raising?

ADV SELEKA SC: Yes.

CHAIRPERSON: To say, how could he talk about the possibility of Eskom losing top ...

ADV SELEKA SC: Top staff.

CHAIRPERSON: People.

ADV SELEKA SC: Yes.

10 **CHAIRPERSON:** On the 9th.

ADV SELEKA SC: Yes.

CHAIRPERSON: In circumstances where we know that the previous day at the Durban meeting the discussion had included the suspension of some executives.

ADV SELEKA SC: That's right.

CHAIRPERSON: And because it was only Mr Tsotsi from the board who ...

ADV SELEKA SC: Yes.

20 **CHAIRPERSON:** Had attended the Durban meeting, we expect that if any board member knew about what had been discussed at the meeting in Durban, he or she would know it through Mr Tsotsi?

ADV SELEKA SC: That's right.

CHAIRPERSON: And if Mr Tsotsi had not told any member ...

ADV SELEKA SC: On the 9th.

CHAIRPERSON: Then there is a question mark as to why Mr Pamensky was talking about the possibility of Eskom losing top people.

ADV SELEKA SC: Yes. Yes.

CHAIRPERSON: When in two or three day's time that topic was going to be before the board.

ADV SELEKA SC: Yes.

CHAIRPERSON: And of course a decision taken to
10 suspend.

ADV SELEKA SC: Yes.

CHAIRPERSON: Occurred.

ADV SELEKA SC: And the evidence is that it was only on the 11th, two days later ...

CHAIRPERSON: Yes.

ADV SELEKA SC: That the Minister came to the meeting and planted, they use the word, planted the seed of suspensions.

CHAIRPERSON: Yes. Yes. Yes.

20 **ADV SELEKA SC:** So two days before, apart from Mr Tsotsi, nobody should be knowing in the board that there is a possibility of us losing, and he uses the word top, top staff ...

CHAIRPERSON: Yes.

ADV SELEKA SC: Members.

CHAIRPERSON: Yes. Where, where is that transcript?

[Indistinct]?

ADV SELEKA SC: Eskom Bundle 12.

CHAIRPERSON: Bundle 12.

ADV SELEKA SC: Bundle 12 Chair. Page 270.

CHAIRPERSON: Okay.

ADV SELEKA SC: At the, at the bottom of the page.
Against line 20 Chair.

CHAIRPERSON: Okay, I'll, I'll read it.

10 **ADV SELEKA SC:** Yes.

CHAIRPERSON: Later to see the – if there is a
connection.

ADV SELEKA SC: Yes. And ...

CHAIRPERSON: Okay, alright.

ADV SELEKA SC: And ...

CHAIRPERSON: Are you done? Or you still ...

ADV SELEKA SC: I am. Dr Ngubani also made a similar
comment Chair.

CHAIRPERSON: Yes.

20 **ADV SELEKA SC:** 2 – 263.

CHAIRPERSON: It's not the same bundle.

ADV SELEKA SC: Yes, the same transcript.

CHAIRPERSON: At 212. Tell me where about?

ADV SELEKA SC: Yes, page 263. At the bottom, against
line 20 as well.

CHAIRPERSON: Just read it into the record.

ADV SELEKA SC: Shall I read it Chair?

CHAIRPERSON: Yes.

ADV SELEKA SC: Against line 20 it says:

10 “You know we have had coal plus cost, you know, mines. This and that, but it is all being electorates to us without a chance to interrogate. Now we are being asked to form a sub-committee, commit our fiduciary duty to this thing. And then the sub-committee takes very serious steps that involve cost. That we might be involving restructuring the organisation etcetera [then he says] probably in firing some people. The answer is no chairman. I mean we cannot work like this. I am sorry.”

Why do they think about – why do they think people will be fired? Why do they think top dog staff members would lose their jobs on the 9th March 2015?

CHAIRPERSON: Yes I think – I think questions should be put to them about this statements.

20 **ADV SELEKA SC:** Yes.

CHAIRPERSON: So that they get a chance to explain, maybe then provide an understandable explanation of contracts.

ADV SELEKA SC: Thank you Chair.

CHAIRPERSON: Was that your last question?

ADV SELEKA SC: That was the last.

CHAIRPERSON: Okay. Mr Ntsebeza I merely just assumed that you might have no re-examination. Do you intend – would you like to re-examine or not yet?

ADV NTSEBEZA: Chairperson yes but very briefly.

CHAIRPERSON: Ja what is your estimate? Five minutes, ten minutes?

ADV NTSEBEZA: Ten at most.

CHAIRPERSON: Sorry?

10 **ADV NTSEBEZA:** Ten minutes at the most.

CHAIRPERSON: Yes okay that is right, let's go for it.

ADV NTSEBEZA: Thank you very much. I would beg the chairperson's pardon in as far as correct referencing of the bundles before me.

CHAIRPERSON: You do not have similar ... (intervenes).

ADV NTSEBEZA: I do not have a full sight with me but the documents have been referenced.

CHAIRPERSON: Maybe we will be able to just follow.

ADV NTSEBEZA: Absolutely.

20 **CHAIRPERSON:** Ja okay, alright. Are you fine doing it from there or would you like to go to the podium?

ADV NTSEBEZA: No it is fine. I can proceed from here.

CHAIRPERSON: Okay alright. Okay.

ADV NTSEBEZA: The first one is to make reference to this to bring to the attention of Mr Tsotsi.

CHAIRPERSON: I am sorry I think you might deprive yourself of the opportunity to appear on television. They must sanitise the podium then you can – you can stand there. I know that is not your concern.

ADV NTSEBEZA: It is not our primary concern at all, but I do understand ... (intervenes).

CHAIRPERSON: Ja but the ... (intervenes).

ADV NTSEBEZA: You have an overarching ...[intervenes]

CHAIRPERSON: The TV people might complain because
10 they want to – you to appear on their television.

ADV NTSEBEZA: Thank you chairperson. Mr Tsotsi in your affidavit – supplementary affidavit that you were taken through by the evidence leader earlier. The last one you filed. Where you are discussing issues related to Mr Nick Linnell. I think it is paragraph 13 of your affidavit.

CHAIRPERSON: I have got it ... (intervenes).

ADV NTSEBEZA: Yes I am told it is Eskom 071233.

CHAIRPERSON: I have got it.

ADV NTSEBEZA: Thank you very much.

20 **CHAIRPERSON:** Ja if you refer to any of his affidavits and you mention the paragraph I will get it in front of me.

ADV NTSEBEZA: Wonderful. Mr Tsotsi if you do not mind let's look maybe or for expedience let me read paragraph 13. You state in his affidavit for the portfolio committee on public enterprise, Mr Nick Linnell states on page

U17AZP149, 13.1 at paragraph 16.

“Whilst Ms Myeni’s son played no active role in the meeting Jabu provided information about the state of Eskom including allegations of wrongdoing and reasons for business failures, some of which are in the public domain.”

13.2 at paragraph 17.

10 “To the best of my recollection Jabu had a number documents that dealt with alleged events at Eskom. These were largely from unidentified sources and unverified content. These were things in investigation would identify and were background in the context but in part some of the allegations did provide some value in scoping an approach to the investigation.”

Now there was a conversation between the chairperson and yourself regarding documents versus report. Is this by any chance dealing with that conversation or is this something completely different?

20 **MR TSOTSI**: Yes this was the conversation.

ADV NTSEBEZA: Ja and I am on specifically the terminology. Here we use the terminology documents. In the earlier record were I think it is in the transcripts of proceedings if not mistaken of the 11th March 2015. There appears to have been an allegation that you indicated you

have a report from the President. Are you talking about the same thing here or are you talking about a different thing here?

MR TSOTSI: This is the same set of documents. The reference in the board meeting was in reference as indicated here of documents that deals with the alleged events of Mr Minnies at Eskom.

ADV NTSEBEZA: Okay now we have established that you enter – and correct me if I am wrong. You used the word
10 documents or at least Mr Linnell who you are quoting verbatim here, uses the wording documents. Yet when you are recorded in the transcript of the 11th March you use the word reports. And you were meaning the same thing or you was talking separate thing.

MR TSOTSI: I was referring to the same things.

ADV NTSEBEZA: Alright yes. Now since we have now established, we talking about the same thing. In the same transcript and I beg your pardon again chairperson because I do not have it with me as we speak. At the time
20 when – I think it was Mr Norman Baloyi in particular who persisted a request that you provide a report at the meeting that will be the basis amongst which reliance could be sought for the mooted suspension. What if you recall was Dr Ben Ngubane's engagement on that topic.

MR TSOTSI: Chair my recollection there was that Dr

Ngubane was not interested in a document which is not our document, meaning an Eskom document. His attitude was that is a report – someone else's. We are looking for our own report and that is what we should be looking. Essentially that was the comment that he made.

ADV NTSEBEZA: Now did that intervention that by Dr Ben Ngubane dispel of the need for the report to be brought forth or was there follow up requests after he had made that intervention?

10 **MR TSOTSI:** No there was no follow up request in terms of board members wanting me to produce a report.

ADV NTSEBEZA: Put differently if the fellow board members of the meeting accepts his intervention when you said but we not interested in the reports of other entities like the president's. We want our own report. Because I am trying to deal with this issue that says that later – a few days later an allegation is made that you make reference to a report which Nick Linnell refers to some documentation here which you say is the same thing.

20 But Dr Ngubane intervenes in the conversation against the backdrop of a request from Norman Baloyi and says but we not interested. It is not our report, we need to do our own. Was there a follow up request?

MR TSOTSI: Chairman the board members appeared to have lost interest in pursuing that issue when Dr Ngubane

made the statement he made. And I – at that time too I was not – I did not pursue the issue any further after the Dr Ben Ngubane had indicated that he felt that we should be talking about our own report.

ADV NTSEBEZA: My learned friend's junior is very kind to me. It is Eskom 2038 – sorry Eskom 12 381 in terms of your bundles chairperson. In particular I think Mr Baloyi starts, speaker and then later the chairperson. And it runs up to 12 382.

10 **CHAIRPERSON:** I am able to follow.

ADV NTSEBEZA: Thank you very much.

CHAIRPERSON: Able to follow ja.

ADV NTSEBEZA: So the in the light of this record on the 19th it would appear an allegation is then made against you that you by the way told us of a report that you later could not produce. That you say the acceptance there was that it is not necessary even if it was available. Is that what you said.

20 **MR TSOTSI:** That is the view we should take chairman because I just say I was under pressure a lot in that meeting on the 19th. And there are a number of things which I could have indicated which I did not indicate. Because the whole mindset was you know focussed on by having to defend myself from the attack which was made against me by the board.

Yes but in answering the question, that would be the case. I will accept with what Mr Ntsebeza say.

ADV NTSEBEZA: In as far as the alleged misdemeanours that was also discussed at length earlier on, certainly it would appear on record you had to clarify as you testified what Nick Linnell document would have been referring to. And then you testified also today that but the conclusionary[sic] remarks you made as found in your affidavit were clearly stated as you read into the record.

10 That there was no basis upon which wrongdoing was imputed on the executives to be contemplated to be suspended. Notwithstanding the fact that there may have been allegations that had not yet been verified, is that correct to understand?

MR TSOTSI: Yes that is correct yes.

ADV NTSEBEZA: So when then there is an allegation later that – and I am treating really the thing that could have – could there have been a proper basis for your fellow board members to have lost confidence in your other
20 than for the fact that there was a plan that you may not have been aware of that was going on hijacking these proceedings that you thought were ordinary, innocent enquiry yet there were people that may have been aware of other things unbeknown.

MR TSOTSI: Chairman this is a conflict for me because I

have – I think earlier even myself stated that there were some goings on which are difficult to explain, in terms of impacting the issues that were currently going on at the time. So it could very well be that this could have been the case.

You will recall also Chair – I do not know whether this was put before the commission as evidence. But I simply say that it was. That following the – one of his allegations about secret meetings. I wrote a letter to the
10 minister complaining about - in fact this very existence of a secret meeting.

And that these meetings were designed to sabotage the work that the board is doing. And in fact the contrary to the spirit that we were doing this business and as a consequence of that the board is not doing what it is expected to do.

