

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

24 MARCH 2021

DAY 367



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TRANSCRIBERS:

B KLINE; Y KLIEM; V FAASEN; D STANIFORTH



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PROCEEDINGS RESUME ON 24 MARCH 2021

CHAIRPERSON: Good morning Mr Franklin, good morning everybody.

ADV FRANKLIN SC: Good morning Chair.

CHAIRPERSON: I must give my decision on Bain's request of yesterday and then I will have an announcement – a brief announcement to make and then we can start.

ADV FRANKLIN SC: Thank you.

CHAIRPERSON: Thank you. Yesterday morning I heard
10 argument in connection with a request that has been made
by Bain and Company South Africa Incorporated that I
should provide it with written permission in terms of
Regulation 11 – 11.3 A of the Regulations of the
commission.

That provision reads as follows and I quote:

“No person shall without the written permission of the
Chairperson.

a. Disseminate any documents submitted to the
commission by any person in connection with the
20 inquiry or publish the contents or any portion or the
contents of such document and the dissemination of
any such document and or any portion thereof is a
criminal offence in terms of the Regulations.”

Bain's request was communicated to the commission by
way of a letter dated 26 November 2020 to which I had

regard yesterday.

After dealing with certain matters in paragraphs 1, 2 and 3 of that letter Bain's attorneys wrote the following in paragraph 4 and I quote"

"While we await directions from the commission in respect of the hearing of the application we also wish to address a request to the commission in respect of the publication of Bain South Africa's affidavit."

10 And then in paragraph 5, 6 and – that was 5, 6 and 7 it says:

"Bain South Africa may wish to publish the affidavits accompanying their application when Mr Williams begins his testimony before the commission. That is necessary to ensure that Bain South Africa is fairly treated by them, the media and the public at large even the serious inflammatory and potentially defamatory material contained in
20 Mr Williams' affidavit and presumably his forthcoming testimony. Fairness demands that Bain South Africa's version must be publicly available simultaneously with his so that they can be assessed alongside one another. The need for this even handed

release of information is particularly acute where Bain South Africa will not be able to test Mr Williams' evidence at the time that he gives it and we will only have an opportunity to cross-examine him later if at all."

6.

"We note that Regulation 11.3 A of the Regulations applicable to the commission provides that "no person shall without the
10 written permission of the Chairperson

a. Decimate any documents submitted to the commission by any person in connection with the inquiry or publish the contents or any portion of the contents of such document." The object of that provision appears to be to prevent information submitted to the commission from being leaked by that party. We do not
20 understand it to operate against a party like Bain South Africa which wishes to disseminate its own affidavits to promote transparency and openness in the commission's process. Moreover once Mr Williams begins his testimony and thereby

discloses the evidence he has submitted to the commission there is further no reason to maintain confidentiality over his affidavit. (bar those portions that Bain South Africa has sought to withhold permanently from disclosure due to – due to confidentiality of privilege obligations) or to preclude Bain South Africa's reference to it."

10 7.

"We accordingly request the commission's confirmation alternatively permission that Bain South Africa may publish and or decimate its affidavit as soon as Mr Williams commences his testimony."

The request by Bain was not based on any substantive application that may have been brought it was simply based on this request and as I indicated I heard argument upon it.

20 It is quite clear that its basis is simply that Bain believes that if it is not allowed to publish its affidavits when Mr Williams gives evidence that will be unfair in circumstances where Mr Williams will be giving evidence implicating it.

I must indicate that during the course of argument

and following upon a remark that I had made namely whether or not instead of seeking the publication of the full affidavits Bain would be satisfied with the publication of a summary of the contents of the affidavits so that not all details in the affidavit would be published.

Following that Counsel for Bain indicated that Bain no longer sought permission to publish the whole affidavit and they confined their request to seeking permission to publish a summary of the affidavit.

10 It will be clear from the letter on which Bain's request is made that there is nothing special that Bain relies on really to ask for permission. Its Counsel indicated yesterday that it had provided comprehensive affidavits but I do not think that that is a feature that makes its case special.

Therefore this case must be or its request must be decided on the basis that it is a request for permission as contemplated in Regulation 11.3 A but there is really nothing special in the features of its case.

20 As I read Regulation 11.3 it appears to me that it seeks to lay down what would be the norm namely that there should be no publication of a document that has been submitted to the commission unless the Chairperson provides written permission therefore. And it would seem that the Chairperson would have to be satisfied about

something special with regard to such a request before he provides such permission because otherwise if he were to provide permission in regard to a case that does not have any special features then that would undermine Regulation 11.3 A.

But the whole case of Bain is based on the suggestion or contention that there will be unfairness if Bain is not able to publish its affidavits or a summary of its affidavits when Mr Williams gives his evidence.

10 In this regard it is necessary to have regard to the legal framework that governs the proceedings of this commission. Obviously this commission has to operate within the parameters of the constitution, the Commission's Act, the Regulations promulgated under the Commission's Act which apply to this commission as well as the Rules of the commission.

20 Now the Rules of this commission particularly Rule 3 makes provision that when a witness has submitted a statement or has made a statement to this commission or an affidavit implicating somebody that person should be notified of – about a statement and that he or she or it is implicated by that witness and that person must be given a copy of the statement or the relevant portions thereof and that person then is advised that he or she or it has the right provided for inspection in Regulation – in Rule 3.

And those – those rights include the right to apply to the commission for leave to adduce evidence or to testify. The right to – for leave to call other witnesses in support of your version as well as for leave to cross-examine the witness. Indeed you have such a person has the right to be present when that evidence is given by that witness.

In this case Bain has applied for leave to cross-examine Mr Williams but that application has not been
10 decided as yet. I indicated during argument yesterday that from my position that application could be decided even later this week or next week if all the affidavits are in. I understand that Mr Williams has furnished his response to the application but Bain is yet to decide whether they file a further affidavit or not.

As far as the commission is concerned I will be prepared to hear that application as soon as possible after I have been advised that either Bain has decided that it will not file a further affidavit or 00:15:55 has filed an
20 affidavit.

But I raised with Counsel for Bain yesterday the fact that Bain seems not to have applied for leave to testify and that appears to be factually true and I think he was not in a position to indicate whether – whether Bain wished to testify and I asked him the question whether Bain would

subject themselves to questioning before the commission and he indicated that he did not have instructions at that time on that point.

Now the legal framework applicable to these proceedings make it clear that Bain could have applied for leave to testify before the commission and if they had done that it would have been possible for example to include its witness or even witnesses this week so that their witness or their witnesses or at least one of them could well have
10 been able to testify soon after Mr Williams but they did not make such an application.

If they had made such an application and such an arrangement could have been made and had been made it is clear that its version could have been articulated by its own witness maybe the same day as Mr Williams or the following day.

The fact that that is not going to happen is because Bain elected not to make that application.

2. To the extent that Bain has put its version in the
20 affidavits with regard to Mr Williams' evidence when the evidence leader leads Mr Williams he will put Bain's version to Mr Williams for him to comment on it and therefore the essential features of Bain's version will be put to Mr Williams and the public will know what Bain's version is or response is to Mr Williams evidence.

Of course if Bain decides to apply for leave to testify and that leave is granted and there is no reason why it would not be granted generally speaking when there is a witness who implicates them in a serious manner then Bain would get a chance to put its version.

The upshot of all of this is that

1. Any unfairness that Bain believes will flow from the fact that it cannot publish its – or it does not – or it is now allowed to publish its affidavits or a summary of its affidavits while Mr Williams is giving evidence one will be mitigated by the fact that its version will be put to Mr Williams. I say mitigated but actually it seems to me that there will be no unfairness because its version will be known publicly. It will be put to Mr Williams at least the essential features of its response but also if there is any unfairness it seems to me to flow from Bain's own failure to apply for leave to adduce evidence because as I have said if it had done so and it had sought to make sure that its witness gave evidence as soon as possible after Mr Williams has given evidence that could well have been arranged. That – that arrangement was not done flows from the fact that Bain did not take the initiative to apply for leave to testify or adduce evidence and did not make those arrangements.

In the past it has happened in this commission that kind of arrangement has been made and in this regard I want to refer to the Aviation work stream where implicated persons were given an opportunity to testify as the witnesses that were implicating them were testifying or soon as – soon as possible thereafter.

In these circumstances I am of the opinion that this is not a case in which I should provide the written permission contemplated in Regulation 11.3 A and
10 accordingly I decline to provide such permission.

ADV FRANKLIN SC: Thank you Chair.

CHAIRPERSON: Yes I will now just make an announcement.

I have previously said that the President of the Republic President Ramaphosa will appear before the commission at some stage and that he had indicated that he would be ready to come and testify and be questioned about any matters that are being investigated by the commission once I had determined the dates.

20 I have now determined the dates when he will appear and I deem it appropriate that I should make this announcement publicly.

I have determined four days – the dates are 22 and 23 April and 28 and 29 April. On the 22nd and 23rd of April those dates are effectively provided for the ruling party the

ANC because I have also indicated this commission cannot complete its work without the ruling party also coming to give evidence and deal with certain matters and I was assured by its President that it would come and it was – was just prepared to do that.

I understand that President Ramaphosa will testify representing the African National Congress but I have indicated that from the commission's side the President will have to testify as President of the country and former
10 Deputy President of the country but it is up to the ANC to provide its witnesses but I understand that he will lead that delegation as well in his capacity as President of the ruling party.

But the dates of 28 and 29 April that is when President Ramaphosa will be testifying in his capacity as President of the country.

So I thought I should just make that announcement so that the public is aware.

Yes we may proceed.

20 **ADV FRANKLIN SC:** Thank you Chair. Chair before we continue with the resumption of Mr Williams' evidence as you will know there are two further SARS witnesses who have been scheduled to testify today Mr Symington and Mr Van Loggerenberg both were required to be here at ten o'clock this morning and because of the way that events

unfolded yesterday Mr Williams' evidence is not yet complete and will still take some time. So the request Chair is for you to excuse the witnesses until further notice. We will be in touch with their legal representatives and let them know our estimation of when – when it is that they will be required but we would just ask that the Chair formerly excuse them from continuing in attendance right now.

The second issue is that there are a number of my
10 learned friends who are here who represent those witnesses in addition there is a colleague who represents the State Security Agency and I believe that they would like to place themselves on record.

CHAIRPERSON: Okay one I will excuse those who – the witnesses for today who need to be excused from attendance at the moment and they will be advised by Mr Franklin through their legal representatives in terms of when they should come back. So that is done.

And then the legal representatives who need to
20 place themselves on record you may do so from where you are if your mic is working.

ADV FOURIE: Good morning Chair.

CHAIRPERSON: Good morning.

ADV FOURIE: My name is Greg Fourie I am an advocate at the Johannesburg Bar and I represent Mr Symington.

CHAIRPERSON: Thank you. Thank you.

ADV HOTZ: Good morning Chair.

CHAIRPERSON: Good morning.

ADV HOTZ: My name is Bernard Hotz from Werksmans Attorneys I represent Mr Van Loggerenberg.

CHAIRPERSON: Thank you very much. Okay are we done? Is there somebody else? Oh you need a mic that is working?

ADV MAHLATE: Good morning Chairperson.

10 **CHAIRPERSON:** Good morning.

ADV MAHLATE: My name is – my name is Ntete Philip Mahlate I appear together with my learned colleague 00:27:57. We are here on behalf of Security Agency South Africa but it (inaudible). There are submissions that were made in fact we did have submissions. I am not too sure if the Chairperson would have seen this application?

CHAIRPERSON: I have seen the application yes.

ADV MAHLATE: My instruction or rather our instruction is to address the Chairperson insofar as the concerns that
20 are raising up.

CHAIRPERSON: Ja. Do not do that now because we are not going to deal with Mr Van Loggerenberg's evidence now. I think once we are done with Mr Williams' evidence we can then look at that application.

ADV MAHLATE: Thank you Chairperson.

CHAIRPERSON: Okay alright. Thank you. Are we done with legal representatives who wish to place themselves on record? It looks like we are done. Okay Mr Franklin.

ADV NGOJANA: Chair I appear today for Mr Williams.

CHAIRPERSON: Where are you?

ADV NGOJANA: I am right behind – ja.

CHAIRPERSON: Okay.

ADV NGOJANA: It is Advocate Ngojana.

CHAIRPERSON: Yes.

10 **ADV NGOJANA:** I appeared before you previously when the matter was postponed.

CHAIRPERSON: Yes were you here yesterday?

ADV NGOJANA: No yesterday I was not in [?].

CHAIRPERSON: You were not here oh okay.

ADV NGOJANA: My attorney was here.

CHAIRPERSON: Yes I was wondering how I missed your presence.

ADV NGOJANA: Apologies Chair.

CHAIRPERSON: Oh okay alright thank you. Thank you.

20 Yes.

ADV GOODMAN: Chair Isabel Goodman. Mr Cockrell and I were here and remain on record for Bain.

CHAIRPERSON: Yes okay no thank you. Okay.

ADV FRANKLIN SC: Thank you Chair one matter of procedure. We intend calling Mr Symington next and so I

would ask that the – any such application as need to be argued in relation to Mr Van Loggerenberg take place in ...[indistinct – word cut] ... to him being due to give evidence. So just to let my learned friend know.

CHAIRPERSON: Okay.

ADV FRANKLIN SC: And we will keep in touch with him.

CHAIRPERSON: Yes.

ADV FRANKLIN SC: In order to let him know what our estimate is.

10 **CHAIRPERSON:** Ja.

ADV FRANKLIN SC: Or when that is likely to be.

CHAIRPERSON: Ja.

ADV FRANKLIN SC: And the – our also ongoing interactions between the Commission and the agency in an attempt to reach some accommodation that will a need for an application but we will obviously report on that to you.

CHAIRPERSON: Yes. Yes. No, no. That is fine. I would have imagined that the kind of arrangements that were made previously when there was evidence concerning the
20 State Security Agency, you would have been easy to agree upon but I will leave it to the parties to talk about it.

ADV FRANKLIN SC: Thank you, Chair.

CHAIRPERSON: Ja.

ADV FRANKLIN SC: Alright. If we may then call Mr Williams to continue his testimony?

CHAIRPERSON: Yes. Good morning, Mr Williams.

MR WILLIAMS: Good morning, Chair.

CHAIRPERSON: The oath you took yesterday will continue to apply today.

MR WILLIAMS: Thank you, Chair.

CHAIRPERSON: Okay alright.

ATHOL WILLIAMS: (s.u.o)

CHAIRPERSON: Mr Franklin.

EXAMINATION BY ADV FRANKLIN SC (RESUMES):

10 **Thank you. Good morning, Mr Williams.**

MR WILLIAMS: Good morning, Mr Franklin.

ADV FRANKLIN SC: We continue with your testimony. You will recall that yesterday we had reached the point where I have led you through the various operational and other strategic plans that had been compiled by Bain South Africa in relation to the restructuring of the South African economy and also certain plans in respect of SARS itself. Do you recall that?

MR WILLIAMS: I do, Chair.

20 **ADV FRANKLIN SC:** And I had asked you to indicate to the Chair whether in your experience that was an example of typical CEO coaching or not.

MR WILLIAMS: That is correct Chair. I recall that.

ADV FRANKLIN SC: Alright. I would like to move on from that and I would like to deal with a topic which relates to

Bain's knowledge of Mr Moyane's appointment before that was announced publicly.

And to that end, may I ask you, please, to firstly turn to AW-67 which appears at page 420 of the SARS Bundle 01. So I would be principle in SARS Bundle 01 until I tell you otherwise. Do you have page 420?

MR WILLIAMS: I do, yes.

ADV FRANKLIN SC: That is a document which we referred to yesterday. Just to remind you. It was
10 Mr Massone's partner's self-assessment in December of 2013. And if I could ask you to look, please, at paragraph 2 on page 421?

MR WILLIAMS: [No audible reply]

ADV FRANKLIN SC: Do you have that?

MR WILLIAMS: I do, Chair.

ADV FRANKLIN SC: Yes. The second sentence reads as follows:

20 "The person we prepared the document with and we pitched to the SA President is most likely to be appointed as Commissioner in the next few weeks/months and they will be assisting them should he get the job..."

Just stop there. It would appear from this that Bain had information in December of 2013 that Mr Moyane was likely to be appointed as the new SARS Commissioner.

Is that your understanding?

MR WILLIAMS: That is how I read it, Chair.

ADV FRANKLIN SC: Then would you look, please, at AW-86 which is on page 470.

MR WILLIAMS: [No audible reply]

ADV FRANKLIN SC: That is an email chain. At the bottom, it is Mr Franzen who sends an email to Mr Massone on the 4th of April 2014 and he says:

10 “Ciao. Just wanted to check how your “big meeting” went yesterday. Take care...”

 There is then a response from Mr Massone to Mr Franzen.

CHAIRPERSON: I am sorry, Mr Franklin. I am looking at page 470. Is that the right page?

ADV FRANKLIN SC: That is right. 470.

CHAIRPERSON: Yes.

ADV FRANKLIN SC: I referred the witness first to the bottom of the page, which is the first short email and then I am looking at the middle of the page.

20 **CHAIRPERSON**: Okay now I can see...

ADV FRANKLIN SC: Thank you, Chair. Mr Massone responds to the enquiry.

 “Thank you, Fabrice(?), it went very well...”

 And then the first dash is:

 “- SARS is...”

It looks like Pe-go-go(?) [phonetically]. Sorry:

“SARS is a go, right after the elections.

Central Procurement Agency: He loves it.
Wants an implementation plan. Wants to
accelerate Phoenix.

- Asked us to organise a workshop with the
new Cabinet of ministries after the elections
(sort of new strategy by a sector, plus-
minus, RDO/mobilisation.

10 So I would say very well. I will update the
team on next call...”

In the context of your analyses of the
information provided to you, can you elucidate what is
being said here?

MR WILLIAMS: Chair, my understanding of this meeting
that is referenced here is a meeting between Mr Massone
and former President, Jacob Zuma that happened and
obviously during the meeting a number of things is
discussed and he is giving an update to his team of what
20 was discussed, what was agreed.

ADV FRANKLIN SC: H’m, h’m.

MR WILLIAMS: So it certainly seems to me that from that
meeting Mr Massone is giving the impression that SARS is
a go and my understanding of what he means by SARS is a
go is that Bain was expecting to be doing work with SARS

and they would given some assurance of that.

Also – or also in the sense that Bain was expecting that Mr Moyane was going to be appointed as the Commissioner and that seems to be that is a go. In fact, there are two points to be reversed.

The first is that, he seemed to get assurance that Mr Moyane was going to be the Commissioner and therefore Bain would be given that work. But I think the points below that, I think make reference to some of those
10 plans we discussed yesterday.

So by this point, Mr Massone and Bain had presented the Central Procurement Agency plan and we see that the President seems to like that, the once implementation plan which indicates that the President supported the concept of this that Bain had presented and now want to move towards actually making it happen.

I think the reference to Phoenix, we discussed yesterday. So those plans we saw presented to the President three, four, five times and he wants to move
20 along with that. I think the last point, just RDO, is typically – it is a Results Delivery Office. The Programme Management office.

But that begins to yet indicate this point about let us get on with things now. We have discussed the concept. So we now want to act.

So they are talking about Bains setting up a Programme Management office to put some of these plans into action and particularly to start with the workshop with Cabinet Ministers to discuss some of these plans that have been presented to the President.

Chair, that is how I understand this email in the context of what I know.

ADV FRANKLIN SC: Is that ...[intervenes]

CHAIRPERSON: Just one second Mr Franklin.

10 **ADV FRANKLIN SC:** Sorry, Chair.

CHAIRPERSON: The technicians, if they could switch off the screen here? It does not... [Speaker's voice drops – unclear] The witness is here. I cannot look at him. Yes, okay. Let us proceed. I see, Mr Williams, that Mr Franzen – I am not sure which one is the surname and which one is the name.

MR WILLIAMS: Fabrice Franzen.

CHAIRPERSON: Ja. He refers to the meeting that was supposed to have taken place the day before as the “big
20 meeting”. I wonder whether you could be troubled to go back to that schedule of meetings Mr Massone and the President and other people to see whether there was any meeting on 3 April 2014 that is reflected because the date for this “big meeting” would have been 3 April since this email is on the 4th.

MR WILLIAMS: Chair, I must check the notes. I would have cross-referenced it.

CHAIRPERSON: Ja, okay, we – it can be checked for later. It could just be interesting.

MR WILLIAMS: Yes.

ADV FRANKLIN SC: Yes, if – just to direct the witness in order to answer the Chair’s enquiry. The tracker table is at page 306. On page 307, there is an indication of a meeting on the 3rd of April 2014 at the bottom of the page.