I even suggested to the minister that minister should dissolve the board on the basis of the – this kind of behaviour. So there was a lot of that going on.

20 **ADV NTSEBEZA:** Perhaps to move now to Mr Linnell's affidavit which was – as I understand it filed in December last year – 2020. This chairperson I do not know whether it is read in the record but was made available to us. At least to me, late yesterday. And I do believe that my colleague – we received it from Advocate Seleka.

CHAIRPERSON: What document is it?

ADV NTSEBEZA: It is Mr Nick Linnell's supplementary affidavit pursuant to him having appeared on the 5th and the 6th October last year. Where he seeks to explain certain things that he believes that when reflecting on the transcript of proceedings were not put orally as he would have loved to.

CHAIRPERSON: Oh okay I am not sure if I have seen it. But if you have got it – either we have it or the evidence
10 leaders have got it.

ADV NTSEBEZA: I am sure the evidence leaders do have it because we got it – the specific paragraph is paragraph 50 ... (intervenes).

CHAIRPERSON: You should just state what the date of the affidavit is so that it will be easy to trace it. When it was deposed to.

ADV NTSEBEZA: Yes chairperson I will get to it now. The 17th December 2020.

CHAIRPERSON: Okay I think Mr Seleka appears to want
20 to say something about this. Maybe speak from where you are Mr Seleka if you can because the person who is going to sanitise seem to be far.

ADV SELEKA SC: (Inaudible – away from mic).

CHAIRPERSON: Yes.

ADV SELEKA SC: (Inaudible – away from mic).

CHAIRPERSON: Yes.

ADV SELEKA SC: (Inaudible – away from mic).

CHAIRPERSON: Yes.

ADV SELEKA SC: So the Chair and us will not have it in the bundle.

CHAIRPERSON: At the moment.

ADV SELEKA SC: At this present moment yes. Because Mr Tsotsi did not address the situation in his latest supplementary affidavit.

10 **CHAIRPERSON:** Okay, alright just in case that was not captured in the record. Mr Seleka says that affidavit to which Mr Ntsebeza is referring was received by the commission but has not been included in the bundle. But you may – go ahead Mr Ntsebeza.

ADV NTSEBEZA: I am indebted ... (intervenes).

CHAIRPERSON: We want to finish Mr Tsotsi's evidence.

ADV NTSEBEZA: I am indebted. Paragraphs 50.14, and I will read it into the record very shortly. Certainly to my knowledge there was no involvement of Mr Popo or the
20 ...(indistinct) the 11th March 2015.
50.14.

“If I had been part of the ploy to suspend executives under the pretext of an inquiry it would have been logical to assume that I would have as a business consultant who derives his

living from such work who have a pre-sense to the board's demand to limit enquiry and simply ... (indistinct). R23-million is that Dentons and through a limited investigation. One would not expect me to act to my own detriment. The only benefit I secured for this engagement was the R30 000 that ultimately was paid for my services for the work done from the evening of the 8th March to about the ... (indistinct).”

10 That is – and I close the quotation there, you had made the reference to payment being made to Mr Linnell. Is this where you attribute this fee that was paid for or is there any other ... (indistinct).

MR TSOTSI: That is correct chairman. I saw it in that document.

ADV NTSEBEZA: I could be done – if I may beg your pardon just one more second.

CHAIRPERSON: Okay.

ADV NTSEBEZA: Thank you one last point chairperson.
20 A lot of discussion occurred earlier regarding the exchange between yourself and the minister in particular regarding the composition and the names of the board committees. That on the 16th December 2014 you had sent to the minister. And then later on - at least on record what has been made available is the revised one that you send to

the minister in January. Now if I may beg my evidence leader's assistance on that specific affidavit. Because I want to make reference to a specific paragraph.

CHAIRPERSON: Alright okay.

While your counsel is looking for the relevant passages can I clarify this? With regard to the composition of the different committees of the board that we talked about earlier; ultimately the composition of the committees of the board that prevail and was implemented.

10 Was it the one that the minister had insisted upon had sent to you or was it another one that you put up?

MR TSOTSI: Chairman from what I saw of the document that I was referred to show the two – 16 December and 26 January. The 16th December one is the one that I had sent to the minister which I had received from Mr Salim Essa. Which I may say and I will say this in a follow up affidavit, is substantially the same as what appears on my – on the 26th January.

CHAIRPERSON: Yes but my question was not that. My
20 question was we saw the composition of the board committees that you sent to the minister on the 16th December which you say you got from Mr Salim Essa – the composition. But the email was your email?

MR TSOTSI: Yes.

CHAIRPERSON: And then we have seen the composition

of the board committees that you sent to the minister on the 26th January.

MR TSOTSI: Yes.

CHAIRPERSON: And you said the minister sent you the same composition as the composition you sent him on the 16th December which was the composition given to you by Mr Salim Essa. My question is, which composition ultimately - was ultimately implemented?

MR TSOTSI: It is that same composition.

10 **CHAIRPERSON:** Which one?

MR TSOTSI: The one that I received from the minister and I said ... (intervenes).

CHAIRPERSON: Yes.

MR TSOTSI: The one I had sent to the minister.

CHAIRPERSON: Yes that is the one that was ultimately implemented.

MR TSOTSI: Correct.

CHAIRPERSON: Okay no that ... (intervenes).

20 **MR TSOTSI:** Same as I said chairman or my involvement – my membership of the investment and finance committee.

CHAIRPERSON: So when – in the one that you sent to the minister on the 16th December your name was reflected also in the investment and finance committee.

MR TSOTSI: Yes.

CHAIRPERSON: And the one that the minister sent to you

was the same except that your name was no longer in the investment and finance committee, is that what you saying?

MR TSOTSI: No.

CHAIRPERSON: What is – what she sent you was exactly what you have sent him?

MR TSOTSI: Correct.

CHAIRPERSON: But later on you yourself took your name out of the investment and finance committee.

10 **MR TSOTSI:** That is correct.

CHAIRPERSON: And was there a replacement for you in that committee or was there no replacement ... (intervenes).

MR TSOTSI: There was a replacement. There was somebody else who took my position.

CHAIRPERSON: Ja would you have decided on the replacement or would the minister have?

MR TSOTSI: I decided on the replacement.

CHAIRPERSON: Without the minister?

20 **MR TSOTSI:** Yes Chair.

CHAIRPERSON: Okay, alright. So but ultimately is the one you receive from the minister that was implemented subject to the fact that your name was no longer in investment and finance committee.

MR TSOTSI: Yes.

CHAIRPERSON: And somebody else was put in there and the person who was put in was decided upon by yourself.

MR TSOTSI: Correct.

CHAIRPERSON: Okay. But you just said now I think that the – you said the composition was substantially saying – you remember in the morning we talk – we tried to establish from you whether it was exactly the same or substantially and I thought you said exactly. But now you say substantially. Do you remember that discussion?

10 **MR TSOTSI:** Yes chairman I remember that. I think and I might have used the word exactly in my affidavit to the portfolio committee.

CHAIRPERSON: Yes.

MR TSOTSI: But now on seeing and on recalling that I have actually moved myself out of the IFC, it would not be identical.

CHAIRPERSON: Well it may be that I keep putting to you something in a different context – something you said in a different context. Because you may have been saying in
20 the morning the composition that the minister sent to you was exactly the same as the composition you sent to her on the 16th December.

MR TSOTSI: That is correct.

CHAIRPERSON: So if you say the two were the same – exactly the same that would correct.

MR TSOTSI: Yes.

CHAIRPERSON: What is different is the composition that was ultimately complete – implemented because the one that was ultimately implemented in fact from the one you sent to the minister on the 16th December and the one the minister sent to you only in one respect. Namely that your name was no longer in the committee for investment and finance, otherwise it was the same.

MR TSOTSI: Correct. Do not forget chairman I also said
10 that I also did my changes which included amongst others my removal of myself from the IFC.

CHAIRPERSON: Yes, ja, no, no I understand that but ...
(intervenes).

MR TSOTSI: So the only thing the minister – the only thing that got retained even after the minister had instructed the composition of the committee should be exactly as she has sent it back to me which included me and the IFC. I still changed myself – took myself out ...
(intervenes).

20 **CHAIRPERSON:** That time, ja.

MR TSOTSI: Even post that time.

CHAIRPERSON: Ja no that is fine. Okay Mr Ntsebeza.

ADV NTSEBEZA: Precisely my area of interest in clarification on re-exam ... (intervenes).

CHAIRPERSON: Okay.

ADV NTSEBEZA: May I request that we first focus on Eskom 071222, paragraph 4, as we try and clarify ... (intervenes).

CHAIRPERSON: Yes you can continue.

ADV NTSEBEZA: And I will read into the record, this is Mr Andile Zola Tsotsi's affidavit – supplementary affidavit.

CHAIRPERSON: Okay you reading too softly.

ADV NTSEBEZA: Oh, it is Mr Tsotsi's affidavit at paragraph 4 and I read ... (intervenes).

10 **CHAIRPERSON:** Ja it is the one that we based Exhibit U17.2, starting at page 1222 and you are reading from ... (intervenes).

ADV NTSEBEZA: Correct paragraph 4.

CHAIRPERSON: Ja.

ADV NTSEBEZA:

20 "To the best of my recollection the allocations as reflected in my email of 16 December 2014 are precisely as I had received them from Mr Salim Essa. At the time I decided to pass it on to the Minister Brown as is. And my commentary regarding the chairperson of Audit & Risk Committee needing to be a CA, I was priming the minister to changes that I intend to make which subsequently did – I suppose I did.

One such change was removing my name from the

investment and finance committee.”

Now what do you mean by this? Do you want to expand? I mean we understand what you meant. You did pass exactly that which you received from Salim Essa to the minister. But also you say you were priming the Minister for changes, what do you mean by priming, expand on that?

MR TSOTSI: Chairman when I looked at the committee of the allocation, I clearly did not agree with what was on
10 there, so when I am talking about priming the Minister I was alerting her that I am likely to make some changes because that was my ...[intervenes]

ADV NGCEBETSHA: Hold on there. Now Chairperson if I beg your pardon and ask this, you see Eskom 07031, this is Mr Tsotsi’s original affidavit. On paragraph 20.3 I start to read.

CHAIRPERSON: Yes, let us read.

ADV NGCEBETSHA:

20 “The other occasion was when the new Board came into being, where I was required to place Board members in sub-committees of the Board. Salim Essa sent me his configuration and asked that I pass it on to the Minister as my submission. I quietly ignored his submission and sent mine to the Minister whereupon the Minister responded with the

exact submission I have received from Salim Essa. I kept going back and forth with this process of chopping and changing locations with the Minister until she called me to a meeting, at the meeting was Salim Essa and Tony Gupta, she merely informed me that the Board allocation will be the way she sent them to me. This she did in the presence of these two gentleman. I do not know if Mr Essa had any involvement in my resignation.”

10 Now, I close quote there. What we are picking up from the original affidavit read together with this supplement, is that - and you must correct me where I am wrong. The original list that you sent on the 16th of December was received from Salim Essa and was sent as is to the Minister, is that correct?

MR TSOTSI: Correct.

ADV NGCEBETSHA: Secondly, what we are picking up specifically reading from your original affidavit, is that, whereas we have dealt with the Chairperson, regarding the
20 inaccuracy of placing the words quietly ignored, was not what really happened.

MR TSOTSI: Yes.

ADV NGCEBETSHA: Notwithstanding what your intention was to convey this.

MR TSOTSI: Yes.

ADV NGCEBETSHA: But the reality is that there was a back and forth chopping and changing between yourself and the Minister. Can you expand on that what you meant?

MR TSOTSI: What I meant, there is that I made the changes or suggested changes following what Minister's response was when I sent Salim Essa's original submission, and I then got the idea from the Minister again, that I should not make any changes and the allocation is as what she had sent me. So...[intervene]

10 **ADV NGCEBETSHA:** Yes, continue.

MR TSOTSI: So this culminated then in her calling me to a meeting because I suppose in her mind, I was resisting what she was saying, by introducing changes that were not in accordance with what she had wanted to happen.

CHAIRPERSON: Do you know why she would insist on the composition of committees being the way she wanted them to be, other than the one or two committees that she says in her affidavit, she was legally entitled to decide upon because she says in her affidavit:

20 "Legally, I was entitled, or obliged or I had the responsibility to see to the composition of."

I think the Audit and Risk Committee and the Ethics Committee.

"To the others, the other committees."

She seems to concede that she did not legally have a right

of power to proceed, to determine their composition. But here now, on your version, she was insisting that even with regard to the other committees, the composition should be the way she wanted, and not the way you as the Chairperson or you as the Board wanted it. Do you know why she would have insisted on doing something that she had no right to do?

MR TSOTSI: Chairman, I do not know of that explicitly, I do not have any evidence to that so that I can say I know.

10 **CHAIRPERSON:** Yes.

MR TSOTSI: However, the moment I got this document with the composition from Salim Essa where he said I should pass it onto the Minister, I immediately had in mind that there must be some relationship between Salim Essa and Minister Brown.

That Salim would ask me to do a thing like this, and then what was reinforced in my mind in terms of that was when I then was called by the Minister, and she insisted on what she insisted i.e. that allocation that I originally got
20 from Salim should stay as it is and unchanged.

And say, doing that in the presence of Salim Essa and Tony Gupta. So I came to the conclusion there, and then that she was serving the interests of people outside of Eskom, namely the Gupta's. That is the impression I have and that is the impression I got at the time.

CHAIRPERSON: Okay, Mr Ngcebetsha.

ADV NGCEBETSHA: That will be all, thank you.

CHAIRPERSON: Okay, thank you. I think there is just one or two last things Mr Tsotsi. You know, your counsel referred you to your affidavit where you - where he quoted or where in your affidavit had quoted Mr Linnell, talking about documents that Mr Maswanganyi had the meeting in Durban, and he asked you whether those are the documents that you were talking about when you said there
10 was a report, and you said, yes, you remember that?

MR TSOTSI: Yes.

CHAIRPERSON: But I am under the impression and I think I did say this before you, you did not say that is not true. I am under the impression that you are reported to have said to the Board, on the 11th that the report you were talking about was in the Presidency.

If I am wrong about that, my question might fall away but if I am correct about that, there might be a question of, how it is possible that you could say that
20 those are the documents we are talking about, which Mr Maswanganyi had that meeting of the 8th if you had said the report you were talking about was in the Presidency.

MR TSOTSI: Chairman, I did say that because do not forget, from my perspective, because this thing was entirely new. There were people who had documents

there, and I took the view, that these documents were part of documents which were in the hands of people in the Presidency, it happen to be in the hands of a particular individual at that time.

And I understood that they themselves would have gotten those documents from the Presidency, from somebody within the Presidency, and so, I was referring to the to the source of the document, the fact that someone else had physically the document in their hand was not
10 really the issue. I was really saying, this is the source of the document.

CHAIRPERSON: Okay, then there is the question of when exactly the meeting that you talked about, involving yourself, Ms Brown and Mr Essa and Tony Gupta took place.

Your counsel also referred to quoted paragraphs from your affidavit where you seem to say there was too'ing and fro'ing between or talking between yourself and the Minister in relation to the composition of the Board
20 committees, until she called you to a meeting and said, the composition that will be implemented was the one she had sent to you.

That seemed to suggest to me that you may be mistaken in thinking that a meeting took place before the 26th of January. I do not know whether you have the same

feeling because when you say until it's like after that meeting, the too'ing and fro'ing stopped because now she had put her foot down, but before that, there was exchange of different compositions between yourselves or you kept on sending.

In the end, it might not matter whether it was before or after the 26th of January but I thought I must just raise that again, whether in your own mind you seem quite clear that it was before the 26th of January, or whether it could
10 be that it was after.

MR TSOTSI: Chairman, it was before the 26th of January. Do not forget also, if you recall some of the evidence from other Board members, that they were already operating in sub-committees in January.

CHAIRPERSON: So this was before?

MR TSOTSI: Yes, it would have had to have been clarified to a large extent.

CHAIRPERSON: Okay, no that is fine. Okay, nothing arising?

20 **ADV SELEKA SC:** Mr Tsotsi just opens another just opens another can of worms after the other.

CHAIRPERSON: Mr Ngcebetsa?

ADV NGCEBETSHA: Chairperson, certainly for me I probably was over simplistic, I thought the point was made, maybe if you indulge me just on this last point arising from

your comment.

CHAIRPERSON: Okay, alright. Maybe you can do it from there.

ADV NGCEBETSHA: Yes. Mr Tsotsi now, the back and forth between yourself and the Minister at what point does that happen, if you were to give a proposed dates because we know that the 16th of December 2014 you received from Essa you passed onto the Minister.

MR TSOTSI: Chair this would have occurred shortly after
10 I have received the response from the Minister.

CHAIRPERSON: Okay.

ADV NGCEBETSHA: Right.

MR TSOTSI: After I had sent I passed on what Salim Essa had sent me, she came back and said, this is okay. Then I - following that that would have been post the 16th. So it would be sometime between the 16th and let us say, maybe the first week or so of January. That would have been the sort of the timeframe.

CHAIRPERSON: Ja, maybe before you proceed Mr
20 Ngcebetsa let me just interpose this question. You see, the letter, the email letter read to you from the Minister of the 28th of January, which we all thought must have been a response to the composition you sent to her on the 26th of January.

If you read that email she seems not to be

responding to the composition you sent in substance, she seems to be saying you sent it in a wrong way, you must send it under cover of some letter, and then she sets out a number of items, she says you must send it together with all of those requirements.

Now, if she had directly prior to that said to you, you shall implement my composition there may be some tension there because she seems to be in that email to be saying I will consider your composition but after you have
10 done the following, put it under cover of a certain letter and also give me the following things, she sets out six things. Now, if your version, on your version that prior to the 26th of January, she had already said implement my composition and nothing else.

It seems that that might not be consistent with the tone of her email of the 28th where she seems to be entertaining, and not rejecting your composition but saying bring it under cover of another letter and include the following other things. But you might say look I am clear
20 in my mind it was before or you might say, look, maybe it was after. In the end, it might not matter and I was just thinking you might be able - it might jog your memory.

MR TSOTSI: Chairman what I said is that the meeting of the Minister where the two gentlemen were present Salim Essa and Tony Gupta, is really the culmination of what the

Minister wanted and that was, as far as she was concerned, putting your foot down as you say, this is what is going to happen, right.

Now, that meeting occurs before the 26th so on the 26th I sent to her, in essence, what she says, is the culmination of what should be done for the saying for the that I insisted on taking myself out of the IFC. She accepted that that insistence on my part, but the rest of the composition is the same as what Salim Essa had sent me on the 26th, notwithstanding my iterations that I sent to her in the interim between the 16th of December and the date on which she put her foot down in the presence of the Gupta's.

CHAIRPERSON: Yes.

MR TSOTSI: So what she was asking for on the 28th is just a formalisation of what I had sent her on the 26th in a format which she can use in her reporting, in a format she can use in the, what was called the shareholders meeting with the Board. So it was just a formalisation on her part to say, I want this composition you sent me on the 26th put it and include the following things.

CHAIRPERSON: Okay, Mr Ngcebetsha, you had asked for one question I gave you but you might have the last one.

ADV NGCEBETSHA: The last is that put differently, this is the proposition I put to you, you need to correct me if it

is wrong.

The 26th correspondence becomes the culmination of your conceding that all the changes you had suggested were rejected safe for you taking yourself out of A, B that the response by her on the 28th simply suggests that now that I am satisfied that you are doing what I want, and not what you post, now you can formally put it in this post.

MR TSOTSI: Chairman, I wish I could have put it that way but that is precisely, precisely the situation.

10 **ADV NGCEBETSHA:** Thank you, very much.

CHAIRPERSON: Well you pay him for that. But let me ask the question, your composition of the 26th, because Mr Seleka's junior has not, we have not had the final version of what she is preparing. Your composition of the 26th that you sent to her, to the Minister was it the same as the composition she sent to you, except that your name was no longer in the Investment and Finance Committee?

MR TSOTSI: The answer is yes, Chairman.

20 **CHAIRPERSON:** Okay, alright. Now, in your affidavit in the paragraph that your counsel have read, you seem to suggest that you intended making changes to the 16th December composition, but you have only talked about removing your name. Does that mean you decided not to make any other changes that you may have thought you would make?

MR TSOTSI: The other – yes one change I recall making was to take Chwayita Mabude out of, as Chairperson of ARC and put in Mark Pamensky because Chwayita although quite she is a financial person at the time, I do not think she was a CA, and I made the point in my statement that ordinarily that position is occupied by someone with a CA, so Mark Pamensky being a CA, I put his name there.

So that is one of the changes I recall. Some others I could have made on the basis of the CV's of the Board members when I looked at, which is what was guiding me
10 in terms of the allocation.

CHAIRPERSON: So is the position therefore, that the composition of the committees of the Board that was finally implemented was one, not exactly the same as the one that the Minister sent to you. Two, one difference was that you had taken your name out of Investment and Finance Committee but that was not the only change you made. You also made some changes relating to Mr Mabude and Mr Pamensky.

20 **MR TSOTSI:** Ms Mabude.

CHAIRPERSON: Oh is it Ms I am sorry, Ms Mabude, but are you saying there could be other changes that you do not remember?

MR TSOTSI: There could have been other changes Chair that I might have proposed but I do not recall, quite

honestly.

CHAIRPERSON: So, from what you are now saying, it looks like there may have been substantial changes to the composition that she sent you that you effected.

MR TSOTSI: No.

CHAIRPERSON: Ja, first you said one, your name. Now, you have said also Ms Mabude but you have said there could be others. So I am saying it looks like could be substantial because the committee's members were not
10 many in any committee.

MR TSOTSI: Yes.

CHAIRPERSON: Did you – there was about four or five people at most of the time, is it not?

MR TSOTSI: Chair, so let me put it another way. The Minister rejected every change I made save or my exclusion of myself from the IFC that is...[intervene]

CHAIRPERSON: Well if that is so then you must be back to your version, which is the composition of the committee's that was ultimately implemented, was the
20 same as the composition that the Minister sent to you, except that your name no longer appeared under Investment and Finance Committee.

MR TSOTSI: That was what ultimately happened.

CHAIRPERSON: Yes, but are you saying in between before you reached that point, you had suggested other

changes including Ms Mabude and Mr Pamensky?

MR TSOTSI: Correct.

CHAIRPERSON: But that was rejected.

MR TSOTSI: Correct.

CHAIRPERSON: And you are saying there may have been others that you cannot remember, other changes but whatever other changes you suggested were rejected by the Minister, and the only one she accepted was your removing yourself from the Investment and Finance

10 Committee?

MR TSOTSI: Correct.

CHAIRPERSON: Okay, alright.

ADV SELEKA SC: Yes, Chair thank you. I thought the last question, which was asked turns everything by my learned friend around. That last question, Mr Tsotsi said to you, does it mean that your email of the 26th to the Minister, which email is your revised list? You were simply saying to the Minister, okay, now that you have asked me to do the changes, here is your changes, and the Minister

20 responds and say, okay, formalise it, you know, follow this formalities in submitting it to me.

But earlier, that is not how we understood you to be saying, we understood you to be saying the email of the 26th of January 2015 contained your own list.

CHAIRPERSON: Yes, I had understood him like that.

ADV SELEKA SC: Yes.

ADV NGCEBETSHA: No, Chairperson if you allow me?

CHAIRPERSON: Yes, Mr Ngcebetsa.

ADV NGCEBETSHA: To complete what actually happened Mr Tsotsi said, there are missing exchanges of email, which is where these changes were, and the only ones he sees now are the 16th of December 2014, and the 26th and the 28th of January. That is where they gap warranted is for clarity.

10 **CHAIRPERSON:** Ja, look in the end it may not or may, may or may not matter a lot, but at this stage one does not know whether it will end up being material or not. But the one thing that we know you have said now, Mr Tsotsi is the ultimate composition of the Board committees that was implemented was the same as the one the Minister sent to you, except in one respect. That one respect was that your name was no longer in the Investment and Finance Committee.

MR TSOTSI: That is correct Chair.

20 **CHAIRPERSON:** That is what you say. Okay, and we ought to have somewhere a document that can prove what the ultimate composition of the committees was I would imagine.