10 Do you see that?

MR WILLIAMS: That is correct Chair. I do see it. In fact, there it confirms what was discussed was the workshop with the Cabinet Ministers and the Central Procurement Agency. So cross-referenced.

CHAIRPERSON: Ja, okay.

ADV FRANKLIN SC: Thank you. Then, please, if I could ask you to look at AW-106, page 572?

MR WILLIAMS: [No audible reply]

20 **ADV FRANKLIN SC:** It is another email string. The first of those emails at the bottom of the page is from Mr Massone to Mr Beaumont and copying others, dated the 28th of August 2014.

And he says:

“Guys, just had a call and heard that the SARS announcement should happen tomorrow or

Monday.

Meeting later in the office to discuss also a procurement process, Fabrice, Stefano(?), how many teams do we have?...”

And then he continues. Then in the middle of the page is an email from Stefano(?) to Massone of being others, dated the 28th of August 2014.

10 “Vittorio, that is great news. The latest thinking was to start with one team, et cetera, for three months and do fundamentally two things.

1) Run a full operational/strategic assessment of SARS.

2) Assist Tom in starting properly his new role (direct CEO support work).

We will then be able, based on the operational/strategic assessment to build up a platform for a broader SARS Transformational Programme (6 to 12-months plan)...”

20 I am just pausing there. It would appear that Bain had received information that the SARS announcement was to take place in...

MR WILLIAMS: That is correct Chair. That is how I read the email.

ADV FRANKLIN SC: Could I ask you? At this stage was

this news public that Mr Moyane was going to be appointed as Commissioner?

MR WILLIAMS: In August of 2014, I do not think so Chair. I think it was announced in September of 2014.

ADV FRANKLIN SC: Alright. So it certainly was not in December of 2013, the document I took you to, or April of 2014?

MR WILLIAMS: That is correct Chair. It was not public who the new Commissioner would be.

10 **ADV FRANKLIN SC**: Could I ask you for your comment on the fact that Bain as a consulting company appear to have been privy to information about an appointment of the new Commissioner of SARS before the public of South Africa new about it?

MR WILLIAMS: Chair, I mean, I think that is highly unusual, I guess for anyone to know something that has not been announced publicly, something of this, the seniority of this person, the importance of the role. So I think for any of us to have known that, I would think, would
20 be problematic.

The fact that a management consulting firm – the fact that a non-South African management consulting firm staffed by non-South African seemed to this non-public information and access to it before any of us... I personally, as a South African, find it problematic and I

think in terms of normal business practice that that also seems strange to me.

You know, one could argue: Well, you know, maybe someone bringing a friend inside the presidency could have known but my understanding from this trail of events, it seems they had access to a channel of information into our public institutions where they go this information.

ADV FRANKLIN SC: Yes. Then, yesterday you made a
10 comment on one of the emails which I showed you and you said that it appeared that Bain had an insider at SARS who was providing information and you identified that person as Mr Jonas Makwakwa.

MR WILLIAMS: That is correct, Chair.

ADV FRANKLIN SC: Please would you look at paragraph 113, page 58 of your affidavit?

MR WILLIAMS: [No audible reply]

CHAIRPERSON: Of course, it is – I guess, you mean page 58 of the bundle?

20 **ADV FRANKLIN SC:** At page 58 of... Yes, indeed.

CHAIRPERSON: Ja, of the bundle.

ADV FRANKLIN SC: That is correct. I am sorry Chair.

CHAIRPERSON: Ja.

ADV FRANKLIN SC: And that is at page 58 of the bundle, appears paragraph 113 of your affidavit. Do you have

that?

MR WILLIAMS: I do, yes.

ADV FRANKLIN SC: Thank you. You say there that:

“The level of specifically with which Bain was able to offer action, guidance to Moyane would only be possible if access to inside information at SARS and as it turns out, this is exactly what happened.

10 Franzen indicates in an email to Kennedy on 3 September 2018, that Bain had multiple meetings with Jonas Makwakwa, Head of Internal Audit, SARS and that Makwakwa was at “deep throat” relying on information about events at SARS to Bain and Moyane...”

Now if I could just stop there. Would you turn, please, to AW-96, page 509?

MR WILLIAMS: [No audible reply]

CHAIRPERSON: Is that 509?

20 **ADV FRANKLIN SC:** Correct. That is an email dated 3 September 2018 from Mr Franzen to Steward Min and Chris Kennedy. Now this, of course, is at the time of the Bain Investigation and... the Baker McKinsey Investigation. Is that correct?

MR WILLIAMS: That is correct, Chair, and the Nugent Commission.

ADV FRANKLIN SC: Am I correct that this reflects information that have been uncovered by the investigation by Baker McKenzie on behalf of Bain?

MR WILLIAMS: That is correct, Chair. So ...[indistinct] had been asked to send the legal team his recollection of events and to this email he sent to them.

ADV FRANKLIN SC: Please look at the fourth bullet point. So Mr Franzen reports to these two members of Bain Legal:

10 “In 2014, Vittorio also had multiple meetings with Jonas Makwakwa the future Head of BIAT...”

Do you know what that is?

MR WILLIAMS: It is Business and Individual Tax.

ADV FRANKLIN SC: Is that at SARS?

MR WILLIAMS: At SARS. The largest unit within SARS in terms of tax portion(?), Chair.

ADV FRANKLIN SC: At that time, Head of Internal Audit at SARS. First bullet point:

20 “These meetings were with Vittorio, Moyane and Makwakwa.

They also happened in plain sight of the office...”

And then the second bullet point:

“As Vittorio indicated during witness

preparation, Makwakwa was playing the sort of
"deep throat" on events..."

I think that is meant to me.

"...happening at SARS and feeding into
Moyane..."

So that would appear to confirm what you have
said in your statement at 113. And your comment on Bain
having access into a state organisation via a "deep throat"
in preparation for an assignment there?

10 **MR WILLIAMS:** Chair, firstly. Bain had made it and
continuous to assert that all these materials prepared for
Mr Moyane, was based on public information. So it was
outside in the – call them out and in document. This all
public information and so that they were using to prepare
this document.

And as indicated yesterday, you can see from
some of the materials, it appears that there is actual
information no one outside of SARS could possible know
and so there was a case of specificity. And as we see from
20 these emails and one document we reviewed yesterday,
which is actually a document prepared by Mr Jonas
Makwakwa which was fed to Bain.

So it certainly – the first idea that Bain only
relied on public information, to me seems to be incorrect
because here is evidence that they had access to

information from the inside of SARS. Here we got Mr Fabrice Franzen who led Bain's operational project day-to-day at SARS saying that Mr Massone had met with Mr Makwakwa multiple times.

Here, Mr Massone said he only met Mr Makwakwa once in discussing personal matters. And this phrase "deep throat" which I find quite disturbing as well that in Mr Franzen's mind Mr Makwakwa was feeding information multiple times to Mr Moyane and to Bain.

10 Chair, the fact that and to the evidence leader's question. I am no legal expert but from my sense is, that someone, a senior executive in a public institution was feeding sensitive information to outsiders, to me, it is troubling.

I also understand that it is illegal to do that because of SARS. So I think, my interpretation of this is, that is – this is troublesome. This is worrying.

CHAIRPERSON: Ja.

ADV FRANKLIN SC: Well ...[intervenes]

20 **CHAIRPERSON:** I see that this email also reflects that they knew that Mr Makwakwa was the future Head of BAIT, which you say is Business and Individual Tax. Is that right? A section in – at SARS. Is that right?

MR WILLIAMS: Chair, I read it differently to that.

CHAIRPERSON: Oh.

MR WILLIAMS: I think he is writing with hindsight.

CHAIRPERSON: Oh, with hindsight.

MR WILLIAMS: He is writing with hindsight. So he is saying, Makwakwa, the person who would later become the Head of BAIT.

CHAIRPERSON: Oh. Well, if that is the inferences, this certainly change it to me because when you talk the future, the future is what will come after the day which you are talking. Mr Franklin, is that your understanding as well?

10 **ADV FRANKLIN SC:** Yes, I understand Chair but this is the Bain people writing in 2018.

CHAIRPERSON: Oh, yes.

ADV FRANKLIN SC: What they are reflecting ...[intervenes]

CHAIRPERSON: Yes, yes. Ja.

ADV FRANKLIN SC: ...is what the original position is held by Mr Makwakwa and what he ...[intervenes]

CHAIRPERSON: No, no. Ja, I think you are right. So he is talking about the person who would later become the
20 head of the section?

ADV FRANKLIN SC: Ja.

CHAIRPERSON: It is just way of putting it that may have been confusing.

ADV FRANKLIN SC: Yes. One has to keep an eye on the date ...[intervenes]

CHAIRPERSON: On the date, yes, ja.

ADV FRANKLIN SC: ...between what is the original email and what is produced in the Baker McKinsey Investigation, Chair.

CHAIRPERSON: Yes. No, no. I think the date solves it. Ja, okay.

ADV FRANKLIN SC: In your experience. What would be the normal source of information for a consulting company like Bain in relation to a potential future assignment?

10 **MR WILLIAMS:** Chair, it would be public information and it would be based on the experience of consultants who would have worked – who have worked at that organisation in the past. Even that is very sensitive, the latter. So if I worked at a client, I agree with the client that I have gained there is confidential.

So typically as a consultant, I would form a view, very high-level view of what my take-aways are rather than the details. But it would public information and it would be based on the consultant's experience in that organisation
20 or in that industry.

ADV FRANKLIN SC: Thank you. I would like to move on to another topic which is the tender procedure which preceded Bain's appointment.

Just to remind you of the dates. Mr Moyane was ultimately appointed as the new Commissioner on the

23rd of September 2014. SARS issued a request for proposals on the 12th of September 2014 and Bain was awarded its first contract assignment in January of 2015.

Against that background, could I ask you please to turn to Annexure AW-108 at page 580?

MR WILLIAMS: [No audible reply]

ADV FRANKLIN SC: Firstly, if you could look at page 581 which is part of the same annexure.

MR WILLIAMS: [No audible reply]

10 **ADV FRANKLIN SC:** This is an email from Marilyn Batonga from Baker McKinsey dated 22 November 2018 to, amongst others, you and the attachments are Project Arrow – the subject is Project Arrow Update. And there are various attachments including Project Arrow Review Stats and 2018.11.21 Index of Documents for Client review. Is this another one of the updates you received from Baker McKinsey regarding the progress of their investigation?

MR WILLIAMS: That is correct Chair. This was the way Baker McKinsey send updates. You just... ja, a way to
20 summarise about their progress and investigation.

ADV FRANKLIN SC: And what was Project Arrow?

MR WILLIAMS: So Project Arrow was Baker McKinsey's names for the investigation that Bain had to conduct into the work at the SARS and other SOE's.

ADV FRANKLIN SC: Alright. So this is much the same as

the tracker document scenario?

MR WILLIAMS: That is correct Chair.

ADV FRANKLIN SC: Please then turn back to page 580. That is headed: Project Arrow, Index of Key-Documents, Privileged and Confidential. And then there is some handwritten annotation. Can I direct your attention to the bottom block on the page? On the far left-hand side there is a date. It looks to be 25/092014.

MR WILLIAMS: That is correct Chair.

10 **ADV FRANKLIN SC**: And then it says under document: Diary entry in Franzen's calendar. And then it is s.rfp. And then in the far right column, additional comments, the following is said. Can I just before I read out that comment? Who is the author, as you understand it, who is making these comments?

MR WILLIAMS: This would be an investigator from Baker McKinsey, Chair.

ADV FRANKLIN SC: Alright. What is recorded by the investigator is:

20 "Franzen confirmed during his interview that he did in fact draft the "South African Revenue Service Strategy and Operations Review – Request for Proposal" dated October 2013..."
Do you know what document is being referred to there?

MR WILLIAMS: Chair, it appears that Mr Franzen had drafted the request for proposal that SARS would issue to proposals to do work at SARS.

ADV FRANKLIN SC: Would you please turn to page 574 which is AW-170?

MR WILLIAMS: [No audible reply]

ADV FRANKLIN SC: Is that the document which is referred to in the Strategy Review document that I referred you to earlier at AW-108?

10 **MR WILLIAMS:** That is correct Chair. That is how I understand it. This was the document that was referred to by Baker McKinsey's investigators.

CHAIRPERSON: And just for the sake of completeness. The document is... South African Revenue Services that would be an operation... Request for proposal, October 2014. [Speaker is not clear – voice very soft.]

ADV FRANKLIN SC: Thank you, Chair. So the Chair has read out the heading of the document at page 574. Could I ask you then to go to the content of that document and
20 would you, in summary, tell the Chair what it deals with, subject matter wise?

MR WILLIAMS: Chair, it is – the document describes quite a comprehensive organisational and strategy review of SARS and a redesign of SARS. So it talks – he talks – starts from – it describes the scope of work and

deliverables that starts with thinking and looking at SARS collection capability and how that can be improved. It talks about how SARS' operational performance can be enhanced.

It then – there is a section of SARS' infrastructure and how that can be improved. And it main draft as questions. So is the IT infrastructure adequate to sustain SARS in that context. And then there is a section on organisation and governance.

10 So my understanding of this document is. Well, firstly, it is something that you would expect SARS to draft not BAIN but it covers a broad spectrum of end-to-end almost of the things you would think about if you are going to restructure...

Let me take that back Chair. If you are going to think about massively and significantly improving the performance of an organisation. But of course, it also includes parts of thinking about SARS' structure.

ADV FRANKLIN SC: Alright. Can I take you back then to
20 paragraph 1, Context for a Request for Proposal? There is some background in the fourth paragraph it is said:

“In this context and in order to help the new Commissioner, frame the next of SARS transformation agenda.

The service it is considering the support of an

external third party consulting firm with the following three objectives...”

So it would appear that the document contemplates the appointment of an external consultant. Is that correct?

MR WILLIAMS: That is correct Chair.

ADV FRANKLIN SC: You have dealt in paragraph – with paragraph – the scope of works and the deliverables, then look at page 577, selection process and criteria.

10 “It is recorded this process will be a closed tender. This RFP has been to a selected list of consulting firms that are part of SARS consulting panel.”

And then it gives a number of characteristics or criteria of the consulting firms, as I understand it, that they must meet. Is that how you see it?

MR WILLIAMS: That is correct, Chair.

ADV FRANKLIN SC: And then at the bottom of the page a number of dates are given for the selection process, RFP issuance, that is in the future, Q & A session, proposal
20 submission date, engagement to start no later than 10 November 2014. Your comment on Bain appears on this document to be one of the potential consulting firms that might be appointed pursuant to a request for proposal process, your comment on it having drafted this request for proposal?

MR WILLIAMS: Chair, I find that again improper in two senses. One, it is anticompetitive that one of the potential consultants, among others, is able to draft the rules of the game effectively for they are going to be judged, so that is anticompetitive.

Again, secondly, problematic for me because we are dealing with public institution in SARS that SARS could allow Bain to draft this document which then guided the actual RFP which SARS had issues.

10 **CHAIRPERSON:** Well, it is interesting that that is what seems to have happened here because it is not the first time I hear evidence of that kind. I heard similar evidence in relation to allegations of corruption relating to BOSASA in its dealings with the Department of Correctional Services also where a potential service provider is allowed to basically prepare the request for proposal or the specifications [indistinct – dropping voice]. So, yes.

ADV FRANKLIN SC: Thank you, Chair. Following on the Chair's theme, would you look at AW109, page 583? This
20 is an email from Mr Massone to Mr Mehan dated the 18 November 2014 and I direct your attention to the second paragraph. Before I read that out do you know what the subject matter of this email is?

MR WILLIAMS: As I understand the context here, Chair, Bain was expecting to be doing work at Telkom or

expecting – yes, expecting to be doing work at Telkom and Mr Massone is trying to get his boss to I think strong-arm some of their colleagues around the world to send capabilities because Bain did not have the capabilities in South Africa to do the work that Telkom required.

ADV FRANKLIN SC: How do you discern from this email that it relates to Telkom? There is a reference to an RFP for that famous separation project is out and actually includes the national broadband plan. Is that...?

10 **MR WILLIAMS:** That is correct, Chair. Separation project was one of the projects that Bain had been expecting to come from Telkom and, of course, talking about broadband would be linked to a telecommunications company.

ADV FRANKLIN SC: Alright in that context of a Telkom request for proposal, I direct your attention to paragraph 2 which says:

20 “As much as it is “designed for us” (and allowing for a piece of work to be done by the Deloitte regulatory team) we need to make sure they feel comfortable with TM and our expertise (and we know that we cannot claim to have done much on this specific topic)”

The reference to designed for us, what do you understand that to convey?

MR WILLIAMS: Chair, I understand that to be that this

RFP for work to be done at Telkom, Bain described as that RFP was designed for Bain and so again, this idea of Bain influencing RFPs from public institutions seem to have been fairly widespread. I think also relayed to that, this idea – you know, organisations hire management consultants for their particular expertise because organisations have people who should be running their businesses. Here you go outside when you want some particular expertise and here you have Bain admitting they
10 do not have that expertise and so they are trying to find it somewhere else in the Bain system because, like he says, and my understanding is, “as much it is designed for us” meaning we are almost assured that we are going to get this work but just to kind of show that we have got some people who know something about telecommunications or broadband.

ADV FRANKLIN SC: Right, then please go to paragraph 128 on page 64 of this bundle. What you have done is to collect together various examples highlighting the
20 engagements between SARS and Bain around procurement, is that correct?

MR WILLIAMS: That is correct, Chair.

ADV FRANKLIN SC: Going to the first subparagraph you refer to an email of – sorry, it is AW112 at page 590. So if you could just keep your finger at paragraph 128 but turn

to page 590 and there is a request at the bottom of the page from Ms Mogopo Diyoka (?), dated 2 December 2014 and she asks Mr Massone as follows:

“Hi Vittorio, just a note to request any current public entity relationships and references you have.”

That is a request for information at a time prior to the RFP having been issued, is that correct?

MR WILLIAMS: That is correct, Chair. You would
10 typically ask for references, even a higher organisation so that you can speak to others who have worked with them to just establish their credentials.

ADV FRANKLIN SC: Right. Then in 128.2 on page 64 you make reference to an email of the 4 December 2014 which is the next annexure AW113 at page 592. Again an email string. I direct your attention firstly to the bottom of the page, Massone’s email to Mr Sipho Maseka dated the 4 December 2014 and what Mr Massone says in the second paragraph:

20 “I received a call from SARS (the Acting COO) who told me that they would like to use Telkom’s contract to give a mandate to Bain. Apparently law (or practice) says that they can piggyback another SOE. This will enable an immediate start avoiding long and complicated tender processes.”

Stopping there, do you understand the reference to piggybacking on Telkom?

MR WILLIAMS: Chair, not an area of my expertise but I do understand that there are provisions among – for state entities that if once that entity has a contract with a provider, another state entity can piggyback on that contract to procure services from that provider. So I think this was - the attempt here is to piggyback off Telkom's contract for SARS.

10 **ADV FRANKLIN SC:** Yes, as it turns out was that method used?

MR WILLIAMS: Chair, it was not used, it was determined by, in fact, Mr Maseko's and Telkom people say that piggyback arrangement is not appropriate or is not – it is applicable to Telkom so SARS could not use that avenue.

ADV FRANKLIN SC: As it transpires, Bain were awarded their first contract in January of 2015. Could I ask you please to go to AW130 at page 630? That is a document which is headed:

20 "The Bain Team brings considerable experience and expertise to the table."

Do you know what this document's purpose is and who it was sent to?

MR WILLIAMS: Mr Chair, this document would have been part of Bain's submission to SARS in response to the RFP

and so this is Bain demonstrating or apparently trying to demonstrate their expertise that might be applicable to the work at SARS.

ADV FRANKLIN SC: Alright, if we look at the members of the team who are reflected here, we have Mr Massone, Mr Franzen and Neville Eisenberg and then a Mr Bour, who have heard of before. Do you know those gentlemen?

MR WILLIAMS: I know the first two, Mr Massone and Mr Franzen, I have not met the other two, the last two.

10 **ADV FRANKLIN SC:** Are you able to comment on the expertise and appropriateness of this team in relation to an assignment to a country's revenue collecting authority, SARS?

MR WILLIAMS: Chair, when you conduct a consulting project, the main source of the expertise on the consultant team derives from the partners on most senior people in the team. So if I am looking to hire a consulting team I would look at their partners first and so I would be looking at Mr Massone and Mr Franzen to see what expertise do
20 they have working with tax authorities around the world, in Africa or actually at SARS. And if you look at the expertise of Mr Massone and Mr Franzen there is no apparent expertise of working in tax agencies anywhere. My understanding of Mr Massone's expertise is in telecommunications, my understanding of Mr Franzen is in

financial services but mainly in banking, that is not tax authority expertise.