ADV SELEKA SC: Yes.

CHAIRPERSON: It should be somewhere.

ADV SELEKA SC: Ja, that we should have.

CHAIRPERSON: Ja.

ADV SELEKA SC: We will certainly have that, so we will incorporate it in that comparative table, so we can see the evolution of the changes in the ultimate that we have.

CHAIRPERSON: Ja, okay thank you very much Mr Tsotsi, I did not think that we would - you only finished now but that is what has happened and matters needed to be clarified. Some have been clarified, maybe others need to
10 be but thank you very much, I will now excuse you.

MR TSOTSI: Thank you, Chairman I think Mr Seleka must think that I have a very high entertainment value that is why he keeps me here for so long.

CHAIRPERSON: Sorry just repeat?

MR TSOTSI: I am just saying I think the reason why I stay here for so long is because Mr Seleka thinks I have a very high entertainment value, so he likes for me to be around but thank you very much.

CHAIRPERSON: Thank you, Mr Tsotsi and Mr
20 Ngcebetsa, you are also excused. I know you would like to be excused as some of us are going to continue into the evening session. Okay, I think we will take an adjournment Mr Seleka we at half past four, of 15 minutes will that be enough to?

ADV SELEKA SC: I had the same in mind Chair.

CHAIRPERSON: Ja, 15 minutes and then Ms Daniels can be connected.

ADV SELEKA SC: Yes.

CHAIRPERSON: We adjourn.

ADV SELEKA SC: Thank you Chair.

REGISTRAR: All rise.

INQUIRY ADJOURNS

INQUIRY RESUMES

CHAIRPERSON: Are you ready Mr Seleka?

10 **ADV SELEKA SC:** We are ready to proceed Chair.

CHAIRPERSON: Good afternoon Ms Daniels.

MS DANIELS: Good afternoon Mr Chairman.

CHAIRPERSON: Thank you for availing yourself. Have you been waiting for a few hours?

MS DANIELS: Yes, I have indeed.

CHAIRPERSON: Okay. We apologise that we did not finish earlier with the previous witness but I am sure you also want to get done.

ADV SELEKA SC: Yes.

20 **MS DANIELS:** Yes.

CHAIRPERSON: Because you have been appearing before the Commission quite a few times.

MS DANIELS: Yes, I have.

CHAIRPERSON: Yes. Yes, Mr Seleka. I think we will administer the oath afresh.

ADV SELEKA SC: Yes.

CHAIRPERSON: Please administer the oath again.

ADV SELEKA SC: Thank you Chair.

REGISTRAR: Please state your full names for the record.

WITNESS: Suzanne Margaret Daniels.

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

WITNESS: No.

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

WITNESS: Yes.

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.

WITNESS: So help me God.

SUZANNE MARGARET DANIELS: (d.s.s.)

CHAIRPERSON: Thank you. Mr Seleka.

EXAMINATION BY ADV SELEKA SC: Thank you Chair.
20 Ms Daniels is coming back, as it were, to complete if we can, I hope we will, the – her evidence or testimony in regard to the – the last time we were at the penalties. The R 2.17 billion penalties claim that Eskom had against Optimum under Glencore.

And then we will also touch on her evidence in

regard to McKenzie/Trillian to the extent that she played any role in regard to the transactions relevant to the two entities.

And that will map the end Ms Daniels. So let us start with the penalties. And Ms Daniels, my approach is going to be this.

I will tell you what I see from the evidence because, really, about the penalties is – is the big question is. Why the claim which started as R 2.17 billion was
10 settled at... Well, the allegation is that it was settled at R 577 million but when you look at the figures, the actual settlement, is actually R 419 million.

CHAIRPERSON: I thought it went even below that. I must be mistaken.

ADV SELEKA SC: Indeed Chair.

CHAIRPERSON: Ja.

ADV SELEKA SC: Indeed.

CHAIRPERSON: I thought it was two-hundred and fifty something million ...[intervenues]

20 **ADV SELEKA SC:** R 255 million after further deductions.

CHAIRPERSON: H'm.

ADV SELEKA SC: And then the payment is a little over half of that and over R 133 million was not paid. Now – and Ms Daniels, you will tell the Chairperson, when do you become involved and comment on what I am about to put to

you and you can take the Chairperson into the details.

What I have seen from the... Oh, Chair just before I do that. We will be using mainly Ms Daniels' affidavit on the transactions which is found in Eskom Bundle 18(A) for Hadkowiez[?]. It is on page 236 of the bundle.

Ms Daniels, yours I know is not marked in terms of A, B and C. So it is just page 236.

MS DANIELS: Okay. I will go there.

10 **ADV SELEKA SC:** That is Exhibit U-34.1.

CHAIRPERSON: I have got the affidavit but I was still looking for the page where it starts dealing with penalties.

ADV SELEKA SC: Yes, that is ...[intervenes]

CHAIRPERSON: But you might draw – you will refer me to the page when ...[intervenes]

ADV SELEKA SC: Yes, page ...[intervenes]

CHAIRPERSON: ...you need to.

ADV SELEKA SC: Page 263 Chairperson.

CHAIRPERSON: Okay.

20 **MS DANIELS:** Apology Mr Seleka. Is this in Bundle 18?

ADV SELEKA SC: Yes, Eskom Bundle 18.

CHAIRPERSON: I have got it.

ADV SELEKA SC: Thank you Chair.

MS DANIELS: Can you just repeat the number for me, please?

ADV SELEKA SC: You can go to page 263.

CHAIRPERSON: It starts at paragraph 89 of your affidavit from the transactions.

ADV SELEKA SC: Yes.

MS DANIELS: [No audible reply]

CHAIRPERSON: That is the topic of penalties.

ADV SELEKA SC: Yes.

MS DANIELS: I am there, yes. Okay.

ADV SELEKA SC: I would like the Chairperson to have
10 Eskom Bundle 14(C), also next to you Chair.

CHAIRPERSON: I reject it ...[intervenes]

ADV SELEKA SC: It has just been ...[intervenes]

CHAIRPERSON: ...when my registrar said it was here because I said you will tell me when I need it.

ADV SELEKA SC: Okay.

CHAIRPERSON: Then it will be brought.

ADV SELEKA SC: Okay.

CHAIRPERSON: Because there is not much space here.

ADV SELEKA SC: Oh, okay.

20 **CHAIRPERSON:** Ja.

ADV SELEKA SC: Okay Chair. Thank you. Ms Daniels, the – I have looked at your affidavit against the affidavit of Mr Rishaban Moodley of CDH, which is the law firm that represented Eskom in the arbitration regarding the R 2.17 billion penalty.

I appreciate the fact that you came to dealing with the matter, I believe it is in 2016. Is that correct?

MS DANIELS: That is correct. Mr Chair, it was around September 2016.

ADV SELEKA SC: What I have seen from Mr Moodley's affidavit of CDH, is their involvement dating back to October 2013. That is at the time when Eskom goes into a cooperation agreement with OCM. OCM, yes, under Glencore. Even at that stage, they are given instructions
10 to advise on the penalties.

And they give an opinion, a memorandum which I have indicated as the first opinion to Eskom in regard to the penalties in October 2013, 23 October 2013.

Already in that opinion, they raised concerns regarding the calculation of the amount, on the one hand, and on the other, they also raised concerns about what they perceived to be Eskom's abandonment of its rights in terms of the agreement.

And we will come back to these issues that they
20 raised. There is interaction from that date onwards between CDH and Eskom, particularly the Finance Department, in order to try to get to the bottom of the figures.

And this leads to a second opinion by CDH on the 17th of March 2015 in which again CDH raised concerns

in regard to the calculation of the amount.

Now I should indicate that in respect of the first opinion, the amount was not R 2.17 billion. It had been calculated to be at R 1.3 billion. Even as at the second opinion, 17 March 2015 ...[intervenes]

CHAIRPERSON: I am sorry. Where did you say the opinion are, the first one?

ADV SELEKA SC: They will be found Chair in the affidavit of Mr Moodley which is Eskom Bundle 14. And I
10 ...[intervenes]

CHAIRPERSON: Oh, is that the bundle you wanted me to have?

ADV SELEKA SC: Yes, Chair.

CHAIRPERSON: But you did not tell me that I need it now.

ADV SELEKA SC: But I want to lay the background so that when Ms Daniels answers, we can then go into... I want to create ...[intervenes]

CHAIRPERSON: Ja, I want to have it.

20 **ADV SELEKA SC:** Eskom Bundle 14(C).

CHAIRPERSON: What page?

ADV SELEKA SC: Page 891.

CHAIRPERSON: I do not have pages 877.98.

ADV SELEKA SC: Is it Eskom Bundle 14(C)?

CHAIRPERSON: I have got 879.2. It is a memorandum

dated 17 February 2017.

ADV SELEKA SC: 891 Chair.

CHAIRPERSON: Yes, I say... No, I know you said 891 but I am saying that is the last page I have and the next page is 951. It looks like there are some pages in between ...[intervenes]

ADV SELEKA SC: Missing?

CHAIRPERSON: ...that are missing. And I do not remember that I may have taken them out.

10 **ADV SELEKA SC:** Yes, my junior says hers is also the same.

CHAIRPERSON: I have seen a continuation of Moodley's affidavit.

ADV SELEKA SC: The affidavit is missing there.

[Discussion between speaker and junior counsel – unclear.]

ADV SELEKA SC: Oh. Chair, it seems the – there is an overflow from 14(B) to 14(C).

CHAIRPERSON: The bundle I have is 14(C).

20 **ADV SELEKA SC:** Yes, you have 14(C). I see from ...[intervenes]

CHAIRPERSON: Is the correct one?

ADV SELEKA SC: ...from my junior that 14(B), right at the end of it, has the affidavit starting at page 882.

CHAIRPERSON: Ja, I hope I did not take the pages out from... I forget to them taken back into the bundle.

ADV SELEKA SC: Ja, my junior does indicate several pages are missing.

CHAIRPERSON: Ja.

ADV SELEKA SC: In both your bundle and her bundle.

CHAIRPERSON: Well, maybe, probably, the missing pages are in my residence. [laughs]

ADV SELEKA SC: Well, they are missing in hers as well. So.

CHAIRPERSON: Oh. Ja, okay.

10 **ADV SELEKA SC:** Yes, we will...

CHAIRPERSON: Okay I have got Moodley's affidavit. But now it means we will be looking at different bundles and pagination or you will use the paragraph numbers.

ADV SELEKA SC: The page numbers are the same, I see.

CHAIRPERSON: Oh, is that so?

ADV SELEKA SC: Yes.

CHAIRPERSON: Okay.

ADV SELEKA SC: My only concern is whether the annexures are going to be in the right place.

20 **CHAIRPERSON:** Is it not easier to quickly make copies of exactly the pages that are missing ...[intervenes]

ADV SELEKA SC: That are missing.

CHAIRPERSON: ...from the other bundle? Well, I do not know. I do not know where the nearest photocopier may be.

ADV SELEKA SC: Yes, she is communicating with the bundles people.

CHAIRPERSON: Ja. Okay maybe we can go on so long.

ADV SELEKA SC: Yes, Chair.

CHAIRPERSON: Ja.

ADV SELEKA SC: Thank you. So the page and paragraph I wish to refer to of this bundle is – now it is Eskom Bundle 14(C) – I mean, (B). For you Ms Daniels, it makes no difference.

10 **MS DANIELS:** Yes.

ADV SELEKA SC: It is page 891.

MS DANIELS: Yes, sir, I have got that page.

ADV SELEKA SC: Ja, paragraph 22. But the bottom line is this. Let me start with that and we can go into the details. If Chairperson... like to see Chair.

CHAIRPERSON: Does it make ...[intervenes]

ADV SELEKA SC: No, no. It is just that I wanted Chairperson's attention.

CHAIRPERSON: Ja-no, I was listening. [laughs]

20 **ADV SELEKA SC:** Ja.

CHAIRPERSON: Yes.

ADV SELEKA SC: I want to do – I want to lay the building blocks and the Chair – I do not want to leave the Chair behind.

CHAIRPERSON: Okay.

ADV SELEKA SC: [laughs] Ja, I want to be at the same stage.