ADV FRANKLIN SC: Alright, I wish to take you out of bundle SARS 01 for a moment and ask you to look at SARS bundle 03. Do you have that?

MR WILLIAMS: I do, Chair.

ADV FRANKLIN SC: Thank you, please look at page 196 of SARS03.

CHAIRPERSON: Is that 196?

10 **ADV FRANKLIN SC:** Correct. Mr Williams, that is an affidavit deposed to by Ms Diyorka on the 16 February 2021. You have seen that document?

MR WILLIAMS: I have, Chair.

ADV FRANKLIN SC: You will recall that Ms Diyorka is the person who asked for references in AW112.

MR WILLIAMS: That is correct, Chair.

ADV FRANKLIN SC: And she was at the time SARS' executive – from SARS' executive procurement department.

MR WILLIAMS: That is correct.

20 **ADV FRANKLIN SC:** I just want to put this affidavit to you because Ms Diyorka has set out her version of events specifically in relation to paragraph 128.1 of your statement and the essence of Ms Diyorka's intention is that she denies any irregularity in relation to having asked for the references that are referred to in her email. If you

could just read the affidavit to yourself and please give the Chair such comment as you have.

MR WILLIAMS: Chair, what Ms Diyorka says, she is referring to a paragraph in my affidavit. So in my affidavit I say it seems problematic that Ms Diyorka sought references from Bain even before the RFP process had begun, even before SARS issued the RFP, she was already seeking references from Bain so why would she be seeking references from Bain if the RFP had not even started and
10 that was a statement in my affidavit. Her response is that she makes no reference to the RFP process in her email to Bain. So she discounts my reference to an RFP process and she is actually right, she makes no reference to RFP process in her email. It does not change the fact that she is still asking a service provider for references and her explanation is that she was actually asking for references because they were still busy pursuing the piggyback avenue. So she does not deny, in my understanding that she sought these references for procurement purposes.

20 **CHAIRPERSON:** It has to be so, on her own version.

MR WILLIAMS: Absolutely.

CHAIRPERSON: Yes.

MR WILLIAMS: And she does say she was – yes, she does not deny it was for procurement purposes. It still raises the question of why would SARS be seeking

references from Bain before work had been done or any tender process or contracting process had begun. It seems that they already decided as early as 2 December 2014 that Bain would be their consultant.

ADV FRANKLIN SC: Alright, thank you. In a word is there anything you wish to change in relation to what you have said in paragraph 128.1 having read Ms Diyorka's affidavit?

MR WILLIAMS: Chair, the essence of the paragraph
10 would not change which was that it appears SARS had already decided that they were going to procure services from Bain for this restructuring work. I make reference to the RFP process but obviously there was a channel being sought even before the RFP process trying to get Bain in as the consultants.

ADV FRANKLIN SC: Alright, could I then take you back to 128 in SARS bundle 01 which is where we were before we deviated to Ms Diyorka's affidavit. What you have done ...[intervenes]

20 **CHAIRPERSON:** Are we going back to his affidavit?

ADV FRANKLIN SC: That is correct, Chair.

CHAIRPERSON: Okay.

ADV FRANKLIN SC: You have set out a chronological list of various interactions relating to procurement.

CHAIRPERSON: What was the page?

ADV FRANKLIN SC: 64.

CHAIRPERSON: 64, okay. Thank you.

ADV FRANKLIN SC: And you can confirm there were various phases to the Bain assignment at SARS.

MR WILLIAMS: That is correct, Chair.

ADV FRANKLIN SC: Alright, please look at 128.3 where you say that on 12 March 2015:

“Massone sent an internal mail to colleagues informing them that Jonas at SARS...”

10 Presumably Makwakwa.

“...informs him that Moyane met with SARS’ procurement department and that he does not see problem.”

And this is a reference to AW116. What do you make of that and do you know what context it being referred to here?

MR WILLIAMS: Chair, it might be, if I may, to perhaps take a small step back just to describe the overall procurement process, if I may?

20 **ADV FRANKLIN SC:** Okay.

MR WILLIAMS: There was – so the RFP that SARS issued in December 2014, that is the RFP that Bain and other consulting firms responded to. That was for a six week piece of work which they referred to as the diagnostic and the Bid Adjudication Committee at SARS expressed

some discomfort with parts of Bain's proposal – and I have seen this from submissions to the Nugent Commission, which are public, but they go ahead and agree that Bain can be appointed but they make it very clear, they stipulate that if there is any additional work SARS must go back to the market to open tender and so that is that first piece of work, that six week piece of work which started in January 2015 and by the time we get to this stage, March 2015, that piece of work ended.

10 So now the emails and the discussions are from Bain's side how are we going to extend this and we know that Bain ends up working at SARS for 27 months having only even been awarded a contract for six weeks. This contract was awarded for 2 point something million rand and at the end they were paid R164 million.

 So I was very interested to understand what changed from being awarded a six week contract to working for 27 months and an email like this that in paragraph 128.3 gives us some indication of what was
 20 happening inside SARS because it indicates that the Commissioner had gone to speak to the procurement people within SARS. Now I have never worked at SARS, I actually have not worked at any government entities but my understanding again is of the PFMA and how procurement rules work is the procurement department and the legal

teams makes those decisions of procurement. You would have not the Commissioner going in and intervening in a procurement step.

So here is an email from Makwakwa to Bain saying do not worry about this extension, we are going to make a plan because the Commissioner has gone to see procurement.

ADV FRANKLIN SC: Right, then AW117 on page 600 which is an email from Mr Eisenberg to Massone dated 13
10 March 2015.

MR WILLIAMS: Sorry, what page?

ADV FRANKLIN SC: It is 600.

MR WILLIAMS: And then Mr Eisenberg says to Mr Massone:

“Spoke to Jonas. Here is the situation on procurement:

- They have to run the procurement process for phase 2, in particular they feel need to be bullet proof. Jonas mentioned they received some
20 letters of complaint already from some of the losers of the original process. They believe it will take four to six weeks. In the meantime they want to run two of four streams as an extension of phase 1 org stream and RDO setup but not collection full potential or network of the

future/process involvement.”

Are you able to shed light on what is being discussed there?

CHAIRPERSON: I am trying from my side, Mr Franklin, to see where you are reading at 600.

ADV FRANKLIN SC: I am sorry, there is an opening paragraph:

“Spoke to Jonas.”

CHAIRPERSON: Yes.

10 **ADV FRANKLIN SC:** Then there is a first bullet point.

CHAIRPERSON: Oh, okay.

ADV FRANKLIN SC: Second and third. I read the first three bullet points.

CHAIRPERSON: Thank you.

MR WILLIAMS: Chair, my interpretation of the email, I think two points jump out for me. The one is that SARS is now telling Bain, look, we cannot – we have to run a public procurement process if we are going to go into phase 2 to continue the work.

20 But secondly, what they seem to have done and become quite clever, they have now said – because the first contract was what they called phase one, the six week contract. They are now between Bain and SARS, say well, actually, there is phase 1A and phase 1B and so we are not extending the contract, it is not phase 2 but we are doing

this phase 1B and so we are still covered by the initial contract and so they want us – so here you are saying SARS want us to run two of our four work streams, so continue the work as an extension of phase 1 because it is now phase 1B.

ADV FRANKLIN SC: Alright, then AW118 page 602 is a further email from Mr Eisenberg to Mr Massone dated 19 March 2015. Do you have that? And he says:

10 “Ronald just called to inform me that they have decided they need to run an open tender process and that no extension is going to be possible. They still aim to be ready to start with the successful provider by May 1st and he said they still hope that we are the winning bidder.”

So it would appear that they came to a realisation that they would have to run a tender process, is that how you understand this?

MR WILLIAMS: That is how I understand it, Chair, which again the fact that there are SARS executives all just
20 trying to not make this an open tender process, immediately just a natural thinking to be doing. We had the six week contract, it is done, the understanding was we need to go back into the market for tender process, there should not be a debate about it. So the fact that the back and forth is going on to try and avoid it already for me is

problematic but it seems now they have told by their legal team or procurement team they have to go to the market in open tender but still indicating that still like Bain would be the winner. Open tender process does not have a preferred winner, as I understand them.

ADV FRANKLIN SC: Then AW119 page 604, from Mr Massone to Franzen and others dated 1 April 2015, seems we are see-sawing back and forth because now what is written is the following:

10 “Spoke with Jonas at SARS now, they might have found a way to legally resume work without tender process. Commissioner needs to make a final call but we should be ready to restart for phase 2 by mid-April.”

Is that your understanding that there is now an attempt to engage Bain for another phase without a tender process?

MR WILLIAMS: That is correct, Chair, so again indication of this internal battle going on and I imagine it is executives going to the procurement team trying to find
20 ways to move them and they seem to have found a legal way to have done that.

ADV FRANKLIN SC: Then AW120 at page 606, Mr Bour writes to Massone and other on the 9 April 2015 and deals with procurement process in the first part of that email. Do you see that?

MR WILLIAMS: I do.

ADV FRANKLIN SC: And he says in the second bullet point:

“Jonas does not anticipate any issue, he said “there is one person that is making some noise but he is not even a voting member”, they have had legal advice and it is okay to go through without an RFP. He said we should be “ready to run” when the decision is made.”

10 Your understanding of what stage the parties are at by 9 April?

MR WILLIAMS: chair, it does seem that they have now found this “legal way” to move to proceed without going to the market, without going to the RFP. Chair, if I may, Adv Franklin will guide me.

ADV FRANKLIN SC: Yes.

MR WILLIAMS: I have got some understanding based on reviewing the transcripts and submissions to the Nugent Commission by National Treasury, Mr Solly Tshitangano of
20 what was happening behind the scenes and, if relevant, I can share that.

CHAIRPERSON: Ja.

MR WILLIAMS: So this legal way that they seem to have found was for SARS to declare this Bain project in emergency and in fact they invoked some rule that says

you can extend the contract if it is an emergency, one. Or, if it is single source.

So if there is only one company in the country that can provide these services, you are allowed to then extend it and my interpretation is neither was this an emergency, restructuring SARS, no one will be saying SARS drastically urgently need to be restructured or that Bain was the only organisation in the country who could do that. But that I understand from Mr Tshitangano's testimony was what this
10 legal route was.

ADV FRANKLIN SC: Thank you. And then AW121, page 608, an email from Mr Bour to Mr Massone on the 9 June 2016. Do you know what phase had been reached by this stage, 2016?

MR WILLIAMS: So, Chair, this is now over a year later from the discussion we have just been having. So this is the third phase of Bain's work. So initial six weeks, then they got 2.6 million, then they got this emergency extension for a year and a bit and that they charged 150
20 million and the now they come to end of that second phase and now the question – the problem arises again of who they are going to extend it one more time without going to the market.

In fact Mr Massone writes an internal email that says we cannot go the market because if we do go the

market, we know we will lose. So we have to continue here, we have to find a way of extending this contract it cannot be to go to the market, it cannot be to a competitive tender process.

So this email is now more updates on discussions between Bain and SARS around extending this contract.

ADV FRANKLIN SC: Could I direct your attention to the piece under the heading:

“Feedback from Ronald.

10 Said that we should not ... the procurement/legal process, they still need to provide feedback to him and Jed on the way forward but if they cannot formally extend the contract they will copy/paste the information in a new agreement. This will not need to go through the typical process with RFB, Matsebani said there would be a deviation justified as in phase 2 [the difference of phase 2 is that they have all the documents ready].”

20 So your understanding of the way in which the next phase was dealt with?

MR WILLIAMS: Chair so firstly it confirms that they figured out some way of justifying a deviation in phase 2. Now for phase 3 this reference to Jed, I will not be able to say his surname, but that Jed was the head of the customs part of SARS. And so the three phases of work had started

with phase 1 was focused on SARS structure and operating model, phase 2 was SARS structure and operating model and begun to do work on customs.

And then phase 3 was going to be almost entirely work on customs. So that is the relevance of them saying Jed seems to be, you know support this going forward. But how they then did this was very creatively again, of saying we cannot go back to the emergency argument or the single source argument.

10 The argument now was, if we do not do phase 3, then phase 1 and phase 2 would become meaningless. It would have no impact on SARS and in fact, it would render that as wasteful expenditure, and so our hands are tied, we have to do phase 3 otherwise, we have wasted money during phase 1 and 2. There might be many arguments why that does not hold water but one is like I just described, phase 3 was focused on the customs.

20 So even if they did not do phase 3, the work done in phase 1 and 2 on the overall SARS structured operating model would not have had zero impact. So it would not have been wasteful expenditure but that was according to again, National Treasury, the argument Bain put forward and Mr Chitten Garo[?] says, National Treasury found their hands tied because they did not want to have this wasteful expenditure.

ADV FRANKLIN SC: Thank you, so, just to summarise on this aspect, was there ever an open tender process that was run as far as you know, in relation to phases 2 and following?

MR SYMINGTON: No, Chair, there was no open tender process run.

ADV FRANKLIN SC: Chair, I am about to move on to another topic, I do not know if that is a convenient time to take the adjournment?

10 **CHAIRPERSON:** Well you have still about four minutes we could either use that or we could adjourn now, I guess your indication is that you prefer that we will adjourn now.

ADV FRANKLIN SC: Thank you.

CHAIRPERSON: Okay we will adjourn now; we will resume at 25 past 11.

ADV FRANKLIN SC: Thank you.

CHAIRPERSON: We adjourn.

REGISTRAR: All rise.

INQUIRY ADJOURNS

20 **INQUIRY RESUMES**

CHAIRPERSON: Okay let us continue.

ADV FRANKLIN SC: Thank you Chair. Mr Williams we know that of course Bain proceeded to do work at SARS and Mr Moyane was he commissioner. I would like to just highlight certain aspects of the execution of that mandate and in

particular just refer you to what has been dealt with in detail by the Nugent Commission that is the resignation or termination of a number of senior people.

Firstly would you look at AW95 please.

CHAIRPERSON: Which is that page?

ADV FRANKLIN SC: That is at page 5 – 507 Chair.

CHAIRPERSON: 507.

ADV FRANKLIN SC: In the middle of the page Mr Franzen writes to Mr Massone the subject is Alert SARS and the date
10 is 3 December 2014 and he says:

“Good bye Barry Hore...”

And then the response is Massone to Franzen of the same date:

“Now I am scared by Tom. This guy was supposed to be untouchable and it took Tom just a few weeks to make him resign, Scary.”

Firstly who is Barry Hore?

MR WILLIAMS: Mr Chair Barry Hore was the Chief Operating Officer of SARS. His name was mentioned in one
20 of the documents that Bain prepared for Mr Moyane saying Test BH the COO and so the idea was test Barry Hore. And my sense is the test was not for his technical or business skills.

ADV FRANKLIN SC: Your reference to test Barry Hore that is from the 100 day TM Plan?

MR WILLIAMS: That is correct Chair.

ADV FRANKLIN SC: Yes and then just the comment on the tone of the interchange between the two Bain people?

MR WILLIAMS: It is – so – so Mr Barry Hore had a reputation of being quite a tough guy. He had been brought to SARS from Nedbank at Nedbank he was Head of Technology for Nedbank and I think it was Minister Pravin Gordhan who brought him to SARS at the very early stages of the modernisation program to build this IT capability. So
10 his – my understanding of Mr Barry Hore is seen as very credible in terms of IT and building IT systems and also quite a tough guy and so the idea that they are now seemingly or joking saying goodbye Barry or Mr Massone saying this guy I read it to be meaning Mr Hore.

This guy was supposedly untouchable but it was after a few weeks Mr Moyane was able to get him to resign. So in my sense was that all he said we were going to test Mr Hore and this seems to have been the resolution that Mr Hore was not going to part of the future – that he has gone and so
20 goodbye Mr Barry Hore in almost a joking way.

CHAIRPERSON: You might or might not be able to answer this question and in which case you can say that you are not able to. Would it be fair – or let me ask it this way. Do you think there is a connection between Mr Hore's departure from SARS with what Bain said or somebody from Bain said

in one of the emails you looked t yesterday where they were talking about Mr Moyane having to neutralise certain people. I cannot remember what the other word was but I remember...

MR WILLIAMS: Watch out.

CHAIRPERSON: Watch out yes. Are you able to say anything or you are not able to say anything?

MR WILLIAMS: Chair I think the Bain document answered that question because on the slide of the page right before
10 that document where they describe the watch outs and the neutralise it is on that page where they say test Barry Hore and so for me it was – he was probably...

CHAIRPERSON: Oh they specify him.

MR WILLIAMS: Him only.

CHAIRPERSON: Yes.

MR WILLIAMS: Yes. So they describe the neutralise watch out process in general.

CHAIRPERSON: Ja.

MR WILLIAMS: So they say hey you can go in there do this
20 you know label the watch outs, label the neutralised guys.

CHAIRPERSON: Yes.

MR WILLIAMS: But with 00:05:10 of that there is going to be specific guy you must watch out for and test and this is Barry Hore.

CHAIRPERSON: Okay. Mr Franklin.

MR WILLIAMS: Mr Franklin apologies Chair if I can just add just again part of the relevance of Mr Barry Hore he had 70% of Star – of SARS staff – 70% of the operations reporting to him so he was the key guy who made SARS function.

ADV FRANKLIN SC: Yes just so that it is clear for the Chair if we could go back briefly to the TM first 100 days document which is at page 492 and is AW92. Please look at the second page 493 are those the references that you have
10 been making? Let us look at the top right hand side of the page under the heading Keep the Ball Rolling the fifth bullet point Testing BH is that what you talking about?

MR WILLIAMS: I cannot see it. So page 493

ADV FRANKLIN SC: Yes.

MR WILLIAMS: Take Control.

ADV FRANKLIN SC: Under the heading Keep the Ball Rolling.

MR WILLIAMS: Oh that is correct Chair. So page 493 the column Keep the Ball Rolling the very last point there is
20 testing BH and assessing performance at different components of COO perimeter.

CHAIRPERSON: Okay. And but CA – BH was not COO is that correct or was he?

MR WILLIAMS: He was the COO.

CHAIRPERSON: He was the COO. Okay.

MR WILLIAMS: Ja.

CHAIRPERSON: Okay.

MR WILLIAMS: And later we know that Mr Jonas Makwakwa becomes the COO.

CHAIRPERSON: Hm okay.

ADV FRANKLIN SC: And then just to complete it at the bottom of the page the last bullet point under the heading Build a Healthy Sponsorship Spine to Accelerate Change and Individual – sorry and identify individuals to neutralise the
10 last bullet point is Identify individuals that could hamper change – watch out – to neutralise. That is what you were referring to?

MR WILLIAMS: That is correct Chair.

ADV FRANKLIN SC: Alright then just in relation...

CHAIRPERSON: Thank you Mr Franklin.

ADV FRANKLIN SC: Sorry.

CHAIRPERSON: Thank you Mr Franklin.

ADV FRANKLIN SC: Thank you. Just in relation to the climate at SARS once Mr Moyane had taken over did you
20 have occasion to speak to Bain colleagues who were there at the time 2014/2015?

MR WILLIAMS: I was Chair especially during my oversight period in 2018 I was able to also engage with Bain staff many of them came to me wanting to tell their experience of what happened when they were at SARS. Many of them in

my mind traumatised by what happened at SARS.

ADV FRANKLIN SC: Alright let me just take you to a couple of annexures in that regard. Would you look firstly at AW27 page 621? In the middle of the page we have an email from Bain investigation was that a general email address that relevant people were part of?

MR WILLIAMS: This was the email that Baker and McKenzie used to give the Bain investigation updates it was their email address.

10 **ADV FRANKLIN SC:** Right it is dated the 18th of December 2018 so this is during the Baker McKenzie investigation and Baker McKenzie say the following:

“I wanted to bring the whistle blower email
below to your attention.”

Now just before we get to that – that email you see the person whose name it is – have you had any communication with that person and indicated whether they are concerned or not to have their name revealed?

MR WILLIAMS: Chair I had never met this person but I sent
20 her an email and asked her firstly told her I would like to include her testimony or her feedback in my affidavit would that be okay with her and she gave me her permission to include her name and her – her testimony.

ADV FRANKLIN SC: Alright so this person sends an email dated the 18th of December 2018 to the Bain investigation

team and she says:

“Dear Baker McKenzie team and indicates on page 622 that she was a former Bain employee over the period 2015 to 2018. She says although primarily based in Washington DC during her Bain tenure she spent September 2016 through April 2018 in the Johannesburg office and she was staffed to a SARS case from September 2016 through to early February 2017 while she was a second year consultant.”

Just looking at the third paragraph she sets out what her experience was like during that assignment is that correct?

MR WILLIAMS: That is correct Chair.