CHAIRPERSON: Ja, I am happy that today you do not want to do that. [laughs]

ADV SELEKA SC: [laughs]

CHAIRPERSON: Alright.

ADV SELEKA SC: Ja. In short, Ms Daniels, before we go into the details. What we see from the concerns raised by the attorneys for Eskom, CDH. In the ultimate end which
10 leads to the amount being drastically reduced from R 2.1 billion to eventually R 419 million, is a distinction between two periods.

There is the penalised period, which is from March 2014 to May... Sorry, it is March 2012 to May 2014. They call it the penalised period. That means Chair, that is the period when Eskom had imposed penalties and deducted.

CHAIRPERSON: What is the period?

ADV SELEKA SC: March 2012 to May 2014.

20 **CHAIRPERSON:** Ja?

ADV SELEKA SC: Now they had deducted an amount of R 158 million from OCM but in that period ...[intervenes]

CHAIRPERSON: One second Mr Seleka.

ADV SELEKA SC: Yes, Chair.

CHAIRPERSON: Yes, continue.

ADV SELEKA SC: So that period has on the one hand an amount that was actually deducted. This amount gets to be included in the claim. Then it becomes a double claim.

CHAIRPERSON: So an amount that was deducted from the claim?

ADV SELEKA SC: It was deducted from – so it is imposed as a penalty.

CHAIRPERSON: Ja.

10 **ADV SELEKA SC:** And then deducted from the invoices. So ...[intervenes]

CHAIRPERSON: Oh, yes.

ADV SELEKA SC: Yes.

CHAIRPERSON: It means OCM paid.

ADV SELEKA SC: That is right.

CHAIRPERSON: You paid – paid the penalties.

ADV SELEKA SC: Penalties in that period.

CHAIRPERSON: Yes, yes.

ADV SELEKA SC: To that amount.

20 **CHAIRPERSON:** Yes.

ADV SELEKA SC: They still included it in the R 2.17 billion.

CHAIRPERSON: Okay and how much was that amount?

ADV SELEKA SC: It is R 158 million.

CHAIRPERSON: Okay alright.

ADV SELEKA SC: Now Chair, let us see whether I can help you. I can talk... Yes. Chairperson, go to page 928 of Eskom Bundle 14, that affidavit of Mr Moodley. There is a table there with the figures, 928.

TECHNICIANS: [No audible reply]

ADV SELEKA SC: Oh. The recorder – the recording people, Chair, say your – when you speak the mask on, they cannot hear you.

CHAIRPERSON: They cannot hear me.

10 **ADV SELEKA SC:** [laughs]

CHAIRPERSON: I thought they could hear me.

ADV SELEKA SC: No, the sound system does not pick up.

CHAIRPERSON: [laughs] Okay.

ADV SELEKA SC: They might be able to hear you but the technology fails to hear.

CHAIRPERSON: Okay alright.

ADV SELEKA SC: Ja. So that table at the bottom of the page, Chairperson, that is a summary of this claim.

20 **CHAIRPERSON:** And...

ADV SELEKA SC: So the amount ...[intervenes]

CHAIRPERSON: This table ...[intervenes]

ADV SELEKA SC: Yes?

CHAIRPERSON: ...shows how the settlement was arrived at or shows something else?

ADV SELEKA SC: Yes, that is right, how the settlement was arrived at Chair.

CHAIRPERSON: Okay alright.

ADV SELEKA SC: So you will see the amount I am talking about is in the second row.

CHAIRPERSON: Yes.

ADV SELEKA SC: Which is less penalties already deducted.

CHAIRPERSON: Oh, from the R 577 839 105,42 amount.

10 **ADV SELEKA SC:** Correct Chair.

CHAIRPERSON: Okay.

ADV SELEKA SC: Yes. So the R 158 million had already been imposed as a penalty and taken off from OCM but nonetheless the executives within Eskom included it in the arbitration claim, thus increasing the claim to R 2.17 billion. That is the one aspect.

The other aspect, which is not apparent from the table Chair, is what they referred to as penalties for sizing specification. So they are saying OCM in the period of
20 March 2012 to May 2014, you delivered coal that was not according to size specification.

That penalty amount was R 1.4 billion but Eskom had problems with it in the sense that in succeeding to prove the claim because they had not complied with the agreement to notify OCM as and when the breach occurred

that you have breached and this is how we are going to calculate the penalty.

If you do that – if you do not do that then you assume to have accepted ...[intervenes]

CHAIRPERSON: You are taken to have no problem with the coal.

ADV SELEKA SC: Indeed Chair.

CHAIRPERSON: Ja.

ADV SELEKA SC: Indeed Chair.

10 **CHAIRPERSON:** H'm.

ADV SELEKA SC: And you will see ...[intervenes]

CHAIRPERSON: So the failure to give that notice resulting you being barred from claim if you did not give that notice within the time ...[intervenes]

ADV SELEKA SC: Contemplated.

CHAIRPERSON: ...time.

ADV SELEKA SC: Yes.

CHAIRPERSON: Ja, I remember seeing that.

ADV SELEKA SC: Yes. And now this is three years later.

20 This is in 2015, March 2012, March 2013 and then May 2014. Three years later, CDH says these are the concerns. You are taking – you might be taken to waived your rights because you did not evoke those rights.

CHAIRPERSON: H'm, h'm.

ADV SELEKA SC: That R 1.4 billion, Chair, the

abandoned it.

CHAIRPERSON: On that ground or ...[intervenes]

ADV SELEKA SC: There is another ground.

CHAIRPERSON: Okay.

ADV SELEKA SC: There is another ground. But I think it is an accumulative effect of all these grounds. The other one, and you see this from the memos Chair, the other one is that Eskom had agreed with OCM in 2015 on specifications, size and specifications that now matched
10 the coal that OCM had supplied during the past three years.

And once they did that, OCM says: So what is your problem? Why are you putting this in the claim? Because you have agreed with us and you did not any suffer any harm to your power station.

So that R 1.4 billion which Eskom should have known, ought to have known, they had capitulated on that but they still included it in the amount. So nothing then gets to be claimed for the period March 2012 to May 2014.

20 Then there is a period from June 2014 to May 2015. Eskom, again, included a claim for sizing specification. That claim, Chair, had to be abandoned because of that agreement. Because of not invoking the clauses that say you are in breach. We will impose the penalties ...[intervenes]

CHAIRPERSON: The notification(?) clause?

ADV SELEKA SC: Correct.

CHAIRPERSON: H'm.

ADV SELEKA SC: Ja. And that amount was R 744 million. What Eskom, ultimately, pursued against... Now this is Tegeta. This is now in 2016/2017. But they ultimately pursue against them and then to settle. It is amount of R 419 million. That amount is penalties imposed only in respect of quality specifications.

10 And then from that amount you will find the deductions on page 928 in that table. The total penalties, R 419 million and then there is less CV penalty which is R 126 million. So they are deducting from the amount, two further amounts, R 126 million and R 37 million and the amount, ultimately, is R 255 million. Ms Daniels, you follow that?

MS DANIELS: Yes, I did.

ADV SELEKA SC: Now, ultimately, the attorneys for Eskom gave, what I see from the evidence, to be five legal
20 opinions where they raised concerns. Could you comment on the correctness or otherwise of what I have explained to the Chairperson in regard to how the amount was ultimately reduced? On the other hand, or first and foremost, but on the second or secondary to that, to explain to the Chairperson why was the higher amount

pursued despite the fact that the officials within Eskom ought to have known that they had already charged OCM in respect of one amount, why are they double-claiming it, or sought to do so? And two, why they sought to incorporate in the claim way after the fact penalties that they had failed to pursue during the first three years when the breach occurred?

MS DANIELS: I am sort of – Mr Seleka did a very good summary there so I am not sure how much I am going to repeat when I say what I say but you can guide me on that. It is correct what Mr Seleka was saying about how this amount was arrived, there are really those two factors, the double-counting of the 158 million and the application of the size in penalty which in reality was not a penalty, as such, but it was really supposed to be a payment reduction for coal received. The formula was set out in the first addendum to the coal contract and it is correct that the attorney in CDH way back in 2013 had raised the issues that they raised and both to Eskom’s internal legal advisers and to – and I mean, to them and also to the executives responsible in primary energy in generation and also the chief executives. So in 2015 just before the decision to institute action, this would have been head of generation was Mr Matshela Koko, the chief executive was Mr Brian Molefe and I think the head of primary energy at that time

was Mr Johan Bester. I think he was acting. I seem to recall from his testimony that he did raise these concerns with Mr Koko and Mr Molefe.

The attorneys have been consistent since 2013 in respect of three aspects. Eskom, in terms of its contract management procedure in primary energy, did not provide the proper notices, the proper contract management mechanisms to actually enforce the sizing issues and in effect waived its rights by doing so and you will see in the
10 later opinions Cliffe Dekker Hofmeyr does talk about the argument for rectification because it seemed to be an unattended consequence.

At the time the issue when the first addendum was concluded the issue was around sizing and the protection of, you know, the right kind of coal going to the power station. So that was one issue.

So the contract management – and that is consistent throughout that they say even in the opinion that I asked for in late 2016 they do say that this is an
20 issue that we have in terms of we do not have sufficient evidence to prove that we had invoked our rights and effectively we had then waived them so we could not enforce them.

The methodology in terms of calculating the other payment deductions was also inconsistent, so that is why

you have the quality issues that we have. The unattended consequence of the sizing formula that we had was that pertinent quality parameters were then not penalised and that was another issue that Cliffe Dekker raised and this was not the first that this issue was raised in 2016 when the opinion came. If you look at the 2013 opinion that Mr Seleka mentioned, 2015, you will see that those issues are there. The issues have been consistent throughout and last but not least, there was also an issue with the manner
10 in which Eskom was sampling the coal.

And a further issue was that Optimum did raise that they were not able to meet the sizing requirements and that their parties then entered into negotiation and effectively what that negotiation was then suspend the sizing payment reduction mechanism. So this was – I think you would see it in the documentation around 2014/2015 when Glencore or Optimum said that they would need to renegotiate that, that was part of the cooperation agreement.

20 Now this was presented to the primary energy people and it was presented to Mr Koko and Mr Molefe at the time and they notwithstanding these procedures insisted on going ahead and claiming the 2.1 billion. Effectively, Mr Chair, if you took the sizing, if you included the sizing penalty, it took the amount up to 2.1 billion. If

you removed it, it was at the 419 mark. So I think there were those – all those factors but Mr Koko and Mr Molefe insisted on proceeding with the summons and you will see that when Cliffe Dekker Hofmeyr issued the letter of demand, they do say that this issue needs to be further investigated and....

CHAIRPERSON: Looks like there has been an interruption.

ADV SELEKA SC: Yes.

10 **MS DANIELS:** ...Mr Seleka, does that cover...?

CHAIRPERSON: Well you disappeared not in terms of your picture but your voice, we could not hear you for a few seconds, maybe 10, maybe 15, I do not know, so we did not hear. I think you maybe need to start that answer afresh.

ADV SELEKA SC: We lost the signal, Ms Daniels, when you were talking about CDH sending a letter of demand and then said something, further work needs to be done.

20 **MS DANIELS:** Okay. In the letter of demand when the instruction was provided, this was in 2015, Mr Chairman, the instruction was provided that they need to issue the letter of demand. They did indicate that further work needed to be done on assessing the claim because effectively what the sizing provisions in the first addendum did was if they were not enforced by Eskom they actually

fell by the wayside, so effectively, like Mr Seleka explained, they were waived. I think in terms of the agreement it actually says that the coal – it is not a waiver in the traditional sense but the coal had – in the event that Eskom does not raise objections, the coal is accepted to have met the quality specs and CDH indicated that we have to investigate if that is so. You know, there was not enough paperwork at the time and this was presented, this fact was presented to the executives at the time and they
10 decided notwithstanding that to pursue the claim as instructed.

ADV SELEKA SC: Yes, thank you. Chair, if we take it step-by-step and we start on bundle 14, page 891, paragraph 22, with that background in mind, we go back to October 2013. Ms Daniels, you got the page?

MS DANIELS: You said 822?

ADV SELEKA SC: 891. Eskom bundle 14, ja.

MS DANIELS: Okay, yes.