ADV FRANKLIN SC: And could you highlight for the Chair the features that she had communicated to the Baker McKenzie team?

MR WILLIAMS: Chair this consultant firstly because I often refer to them as junior consultants as a partner junior consultant by that – my measure but yes she has got undergraduate degree, she has got a Master’s Degree from the Wharton School, an MBA from Wharton School so a highly educated, highly accomplished person and she describes in detail her awful experience being a Bain

consultant working on the SARS project.

“She says almost immediately a – it was apparent to me that we were not in fact creating any value for the client and that the clients were largely uninterested in us. In another part she says our work there was effectively a sham. Somebody is – sorry something was simply not quite right. I tried to communicate this to management meaning her Bain superiors and she mentions those who she communicated this to. But the work they were doing was unethical she says and I felt my personal ethics were being compromised by the position I was put in while serving on this project. I shared this concern with a partner in Washington DC and again twice she shared her concern with a partner in Washington DC and I requested to be removed from the project in January 2017.”

And just lastly the last comment

Her view is – ja she had this awful experience she did not just keep it to herself she shared it with senior people in Bain and was dismissed.

“I told my supervisors that something

was not right and I told the partner that something was not right and I was brushed aside. My complaints were dismissed.”

ADV FRANKLIN SC: Alright in similar vein would you turn over the page to page to AW128 page 624 there is another email which is addressed to Bain Investigation 5 November 2018 and that is another one that was brought to your attention, is that correct?

MR WILLIAMS: That is correct Chair.

10 **ADV FRANKLIN SC:** Now this particular person and you indicated to the Chair whether this person is aware of and is happy to have their name revealed.

MR WILLIAMS: Chair despite what Bain says in their affidavit I do have this person’s permission as well to present his – his opinions and feedback.

ADV FRANKLIN SC: Alright so what this particular person says at page 624 at the bottom of the page he indicates he was a Bain employee from November 2015 to August 2016 and for the duration of that time he was 100% assigned to
20 the SARS case and worked on three work streams and he then identifies what those work streams were and over the page at 625 he gives the Bain team a – an indication of what it was like to work at SARS and once again could I ask you to highlight those observations that are relevant to and understanding of what the climate was at SARS at this time?

MR WILLIAMS: Chair again this – this consultant highly accomplished a degree from UCT and a Master’s Degree from Insead so I have referred to him as junior but again he is an accomplished person. He says

“The SARS staff were highly sceptical of our presence at the offices.”

He describes that one of his tasks on the team was to share media reports – media articles with the Bain team of what was happening at SARS. And then the moment
10 negative stories started coming out like the rogue unit and other things happening at SARS he was told to stop doing that. To selectively share the news articles within the Bain team. But he goes on to say that:

“Senior management resistance was obvious referring to SARS senior management. The SARS senior management resistance was obvious through the organisation work. This was the restructuring work but again the perspective was landed upon me that we
20 were to – was to power through and get it done.”

It is this idea that despite SARS senior management being resistant to Bain’s work the Bain team were told to power through and just to get the work done.

And then just lastly one of his comments:

“What does stand out for me was the arrogance with which the Moyane, Zuma, Bain links were dismissed.”

And I think he is referring to the media articles were saying there is obviously a link between Moyane, Zuma and Bain and within Bain he is saying the arrogance with which they dismissed this link and the general acceptance that came from the floor in the team as the project grew evermore work streams.

10 The feeling that we were smarter than them and we will have our facts ready if they come for us was one definitely felt throughout the team in his time at Bain. He says; I also felt leadership were dismissive of the reports when they first surfaced at the end of 2015.”

ADV FRANKLIN SC: Just for the record are you referring there to the second last paragraph on page 625?

MR WILLIAMS: That is correct Chair.

ADV FRANKLIN SC: Alright I would like to take you now to certain press releases which were issued by Bain in the
20 course of the Nugent Commission workings. Would you first please go to AW3 at page 125. I think you identified that earlier as being a Bain statement that was sent to the Bain team so that was an internal document, is that correct?

MR WILLIAMS: That is correct Chair it was sent to the Bain team and Bain’s alumni.

ADV FRANKLIN SC: And you had – you had commented that – that the statement trivialised the real impact on Bain Alumni, is that right?

MR WILLIAMS: That is correct Chair.

ADV FRANKLIN SC: But then please look at AW6 at page 132 is that a Bain press statement that was issued to the public in general it appears on or about 2 September 2018?

MR WILLIAMS: That is correct Chair it was a public statement presented by Bain.

10 **ADV FRANKLIN SC:** Alright this takes us back to the beginning of your testimony and the reason for your appointment but we did not highlight what was said by Bain so in the first paragraph it is recorded that:

20 “In light of new questions being raised during last week’s testimony before the SARS Commission of Inquiry and from media inquiries Bain and Company is now undertaking a deep and extensive investigation led by our global leadership and external counsel into all matters relating to our work with SARS. We want to be absolutely certain that we entered into our SARS engagement in full compliance of applicable procurement laws and that our investigations findings are accurate and

unassailable.”

And then the second paragraph just the first sentence.

“We want to be completely open and transparent as we believe that is what the people of South Africa deserve.”

Could I then take you to the fourth paragraph where the following is said:

10 “We have listened with concern to the testimonies of SARS employees who feel they have been mistreated and disrespected at their frustration and pain and the consequences this has had on the lives of these individuals and their family – families. We are dismayed by the way our work has been used to further a different agenda than was intended. In our recommendations there was no need for any layoffs or terminations. This did not turn out to be the reality when
20 the model was implemented. We are deeply sorry for how this turned out we wish we had known then what we know – oh sorry what we do now.”

If I could then ask you to look at AW10 page 142. This is a further press statement dated the 10th of September

AW10 page 142, do you have it?

MR WILLIAMS: I do Chair.

ADV FRANKLIN SC: The second and third paragraphs are as follows:

10 “To understand what happened we launched
an independent investigation led by the
global law firm Baker McKinsey. The
investigation is focussing on understanding
the facts relating to people processes and
governance that related in us getting and
accepting the work. Our own internal review
established that our engagement with SARS
did not meet our standards for delivery of
sustainable positive results for our clients.
We do not want to benefit from work that was
used to further a different agenda than was
intended.”

20 Just pausing there. There have been a couple of
references to a different agenda do you know what that is a
reference to?

MR WILLIAMS: Chair my understanding of that reference is
Bain is asserting that they went into SARS with complete
legitimate and wholesome intent and they were unwitting
participants in some agenda to damage SARS and so while
by their version yes they were there at SARS while this was

all happening it was completely without their knowledge and so apparently expressing regret for having been there when this was all going on.

ADV FRANKLIN SC: Then there is a further press release which is at AW45 page 252. We have looked at it briefly before. This is 17 December I presume 2018. You have that?

MR WILLIAMS: Yes I do and it is 2018.

ADV FRANKLIN SC: Alright if I could just take you to some
10 of the paragraphs the first is:

“The past few months have been a highly challenging and sobering period for Bain South Africa and Bain Globally through public testimony and documents submitted at the Commission of Inquiry head by Judge Nugent it has become painfully evidence that the firms involvement with the South African Revenue Services SARS was a serious failure for South Africa for SARS and clearly
20 for Bain too. The Commission’s hearings and the final report published last week have laid bare the disarray in which SARS now finds itself with both morale and performance severely damaged.”

CHAIRPERSON: Mr Franklin you left me at 142.

ADV FRANKLIN SC: I am sorry. This is page 252.

CHAIRPERSON: 252?

ADV FRANKLIN SC: Correct and that is Annexure AW45.

CHAIRPERSON: Okay I have got it but I did listen as you were reading.

ADV FRANKLIN SC: Thank you. So there appears in those first two paragraphs to be an acknowledgment that things went wrong. On this right hand side of the page you will see what Bain writes is that:

10 “We clearly made significant errors of judgment on taking on this work.”

 And then in the third paragraph:

 “We accept that through various lapses in leadership and governance Bain became an unwitting participant in a process that inflicted serious damage upon SARS.”

 Just your comment about errors of judgment and being unwitting participants?

20 **MR WILLIAMS:** Chair on my read of the multiple emails that indicate that Bain knew about Mr Moyane’s appointment coming, on the nature of the content of the materials that Bain had presented and prepared for and with Mr Moyane, the way that procurement process worked which seemed obviously to be irregular.

 All of this indicates to me that Bain did not arrive at

SARS as unwitting participants. In fact it appears to me on the reading of those facts that Bain arrived at SARS as apparently Mr Moyane did with the restructuring agenda.

It was designed months before either of those parties arrived because it is there in the documents. The TM 100 days and the previous document at SARS 2.0 documents lay out the plan for restructuring. So to say that they arrived and they shocked by what happened and they were unwitting participants for me just does not accord with what the
10 evidence I have seen.

ADV FRANKLIN SC: As part of your oversight function you were concerned to ensure that all material information was placed before the Nugent Commission, is that right?

MR WILLIAMS: That is correct Chair.

ADV FRANKLIN SC: We know that Mr Massone testified and we know that Mr Min testified apart from those two did any other Bain employees testify?

MR WILLIAMS: Chair Judge Nugent invited Bain to present any witnesses they wanted to. In fact he created a whole day
20 during the Nugent Commission for Bain to send any witnesses and no one – and Bain declined that invitation.

ADV FRANKLIN SC: Please look at your affidavit at paragraph 158 page 75. There you have said that:

“It was clear to Bain who the Nugent
Commission would be interested in speaking

to as witnesses.”

And you have referenced an email from Mr Kennedy on the 28th of September 2018. Did Mr Kennedy identify people who would be of interest to the commission in his view?

MR WILLIAMS: Chair Mr Kennedy does and Mr Kennedy was leading from the Bain’s legal standpoint and he identifies in this email what he – who he thinks the Nugent Commission might be interested in speaking to and he
10 names them as Fabrice Franzen which makes sense because he headed up the Bain project and ran the day to day operations and he identifies Stephane Timpano who we know had drafted many of the materials that Bain had presented to Mr Moyane and to the President.

Because this is relevant because Bain – the – the narrative Bain advances is that only Mr Massone knew what was going on and he was now gone so there is nobody could know what happened. But it is interesting that they identified people internally who could have added – shed
20 light on what happened.

ADV FRANKLIN SC: Would you look please at AW143 page 664. In the second half of the email string you will see one from Mr Kennedy to Mr Min dated 3 October 2018 and he says:

“Just thought I would give you the key points

from the call. He says Athol's list of additional witnesses does make sense in the context of DOJ."

Now I am just stopping there. What is Athol's list of additional witnesses?

MR WILLIAMS: Chair Baker McKinsey had prepared a list of Bain employees who would have got an interview to gather additional information as part of their investigation. And when I saw that list it seemed to omit very obvious members
10 of Bain senior team who should be there and so I submitted – well based on my own read of it a list of people who I felt needed to be included in that list of witnesses with the interview.

ADV FRANKLIN SC: I do not believe we have that – that email with your list of witnesses I might be wrong but do you recall offhand who you thought were obviously of interest and ought to testify at the Nugent Commission?

MR WILLIAMS: Chair I do not think we got that list here but my recollection were – there were obvious people. There
20 were people like Paul Niehand who was Mr Massone's boss surely he should be interviewed. We heard the name Wendy Miller yesterday who was Bain's Global head of marketing was involved in a lot of the discussions around the Ambrobite contract. Her name was not on the list. In fact I suggested that Mr Stuart Min who was Bain's head of global

legal should be on the list because he had knowledge of what was happening with Ambrobrite and a few others. I think even Fabrice – no Fabrice Franzen was – there were other some operational people who was just obvious would know something was not on that list.

ADV FRANKLIN SC: Then look at paragraph 160 on page 76. There you said, not only was Bain withholding witnesses from the Commission, they were also excluding key Bain people from the investigation.

10 “I was contracted to oversee. Given the facts of the situation, it seemed extremely odd to me that Baker and McKinsey is not planning to interview...”

And then you give a list of people. Could you identify those people and briefly explain to the Chair why you believe they were obvious topics of – subjects for interview?

MR WILLIAMS: Chair, so I will start with Stephan Compano(?). We know he was involved in preparing
20 materials that they presented to President Zuma to Mr Moyane on SARS. So I suggested... to be interviewed. I mentioned earlier, Mr Paul Myan(?) was Mr Massone's boss. Not only did he have knowledge of what Mr Massone was doing, he would have seen Mr Massone's personal assessments. So Mr Myan...

I then mentioned Mr Min, Steward Min. He was Global Head of Legal. He seemed to, in my mind, be directly involved in many relevant discussions in his role as Global Head of Legal for Bain. And then I mentioned Ms Wendy Muller, who would raised many of the concerns. I would have thought she would be instrumental because if she raised the concerns and someone told – someone wrote those concerns, they might be interested to know who that person was.

10 I mentioned Christopher Cameron who was a Senior Bain Manager. He worked on the SARS Project. So again, from an operational underground standpoint. And in fact, I mentioned Chris Kennedy who was Senior Counsel at Bain because he in fact had negotiated the SARS contract.

So when Bain had engaged with SARS at the outset, it was Mr Kennedy who that contract and was intimately involved. Chair, Bain did not have any legal capability in South Africa. So they relied on Bain's legal
20 capability in Europe and the US. And so whenever there was anything legal, it would have involved Mr Kennedy or others.

ADV FRANKLIN SC: As far as the investigation by Bain, which you say began as a short ad-hoc investigation by Bain itself and then was taken over by Baker and

McKinsey, as far that is concerned. Could I ask you to look at the document at page 160 which is AW-14, a letter from Baker and McKinsey dated the 25th of September 2018 and it is headed, Bain South Africa Investigation Plan?

MR WILLIAMS: [No audible reply]

ADV FRANKLIN SC: Right. Just to highlight certain features. The background at 1.1 records that:

10 “This plan governs the investigation of Bain, contract with SARS which is to be conducted by Baker and McKinsey...”

And it records that:

 “Bain commenced the investigation in response to questions raised by the Nugent Commission...”

 And then in 1.3 it sets out what the investigation will address, the various questions it will address. It gives the scope of the investigation in paragraph 2 and it gives the investigation methodology in paragraph 3 which
20 includes interviews. Just pausing on interviews. Did you ever see the interviewed notes of interviews that were conducted?

MR WILLIAMS: No, Chair not. Despite continuous requests and urging appeals, access to interview notes was denied to me.

ADV FRANKLIN SC: Then 3.6, the reporting and findings and independence but before we get into the detail of that. What was your understanding, having been appointed and with the background which led to your appointment. What was your understanding of the ultimate objective of this investigation and whether it would be reported on, and if so, to whom?

MR WILLIAMS: Chair, my understanding was that this was a real sincere attempt and effort on Bain's part to
10 really understand what happened at SARS and Bain's involvement with SARS and with some of the other state entities. I really believe that Bain was shocked by what happened and what they have heard and so this was a comprehensive investigation to really get to the bottom of what really happened.

Bain had made it very clear to me, to the staff and even to the public that the intent was to be open and transparent with what they find. So much so that they to give public and the Nugent Commission some assurance
20 that what they find will be reported truthfully.

And so my understanding of this process of the investigation was, I would see everything that Baker and McKinsey finds and at the end of the investigation, Baker and McKinsey would produce a report on these findings against which I could then write my report on whether I

believe they had both conducted a comprehensive investigation and reported those findings truthfully.

ADV FRANKLIN SC: Let us then proceed to examine what happened in fact. Firstly, was a final investigation report by Baker and McKinsey ever produced to the Nugent Commission and/or the public?

MR WILLIAMS: No, Chair. Baker and McKinsey nor Bain nor presented a report to the Nugent Commission, nor did they make a report public of their findings.

10 **CHAIRPERSON:** Was that contrary to the plan that persuaded you to agree to play a role?

MR WILLIAMS: That is correct Chair.

CHAIRPERSON: Ja.

MR WILLIAMS: It was contrary to what Bain had said publicly, what Bain had said internally, what Bain had said to me, what Bain had said in the contract, Baker and McKinsey and what Bain had said in my contract with Bain.

CHAIRPERSON: H'm. Mr Franklin.

20 **ADV FRANKLIN SC:** Thank you. Let us just establish when you found out about this. AW-160, page 796. That is an email string. Would you look at the email at the middle of the page. It is from you to Chris Kennedy and Mr Moolman dated 11 December 2008(sic).

MR WILLIAMS: 2018.

ADV FRANKLIN SC: Sorry, 2018. And you have said:

I think Bain not realising investigation findings
will kick up a media storm...

I do not use your exact words. I take it you had
found out at or about this time that there was no intention
to release a report. Is that right?

MR WILLIAMS: That is correct Chair. The role – my role
was about oversight but I also felt that I had the
responsibility to nudge Bain towards doing what the writing
was because that is what they wanted me there to do and
10 to be part and to show the public and to me Judge Newton
was that I also advance this effort to do the right thing.

So when Bain said they are to going to release
an investigation then into their findings, I said that is going
to be massively problematic. And so I raised this concern
here as I did many other places.

CHAIRPERSON: Did they give you the reasons why they
were saying they would not release the report to the public
and they would, as I understand the position, give it to,
despite the fact that they promised the public that they
20 would be transparent about this investigation?

MR WILLIAMS: Chair, my understanding is based entirely
on an email that I received from Mr Kennedy because I
asked that question. And he – the answer to me was that
the findings of the investigations will be problematic for
Bain if it were public because they are likely to attract

prosecution. So I think rephrase that apologies.

But they were problematic because they could be used against Bain should they be prosecuted. And that will be problematic in South Africa and in the United States. So the findings were there, they looked at the findings.

My interpretation saw that what was there, pointed to some wrongdoing or improper behaviour. And then said there is no way that we can make this public because this will hurt us if there was a prosecution.

10 **CHAIRPERSON**: Ja, it would seem obvious that if the findings were favourable, they would have made them available.

MR WILLIAMS: That is absolutely my understanding.

CHAIRPERSON: Ja, okay. Mr Franklin.

ADV FRANKLIN SC: Thank you, Chair. Just on the Chair's question. The email at the top of the page, it appears to give a reason. Is that correct?

MR WILLIAMS: This is an email from Mr Kennedy to me. Yes, that question had been discussed. Referring to my
20 question this will be a problematic if Bain would release the findings. It was the very clear advise from Baker and McKinsey that they should not release their findings to me, to the public.

ADV FRANKLIN SC: Then please look at AW-162, page 801 an email from you to Nicola Wilson and Mr Moolman

dated the 11th of December 2018.

CHAIRPERSON: What is the page number again?

ADV FRANKLIN SC: It is 801 Chair.

CHAIRPERSON: 801.

ADV FRANKLIN SC: And this all seems to have happened on the same day and this is later in the day, the emails we saw at page 796 and what you say is this in the second paragraph:

10 “I understand from Baker and McKinsey and
Chris K that Baker and McKinsey’s
investigation findings will not be documented
in a report.

This is a significant change and complicates
things for me.

Would have appreciated being informed of this
change proactively by somebody at Bain,
rather than have to adduce it from the
discussions with Baker and McKinsey.

20 I have communicated to Baker and McKinsey
and Chris that I will finalise my report based
on what I know and including this new
development...”

Why did you addressed this to Nicola Wilson?

MR WILLIAMS: Because Nicola Wilson was Head of
Marketing and Public Relations at Bain in South Africa.

She was one of the people who I dealt with internally. So it was either Mr Moolman who was acting... Sorry, Chair. Either Mr Moolman who was acting... Or Ms Wilson. I did copy Mr Moolman in that email, saying this was a surprise to me to hear.

And Chair, the reference to “I had to adduce this...” at no point – so the plan was very clear. Baker and McKinsey was going to write their findings, produce their report and will also come to me. At no point did Bain
10 or Baker and McKinsey said: Athol, we have decided not to send you this report.

It kept coming up when I was saying: Guys, when will I see the report? When will I see this report? And it was sort of back and forth. Eventually I then said in an email, am I going to see the report? And they said no.

ADV FRANKLIN SC: Then please look at AW-166, page 809 which is an email from you to Moolman and Kennedy and others, dated 14 December 2018. I think it is true to say here that you then your spleen on this topic and you
20 have said that although Bain repeatedly committed to doing the right thing, this latest development was a problem for you. Can you just elucidate what it is that you said and why?

MR WILLIAMS: That is correct Chair. The... As we discussed yesterday. I engaged with Bain, one, because I

had a history with this company and it is a long history with this company and a very proud history with this company. Two, that they gave me assurance... partner that we are going to do the right thing.

And they contracted with me very specifically about what my role was going to be. There was no doubt in anyone's mind what was going to be. There were even times where Bain would ask me to... their staff, to calm the staff down, to give them assurance that the right thing has
10 been done.