ADV SELEKA SC: Paragraph 22.

20 “During October 2013 CDH provided a legal opinion to Eskom relating to the potential penalty claim on the sizing quality parameters under the CSA and addenda thereto including our preliminary concerns relating to the evidence which would be necessary for such a claim to succeed.”

And they refer to:

“See item 11 of the bundle.”

Chairperson, that is the opinion, it is on page 984 but let me read further here before we go to it. It says:

“Pursuant to this advice...”

984, Chair, the same bundle.

CHAIRPERSON: I do not think I have got...[intervenes]

ADV SELEKA SC: No, no, no, that is where the overflow comes in.

10 **CHAIRPERSON**: I do not think I have 980 something, my last page is 950.

ADV SELEKA SC: Indeed, Chair. Sorry, that is where we overflowed to the next, 14C, 984.

CHAIRPERSON: Yes.

ADV SELEKA SC: Ja. That is a memorandum on page 984 from Cliffe Dekker Hofmeyr dated 23 October 2013 addressed to Mr Johan Bester and, Chairperson, in this memo they will then raise the concerns which they refer to in the affidavit.

20 **CHAIRPERSON**: Yes.

ADV SELEKA SC: So I will confine myself for present purposes to the affidavit – well...

CHAIRPERSON: Am I right to suspect that we might be using this bundle for some time?

ADV SELEKA SC: Yes, Chair.

CHAIRPERSON: So I can get rid of the other two that I have got here for now.

ADV SELEKA SC: Yes, Chairperson. Yes, Chair. B and C, 14B and C go together, Chair, and I am sorry, you do not have space there because the affidavit is in B, 14B and the annexures are in 14C.

CHAIRPERSON: You can see, Ms Daniels, what they are doing to me.

MS DANIELS: Ja, it is terrible and this is quite complex,
10 Mr Chair, you know, to navigate between the two, I do feel sorry for you, I will try my level best to keep it simple.

CHAIRPERSON: Yes, Okay, I will keep all the files here. Okay.

ADV SELEKA SC: Ja. So if I may just pick up on certain points in that memorandum of 23 October 2013 and this is under the heading Coal Quality, so that is quality specifications on – it is paragraph 4 and it tells – they first set out how you should impose a penalty in paragraph 4.2, 4.2.1, 4.2.2 and so on. So if you want to claim, that is
20 Eskom, a penalty for coal that does not comply with quality, you need to invoke those provisions. So Eskom had failed to do so. And then you go to paragraph 4.4, Chair, on page 985. They say:

“However, the apparent abolishment of Eskom’s rights...”

And I think this is the abolishment was referring to. Ms Daniels, you will explain that.

“...to an outright rejection of payment for coal which fails to comply with the volatile quality parameter may well have been an unintended consequence of the amendment of the CSA.”

Ms Daniels, are you able to explain that statement?

MS DANIELS: I will try to explain it in simply layman’s terms.

10 **ADV SELEKA SC:** Well, let me express my understanding of it and you can comment on that.

MS DANIELS: Alright.

ADV SELEKA SC: The way I read it or understand it, it seems to me that the CSA was subsequently amended and with that amendment Eskom’s right to refuse to pay for coal that is noncompliant with quality specifications was abolished or it was deleted, taken away.

MS DANIELS: It was essentially with the first addendum it was taken away if Eskom did not follow the procedure set
20 out as they are set in 4.3. So yes, it was an unintended consequence. The reason for that, Mr Chair, was that in a previous arbitration we – Eskom lost the case because the arbitrator felt that we could not not pay for coal that we had burnt because it had already gone through – because the issue here is that the quality results would only

become known once Eskom had burnt the coal, you know, it has gone through the power station. So the argument was that we had had benefit of using the coal even if it was at a lower grade but we had burnt the coal and therefore we had gotten value for it and we ought to pay for it.

And in the first addendum, that was the reasoning that led us to put the sliding scale for qualities. Volatility is one of those issues that it needs to allow the coal to ignite and spark and this was an unintended consequence
10 that the attorneys picked up but in the overall picture, it was not really an abolition the penalty regime because we more equitable for both supplier and Eskom. That was the rationale at the time. And I think these are the problems that the attorneys picked up as the application of that provision.

ADV SELEKA SC: Ja, that is – it is hard to follow that explanation. Anyway, they say it may well have been an unintended consequence. Then they go further to say:

20 “The nature of the volatiles of coal is that should it exceed the prescribed range contemplated in clause 4.4.1 of part 2 of schedule 1 to the CSA it is relatively incombustible and of no or little use to Eskom. That being the case, Eskom may want to consider bringing a claim for the rectification of the CSA and addenda in order to ensure that the

intention of the parties is correctly portrayed. As the CSA with the first addendum thereto currently stands, Eskom's remedy for coal which does not meet the volatiles quality parameter is limited to the payment reduction contemplated in clause 3.6 of the first addendum and the other remedies provided (specific performance) therein."

Then they go on to say:

10 "Provided that Eskom has evidence of the people who negotiated the first addendum available to prove their common mistake and that the arbitrator shall rectify the common mistake of the parties."

Now there are two things. Firstly, it is whether if the amendment brought about an unintended consequence, the attorneys are saying you will have to bring people who negotiated that amendment to come and show that this was indeed a common mistake between the parties in order for you to succeed with a rectification Is that a correct understanding?

20 **MS DANIELS:** That is correct.

ADV SELEKA SC: You will need the evidence of the people who negotiated. On the other hand, they say:

"The remedy available to you under the circumstance, in the present circumstances, is what is contemplated in clause 3.6."

Which they set out in paragraph 4.2 in the previous page.
Is that correct?

MS DANIELS: I am just reading. Yes, that is correct.

ADV SELEKA SC: Okay. And then in terms of clause 3.6
this is what Eskom needed to do.

“4.2.1 In the event that any quality parameter is not
met for a three day rolling period no
adjustment shall be made to the purchase
price.”

10 So you paid a full purchase price.

MS DANIELS: Yes, that is correct, even if there was an
issue.

ADV SELEKA SC: Yes.

MS DANIELS: With any of the quality parameters but this
would imply that Eskom kept proper records.

ADV SELEKA SC: I see. That is the first three day rolling
period.

MS DANIELS: Yes.

ADV SELEKA SC: Let us go to the next one.

20 “4.2.2 In the event that any quality parameter is not
met for a four day rolling period...”

So in the period of four days.

“...you have failed to meet the quality spec
then Eskom shall only pay 90% of the
purchase price for such coal.”

MS DANIELS: That is correct.

ADV SELEKA SC: But then again it requires you to monitor the situation.

MS DANIELS: Yes, it requires – and that is why the integrity of the sampling process that you will see CDH talks about later on was so paramount because in order for this to work, Eskom would have to have records of daily if not hourly monitoring so that we could have a proper average.

10 **ADV SELEKA SC:** Yes and it goes on like that to next page, paragraph 4.2.3:

“If after five days the supplier is supplying coal that does not need quality specification, then Eskom has an entitlement to pay only 75%.”

And if it is a breach of six days then they only pay 50%. If it is a breach over 7 days or more then it is calculated differently.

MS DANIELS: Yes.

20 **ADV SELEKA SC:** The purchase price shall be reduced to R1 per ton.

MS DANIELS: Yes, that is correct.

ADV SELEKA SC: That is on quality, but Eskom had not done – invoked this clause.

MS DANIELS: No, it had not.

ADV SELEKA SC: And that red flag is raised way back in

2013.

MS DANIELS: Yes it is and it is repeatedly raised in – well, it is consistently raised in CDH’s communication with Eskom.

ADV SELEKA SC: Yes. So it is a bit of a technical territory and I am trying to move slowly.

CHAIRPERSON: No, I understand, it needs ...[intervenes]

ADV SELEKA SC: Careful consideration.

CHAIRPERSON: Patience. So, ja, no, no, that is fine.

10 **ADV SELEKA SC:** That is why I thought I would start with the bottom line.

CHAIRPERSON: Ja.

ADV SELEKA SC: And then we go without the picture from there.

CHAIRPERSON: No, no, that is fine.

ADV SELEKA SC: Ja. So that is on quality. On sizing – that is quality specifications because there is two specs, Chair, we are dealing with here, there is quality and size. Size comes on page 986.

20 **CHAIRPERSON:** Yes.

ADV SELEKA SC: Ja, that is:

“Risk for Eskom. On the imposition of payment reduction for coal which fails to comply with size and specification. The risk for Eskom...”

Now they are going to set out the risk and they say in

paragraph 6:

“One of the major concerns Eskom has raised is the apparent failure or refusal by OCM to supply and deliver to the Eskom Hendrina power station coal which complies with the average monthly size distribution contemplated in clause 3.4.3 of the first addendum to the CSA.

10 The apparent failure, refusal by OCM to supply. Eskom has not imposed any penalty or payment reduction for the continued failure by OCM to supply and deliver to it coal complying with the size and specification but now it intends to do so. However, during the past few months a number of issues of concern have been raised. Should Eskom decide to impose the payment reduction for the period May 2012 to date, these concerns are *inter alia* the following:

20 The credibility of the sample process used to analyse compliance with the sizing specification of the coal supplied and delivered to the Hendrina power station by OCM which OCM has placed in dispute.”

And Chairperson, then they explain and what is important is what you see on the next page, page 987. That paragraph at the top of the page, I want to read – to

capture it there where it says, the three lines to the bottom of it:

“However, of concern for Eskom should be the statement made in its internal report titled Hendrina HEMA Sampler audit date 7 June 2013 as prepared by Mr Khulakane Dladla which records the following about the sampling process. The HEMA Sampler misalignment is the major concern with regards to the reliability and representativeness of sample issues experienced with the HEMA sampler. The original equipment supplier must be contacted in order to repair the misalignment of the HEMA sampler. The sampling system can then be audited again once this issue has been resolved.”

Ms Daniels, can you explain that? That concern?

MS DANIELS: In essence Eskom was not able to sample properly at that stage Mr Chairman. It was defective, the sampling system. So it was riddled with errors.

ADV SELEKA SC: So in, in other words whereas Eskom was now intending to charge or to impose a penalty for quality that did not comply with sizing specification, Eskom had, or their attorneys were identifying that, but you do have a problem in that intention or in that pursuit, because your sampling process is not in order.

MS DANIELS: Well Mr Seleka, I would put it a little bit

strongly if I remember what was happening at the time. I think the, the sampling system, not that CDH was saying we have a problem. I think they were saying that we can't actually prove our case.

ADV SELEKA SC: I see.

MS DANIELS: Until, until we fix the hammer sampling process, and that was an issue at the time, you know that we would actually not be able to prove reliably that the supplier failed to meet the sizing requirements.

10 **ADV SELEKA SC:** Yes. Thank you. Chairperson there is still ...

CHAIRPERSON: I'm sorry, I'm sorry.

ADV SELEKA SC: Details.

CHAIRPERSON: Ordinarily how would you prove that the sizing requirement had been met under, on normal circumstances?

MS DANIELS: Standard operating procedure Mr Chair, there would be a sampling process every, determined at a determined timing period. This was on a conveyor into the,
20 into the power station, so there would be samples taken at different parts of the conveyor.

That will then be taken to a lab and there would be, you know a composite sample tested. And those results would be made available to both the supplier and to Eskom. What was happening here was that the, the

hammer sampler was not taking regular samples.

It was not taking comparable samples, you know like for like sizes. So the test results were always in dispute.

CHAIRPERSON: Okay, thank you.

ADV SELEKA SC: Ja.

CHAIRPERSON: So the problem was that you, you had no records to prove the results of any testing that may have been done? Or the testing ...

10 **MS DANIELS:** Yes ...

CHAIRPERSON: Or the testing had not been done, hence you did not have the records?

MS DANIELS: Or if the testing was done, the records were faulty and not consistent.

CHAIRPERSON: Ja, okay.

ADV SELEKA SC: Yes.

CHAIRPERSON: So it was effectively Eskom's own failure to do what they were supposed to do?

MS DANIELS: Yes, at that time and they ...

20 **CHAIRPERSON:** At that time.

MS DANIELS: Ja. It was just, it was a mess if I can use that word.

CHAIRPERSON: Okay.