In those meetings, I described the process that was going to unfold, whether the investigation should happen, I would see the report, we understand there might be some sensitivities in the report, people's email addresses or bank account details, et cetera, that might be excluded but I would see the full report, fully investigation details and I would offer an opinion on whether that was truthful or not.

That was very clear, Judge. And so – and I put
20 my reputation on this. Externally, there were so many people who were my trusted associates who said to me: Athol, what are you doing? And I would say: Guys, this process is going to be a first in the country because here is a company who says we know we have done wrong and we are going to investigate it and report it.

So for me there was a lot at stake in this process. So when it became clear to me that Bain were now deviating from that process, that upset me because it meant that they lied to the public, lied to their staff, lied to the authorities on what is going to happen and it appeared that I was part of that lie because I was there.

And so I wrote to the most senior people who I dealt with, Mr Moolman, Mr Kennedy, Mr John Senior who replaced Mr Massone as the Head of the South African
10 office, and Mr Hodgkinson. Laid it out very clearly that what is happening here is unacceptable, that they would consistently said that they were going to tell the truth and reveal the report, reveal the findings and now they are not doing it.

And at the end of this email, Chair, I say to request and I say I would like to urge Bain to fulfil the promise made to the South African people to be completely open and transparent by making a version of investigation findings public and allowing me access to all the relevant
20 evidence and document and findings so that I can act without restrictions.

And that phrase, without restrictions, was in public, was in my contract. This access will allow me to conclude my oversight role and write my final report. You asked me to stand up in front of a Joburg office on a few

occasions describe my role.

And I go on to say, basically, in the absence of you sharing this with me, I – you are actually blocking me from completing my duties.

ADV FRANKLIN SC: Then paragraph 201 on page 89 of your affidavit, please. Would you go to that?

MR WILLIAMS: [No audible reply]

ADV FRANKLIN SC: It appears that on 19 December 2018, you were eventually show something.

10 Is that right?

MR WILLIAMS: Not exactly Chair. I was invited to be shown something.

ADV FRANKLIN SC: Right. Will you explain what you were invited to see and what you did or did not see pursuant to that invitation?

MR WILLIAMS: So, Chair, as you could tell from this email that I was sent, I was urging Bain to let me see the findings because that would allow me to complete the duties that they hired me to do. What Baker and McKinsey
20 and Bain then go to – the point they got to was saying, we can show you the report, you cannot print it or take it away with you and you cannot make reference to it.

So you cannot talk about having seen this report but we will show it to you and I said I reject that. That makes no sense to me to say I have seen something when

actually I have not seen it. So I rejected that.

They then came back and said okay we have got another plan. We will do a link with you, a top technology link where the report appears on your laptop and I can see it but I cannot download or print it.

So on the 19th of December this meeting was set up with Baker and McKinsey and Bain and myself. That was remote I was in Cape Town and they were scattered around the world and I was to see this presentation. Sorry,
10 I was to see this report. So the meeting was set up. It was clear I was going to receive the report.

After the meeting, I still have not seen the report. And so at that point I asked but when am I going to see the report and the Baker and McKinsey partner, Reagan Demas was in the United States and he said: Well, why do I want to see this report? They will read it to me.

And I said, well, that does not make sense to me at all. It is like you are describing a painting to me. I have
20 not seen the painting but I cannot see the painting, you describe it to me. That was exactly the metaphor I used on the call. And he said, no, but he is going to read it to me. Do I think he will lie to me?

But of course, that was not the point. The point was this meeting was set up for me to see the report and

so I was extremely angry and ended the call because it was clear that they were not going to show me this investigation report.

ADV FRANKLIN SC: As with regards to your own reporting, Mr Williams, will you look at AW-154, page 694?

MR WILLIAMS: [No audible reply]

ADV FRANKLIN SC: Can you confirm that document? From pages 694 to 733, it is an interim report dated 20 November 2018 which you submitted to the Nugent
10 Commission.

MR WILLIAMS: That is correct Chair.

ADV FRANKLIN SC: Then AW-155 at page 735. Can you confirm that that is your final report to the Nugent Commission dated the 20th of December 2018?

MR WILLIAMS: Chair, this is my final report. Just ...[intervenes]

ADV FRANKLIN SC: Yes, my mistake. It was not submitted to the Nugent Commission. The Nugent Commission had completed its own report by then. Is that
20 right?

MR WILLIAMS: That is correct Chair. And the reason this was late to submit to the Nugent Commission was that I kept to have waiting for Bain to give me the investigation report. And the reason I did the interim report was to give something to Nugent Commission in terms of reporting from

me and Judge Nugent made extensive reference to my interim report in his final report but I could not get from Bain the final report from Baker and McKinsey in time to produce the final report in time for the Nugent Commission.

ADV FRANKLIN SC: Alright. That report speaks for itself. You have dealt with a number of topics therein. I take it that you stand by the conclusions which you reached?

MR WILLIAMS: Chair, I stand by the conclusions I
10 reached at that point of what I knew at that point.

ADV FRANKLIN SC: And just taking that further. Did you acquire further knowledge thereafter which informs your present view of the SARS engagement? And if so, what was that further knowledge?

MR WILLIAMS: So, Chair, my view now is different from what I expressed in this report and two things led to that change of view. One is the initial experience I have with Bain. So this runs up to December 2018. As you know, I did spend another eight to nine months with Bain and so
20 that experience added to my knowledge of what really happened and so it caused me to change my view.

And secondly. I then after making contact with the Nugent - the Zondo Commission, I then went and reviewed all of the materials I had and that informed a different opinion. So what I reviewed at this stage, that

particular view. When I had this broad experience with Bain and with all the materials I had, I formed a different opinion.

ADV FRANKLIN SC: Alright. Could I ask you now to turn to a different file which is SARS Bundle 03 and Exhibit WW-6?

MR WILLIAMS: [No audible reply]

ADV FRANKLIN SC: Please look at page 12 in SARS 03.

MR WILLIAMS: [No audible reply]

10 **ADV FRANKLIN SC:** You will see that that document running from page 12 to page 37 is an affidavit deposed to by Mr Moyane dated the 3rd of March 2021 and in it, what Mr Moyane has done, is to address various themes and to answer allegations that have been made against him by various witnesses, who either had been called or are to be called to the Commission. You have read this affidavit?

MR WILLIAMS: I have Chair.

ADV FRANKLIN SC: Please turn to page 29.

MR WILLIAMS: Chair, can I restate that? Apologies. I
20 have not read the entire affidavit. I was provided with sections of his affidavit that applied to me.

ADV FRANKLIN SC: Alright. That is what I wish to refer you to. The section at paragraph 62, page 29 to 68, page 35. Now I am not going to read the entire version. I am going to just highlight certain of the allegations made by

him and ask for your response. Paragraph 62, page 29.

He says he has never met you but says you are a self-styled whistle-blower and a determined and disgruntled former employee of Bain who is on a mission to implicate his former employer in an alleged wrongdoing, rightly or wrongly so. What is your reaction to that allegation against you?

MR WILLIAMS: Chair, it is interesting that someone can say they never met me but they have got such a clear
10 description of me. He describes me as a disgruntled former employee. Chair my response to that is. I understand a disgruntled person as someone who is angry and dissatisfied with the situation.

And so I am inclined to agree with Mr Moyane that I am disgruntled because I am angry and I am dissatisfied with the corruption in our country. I am dissatisfied and angry about what happened at SARS. I am angry and dissatisfied with what Bain has done to cover it up and being involved with it.

20 So, yes, I am disgruntled. I might not be for the reasons he thinks I am disgruntled. In fact, I think all of South Africa is disgruntled, angry and dissatisfied with what has been happening in our public institutions.

ADV FRANKLIN SC: Secondly, in paragraph 64 he summarises your allegations against him in a number of

propositions which we do not need to go to. It is his summary of what he says you say. He concludes in paragraph 65:

“It is not clear how all the above, if true, translates into my personal involvement in or knowledge of state capture or even the capture of SARS, and if so, for what unlawful purpose...”

So you can read 64 if you wish which is
10 Mr Moyane’s summary of your allegations against him but would you react to his contention that even if those allegations are true, it is not clear how this translates into any knowledge of state capture or the capture of SARS?

MR WILLIAMS: Chair, I do not feel I am in a position to respond to that. What is determined to be unlawful, I just do not think I have to enough to whether what I have observed was lawful or unlawful from what I read and understood was lawful/unlawful. I do have a sense a lot of it was improper and unethical and not becoming of a leader
20 of a public institution.

So if the evidence I have seen is correct that Mr Moyane planned with Bain to enter SARS to cause damage at SARS which is what the evidence seems to suggest to me and I do think it unethical and improper. I cannot make an assessment on unlawfulness or not.

ADV FRANKLIN SC: Fair enough. Paragraph 66, he sets out his own version of events which he says... Let me just read it.

“I wish to narrate the following version of events so that the mind of the Commission can be put at rest about the absence about any possible state capture motives on my part...”

He then sets that out. I do not think it directly implicates you.

10 **MR WILLIAMS:** Mr Franklin, if I may? And may it is a typo in Mr Moyane’s affidavit. At 66.3, he says:

“At some point in the very early part of 2013, the President informed me in strict confidence that he intended to appoint me to the position of SARS Commissioner...”

If that is correct, then it changes the narrative we have been working on quite substantially, that the President could inform him in early 2013. I suspect it is early 2014 but...

20 **CHAIRPERSON:** Ja, this early 2013.

MR WILLIAMS: So much the point that he was informed very early on that he would get the job.

CHAIRPERSON: But this is strange because in paragraph 66.1, he says sometime, probably in the second half of 2013 the position of SARS Commissioner was advertised in

the mass media. So if he – if the President told him in the very early part of 2013 that he intended to appoint him to the position of SARS Commissioner, he says for which I had applied, then how could he have applied before the position was advertised? Or am I missing something here?

MR WILLIAMS: Ja, let me... Sorry.

CHAIRPERSON: H'm?

MR WILLIAMS: I agree with you Chair. But I am affording Mr Moyane the benefit of the doubt ...[intervenes]

10 **CHAIRPERSON**: Yes.

MR WILLIAMS: ...by saying it was a typo.

CHAIRPERSON: Yes.

MR WILLIAMS: But if it was not a typo, it does raise more serious questions.

CHAIRPERSON: Ja, yes. Yes. It is very interesting because he talks about the General Election. He says there is six... Well, he says, just to complete that part of 66.3 which you have started reading Mr Williams.

20 "At some point in the very early part of 2013 the President informed me in strict confidence that he intended to appoint me to the position of SARS Commissioner for which I had applied. He explained that his intention should be kept under wraps as he only intended to formalise it if he was

still in office after the general elections which were scheduled to take place in May 2014.”

And then he says at 66.4:

“I fully understood that a decision was obviously conditional upon the happening of three political or constitutional events, namely the ruling ANC would win an outright majority in the 2014 elections and then there are other matters connected with the election in parliament of the President.”

10 But he mentions 2013 in three sub-paragraphs there. First he says at 66.1:

“Some time probably in the second half of 2013 the position of SARS Commissioner was advertised in the mass media.”

66.2:

20 “In or about early September 2013 I submitted a formal application. I did not do so at the suggestion or investigation of any person. By then I was already a veteran civil servant having held several key positions in the civil service.”

And then I have read 66.3. Do you know when the advertisement came out, other than he what he says. Do we have by any chance a copy? You do not have?

ADV FRANKLIN SC: Chair, I do not, that is something I wish to establish.

CHAIRPERSON: Ja, in Mr Gordhan's affidavit statement that he submitted I think in 2018 he does deal with the advertisement of the position of SARS Commissioner but I do not know whether he attaches a copy of the advert nor do I remember whether he mentions when the advertisement would have gone out but he might be mentioning that.

ADV FRANKLIN SC: Yes, we will follow that up, Chair.

CHAIRPERSON: Ja, okay, alright.

10 **ADV FRANKLIN SC:** Thank you. The last part of the version of Mr Moyane that I wish to put to you is at paragraph 67 on page 35 of SARS03. 67, page 35. Having given the analysis which appears in paragraph 66 of his version of events he says:

20 "The above analysis takes us to the next important issue namely that neither Mr Williams nor any of my abovementioned accusers has ever actually suggested to this Commission what my alleged motive or incentive possibly was for engaging in any alleged unlawful or state capture activities, neither has anyone indicated what unlawful benefit or gains accrued to anybody as a result of my alleged conduct nor what prejudice was suffered by the public purse or fiscus, exactly to what end was I

allegedly engaged in so-called state capture, who lost what, who benefited what.”

Are you in a position to respond to that?

MR WILLIAMS: Chair, just briefly, I reject that label or reference to me as accuser. I did not set out to accuse Mr Moyane of anything. If Chair recalls how I even tend to be here was because I had a set of documents which came to me by way of Bain and from Baker McKenzie.

All I did was to read those documents, review them
10 and offer my interpretation of what was happening but to the extent that Mr Moyane’s name and activities were reflected in those documents, I just relay that in my affidavit. I did not set out an argument to accuse him of anything.

MR SYMINGTON: Yes and then one further exercise I wish to conduct, I wish to give you the Bain application which is in SEQ44/2020. You will see, Mr Williams, that the – Bain brought an application, as you know, to cross-examine you and for other relief and the founding affidavit
20 in support of that is Mr Min’s affidavit. That appears at page 10, if you look at the top right hand corner, page 10 to 72 without annexures. You have seen and read that affidavit.

MR WILLIAMS: I have, Chair.

ADV FRANKLIN SC: And you have indeed, am I correct,

you have filed an affidavit in response thereto and perhaps just for the benefit of the Chair, so that we know what we are dealing with, you filed two affidavits, one with an annexure or annexures and one without, is that right?

MR WILLIAMS: That is correct, Chair.

ADV FRANKLIN SC: Let us look at the first one which is at page 227 to 274.

CHAIRPERSON: This is now in the file containing Bain's application.

10 **ADV FRANKLIN SC:** That is correct, Chair.

CHAIRPERSON: That is the application for leave to cross-examine Mr Williams.

ADV FRANKLIN SC: Correct.

CHAIRPERSON: And it seems that it only has pagination in red numbers, is that right?

ADV FRANKLIN SC: Correct.

CHAIRPERSON: Yes, okay, and what is the page on the red numbers?

ADV FRANKLIN SC: Yes, it is the page 227 to 274 and
20 could I ask you to ...[intervenes]

CHAIRPERSON: I am sorry, tell me the last three digits or four digits whatever it is?

ADV FRANKLIN SC: It is 227, Chair.

CHAIRPERSON: 227. Okay, I have got it.

ADV FRANKLIN SC: Thank you. That is a document

headed respondent's answering affidavit in your name.

Would you look at paginated page 274?

CHAIRPERSON: I am sorry, Mr Franklin, did you ask me to admit Mr Williams' affidavit?

ADV FRANKLIN SC: No, I have not.

CHAIRPERSON: Okay, we must make sure we do that before we...

ADV FRANKLIN SC: Yes.

10 **CHAIRPERSON:** I just remember now that we are looking at this one.

ADV FRANKLIN SC: Yes.

CHAIRPERSON: Ja.

ADV FRANKLIN SC: And the purpose of this present exercise is just to indicate that there are two versions which are to be filed.

CHAIRPERSON: Yes.

ADV FRANKLIN SC: I will only ask the Chair to admit the second one.

CHAIRPERSON: Ja. No, that is fine.

20 **ADV FRANKLIN SC:** So the first one, Mr Williams, if you see at page 274 it is dated the 19 March 2021, is that correct?

MR WILLIAMS: That is correct, Chair.

ADV FRANKLIN SC: And then the version I wish you to look at please is at page 275 to 322 and that version has

certain annexures, is that correct?

MR WILLIAMS: That is correct, Chair.

ADV FRANKLIN SC: The second version which starts at page 275 runs to page 322 and we see a date of 22 March 2021. Is that an affidavit deposed to by you on that date?

MR WILLIAMS: That is correct, Chair.

ADV FRANKLIN SC: And do you confirm the truth and accuracy of the content of that affidavit?

MR WILLIAMS: Yes, I do, Chair.

10 **ADV FRANKLIN SC:** Chair, might I ask that that affidavit be admitted? It does not have an exhibit number because it is in an application file.

CHAIRPERSON: Yes.

ADV FRANKLIN SC: But it is identified by reference to the page numbers.

CHAIRPERSON: Well, it is Mr Williams' affidavit and his main one would be exhibit something, maybe W1 or A.

ADV FRANKLIN SC: It is WW1.

CHAIRPERSON: Oh, so this we could make WW2, is that
20 right or there is no another 2?

ADV FRANKLIN SC: I do not think there is another WW2.

CHAIRPERSON: Ja or unless we make it 1A or 1.1.

ADV FRANKLIN SC: I think the safer suggestion is to make it WW1.1.

CHAIRPERSON: Yes, okay, alright. Mr Williams' affidavit

starting at page 275 will be admitted as an exhibit and will be marked as EXHIBIT WW1.1.

AFFIDAVIT OF ATHOL WILLIAMS STARTING AT PAGE 275 HANDED IN AS EXHIBIT WW1.1

ADV FRANKLIN SC: Thank you, Chair. Mr Williams, you indicated earlier that have read the affidavit of Mr Min and you have of course deposed to this affidavit which has just been introduced and in that you answer the contentions made by Mr Min, is that correct?

10 **MR WILLIAMS:** That is correct, Chair.

ADV FRANKLIN SC: I am not going to take you to all of them but I do want to direct your attention to some of them. So I am going to be asking you to look at the affidavit of Mr Min and then to look back at your answering affidavit so have to keep both places open.

The first paragraph that I wish to refer you to is paragraph 62 on page 39. Remember always please to look at the red numbering at the top right hand corner. I am sorry, the page is?

20 **ADV FRANKLIN SC:** Page 39.

CHAIRPERSON: Okay. So in paragraph 62 Mr Min says that:

“Bain accepts and has publicly acknowledged that there were ethical flaws in its conduct and it made mistakes. Mr Massone in particular did not act

appropriately in how he sought to interact with public entities and public figures and to generate public sector work. We returned the fees we received on the SARS' work plus interest before the Nugent Commission completed its work."

You have responded to that in paragraph 79 and 80 and could you just highlight for the Chair what your response to that contention is?

MR WILLIAMS: Chair, my view that Bain admits to ethical
10 flaws is that it is completely meaningless unless they identify what those ethical flaws are. Just saying we admit to ethical flaws does not constitute some admission of wrongdoing.

CHAIRPERSON: Yes and of course if they come to the Commission they will be asked about what those flaws are.

MR WILLIAMS: Absolutely, Chair. It was very relevant in the context also of my role at Bain which was meant to plan remedy and to make amends and as an expert in its field of thinking about remedy and reparation, the first step
20 is to acknowledge the wrongs you did and then the harms you caused to people. How can I make amends to someone that do not acknowledge firstly what I did to them that was wrong and harm might cause? And just saying there were ethical flaws to mean says nothing.

ADV FRANKLIN SC: Yes, then the second aspect that I

wish to put to you from Mr Min's affidavit is paragraph 67, page 40. There Mr Min says:

"Mr Massone procured Ambrobrite Services to assist Bain SA in its attempt to gain traction in the public sector."

And he then goes on to describe the scope of the work. You have dealt with that at para 84, page 306 of your affidavit and again could I ask you to give the Chair, the gist of your response to that allegation?

10 **MR WILLIAMS:** Chair, Mr Min describes Ambrobrite as providing services, which he says are strategic services and operational services and I assert in paragraph 84 that just based on my reading these services – is it okay if I just read from this, much easier.

ADV FRANKLIN SC: Yes, I think it is.

MR WILLIAMS: Okay. So I say:

20 "This is misleading to say that Mr Massone procured Ambrobrite Services. The truth is that Bain procured Ambrobrite Services, not Mr Massone."

The first thing they are saying, Mr Massone procured services, it is Bain who procured those services and secondly, Mr Min writes that:

"Bain was unaware of the nature and full extent to which Ambrobrite was facilitating these types of

introductions at the time.”

And I respond by saying – we had this evidence before us yesterday and today that Mr Min and many others at Bain knew full well what the nature of these introductions were. Ms Miller and Mr Min wrote in incredulous emails to colleagues in which he scoffed at the idea that Ambrobrite’s leaders as entertainment professionals were going to provide Bain with because advice.

ADV FRANKLIN SC: Right, then paragraph 71 on page

10 41. The assertion is there made by Mr Min that:

“Mr Williams is also correct that the Ambrobrite contract raised a number of red flags.

And he continues:

“But it only came to my attention and that of others after Mr Massone had procured Ambrobrite’s services.”

You have responded to that in paragraph 85 on page 306 and you have said that is not correct. Perhaps you can put that in context?

20 **MR WILLIAMS:** Chair, I was at a meeting – and this I have got no proof of – I was in a meeting where Mr Min was on the phone in the US and a number of us were in a meeting, it might have been someone from Baker McKenzie, Mr Kennedy were in a meeting in Johannesburg, so on the phone, where Mr Min says that he objected to

this Ambrobrite contract and we know that from some of the emails he seemed to uncomfortable with the Ambrobrite contract but I say here even if he only knew about the contracts issues after the contract was signed, I saw he mentions that Mr Meehan knew – am I reading the right part? Mr Meehan knew about it, the legal representatives of Bain Global, Mr Graham Luce knew about it and Mr Massone writes in his email to Ms Miller, he says legal and finance had approved this contract.

10 Now as I said earlier, legal meant Global Legal because there was no legal capability in South Africa. Finance we know refers to someone in Europe and the US. So this contention that people globally did not know what was happening just makes no sense to me. And if I refer back to that meeting where Mr Min was on the phone call, we even said if Mr Min is overruled about his objection we asked who then overruled and Mr Min asked who was in the room and when we told him who was in the room he said he was not going to answer that question. But it definitely left
20 me with the impression that Mr Min had objected and he was overruled by someone. Now who overrules your head of Global Legal, Chair, that is someone senior within the organisation. So this contention that Bain Global senior leaders had no idea what was happening here in South Africa and the detail of it, for me, I struggle to follow that.

ADV FRANKLIN SC: Then would you look next at 71.5 on page 42? There Mr Min says that:

Partners of the Bain SA office had also queried the Ambrobrite relationship particularly the payment of success fees to Ambrobrite. Despite their requests, Mr Massone refused to provide them with copies of the Ambrobrite contract beyond displaying briefly on screen during a meeting. Their grasp of what the contract entailed was therefore vague. These concerns were escalated at the time by the local partner team before Meehan who then sought an explanation from Mr Massone of the “rational benefits, the risk management issues”. Of note is Mr Meehan’s question, “where is the rest of the partner group on this? We had talked about getting everyone else on board before proceeding” to which Mr Massone responded “the partner group is on board, Innocent and Fabreze(?) in particular as they are also going to be involved in the target clients”. He says this was not true.”

And then you have read the rest of that. Could I just take you to your response at para 87 page 307? You says that in this paragraph:

“They...”

That is Bain.

“...tried to portray Mr Massone as a lone rogue who was acting wrongfully and without head office’s knowledge or ignoring head office’s warnings.”

And perhaps you can just summarise the rest of what you say there?

MR WILLIAMS: Chair, this is – anyone who studies calamities or things to go wrong in any organisation, will know that it is never just a lone rogue. Very rarely do organisations work where one person can do something
10 without absolutely no one else’s knowledge of it. It is just – that is just not how organisations work and we also, myself as a business ethics scholar, has studied many occasions where corporates get things wrong and the first they do is, they say it is a lone rogue. McKinsey says, it is one guy but I fired him, do not worry, things are sorted. Steinhoff says do not worry, Markus Jooste is out, it is sorted. That is the first response and that is a cop-out because there is always a number of people who know what is going on.

20 So Bain continuously, their media internal communications everywhere seems to say to us the world, the public, there was a bad guy who did these bad things, we did not know about it, but do not worry, we have got rid of him, so everything is fine, nothing to see here and I make the point that firstly, my expertise and common sense

would suggest to you that is not possible that no one knew what was going on but even if you ignore my expertise, just looking at the facts of the evidence we have seen of the email exchanges of the self-assessment reporting, of the meetings were going on, Bain is a partnership, it is not a corporation, it is a partnership, so the partners would know what is going on in South Africa, around the world.

So this contention that Mr Massone was this lone
rouge has to me no substance both in terms of my
10 expertise and experience, anyone's common sense or in
fact the evidence that we have got from Bain.

ADV FRANKLIN SC: Thank you. The next paragraph I
wish to refer you to is 77 on page 46, dealing here with the
procurement process, what Mr Min says is:

“Bain SA later received a request for proposal, RFP
from SARS on 12 December 2014. While it is likely
that Mr Massone knew that such an RFP would be
forthcoming that Bain SA had given some input into
the draft RFP as Mr Williams confirms and that Bain
20 SA was well-positioned given his strong relationship
with Mr Moyane Bain SA received a final RFP as the
same time as other potential vendors and pitched
alongside them. There is no evidence that Bain SA
expected this to be anything other than a
competitive RFP process, Bain SA pitched for the

work in December 2014.”

So we went through that procurement process earlier and you have responded to that paragraph in 91 page 308 of your affidavit and what you ...[intervenes]

CHAIRPERSON: I see, Mr Franklin, that even the deponent to this affidavit says given their strong relationship with Mr Moyane Bain was well-positioned to be given the job.

ADV FRANKLIN SC: Yes, precisely.

10 **CHAIRPERSON:** I think that is quite interesting that it comes from them.

ADV FRANKLIN SC: Yes, it is one of several acknowledgements, Chair, which we would emphasise in due course.

CHAIRPERSON: Yes. Yes, you may continue.

ADV FRANKLIN SC: Thank you, para 91, page 308. What you say in the second sentence is:

20 “Well before the RFP was issues SARS had clearly decided that they wanted to hire Bain and so explored a piggyback contract arrangement with Telkom. Only when this failed did SARS follow an RFP process but it was clear that they wanted to ensure that Bain were hired going as far as requesting client references even before the RFP had been issued. In trying to arrange the piggyback

contract with Telkom Mr Massone wrote to Mr Maseko that the Acting COO of SARS had called him and wants to give a mandate to Bain.”

I think that is self-explanatory. Anything you want to add?

MR WILLIAMS: Chair, just one small part where Mr Min says that Bain had provided input to the RFP. I think we have seen that Bain actually drafted the RFP.

CHAIRPERSON: Yes, yes.

MR WILLIAMS: Down to details of dates and everything
10 else.

CHAIRPERSON: I mean, I do not know whether he seeks to – anywhere he seeks to provide an explanation how come they would provide to make an input on the preparation of the RFP as an outsider.

MR WILLIAMS: It is an astounding admission. Chair, even the statement that SARS want to give a mandate to Bain suggests that they decided they want to give Bain this work and they were going to find some contractual way to make it happen.

20 **CHAIRPERSON:** H’m. Mr Franklin?

ADV FRANKLIN SC: Thank you, Chair. Mr Williams you have filed a comprehensive affidavit in answer, I am not going to take you to any other provisions for now. Is there anything else that you wish to highlight from your answering affidavit?

ADV LE ROUX: Chair, Mr Cockrell has informed me that the live stream has stopped and he is therefore no longer in a position to follow the evidence.

CHAIRPERSON: Oh the technicians are usefully the first ones to pick that up and they normally tell us. Well, anyway, it is about one o'clock, maybe we may as well adjourn and if there is a problem hopefully it will have been sorted out when we return.

ADV FRANKLIN SC: Thank you, Chair.

10 **CHAIRPERSON:** Mr Franklin, there is an evening session that was scheduled for this evening relating to Eskom, Ms Daniels, but because of how things have unfolded since yesterday, there may be a need to talk to the evidence leader. I think I will talk to him but you might wish to talk to him, Mr Pule Seleka, about what arrangements may need to be made.

ADV FRANKLIN SC: Yes, I will. We will over the lunch adjournment do that and if necessary I will, with your permission update you on what is happening.

20 **CHAIRPERSON:** Yes. Ja, no, that is fine.

ADV FRANKLIN SC: Thank you.

CHAIRPERSON: Okay, we will adjourn now and resume at two o'clock. We adjourn.

INQUIRY ADJOURNS

INQUIRY RESUMES

CHAIRPERSON: Okay, let us continue.

ADV FRANKLIN SC: Thank you Chair. Mr Williams, we had completed the exercise where you gave your comments to the version that Mr Min had put up on behalf of Bain in the Bain application to cross-examine. Do you recall?

MR WILLIAMS: I do Chair.

ADV FRANKLIN SC: Yes, that brings us to the end of your testimony and I just wanted to know is there anything that you wish to say to the commission in conclusion?

10 **MR WILLIAMS:** Chair, if I may. This testimony and the last 18 months of me, leading up to me coming here has been incredibly hard for me. To say the things I did about Bain was not easy because these are my friends. These are people I have known for over 25 years.

They gave me my big career break. So I in no way made those statements lightly if I did not believe they were in the interest of South Africa. I decided to resign from Bain even though I had an incredible offer, incredible job at Bain.

20 It became clear to me that Bain were far more interested in managing and protecting themselves from a DOJ prosecution or investigation in the US than making amends in South Africa and I made it clear to everyone at Bain.

They understood that that is how I saw things

happening. Chair, just one comment that sorts of wraps it up for me. This attitude towards South Africa, is an email in my submission to you where, what the Bain Manager says to a Bain Partner.

If you go and see Mr Moyane at SARS, tell him his procurement and legal people are a bunch of losers. It is in my affidavit, and for me this captured the sense of these people in South Africa are irrelevant to us. We will just do what we want.

10 For me the SARS legal and procurement people were defending South Africa, defending the rules, defending our procurement, defending our democracy and for a senior Bain person to say they are a bunch of losers because they were resisting what we were trying to do, captured for me what I thought was wrong with what was happening at Bain and that was why I had to leave.

Chair, I want to add my voice to two things which you have already heard in the commission. The one is this desperate need for protection and support of whistle-
20 blowers which you have said desperately needs to happen and of course I speak about that from my own experience for the last 18 months, which Chair, has been an horrific experience.

The fear I have suffered, the intimidation I have suffered, the legal and financial uncertainty I have had to

face. Chair, 18 months ago I had this perfect career. I was a part time partner at Bain. I was a senior lecturer at UCT.

Today as I sit here I am unemployed and as I understand it I am unemployable because it appears to me that corporate South Africa is uninterested in people with integrity. The horrific cost I have experienced is not just the fear of the legal, the financial cost.

It has been a cost to my health and the cost to my
10 family and no amount of reparation and remedy can make up for that cost to your family. People ask me have I got regrets about what I have done. I say I have got absolutely no regrets for what I have done, even the high cost I have incurred.

But I do regrets the damages done to my family and the stress to my family. So to my family I apologise. Judge, just to add to the second thing. The first thing I am going to add my voice to the appeal of protection for whistle-blowers.

20 The second thing is to hold these enablers of State Capture accountable and we know, we talk about the banks and the corporates and the accounting firms and of course we know all of these and there is a lot of efforts around those.

I just also want to add my voice to that need,

having to hold these enablers accountable. What is interesting judge, I think there was some secondary enablers. There is enablers we know about and then there are companies out there who are continuing to do business with these companies who are involved in State Capture, and I think they are also part of this web of State Capture.

I mentioned to you I had my job at UCT. I was teaching ethics to business leaders and public sector leaders. That is what I was doing, but I blew the whistle
 10 and stepped forward. UCT asked me to leave. From the business school because they said you are doing all these Zondo stuff, you are doing all these things, you are writing your affidavit.

Chair, to write my affidavit, 700 pages, I did it myself. No law firm in South Africa would offer me support. Even the commission said they could offer me no legal support. I wrote that sitting at my desk at home with Google at my side, trying to figure out what to write and how to do it.

20 UCT then said well, then I am neglecting my duties as a senior lecturer and they asked me to leave. This is the experience all whistle-blowers have, where they do not have the support where they are. UCT continues to do business with companies that are involved in state capture.

So I want to hear my voice to that call for us to hold

accountable these enablers. I and that has been my call today and all along Chair. All I wanted from Bain was to make full disclosure and then make amends for it. That is what I was interested in.

I launched a public campaign recently to urge Bain to make full disclosure and that had two and a half thousand signatures. South Africans saying yes, that is our call. But Chair, just in closing if I may you know, as a social philosopher and as a moral philosopher and I know I
10 must go and finish my PHD still ...[intervenes]

CHAIRPERSON: You must finish it. You must complete it.

MR WILLIAMS: I must finish it, I will come back to you when I am done. But Chair, it strikes me that we in South Africa are living in an era of the bully. You can talk about corruption and greed and all the rest of it, but I think we have got a culture where bullies dominate.

Politicians bully the civil servants, civil servants bully citizens, corporate leaders bully their employees and they can bully and do this because there is lack of
20 accountability and no consequences, and so I think this is why the bullies get away with us.

Bullies are [indistinct] in our society. We see it with gender base violence that bullies feel they can get away with anything. That gangsters feel they can get away with anything. In my view we have got to stop these bullies.

We need to move from this era of the bully to the era of the brave. Of politicians now being brave enough to stand up to these bullies. Of legislators willing to go and institute laws to stop these bullies, because I cannot see us moving out of this world of corruption where we all live in fear.

So I speak to people in companies saying you have seen corruption there, why do you not speak up and they talk about the fear they face and so we need brave people,
10 brave people like our civil servants, our corporate leaders into be acting.

Brave people like our health care workers, our school teachers, our nurses and I think brave people like whistle-blowers who stand up and act, not just for themselves, but in the interest of our country, and Chair just in closing, I wrote that email to Bain in September 2018 when I first got involved, where I said my hierarchy of interest is South Africa first, then myself, then Bain.

I think we are beginning to move a needle in South
20 Africa. This moral infliction we are at when corporate leaders, business leaders, lawyers, citizens are willing to act in a way beyond themselves but in the interest of our country.

Thank you.

CHAIRPERSON: Well, thank you Mr Williams. Just two or

three things. One, you mentioned that the commission could also not give you or offer you lawyers. I assume that what you mean is that they could not say get a lawyer that the commission will pay for you, because otherwise members of the legal team, it is their job to interview people who want to give evidence and prepare affidavits for them.

I was told at some stage because I think as you said it has been a long journey between yourself and the
10 commission since we started. Contact was made between the commission and yourself, that you were looking for lawyers to assist you and I assumed maybe in Cape Town.

So I just want to have clarification that whether you are talking about members of the legal team refusing to assist you or whether you are talking about you being told the commission cannot pay for your lawyers. Is it the latter?

MR WILLIAMS: Chair, it strikes me that there is a third option there somehow.

20 **CHAIRPERSON:** Ja.

MR WILLIAMS: I was lost right, I was getting calls from Bain people, Bain lawyers reflecting all sorts of things, and so I was just confused, afraid, not knowing what to do and so I approached the commission and said if you are asking me, you asked me now to write an affidavit, that was never

my intention.

Initially you asked me for documents, I sent you the documents. Then you said write an affidavit and then I said how, how do I write this affidavit, and after that contacted the law firms who said they could not because they were conflicted.

I still said I do not know how to write an affidavit. Can some legal person help me with this. So whether it is a commission legal person or a legal person the
10 commission pays, it was irrelevant. It was just I needed help to do this thing because I knew this thing was going to be an important document.

Even now when I see Bain comment on things I said in my document, it is possible I have caused trouble for myself, because I sat down and just wrote this from what I knew.

CHAIRPERSON: Well, I am surprised if that is the case because the legal team performs that task. But sometimes, some people prefer to have their affidavits prepared by
20 their lawyers and then their lawyers keep in touch with the members of the legal team.

But the first thing is that they would be saying that is the legal team, can we interview you and take the statement, do an affidavit for you but it is your choice if you say no, I have got lawyers, I will get lawyers to do that

for me and then they can send it to you.

You say that is not ...[intervenes]

MR WILLIAMS: Chair, I met with the investigators and I apologise, they can speak for themselves.

CHAIRPERSON: Ja.

MR WILLIAMS: At no point did anyone from the commission offer to write an affidavit for me.

CHAIRPERSON: Yes.

MR WILLIAMS: I was asked to write an affidavit.

10 **CHAIRPERSON**: Yes. Okay, I will find out how that happened or hear what they have to say and the commission will be in touch with you in regard to that, because as I say the idea is that members of the legal team are the ones, the investigators also do that.

MR WILLIAMS: Ja, I paid for my own travel to come here.

CHAIRPERSON: Yes, yes, yes. Well, you in terms of your own travel the commission should be able to take care of that. Was there any discussion about your travelling expenses?

20 **MR WILLIAMS**: Not this time, last time there was.

CHAIRPERSON: Is that so?

MR WILLIAMS: Ja, but I do not want to waste your time
Chair.

CHAIRPERSON: No, no but that is fine. Mr Franklin is there, he hears what you say. I think he will talk to his

team and somebody in his team will try and find out what the position is, but you certainly should not have paid your own travelling expenses to be here and as far as I am concerned, the commission should refund you.

But apart from that, I wanted to also ask and Mr Franklin might be able to say, we did not cover this but of course we were working within time constraints. I thought there was a portion in his affidavit that dealt with items by Bain to I think in your words to silence you or something
10 like that.

Was that oversight not to cover it or because he said, he confirmed it?

ADV FRANKLIN SC: Yes, judge.

CHAIRPERSON: Yes.

ADV FRANKLIN SC: We decided for a variety of reasons.

CHAIRPERSON: Ja.

ADV FRANKLIN SC: Some of them time.

CHAIRPERSON: Yes.

ADV FRANKLIN SC: That it was not directly relevant to
20 the extent that the remainder of the evidence was relevant.

CHAIRPERSON: Ja.

ADV FRANKLIN SC: And for that reason it was not covered in oral testimony.

CHAIRPERSON: Yes.

ADV FRANKLIN SC: Of course it is still in the affidavit.

CHAIRPERSON: Ja, ja.

ADV FRANKLIN SC: And Mr Williams has confirmed it is correct.

CHAIRPERSON: Yes. No, no that is fine, but other than that, Mr Williams I do want to re-affirm that I believe that we should have a strong protection for whistle-blowers in our country in terms of legislation. There should be strong protection, because if whistle-blowers were not there, maybe half of the things that we know about State Capture
10 and corruption in South Africa we would not know.

So it is very, very important. So if you have suggestions or submissions you want to make, feel free to write something and send to the secretary of the commission. I have extended [indistinct] invitation to other people.

I think it should be, should have a strong protection because if we do not have a strong protection for whistle-blowers, then our fights against corruption will be weakened in a very significant way. But I also then take
20 this opportunity to thank you for taking the time to avail yourself to come and give evidence before the commission, and for the fact that also you have not been discouraged from coming to assist the commission.

We appreciate it very much.

MR WILLIAMS: Thank you judge.

CHAIRPERSON: Thank you.

ADV FRANKLIN SC: Thank you Mr Williams for your testimony.

CHAIRPERSON: Yes, you are excused. Do you know whether you would need a few minutes adjournment or we can go straight away?

ADV FRANKLIN SC: I think we can commence immediately.

CHAIRPERSON: Okay. You can call the next witness.

10 **ADV FRANKLIN SC:** Thank you, our next witness is Mr Vlok Symington.

CHAIRPERSON: Remember to sanitise the file as well.

ADV FOURIE SC: Chair, if may place myself on record again?

CHAIRPERSON: Yes.

ADV FOURIE SC: It is Greg Fourie from the Johannesburg Bar. I appear for Mr Symington. I am instructed by Mr Bernard Hotz of Werksmans Attorneys.

CHAIRPERSON: Thank you. Yes, Mr Franklin?

20 **ADV FRANKLIN SC:** Thank you Chair. Good afternoon Mr Symington.

MR SYMINGTON: Afternoon Mr Franklin.

ADV FRANKLIN SC: You should have in front of you a file which is marked SARS Bundle 02.

MR SYMINGTON: Yes.

ADV FRANKLIN SC: Could I ask you to open that file.

CHAIRPERSON: Before he does, let us have the oath administered to him or affirmation. Registrar, have they taken your mic? Well, somebody must look after the mic, that mic and if it is given to somebody else, they must make sure it is returned, otherwise we will be delayed because there is no mic.

Okay, please stand up Mr Symington for the oath or affirmation.

10 **REGISTRAR:** Mr Symington, will you be taking the oath or affirmation?

WITNESS: Yes. Affirmation.

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

WITNESS: Johan Daniel Vlok ...[intervenes]

CHAIRPERSON: Can you hear, could you hear Mr Symington? Okay, just speak up Mr Symington.

MR SYMINGTON: Sure, ja.

REGISTRAR: Please state your full names for the record?

20 **WITNESS:** Johan Daniel Vlok Symington.

REGISTRAR: Do you have any objection to taking the prescribed oath, affirmation? Sorry.

WITNESS: No.

REGISTRAR: Do you affirm 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 I truly affirm.

WITNESS: I affirm.

JOHAN DANIEL VLOK SYMINGTON: (d.s.s)

CHAIRPERSON: Thank you. You may be seated. Yes, Mr Franklin?

ADV FRANKLIN SC: Thank you Chair. I had asked you Mr Symington to have available before you SARS Bundle 02. Do you have it?

MR SYMINGTON: Yes, sir.