ADV SELEKA SC: Ms Daniels where were you at the time of October 2013?

MS DANIELS: I think I was in ...

ADV SELEKA SC: Well ...

MS DANIELS: The commercials.

ADV SELEKA SC: It is a very broad question. What was your position at Eskom at the time?

MS DANIELS: I think I had moved from private energy to the office of the, the Group Executives or the Chief Commercial Officer. So Family(?) Energy was one of the divisions.

10 **CHAIRPERSON:** Yes.

ADV SELEKA SC: So this, ja just go ahead. I'll ask you.

MS DANIELS: So ja, I had, Mr Chair the familiarity with some of the, you know the operational issues with Optimum is because Optimum was one of the first contracts that I managed when I got to Eskom in 2006. So when it was first sold to I be it BHT Billiton to Optimum, I managed the due diligence process.

20 So I do have a little bit more insight than what is normally, what's the word? Expect of like a lawyer or something, because I worked on the operational side at that time.

ADV SELEKA SC: Thank you. Chair there's seven more points and ...

CHAIRPERSON: Ja.

ADV SELEKA SC: You will tell me how much detail should

be laid on the table here.

CHAIRPERSON: Well continue, let's see.

ADV SELEKA SC: Okay.

CHAIRPERSON: Ja.

ADV SELEKA SC: So that's the on specific sizing stack, that's the first concern under 7.1. Then you go to 7.2 the attorneys are raising another point of concern. And they say the contingent by OCM is on page 987.

The contingent by OCM that the sizing
10 specifications contemplated by the first addendum is no longer properly N/O realistically representative of the coal which the OCM Colliery could reasonably be expected to achieve from exploiting the coal deposits constituting the Optimum Colliery.

Ms Daniel are you able to explain that?

MS DANIELS: What, what it meant was Mr Chair is that the sizing specifications as set out in the first addendum, the supplier could no longer meet.

ADV SELEKA SC: So is it an impossibility of
20 performance?

MS DANIELS: It is, that's the legal term, that's correct Mr Seleka. What that then meant is in terms of the agreement, the parties needed to renegotiate the sizing specification.

ADV SELEKA SC: Which is what?

MS DANIELS: And during that ...

ADV SELEKA SC: Sorry, I interrupted you. Proceed.

MS DANIELS: And during that period then the sizing price reduction formula would not be applied.

ADV SELEKA SC: Yes. And we see the re-negotiation on the next page. Page 988 paragraph 7.2.2.

MS DANIELS: Yes.

ADV SELEKA SC: So it this ...

MS DANIELS: So ...

10 **ADV SELEKA SC:** Let me read it.

“Eskom and OCM are also currently re-negotiating the sizing specification. Should Eskom impose the payment reduction, this could potentially be used against Eskom should it be established during a dispute resolution process relating to the sizing in the re-negotiation, that it is not realistically possible for OCM to supply and deliver the size in specification contemplated by the first addendum.”

You may comment.

20 **MS DANIELS:** That is what I was talking about. So during that, during that period when there was the re-negotiation, that, those provisions that the, that you read out earlier Mr Seleka would not apply.

ADV SELEKA SC: I see.

MS DANIELS: That is how it written in the first addendum.

ADV SELEKA SC: Yes. Then there is paragraph 7.3, 7.4 and 7.5 which raises further concerns. 7.3 says:

“The risk that should Eskom set off the payment reduction for OCM’s apparent failure to comply with the size in specification, OCM will attempt to terminate the CSA on the basis that Eskom is not entitled to impose the prepayment reduction inter alia for the following reasons: The sampling process used to determine the payment reduction is not credible.”

10

And I think this goes back to the Henwa sampling tool.

MS DANIELS: That is correct.

ADV SELEKA SC: Ja.

MS DANIELS: So combined, combining that, that we did not have a credible sampling process, with the fact that we are now re-negotiating the sizing issue.

ADV SELEKA SC: Yes.

20

MS DANIELS: Meant that Eskom could actually not apply the payment reduction provisions in the contract. And what CDH is saying is that this would give the supplier, if in the event that we should apply the payment reduction penal – you know mechanisms, that it could lead to the supplier cancelling the contract.

ADV SELEKA SC: Yes. I think you’ve touched on both

7.3.1 and 7.3.2. And if you are busy re-negotiating, why would you settle, deduct, when they say that would be a bona fide conduct? I mean a mala fide.

MS DANIELS: *Mala fide* ...[indistinct] conduct.

ADV SELEKA SC: That's right, not justified, not bona fide.

MS DANIELS: And that also, that also lead to the double counting that you referred to earlier Mr Seleka.

ADV SELEKA SC: Ja. Then 7.4 says:

10 “The risk that the payment reduction could be deemed as an excessive penalty stipulation in terms of the Conventional Penalties Act, 15 of 1962. No documents have been provided which reflects the financial loss or damage to Eskom to date. Or in the medium to long term as a result of OCM's failure to comply with the sizing specification.”

Well that speaks for itself, isn't it?

MS DANIELS: Yes. That, that is what I was trying to explain earlier with the earlier arbitrations that we had, where the arbitrators would say, but you can't prove
20 damage to your power station, yet you have burnt the coal.

ADV SELEKA SC: Ja. 7.5 says:

“Eskom has waived its rights to impose and subsequently enforce the payment reduction for certain of the months OCM failed to supply and deliver coal which complies with the sizing

specification due to Eskom failure to inform OCM of the payment reduction and calculation thereof timorously as required by the terms and conditions of the SCA that with the addendum.”

I think that too speaks for itself.

MS DANIELS: Yes.

ADV SELEKA SC: That concludes the concerns in regard to sizing specification. Now back to that background Chairperson I sought to paint, the penalty for sizing was a
10 huge amount of that 2,1 billion. It was a huge amount. 1,4 Billion.

And because of these reasons Eskom could not pursue, pursue that line. But what it means is, Ms Daniels, this claim could never been pursued in the first place.

MS DANIELS: Mr Chairman, that is, that is correct. It, it was essentially a paper exercise.

ADV SELEKA SC: Ja.

CHAIRPERSON: And the purpose being?

MS DANIELS: Well I think the purpose here was to, as we
20 came to know is to ultimately put pressure on Glencore to renegotiate the contract.

CHAIRPERSON: I thought that ...

MS DANIELS: At that stage. At that stage it was Glencore. Glencore had come with – because they owned Optimum at that stage.

CHAIRPERSON: I thought that you didn't want Eskom didn't want Glencore, didn't want a renegotiation. They wanted to pin Glencore down to the terms of the agreement or is that much later? Is this at a different time.

MS DANIELS: This was ...

CHAIRPERSON: It was a different time. I may, I may have missed something. I know that ...

ADV SELEKA SC: Ja.

CHAIRPERSON: Glencore sought renegotiation of the coal
10 price in terms of the agreement and during, or that was during, well even before Mr Brian Molefe arrived, but when he arrived he was rigid that that would not happen. And he admits that. So that's not the time you are talking about.

MS DANIELS: My, my apology Mr Chair. I made a mistake with the timing sequence. This is, this is, this is 2013.

ADV SELEKA SC: Yes.

MS DANIELS: When this first opinion was, was arrive, arrived at.

ADV SELEKA SC: Yes.

20 **MS DANIELS:** In this time there was still the cooperation agreement being negotiated.

CHAIRPERSON: Okay.

ADV SELEKA SC: Yes.

CHAIRPERSON: Okay.

MS DANIELS: That still, I think it's just to put into context.

CHAIRPERSON: Okay.

MS DANIELS: At this point in time there was still a good relationship with the supplier.

CHAIRPERSON: Okay.

MS DANIELS: But the supplier had already indicated hardship which was one of the provisions in this cooperation negotiations.

CHAIRPERSON: Okay.

MS DANIELS: And this is why this, these issues were
10 asked, asked of the attorneys to a final.

CHAIRPERSON: Okay.

ADV SELEKA SC: Ja.

CHAIRPERSON: Mr Seleka.

ADV SELEKA SC: Yes. Indeed Chair. The corporation agreement was concluded on the 23rd of May 2014, so the following year ...

CHAIRPERSON: Okay.

ADV SELEKA SC: So the corporation agreement was concluded.

20 **CHAIRPERSON:** Okay.

ADV SELEKA SC: Which gets to be terminated only in 2015.

CHAIRPERSON: Yes.

ADV SELEKA SC: Ja.

CHAIRPERSON: But what precisely did Eskom in 2013

want the renegotiations to, of the agreement to be about Ms Daniels?

MS DANIELS: From my understanding Mr Chair, it was the coal, the coal quality issues were raising its head again, notwithstanding the amendments to the contract in terms of the first addendum.

CHAIRPERSON: Ja.

MS DANIELS: And the supplier already was having issues, meeting the sizing which was a big issue for Eskom. And
10 that is where this, where this, these issues started.

But I must give you context that this has always been an issue with Optimum and it required close management from both parties' sides.

CHAIRPERSON: Okay, alright. Mr Seleka.

ADV SELEKA SC: Thank you Chair. Chairperson I see its about 18:10. Should I pace myself to finish by 18:30?

CHAIRPERSON: Well ...

ADV SELEKA SC: Or to stop?

CHAIRPERSON: Let's, let's, well put it this way, if you are
20 not done at 18:30 and there are still important issues ...

ADV SELEKA SC: Okay.

CHAIRPERSON: We can look at adjourning for the day and then finding another hour or whatever. If Ms Daniels would make the time.

ADV SELEKA SC: Yes.

CHAIRPERSON: I'm sure she would make it, it's a question of what date.

ADV SELEKA SC: Yes.

CHAIRPERSON: I am aware that on Tuesday I've got an evening session, but I don't know whether you and I already made any arrangements for an evening session on Monday. And if we haven't subject to Ms Daniels being available, we could try and finish with her on Monday.

ADV SELEKA SC: Ja, the, the Monday witness is Mr Koko
10 Chair.

CHAIRPERSON: Yes.

ADV SELEKA SC: So ...

CHAIRPERSON: So you think we might need to go into the evening with him?

ADV SELEKA SC: We can put anybody in the evening.

CHAIRPERSON: Hey?

ADV SELEKA SC: We can put anybody in the evening.

CHAIRPERSON: Okay.

ADV SELEKA SC: It's a huge risk.

20 **CHAIRPERSON:** But, but we could try and find some time one of the evenings next week.

ADV SELEKA SC: Yes.

MS DANIELS: [Indistinct].

CHAIRPERSON: Does that sound ...

MS DANIELS: That will be okay.

CHAIRPERSON: More or less still fine with you Ms Daniels?

MS DANIELS: Yes Mr Chair, that will be ...

CHAIRPERSON: Yes.

MS DANIELS: In order.

CHAIRPERSON: Okay, alright. So I think let's continue until 18:30.

ADV SELEKA SC: Yes.

CHAIRPERSON: And then we can adjourn and continue on
10 some evening next week.

ADV SELEKA SC: Yes. Yes Chair. I will tell ...[indistinct].
So Ms Daniels then those are the concerns ...

CHAIRPERSON: I wanted to ask you Mr Seleka was
whether there was, you were moving away from that
opinion without going to the conclusion thereof
deliberately?

ADV SELEKA SC: No. I'm not moving away yet.

CHAIRPERSON: Oh I thought ...

ADV SELEKA SC: Yes.

20 **CHAIRPERSON:** I thought you were moving away, okay.

ADV SELEKA SC: No.

CHAIRPERSON: Alright.

ADV SELEKA SC: There is, there is the last point on
quantity specification. The last point on quantity. Ms
Daniels that is raised immediately after paragraph 7.5.

You see the heading in respect of coal quantity?

MS DANIELS: Yes, that's correct.

ADV SELEKA SC: You see that. But what they do first, paragraph 8, 8.1, 8.2, 8.3 to 8.4 they set out the terms of the contract. And the concerns are raised on the next page, page 989 under the heading, conveyor availability dispute. Paragraph 8.5 then reads:

10 “Eskom’s rights to impose a penalty for short supply of coal has also been disputed by OCM on the basis that Eskom is not entitled to impose a penalty for a short supply due to the unavailability of the conveyor system operated by Eskom.”