10 **ADV FRANKLIN SC:** And would you please turn to page 116 and can I just orientate you, throughout these proceedings I will ask you to turn to the page which appears on the top left hand side of the page, in black numerals.

Page 116 is the commencement of an affidavit by yourself, is that correct?

MR SYMINGTON: Yes.

ADV FRANKLIN SC: Please turn to page 171.

CHAIRPERSON: Mr Symington, I am sorry. I just want to
20 confirm. When you were responding to the registrar when she asked you to give your full names, I heard as if you were pronouncing your surname as Symington.

MR SYMINGTON: Yes.

CHAIRPERSON: But is it Symington, not Symington?

MR SYMINGTON: Well, it is up to you Chair.

CHAIRPERSON: Okay, no that is alright. I just wanted to make sure I use the correct pronunciation. Okay, alright. Mr Franklin?

ADV FRANKLIN SC: Thank you, I need to correct myself as well. Mr Symington, at page 171 it appears that you signed this affidavit on the 2nd of November 2020. Is that correct?

MR SYMINGTON: Yes.

ADV FRANKLIN SC: Can you confirm then that the
10 document at page 116 to 171 is an affidavit without annexures to which you attested on the 2nd of November 2020, and that it is truthful and accurate in all respects?

MR SYMINGTON: Yes, Chair it is.

ADV FRANKLIN SC: Thank you. I would like to take you to a number of different topics. We will do so with reference to the affidavit and to the annexures which you have attached.

CHAIRPERSON: Do you want me to admit it Mr Franklin?

ADV FRANKLIN SC: Yes, please. That should be
20 admitted as Exhibit WW3. Thank you.

CHAIRPERSON: And you said without annexures. It does not have annexures?

ADV FRANKLIN SC: No, it does.

CHAIRPERSON: Oh.

ADV FRANKLIN SC: So the affidavit with annexures

should be admitted please.

CHAIRPERSON: Yes, okay. The affidavit of Mr Johan Daniel Vlok Symington, which starts at page 116 will together with its annexures be admitted as an exhibit and will be marked as Exhibit WW3. Okay.

ADV FRANKLIN SC: Thank you Chair. Mr Symington, some background facts first. By whom are you employed?

MR SYMINGTON: Chair, I am employed by the South African Revenue Service.

10 **ADV FRANKLIN SC:** In what capacity?

MR SYMINGTON: At the moment I am a senior executive of SARS in the executive committee of SARS. That is where I am.

ADV FRANKLIN SC: And since when have you been employed by SARS?

MR SYMINGTON: I have been employed by the head office of SARS since the 1st of April 1990.

ADV FRANKLIN SC: So it is for more than 30 years?

MR SYMINGTON: Yes, Chair.

20 **ADV FRANKLIN SC:** And what field are you in at SARS? What services do you provide for SARS?

MR SYMINGTON: Chair, that has ranged over the years. On the 1st of April when I joined the head office of SARS, I was actually dumped in the deep water by having to take care of the matters relating to pension funds, government

funds, retirement annuity funds and so forth.

Over the years my career has developed into what we call personal income tax and that at the moment is my field of expertise.

ADV FRANKLIN SC: And would you let the commission know what your qualifications are?

MR SYMINGTON: Yes Chair, although I must mention having heard Mr Williams' testimony, I am ...[intervenes]

CHAIRPERSON: You are not so confident to mention
10 yours?

MR SYMINGTON: I am hesitant but I will share with you. ‘

CHAIRPERSON: Yes.

MR SYMINGTON: So I have got a BCom in financial management and LLB.

ADV FRANKLIN SC: And is it correct that during your tenure at SARS you have inter alia provided legal advice to the organisation?

MR SYMINGTON: Yes, Chair.

ADV FRANKLIN SC: You mentioned earlier pensions and
20 provident funds. Do you have any particular knowledge and experience of those?

MR SYMINGTON: Yes, Chair. One must understand that where SARS fits into that area, because it is not that obvious, but the hibiscus incentivize people to save for their retirement via a pension fund or so, and it uses the

Income Tax Act to incentivise that by making sure that the fund itself is exempt from tax.

That contributions to the fund is deductible and so on and that is where SARS fits into the area. Now that of course allowed myself and the team that I worked with to engage very intimately with the retirement fund industry. At that time, it was the industry was represented by the live offices association, now it is called ASISA if I remember correctly, as well as the institute for retirement.

10 Over the years we have built up a very workable relationship, and one or two examples of that would be what we know today as reservation funds. That vehicle was developed between myself and the LOA and the institute for retirement funds.

Another example would be what we refer to as living annuities or equity linked annuities. That again was a product that we release in the market together with the live offices association and the IRF. so those were the, I was very intimately involved in that industry and as a result of
20 that I was acknowledged by both inside SARS and outside, as an expert in the field of pension law, if one can refer to it.

ADV FRANKLIN SC: Thank you. Now you are called principally to tell the commission about the events of the 18th of October 2016 but in order to give that context, I

would like to go back to what you have dealt with under the heading broader background on page 117 of your affidavit.

What you say in paragraph Symington, is this:

“What follows under this heading is what I understand and am advised forms part of the public record or falls within the public domain and is regularly reported by the media. I do not have personal knowledge of these facts, but they are relevant to the context in which
10 this affidavit is made.”

Now the commission has heard great deal of evidence covering the issues which you have dealt with here, and so I am not going to lead you through it, but in essence what you have outlined here, is the changes in the Minister's of Finance in 2015 and 2016, where Mr Nene was replaced by Mr van Rooyen and then by Minister Gordhan.

You have also referred to allegations of State Capture by Mr Mcebese Jonas in January of 2016 and you
20 have placed Mr Gordhan in that milieu together with other officials in the national treasury and you have said on the strength of the facts that you have set out in the public domain that it appeared that inter alia Mr Gordhan was an obstacle to parties involved in State Capture.

Is that an accurate summary of the background?

MR SYMINGTON: Yes, it is.

ADV FRANKLIN SC: Alright. So if I could then take you to paragraph 16 of your affidavit. It is also well known that accusations of criminal conduct were made against Minister Gordhan by the Directorate for Priority Crimes, also known as the Hawks, and you know also that during the early parts of 2016 it was widely reported that the Hawks were investigating a broad range of allegations against Mr Gordhan, including alleged involvement in the
10 so called SARS rogue unit and other activities.

Is that correct?

MR SYMINGTON: Yes, Chair.

ADV FRANKLIN SC: Then could I ask you to turn to the first of the annexures to your affidavit which is VS1, page 172. Am I correct that this is the covering letter under cover of which was sent to Mr Gordhan by the Hawks a list of what has become known as the 27 questions?

MR SYMINGTON: Yes, Chair.

ADV FRANKLIN SC: And you have highlighted in your
20 statement, questions regarding Mr Ivan Pillay and you have identified in particular paragraphs 21 to 25 of the 27 questions, correct?

MR SYMINGTON: Yes, Chair.

ADV FRANKLIN SC: And those relate to Mr Ivan Pillay and his functions at SARS, his application for early

retirement and his engagement on an independent contractor contract, is that correct?

MR SYMINGTON: Yes Chair.

ADV FRANKLIN SC: Now that letter, as you will see, refers to a particular case number and you have reflected that case number in paragraph 20 and that is CAS427/05/15 and could you tell the Chair what that relates to, what alleged offenses and whether that later was expanded to include further offenses?

10 **MR SYMINGTON:** Yes, Chair I think I can elaborate on that, that number is the very same number that was used to lay charges in in May 2015 if my recollection is correct by Mr Moyane against a number of names. So that is the number that was used in that.

ADV FRANKLIN SC: Alright, Mr Ivan Pillay - who is Mr Pillay and what was his position at the time that the events that we are talking about took place. Let us go back to 2010 to 2009, 2010. What position did he hold at that time?

20 **MR SYMINGTON:** Chair, if my recollection is correct, and I am speaking under a correction, he was heading up our enforcement area in SARS.

ADV FRANKLIN SC: Right, just continuing with the various charges Mr Gordhan responded to the 27 questions we know, and then also, it is a matter of public record that

on the 11th of October 2016, the while National Director of Public Prosecutions Advocate Sean Abraham's announced that various charges would be brought against Minister Gordhan and also Mr Oupa Magashula who was a former Commissioner of SARS and Mr Pillay, is that correct?

MR SYMINGTON: Yes, Chair it is.

ADV FRANKLIN SC: And those charges related to the approval during 2009 of a request by Mr Pillay that he be allowed to take early retirement and that thereafter he be
10 appointed by SARS on a fixed term contract basis, is that correct?

MR SYMINGTON: Yes, Chair.

ADV FRANKLIN SC: And is it correct that, at that time you furnished a memorandum to the then Commissioner, in which you expressed various views?

MR SYMINGTON: That was then in March 2009, right Chair.

ADV FRANKLIN SC: Could I take you please to the document which appears at page 202, is that the
20 memorandum that you speak of?

MR SYMINGTON: Yes, Chair that is, yes Chair.

ADV FRANKLIN SC: And who was it addressed to, it was a Commissioner who was that?

MR SYMINGTON: It was to, the Commissioner at that time was Mr Gordhan.

ADV FRANKLIN SC: And what gave rise to the request for you to provide this memorandum, what was its purpose?

MR SYMINGTON: But, Chair I was asked by Mr Pillay to write a memo to the Commissioner on these matters that I raise or that he raised with me and that then related to the application, the lawfulness of the of him wanting to go on early retirement and the lawfulness and the availability of the provisions in the Public Service Act, which allows the Minister to allow somebody to go on early retirement.

10 And then the third item that he asked me about was the lawfulness of being appointed after his retirement at SARS and that is the context of it.

ADV FRANKLIN SC: Alright, we can read the opinion ourselves but what was the conclusion to which you came and what did you advise the Commissioner?

MR SYMINGTON: So my advice is very cryptic and that is the way that we would normally write to a Commissioner and in Mr Gordhan's instance, as an example, when he went to somebody to ask for advice, he knows where to go
20 and so his never really interested in the detail, setting out of the law, his interested in my research outcome of the law. And so I advised him in broad terms that all three, one, two and three or one or one or two or three is lawful.

ADV FRANKLIN SC: Right, we will return to that. And, of course, then could I ask you to look at the document at

page 204 and following, is that a letter which is addressed by Mr sorry, by Commissioner Magashula dated the 12th of August 2010 to the then Minister of Finance, Mr Gordhan?

MR SYMINGTON: Yes, Chair.

ADV FRANKLIN SC: And we can read it but is it correct, that the Commissioner sought the Minister's approval for this, of these issues that you had timed on in your memorandum of the 17th of March 2009, i.e. the application for early retirement, the waving of the early retirement
10 penalty, and the request to be appointed on contract after his early retirement.

MR SYMINGTON: Yes, Chair.

ADV FRANKLIN SC: And then if you would look please at page 207 at the bottom of the page there is a date 18 October 2010 and there is a signature EJ Gordhan, Minister of Finance and it is indicated as having been approved, you know what the Minister was approving?

MR SYMINGTON: Yes, Chair I must just mention that I was not involved in this letter. So this is what we know
20 that was sent to the Minister, that this would have been the Minister approving the recommendation under six on this same page. That is normally how we set it out, so we ask the Minister or to whoever we write like the Commissioner, we make a recommendation and then that is what is then approved.

ADV FRANKLIN SC: That took place in 2010. Now jumping ahead, six years later, you have explained how the genesis of criminal charges that were brought against various SARS officials. It is also a matter of public record that a summons to appear in a criminal court on charges of fraud which was served on Mr Gordhan, Magashula and Pillay on or about 11 October 2016. That prompted a letter from an NGO which wrote to the National Prosecuting Authority and essentially indicated that there was no basis
10 to proceed with the prosecution and that it should be withdrawn, is that correct?

MR SYMINGTON: Yes, Chair.

ADV FRANKLIN SC: And would you look please, at the letter from the Helen Suzman Foundation, which appears as annexure VS3 at page 193, you have that?

MR SYMINGTON: Yes, Chair.

ADV FRANKLIN SC: We need not go through the full content of the letter but what the attorneys acting on behalf of the Helen Suzman Foundation do is draw to the
20 attention of the National Director of Public Prosecution certain materials which they regard as relevant in relation to the decision to proceed with a prosecution against these three individuals, is that correct?

MR SYMINGTON: Yes, Chair.

ADV FRANKLIN SC: Please look at paragraph 6.5 on

page 196. Now, having made an allegation on the previous page that the charges are unsustainable, and may in fact be actuated by recklessness for ulterior purpose, and the following is said in para 6.6:

“The position is simply reinforced by the following contemporaneous documentation raised related to the retirement of Mr Pillay.”

And then there are various documents which are attached. Please look firstly at what is attached as annexure A,
10 which you will find on page 200. That is an internal memorandum from Mr Pillay dated the 27th of November 2009 and the purpose is stated to be:

“To explain that I have decided to take early retirement as well as to request you to consider to recommend for possible approval by the Minister certain related matters that will flow from my decision to take early retirement.”

That is addressed to the Commissioner at the time Mr Magashula.

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

ADV FRANKLIN SC: Then going back to the Helen Suzman letter, there is an annexure B which is also accompanies the letter, and that is a legal and policy division memorandum dated the 17th of March 2009, which you find at page 202 to 203. That is your memorandum, is

that correct?

MR SYMINGTON: That is it, Chair.

ADV FRANKLIN SC: And then the third document is annexure C, which is a memorandum dated the 12th of August 2010, which you find at page 204 to 207, which we looked at earlier, which is a recommendation made by the Commissioner to the Minister of Finance and ultimately an approval by the Minister of Finance, is that correct?

MR SYMINGTON: Yes, Chair.

10 **ADV FRANKLIN SC:** And on the strength of these documents, you see that the Helen Suzman Foundation called upon the NDPP to unconditionally withdraw the charges failing which they would bring proceedings, is that correct?

MR SYMINGTON: Yes, Chair.

ADV FRANKLIN SC: Right, I then would like to take you please to paragraph 29 of your affidavit, which is at page 122. Now you say that a Dr JP Pretorius was instructed by Mr Abrahams to reconsider the charges in the light of the
20 allegations made in the FUL, as it is being called F-u-l, Helen Suzman Foundation letter of the 14th of October 2016, which we have looked at, who was Dr Pretorius?

MR SYMINGTON: Dr Pretorius is employed by the NPA and he was also the author of the letter that was sent to the Hawks that was asking me to make an affidavit on the

18th of October 2016.

ADV FRANKLIN SC: Alright, you call that the Pretorius letter and we will come to it in due course. But the essence of it is that the Pretorius letter as you have called it contained a set of questions to you regarding your 2009 memorandum, is that correct?

MR SYMINGTON: Yes, Chair, and that happened because of what the Evidence Leader referred to earlier the submissions was about the Helen Suzman Foundation and
10 another one that included my memo of 2009 and I suspect the NPA wanted to know more about this memo and so I received this letter with a number of questions they have asked me about.

ADV FRANKLIN SC: Alright, before we get to the events of 18 October 2016 and subsequent to that, it is a matter of public record that on the 31st of October 2016, Mr Abrahams convened a further press conference in which he announced that all the charges against Minister Gordhan, Magashula and Pillay were withdrawn with immediate
20 effect.

MR SYMINGTON: Yes, Chair that is correct.

ADV FRANKLIN SC: So, very shortly after having announced the bringing of the charges, they are withdrawn. Would you look please; at annexure VS4 you will find that at page 221.

MR SYMINGTON: Yes.

ADV FRANKLIN SC: That is a written media announcement by Advocate Abrahams, dated the 31st of October 2016. Is it your understanding that this was presented to the press on that day?

MR SYMINGTON: Yes, Chair.

ADV FRANKLIN SC: It is a lengthy memorandum but I want to please identify certain parts of it. Please look at paragraph 14.4 on page 224.

10 **MR SYMINGTON:** Yes.

ADV FRANKLIN SC: Now, it is said there:

“Mr Pillay first applied to go on early retirement in December 2008, when a vastly experienced Human Resource Specialist in the employ of SARS was requested to prepare a memorandum for the early retirement of Mr Pillay.”

Do you know, who that vastly experienced person was?

MR SYMINGTON: Not really, sir Chair that, no.

20 **ADV FRANKLIN SC:** Alright, then please look at the –
over the page, at page 225 paragraph 14 the memorandum was for the attention of the Commissioner, who is Mr Gordhan at the time to recommend to the then Minister to consider approving the early retirement of Mr Pillay in terms of provisions of Section 16(6)(a) and B of the Public Services Act.

Now, if I could take you forward please to paragraph 27 on page 240 and what is said here is:

“FUL and the HFS also inter alia placed reliance on a memorandum from a SARS legal and policy division employee Mr Vlok Symington, dated the 17th of March of 2009.”

That is your memorandum that we have looked at?

MR SYMINGTON: Yes, Chair.

ADV FRANKLIN SC: Then in paragraph 28 what Mr
10 Abrahams records is that:

“This document only came to the attention of the prosecutors for the first time by way of the submission by FUL and the HSF and is advised to the Commissioner of SARS, as a result of Mr Pillay having requested him to consider one, his application for early retirement from the GEPP, two his application to the Minister of Finance to waive early retirement penalty, and three, his request to be reappointed on contract after his early
20 retirement from the GEPP.”

And then, in paragraph 29, the advice that you gave is set out and summarised, do you see that?

MR SYMINGTON: Yes, Chair.

ADV FRANKLIN SC: And then going forward to paragraph
33 on page 245 what Mr Abraham says:

“The advice of Symington appears to have largely influenced Mr Pillay and Mr Magashula.”

And then he says in para 39:

“I foresee great difficulty in proving the requisite *animos*.”

You are a legal person; you understand him there to be talking about the intention to commit a crime?

MR SYMINGTON: Yes, sir, yes Chair, *mens rea*.

ADV FRANKLIN SC: Then please look at paragraph 38 to

10 41, what the conclusion is by Mr Abrahams is:

“As a result, and in the absence of any other evidence to the contrary I am satisfied that Mr Magashula, Mr Pillay and Minister Gordhan did not have the requisite intention to act unlawfully.”

39:

“I am of the view that the matter could easily have been clarified had there been proper engagement and cooperation between the Hawks and Mr Magashula, Mr Pillay and Minister Gordhan.”

20 40:

“In the circumstances, I have decided to overrule the decision to prosecute and those three gentleman on the charges listed in the summons. As such, I have directed the summonses to be withdrawn with immediate effect, and there would

thus no longer be any need for Mr Magashula, Mr Pillay and Mr Gordhan to appear in court in respect to the charges listed in the aforementioned summonses.”

Now have you read that, this announcement yourself in preparation for this hearing?

MR SYMINGTON: I have read it not now, but in 2016, I did. Mr Franklin and Mr Chair what is not very clear to me if one looks at 39 on page 246 where Mr Abrahams says
10 that in the sorry, he says:

“I am of the view that this matter could easily have been clarified had there have been an engagement between the Hawks, Mr Magashula, Mr Pillay and Minister Gordhan.”

Now that may very well be so but this memorandum of Bain dated March 2009 was in the hands of Mr Moyane since December 2014 up to about six months later, and that happened to be in the hands of Mr Moyane because he asked for Mr Pillay’s HR file.

20 Well, he did not ask for it Mr Pillay we learned asked for it but it landed ultimately not in the hands of Mr Pillay it landed in the hands of Mr Moyane and it was kept in his office under lock and key from what I understand for about six months.

Now, my memorandum was in his file and I know

that because HR confirmed that to me not long ago, by way of email. So it was - one would have expected that in the - that when the Hawks had talks with Mr Moyane, that he could have made that memo available to the Hawks as well, and I just wanted to add that there.

ADV FRANKLIN SC: Yes, thank you.

CHAIRPERSON: Well, I am sorry, Mr Franklin, there was clarification provided yesterday and I think previously, in regard to the evidence of Mr Gordhan and Mr Moyane
10 during cross examination, that in the criminal complaint that Mr Moyane had laid with Police, he had not included Minister Gordhan.

I wonder whether that may have been in relation to Mr Pillay's early retirement that may have anything to do with the fact that he was aware of this memorandum. You obviously you might not be able to say...[intervene]

MR SYMINGTON: I will not know that.

CHAIRPERSON: Yes, you would know that.

MR SYMINGTON: All I can say is that it was in his hands.

20 **CHAIRPERSON:** Yes, yes.

ADV FRANKLIN SC: On that score, Mr Symington, could I take a please to annexure VS20 on page 293, which is dated the 19th of October 2016.

MR SYMINGTON: Yes, Chair.

ADV FRANKLIN SC: Do you have that, that is before the

withdrawal of the charges.

MR SYMINGTON: Yes, sir.