8.5.1:

20 “OCM contends that its failure to supply and deliver the required quantity of coal per month is directly linked to the unscheduled stoppages of the conveyor system by Eskom. Eskom has disputed, obviously a mis-contention, that unavailability of the conveyors is directly as a result of Eskom’s conduct and reserved it’s rights to claim the penalty pending the finalisation of the dispute relating to the conveyor availability.”

It will need to be considered, paragraph 8.6:

“It will need to be considered whether the dispute relating to the conveyor availability should be

joined with the hardship arbitration and future disputes relating to the entitlement of Eskom to impose the payment reduction.”

Ms Daniels I’ve had the benefit of going through all of this memos and all the way to the end of the settlement. And I have struggled to find a penalty being pursued by Eskom in regard to short supply. Your comment?

MS DANIELS: Mr Seleka based on what I have seen from the documentation, Eskom in the first instance reduced the
10 supply, the quantity in the first addendum to not the 5,5 million tons. It was reduced. There is a figure in there.

And the – always the issues around the conveyor availability made this very difficult for Eskom to actually impose the penalties. If not impossible, because it was always in, on the back foot in terms of it not performing 100 percent.

ADV SELEKA SC: Yes because, well that’s fine. But you will recall from the settlement that ultimately the penalty that was pursued and on the basis of which a settlement
20 was concluded, related only to quality. I don’t know whether you can recall offhand.

MS DANIELS: I can’t recall offhand. I would just have to look, but quality, that was the only aspect that we could actually prove on a balance of probabilities.

ADV SELEKA SC: Yes. And Chair I can, the conclusion

then comes, follows after that. And it's a summary of what we have traversed ...[indistinct]. Should I read it to the record Chair?

CHAIRPERSON: Well not necessarily.

ADV SELEKA SC: Not necessary.

CHAIRPERSON: You don't think there's anything in dispute?

ADV SELEKA SC: Ja.

CHAIRPERSON: For your purposes.

10 **ADV SELEKA SC:** Ja, I think the points raised in the body of the memorandum covers the issues.

CHAIRPERSON: Okay.

ADV SELEKA SC: Which are then summarised in the conclusion. So let's go back to Mr Moodley's affidavit. And at paragraph 22 ...

CHAIRPERSON: Are you going back to ...

ADV SELEKA SC: To the affidavit Chair which is ...

CHAIRPERSON: Where does it ...

20 **ADV SELEKA SC:** In 14(b). At the end of 14(b). page, for your purposes Ms Daniels is page 891.

MS DANIELS: Thank you Mr Seleka.

ADV SELEKA SC: We were at paragraph 22.

CHAIRPERSON: Okay. You, so you say you are going to Bundle?

ADV SELEKA SC: 14(b).

CHAIRPERSON: 14(b).

ADV SELEKA SC: Page 8 ...

CHAIRPERSON: Moodley's affidavit?

ADV SELEKA SC: Yes Chair.

CHAIRPERSON: And paragraph 22 you say?

ADV SELEKA SC: 22 Yes. Which is on page 89. 891.

CHAIRPERSON: Okay, got it.

ADV SELEKA SC: Thank you. So we had read the first part of the paragraph until see item 11 of the bundle, which
10 is what we were reading. But let me read it again.

“So during October 2013 CDH prove ...”

CHAIRPERSON: Sorry Mr Seleka.

ADV SELEKA SC: Yes.

CHAIRPERSON: I see that you are going back to this affidavit at 19 minutes passed.

ADV SELEKA SC: Yes.

CHAIRPERSON: If you think we can make use of the next 12 minutes or 11 minutes effectively we can continue. I'm thinking just in case you are starting something that might
20 be better started when we would have more time.

ADV SELEKA SC: Oh.

CHAIRPERSON: But if we can make use of it, we can make use of it.

ADV SELEKA SC: I hear the Chairperson. I think I will end with this paragraph.

CHAIRPERSON: Okay.

ADV SELEKA SC: Because the next thing is the second opinion.

CHAIRPERSON: Okay, no that's fine.

ADV SELEKA SC: And that reply has a time of its own.

CHAIRPERSON: Okay, not then that's fine.

ADV SELEKA SC: So the paragraph, let me just read this.

It said:

10 “During October 2013 CDH provided a legal opinion
to Eskom relating to the potential penalty claim on
the sizing quality parameters under the CSA and
addendum thereto including our preliminary
concerns relating to the evidence which would be
necessary for such a claim to succeed.”

And then they refer us to that opinion which we've
read. Ms Daniels, you follow?

MS DANIELS: Yes I am following.

20 **ADV SELEKA SC:** “Pursuant to this advice an
extensive exercise was embarked upon in order to
consider and review the methodology Eskom
needed to apply or should have applied in
calculating the penalties for various coal quality
parameters under the CSA. The reason being that
Eskom itself was unclear as to how the penalty
regime contained in the first addendum to the coal

supply agreement should be applied.”

You see that?

MS DANIELS: Yes I see that.

ADV SELEKA SC: So it begs the question, how does one then adamantly say, or forcefully say OCM needed to pay us 2,17 billion rand? When you as the claimant don't even know how to arrive at the amount? Do you have a comment?

MS DANIELS: Mr Seleka and Mr Chair, this was in 2015
10 and the decision was made, the Executives did not listen to any reason, they were determined to go ahead and notwithstanding these flaws which actually did not get any better they persisted with the claim and actually I think excluded for the time period even the internal legal department from the discussions with the supplier.

CHAIRPERSON: I am not sure if I understand that. Mr Seleka's question is how do you proceed or pursue a claim against somebody in circumstances where you are not clear as to how to apply the agreement on which the claim
20 is based, I think that is the question.

ADV SELEKA SC: Correct.

CHAIRPERSON: So the least that can be expected is that if you pursue a claim based on an agreement you know at least, you should know how to apply that agreement, or that claim in terms of the agreement, so if you pursue it in

circumstances where you are anti how to apply it, it is – it calls for an explanation, why do you – how do you do that.

MS DANIELS: But you would have to ...[intervenes]

CHAIRPERSON: Are you able to throw light on that?

MS DANIELS: I am not able to throw light on that Mr Chair because I was not there at the time but you would have to ask Mr Molefe and Mr Koko for the basis on which they made those decisions, because you will see from the evidence that you know the advice did not change, and you

10 will see later on that ...[intervenes]

CHAIRPERSON: But Mr Molefe was not there, or maybe Mr Koko, 2013 Mr Molefe was not there isn't it?

MS DANIELS: Ja, but what happened in 2013 you will remember they did try and do the cooperation negotiations.

CHAIRPERSON: H'm.

MS DANIELS: That was from 2014 onwards. So there was work done and they went into Primary Energy and Glencore, Eskom and Glencore went into these discussions and they were quite extensive, and that is how they ended

20 up with the increased price.

ADV SELEKA SC: Yes, so to explain it properly Ms Daniels you will say yeah or nay to this, so Chair in 2013 the parties are still negotiating what culminates into an agreement in 2014.

There is no claim yet but CDH is engaged to advise

on what is potentially a claim. The agreement is meant for the parties to cooperate, to reach a commercial amicable agreement going forward. That agreement, which would have then changed the main agreement between the parties, the co-supply agreement, was terminated after Mr Molefe comes there, and that is when the penalties then are sought to be enforced, and that happens the 22nd of June 2015.

And so then that question arises given all this
10 information, given to you already in October 2013 how do you with a clear mind, a clear conscience pursue the claim when this information is already given, and that question arises at that stage, and on that note Chair I think I will pause there, because we will then be going into the second leg of this exercise, which is just as detailed as the first one.

CHAIRPERSON: Would you estimate that we might need an hour or two hours?

ADV SELEKA SC: Two hours.

20 **CHAIRPERSON:** Two hours?

ADV SELEKA SC: Two hours.

CHAIRPERSON: Okay, alright, and would it not be better that Ms Daniels should have completed her evidence before certain witnesses testify such as Mr Brian Molefe? Or not necessarily? I am thinking about – not

necessarily?

ADV SELEKA SC: I think not necessarily Chair.

CHAIRPERSON: Okay, no that's fine.

ADV SELEKA SC: I have an ...[indistinct] with that, but because of the opinions which we rely on in Mr Moodley's affidavit, ja.

CHAIRPERSON: Okay, no that is fine. The missing pages from one of the bundles that we were talking about, I would be glad if ...[intervenes]

10 **ADV SELEKA SC:** Chair it is sorted.

CHAIRPERSON: It is sorted?

ADV SELEKA SC: It is sorted.

CHAIRPERSON: So okay, alright, so if that can be included in the bundle then as soon as we adjourn and then registrar I would like you to make sure that the protectors will know which bundle that is, so that they can show it to me later on which bundle that one is, which had missing pages, which will now be inserted I guess.

20 I do suspect now that I did take out the missing pages to read and sometimes and I suspect they were not taken back and I should have them at home, but because they have been prepared they can be put in, I may have made some notes on those ones, if so I will just replace them.

ADV SELEKA SC: I will check your volume. Chairperson

may I bring to our attention the following in regard to Mr Anoj Singh?

CHAIRPERSON: Yes, he has brought an application or is bringing an application for a postponement, I saw the email during the lunch time so they have printed out a copy for me. The Chair will remember that he is scheduled to testify on the 3rd of March which is next week Wednesday, so maybe we need some direction in regard whether they should come to argue this application before the
10 Chairperson, because summons were issued for him to appear.

CHAIRPERSON: Ja, well they will have to do that, and it might be late, it shouldn't be handed on the day he is supposed to be here, it should be handed in before so if it's granted maybe the date can be used for another witness, but I will read the application, I am not aware of it yet, or it has not been lodged, or it has been lodged?

ADV SELEKA SC: It has been ...[intervenes]

CHAIRPERSON: Oh it is still on the way?

20 **ADV SELEKA SC:** No it is here, I can hand up a hard copy Chair.

CHAIRPERSON: Ja, no don't hand it up, it must be sent to me in the other way other than handing it up.

ADV SELEKA SC: Okay.

CHAIRPERSON: Ja, okay next week I am hearing –

continuing with Eskom related evidence and the witnesses that are lined up, who is testifying on Monday?

ADV SELEKA SC: It is Mr Koko.

CHAIRPERSON: Mr Koko, Tuesday?

ADV SELEKA SC: Mr Brian Molefe.

CHAIRPERSON: Yes, and Wednesday is supposed to be Mr Anoj Singh.

ADV SELEKA SC: Mr Anoj Singh and Thursday is Ms Janke Goodson.

10 **CHAIRPERSON:** Ja, and Friday is Ms Brown, the former Minister?

ADV SELEKA SC: No, I think Eskom is only four days next week.

CHAIRPERSON: Is that so? Is there another day when Ms Brown is being scheduled – I had the impression she would be in March.

ADV SELEKA SC: Ja, I am not aware yet.

CHAIRPERSON: Ja, okay, alright. Okay that's fine so that will have to be done, she will have to be scheduled to
20 give evidence before us, she has to deal with some important issues.

ADV SELEKA SC: Ja.

CHAIRPERSON: So after next week if all the witnesses that are lined up for next week they are all done you would be left with Ms Brown and how many others?

ADV SELEKA SC: There is Minister Zwane as well.

CHAIRPERSON: Oh and Minister Zwane.

ADV SELEKA SC: Which we intend calling.

CHAIRPERSON: Ja.

ADV SELEKA SC: Mr Romeo Kumalo.

CHAIRPERSON: Ja.

ADV SELEKA SC: And the Chairperson has made a request for – well it has to be finalised with you Chair, Mr Eric Woods, Mohamed Bobat.

10 **CHAIRPERSON:** Oh ja, ja, ja, okay no that's fine.

ADV SELEKA SC: Ja.

CHAIRPERSON: Okay, so just for the public so next week we will be hearing, we will be continuing with Eskom related evidence. Okay, we are going to adjourn so Ms Daniels the legal team will be in touch with you with regard to an evening session next week.

MS DANIELS: Thank you Mr Chair.

CHAIRPERSON: Yes, thank you very much, we adjourn.

ADV SELEKA SC: Thank you.

20 **REGISTRAR:** All rise.

INQUIRY ADJOURNS TO 1 MARCH 2021