ADV FRANKLIN SC: And what is that letter?

MR SYMINGTON: Mr Chair, I did not really know what this letter was about, but it listed my name and Mr Lowe's name and then there was a Mike and Gilbert and again those last two I have never met. But this letter what it looks like is that he is giving us permission, all these names in the letter permission to share information with the Hawks.

10 Now why this would be relevant, on the one hand, but on the other hand, I do not really understand why it was necessary for this letter.

Normally, if we have to reveal what we refer to as taxpayer information or SARS information, we would have to get the permission of the Commissioner, when it is just normal SARS information in HR matters, and if it is a taxpayer info, then we are not allowed to share it unless ordered by a court. So I am not sure what the reason is for this letter to have went out but it did.

20 **ADV FRANKLIN SC:** Yes, and what it says it is a letter from the then Commissioner Mr Tom Moyane dated 19 October 2016 to the colonel, head of organised crime, and the caption is CAS427/05/2015, is that the criminal case number that we referred to earlier?

MR SYMINGTON: Yes, Chair and if I may?

ADV FRANKLIN SC: Yes.

MR SYMINGTON: Chair, the relevance of it, and this also goes back to the 27 equations that were posed to Mr Gordhan in February 2016, where this number was used as well, but it shows that somehow that matter, you know, a case number has morphed into something which was not initially there. It may have been in the minds because ultimately when you look at these things, and you look at the way that the charges were framed one, ultimately it
10 would have led to Mr Gordhan, so even though his name was not mentioned there, there was a likelihood that whether it is the Rogue Unit or whether it is the pension fund matter it might have led ultimately, to Mr Gordhan in any event, but that is the relevance.

So even on this date which was very soon after the incident, that we will come to later it refers to myself and Mr Louw, I do not know why Mr Louw but it refers to me. So this re-confirms that in the mind of Mr Moyane who is the author of this letter he was the complainant in this
20 matter and he says so.

When one goes to paragraph 2 of that very same letter, he says in the second sentence. Now, it reads a bit weird, but it says:

“As a compliant in this matter.”

And I assume it must read as a complainant in this matter.

“I have to ensure that all relevant SARS officials.”

And then it goes on, so in his eyes he sees himself as the complainant in the pension fund matter because that is where I was involved.

ADV FRANKLIN SC: But just to clarify then the original complaint under this case number CAS427 related to the Rogue Unit, you said that then morphed, what did it morph into?

MR SYMINGTON: Mr Chair it morphed into an
10 investigation into the validity or the lawfulness of the early retirement of Mr Ivan Pillay.

CHAIRPERSON: And was your role in regard to that matter was your role acknowledged by the Hawks maybe and Mr Moyane as simply the memorandum then that you provided or was there an allegation that you played any other role in regard to the early retirement?

MR SYMINGTON: So Chair at this stage...

CHAIRPERSON: As you understood the position.

MR SYMINGTON: And I am not left behind sorry.

20 **CHAIRPERSON:** Ja let me repeat. I just want to know from you what your understanding was of what it is that you were said to have done that was unlawful or criminal? So in relation to the early retirement matter of Mr Pillay.

MR SYMINGTON: Yes.

CHAIRPERSON: Were you alleged to have done anything

wrong other than the provision of that memorandum of the 9th?

MR SYMINGTON: No I was never – no Sir – no Chair.

CHAIRPERSON: Yes.

MR SYMINGTON: Never.

CHAIRPERSON: So was your understanding that whatever charges they had in mind for you it was because of that memorandum that you provided?

MR SYMINGTON: Are you now referring to the aftermath –
10 the disciplinary charges?

CHAIRPERSON: The disciplinary charges. I see that in this letter at page 293 your name appears there.

MR SYMINGTON: Yes.

CHAIRPERSON: And that refers to that criminal case in Brooklyn and I understood you to say it morphed into a matter relating to the early retirement.

MR SYMINGTON: Oh yes. So...

CHAIRPERSON: Or did you misunderstand something?

MR SYMINGTON: No, no, no. So and that is also my – why
20 I do not really know why this letter was you know is there. It happens to be a day or two after the 18th of October when that incident happened at the SARS offices involving myself that no one ever – no one from SARS ever asked me about that memo of 2009 so I do not know why really he thought that I should have this sort of permission.

ADV FRANKLIN SC: So just to clarify.

CHAIRPERSON: Okay Mr Franklin.

ADV FRANKLIN SC: Chair.

CHAIRPERSON: Yes.

ADV FRANKLIN SC: This is – this is – does not relate to any criminal charges against the four people it relates to permission which is granted by the Commissioner for these people to give information to the Hawks.

CHAIRPERSON: Oh I thought that the giving of information
10 was related to the early retirement.

ADV FRANKLIN SC: Yes but it is not as though they were themselves the subject of a criminal ...

CHAIRPERSON: Oh it was not – okay, no, no that clarifies it
ja.

ADV FRANKLIN SC: Yes.

CHAIRPERSON: Thank you Mr Franklin.

ADV FRANKLIN SC: You have dealt with this in your statement at paragraph 87 where you talk about this letter of the 19th of October 2016 and you have explained in para 88
20 that the four employees mentioned in that letter had no knowledge, no involvement or knowledge of events relating to – I am sorry let me just start again.

The four employees who are there are yourself, Louw, Paiyega and Gunn and you say Pege and Gun had no involvement with or knowledge of events leading up to

Pillay's retirement.

MR SYMINGTON: Yes.

ADV FRANKLIN SC: Therefore the Hawks would presumably have wished to interview them in relation to the alleged rogue unit of which Louw and I had no involvement or no knowledge of. Clearly the inference can be drawn that at the time Moyane signed this letter he was aware that the scope of the initial investigation had been expanded to include the Pillay retirement issue.

10 **MR SYMINGTON:** Yes.

ADV FRANKLIN SC: Is that correct?

MR SYMINGTON: Yes Chair.

ADV FRANKLIN SC: Right. Alright could I then just take you back in the chronology of events and there had been the 27 questions, there had been the Helen Suzman Foundation letter, the Hawks and the NDPP were taking the criminal charges – well they were reconsidering whether they should be proceeded with or not and there was a request inter alia to Mr Moyane as to whether or not there were any further
20 representation or submissions to be made by him as to why the charges against Gordhan et al should not be withdrawn. And could I take you to that letter at VS22?

MR SYMINGTON: On which page is that?

ADV FRANKLIN SC: Page 297. 298.

MR SYMINGTON: Yes Chair.

ADV FRANKLIN SC: And what ...

MR SYMINGTON: So –

ADV FRANKLIN SC: Yes perhaps you can explain it?

MR SYMINGTON: Chair so this letter was written by Advocate Abraham to Mr Moyane on the 17th October 2016 and the – the purpose of this letter was to give Mr Moyane the opportunity to make representations to the NPA about whether the charges here should be withdrawn against Mr Magashule and Pillay and so on.

10 **CHAIRPERSON:** I am sorry Mr Franklin I went to 297 that is not the page you...

ADV FRANKLIN SC: No that is the covering email the action letter is 298.

CHAIRPERSON: Okay, I have – okay I have got it. Yes continue Mr Symington.

MR SYMINGTON: So Chair I think also if I may just Mr..

CHAIRPERSON: Yes.

MR SYMINGTON: Franklin. Chair what is also relevant of this letter is that the NPA Mr Abrahams saw Mr Moyane as
20 the complainant in the very same matter. But nothing to do with the rogue unit – so called rogue unit. But all to do with the early retirement of Mr Pillay.

ADV FRANKLIN SC: And this is the day before the events which I shall get to now.

MR SYMINGTON: Yes Chair.

ADV FRANKLIN SC: And on that day Mr Moyane had been asked whether he had any representations as to whether the charges should be withdrawn or not.

MR SYMINGTON: Yes Chair.

ADV FRANKLIN SC: Alright could I then take you to the events of the 18th of October 2016 which you deal with in your statement at paragraph 37 on page 124 and following. And could I ask you please to – to deal with that in your own words as to – as to what happened? You have already
10 sketched the background and that is that you had been requested in a letter from Dr Pretorius to answer certain questions in by way of an affidavit arising from the 27 questions and your memorandum. Is that correct?

MR SYMINGTON: Yes Chair.

ADV FRANKLIN SC: So please can you take the Chair through the events of that day as you have set out in your statement?

MR SYMINGTON: So Chair I will give you an overview of it I think and then to the extent that you need more detail you
20 will – you are also welcome to ask.

So Chair this day which was a Tuesday was like any other day. It was a normal day I was asked in the morning.

CHAIRPERSON: And this was Tuesday?

MR SYMINGTON: The 18th of October.

CHAIRPERSON: October 2016.

MR SYMINGTON: 2016 Chair.

CHAIRPERSON: Yes okay.

MR SYMINGTON: And I was asked by Mr Louw who was my direct line manager at that point. He was also the – a Chief legal Officer of SARS. I was asked by him to visit him in his office and there he handed me a set of documents which was the letter that was sent by Dr Pretorius via the Hawks to Mr Moyane.

Mr Moyane then handed that over to Mr Louw to ask
10 me to do an affidavit on the questions that was on the letter. Now those questions related to the March 2009 memo which you will remember was handed in by the Helen Suzman Foundation just about a week or so before that I think on the 11th.

And so I went off and Mr Louw also mentioned that members of the Hawks will be visiting me to – to – and I must hand over this affidavit which I was then writing to the members of the Hawks which is you know which is okay, which is normal. You know nothing abnormal about that.

20 **CHAIRPERSON:** Did the letter ask you to do an affidavit or you were doing an affidavit for the Hawks (speaking over one another).

MR SYMINGTON: No the letter asked me to do an affidavit.

CHAIRPERSON: Okay.

MR SYMINGTON: If I remember correctly we must just

double check but I did an affidavit.

CHAIRPERSON: Okay.

MR SYMINGTON: So I went to my office to do the affidavit.

The Hawks arrived there at about ten o'clock the morning where I met with them and we went through the letter and then we made arrangements for myself to go and write the affidavit and they would then – we also arranged that they would meet up with me again at about one o'clock on the same day. That I thought that I should be able to do the

10 affidavit between that time and that time.

CHAIRPERSON: Hm. Did the letter from Mr Pretorius was its main purpose to ask you to do the affidavit?

MR SYMINGTON: Yes Sir.

CHAIRPERSON: Okay alright. Continue.

MR SYMINGTON: So the – and I just want to pause one moment at the let us call it a first meeting of that morning which was a very good meeting. It was just a normal meeting. There were four members of the Hawks. I remember the names of two one was Brigadier Xaba and the

20 other was ...

CHAIRPERSON: Is that Xaba?

MR SYMINGTON: Ja Xaba.

CHAIRPERSON: Xaba?

MR SYMINGTON: Ja Xaba.

CHAIRPERSON: Ja that is Xaba.

MR SYMINGTON: Xaba.

CHAIRPERSON: Ja.

MR SYMINGTON: Thank you.

CHAIRPERSON: Okay.

MR SYMINGTON: Chair and the other was Colonel Moluleke. And one thing that I was interested in because the – the – I was alerted by somebody in my office that my – that memo of 2009 was actually out there since about the end of 2014 when there was a labour dispute between Mr Pillay and
10 Mr Moyane.

And so I was interested to know why they only now arrived at my office to ask me about this memorandum and now my recollection of who – who said what is not so but my recollection then is that Colonel Moluleke said no they only recently received it via the submission of the Helen Suzman Foundation. And I said no well that is – that is interesting but to my knowledge this memo has been out there for a number of years. Then Brigadier Xaba said no we have had it all along.

20 Now at that point it you know I did not attach much value to it and we went on. But in hindsight that was actually something that one should think about because if they had it all along then why did the NPA not have it?

So anyway let me go on to – so then I went to my office, I did the affidavit. I was asked to do more to do two

more questions so the Hawks added two more questions to the letter. I went off – now – I then asked – they then asked – the Hawks then asked to – to visit the offices of Mr Louw. And I then asked my secretary Ms Ell to accompany them there assuming that they do not know where this is. And so she went off with them and this is about a five minute walk if you can call it like that. And when they arrived at the offices of Mr Louw she noticed that they were not there.

And then she and Mr Louw went in – went to look for
10 them because they disappeared in a sense. Only then to find them in the boardroom of Mr Moyane and so now what was you know what the reason for that was I do not know but those are the facts.

Then at about one o'clock we met again. I was not yet a 100% finished with the affidavit because of those last two questions which was – which were added to the list.

And I said to them I need about half an hour to complete the affidavit. Now that was in a meeting just about a minute before that while I was in my office still there was a
20 man in the door which asked me to hand over that letter of the Hawks to him.

CHAIRPERSON: Mr Pretorius' letter?

MR SYMINGTON: Yes.

CHAIRPERSON: Hm. 00:16:12 to.

MR SYMINGTON: Yes.

CHAIRPERSON: That you were given by Mr Louw?

MR SYMINGTON: Yes.

CHAIRPERSON: Hm okay.

MR SYMINGTON: So – and I then mentioned to the gentleman that you know I am not yet done I am now off to the meeting with the Hawks the one o'clock meeting I will explain to them that I need about half an hour more and I assumed that this man was also a member of the Hawks.

Later on after the event it turned out it was the
10 bodyguard of Mr Moyane.

ADV FRANKLIN SC: What is his name?

MR SYMINGTON: Mr Titi, T-i-t-i. So when we then met in the room – boardroom – when I met with the Hawks again Mr Titi was also there. I assumed still there was not five members of the Hawks and not four anymore. You know I really did not know that he was Mr Moyane's bodyguard. I have never met him before.

And so – and the meeting then all of a sudden was frosty. It was hostile. Brigadier Xaba asked me to – to hand
20 over the Hawks – the NPA letter to him and in return he would hand over to me his copy of the very same letter.

So it did not make sense why would you want to ask me for this letter but hand me the letter back again?

ADV FRANKLIN SC: Mr Symington just to – sorry to interrupt.

MR SYMINGTON: Sure.

ADV FRANKLIN SC: You talking about the letter that had been given to you at the beginning of the day by Mr Louw. What you have described as the Pretorius letter?

MR SYMINGTON: Yes Chair. So that was the letter that arrived in the offices of Mr Moyane which was then handed by Mr Moyane's office to Mr Louw to hand to me.

It was that letter that the Hawks all of a sudden now wanted back but they said that I can have their copy of that
10 letter in return.

Now to make a long story short and we can go to that it later turned out that I am in my copy of the letter at the bottom of it was attached emails – of an email. The email trail that originated at the NPA, went to the Hawks then went to a lawyer of SARS and then went to Mr Moyane's office.

But I am there a copy of letter that email was not attached. So obviously they were trying to get the emails out of my hand and that is why they wanted my copy of the letter which happened to have those emails attached and
20 they would hand me back their – their letter where the emails are then not attached.

CHAIRPERSON: The one you had was it the original letter as opposed to a copy or was it also a copy?

MR SYMINGTON: Mine was the original one.

CHAIRPERSON: Was the original.

MR SYMINGTON: Well it was sent by email and it was printed out.

CHAIRPERSON: Ja. Okay.

MR SYMINGTON: So now how – how I realised that was that during the discussion and I must mention then that Mr Titi then did not allow me to exit the room. He actually blocked the room and there was no way that I could exit. I asked for my – yes Chair.

CHAIRPERSON: Was this at SARS offices?

10 **MR SYMINGTON:** Yes.

CHAIRPERSON: Or was this at Hawks office – the Hawks office?

MR SYMINGTON: No SARS office.

CHAIRPERSON: SARS offices.

MR SYMINGTON: It is my boardroom.

CHAIRPERSON: Your boardroom?

MR SYMINGTON: Yes.

CHAIRPERSON: And you had – you were meeting there with the Hawks?

20 **MR SYMINGTON:** Yes Chair.

CHAIRPERSON: And Mr Titi joined them?

MR SYMINGTON: Yes Chair.

CHAIRPERSON: Yes.

MR SYMINGTON: And I thought....

CHAIRPERSON: Now you ...

MR SYMINGTON: He was another member of the Hawks but he was actually the bodyguard of Mr Moyane.

CHAIRPERSON: Yes.

MR SYMINGTON: Sent by Mr Moyane for a particular reason.

CHAIRPERSON: Yes. And you want to leave because you were done with whatever business you had with them at the boardroom or you were – wanted to leave because of these demands for this letter?

10 **MR SYMINGTON:** Yes Chair so – so it was a very unusual – it never – you know – so for me I just simply did not understand what was now going on. And I just wanted to terminate the meeting, exit the meeting, go and do my affidavit, hand that to Mr Louw rather than the Hawks and – but they did not want me out.

So they did not let me out and they said that they will let me go if I hand over that letter of the NPA to them and in return they would hand their letter to me.

As this was developing Brigadier Xaba at a point said
20 but it is actually the emails that we after. Then I realised there is something else now going on and as it happened to be I was making a video of this whole thing and when he referred me to the set of emails I then turned to the emails and the video with doing it and afterwards again to make a long story short there was an email that was – that very

clearly did the Hawks and Mr Moyane had an interest to retrieve.

CHAIRPERSON: At that time when they were making this demand for you to return that email were you aware of what you have told me that at the bottom of it you could tell that there were other emails or you did not know that at that time?

MR SYMINGTON: It was – I only really became aware of the fact that there were this emails when the Brigadier said to
10 me he actually wants the mails that is at the bottom.

But even at that point I – well I read the mails just sort of when he referred me to the mail. It – I did not really understand what was in the mail. It was only later when I went through my own videos that evening the day after that and so on and I actually realised here is a mail from SARS lawyers to Mr Moyane.

CHAIRPERSON: So in your mind as you refuse to hand over the email what was your reason at that time? I am asking because ordinarily one would think it would be easy if it was
20 to say okay you giving me the same thing maybe it is not a big deal. Okay. But if you have some suspicions obviously it could be different.

MR SYMINGTON: No Chair it was all about how we are brought up in SARS. If a document is handed to you – to me as a SARS official I am the custodian of that document.

CHAIRPERSON: Yes.

MR SYMINGTON: There are secrecy laws.

CHAIRPERSON: Yes.

MR SYMINGTON: And so you do not hand...

CHAIRPERSON: You must look after it.

MR SYMINGTON: Yes so...

CHAIRPERSON: You are responsible for it. So if you – if a doc – a SARS doc – or if a document is given to you...

MR SYMINGTON: It is I...

10 **CHAIRPERSON:** You are trained to say it is your document.

MR SYMINGTON: It is my document.

CHAIRPERSON: If anything happens to it you are responsible.

MR SYMINGTON: Yes. I am accountable for that document.

CHAIRPERSON: You are accountable for it.

MR SYMINGTON: And now what I did know it is that Mr Louw said to me that that letter was handed to him by Mr Moyane's office so that even makes it

CHAIRPERSON: More serious.

20 **MR SYMINGTON:** More serious so why I did – and then that was the – actually the main reason. The second reason was that I have learnt over years that if I do not understand something 100% I do not make a decision until I understand something a 100%.

CHAIRPERSON: Yes. Okay.

MR SYMINGTON: Because then I will make the wrong decision.

CHAIRPERSON: Yes.

MR SYMINGTON: And then the – a third to me was just handing over a letter and getting the very same letter back was also of course.

CHAIRPERSON: Was suspicious.

MR SYMINGTON: Yes.

CHAIRPERSON: Mr Franklin.

10 **ADV FRANKLIN SC:** Thank you. You say you videoed the document what did you use to do that?

MR SYMINGTON: My cell phone Chair.

ADV FRANKLIN SC: And did you video each page of the document?

MR SYMINGTON: I videoed each page of the emails yes. Yes Chair.

ADV FRANKLIN SC: Thank you. Did you at any stage call anyone from within the boardroom once you had been prevented from leaving?

20 **MR SYMINGTON:** Yes Chair. So there was a moment when I really thought this is not going to turn out good. There were four huge men of the Hawks and they were not letting me out. And so I called the SAPS emergency number 10111 if I remember correctly and I called them and that of course was a – a disaster on its own because they simply could not

understand why I would be able to phone while being held hostage you know so – and I also called my – but before that I called my secretary and I also called the security of the building that I am in. And I mentioned to them look you know I am being held here you must now help me. So they duly arrived but – and they wanted to open the door but the door was then pulled closed again by Mr Titi. So they were not left inside and I was not able to exit.

ADV FRANKLIN SC: At – eventually you did leave the
10 boardroom at some point?

MR SYMINGTON: Yes Chair.

ADV FRANKLIN SC: And can you describe what happened when you left the boardroom? At that point did you still have the – I will call it the Pretorius letters which was the letter plus the annexures - did you still have possession of that?

MR SYMINGTON: Yes Chair. I did. So there was a moment when Mr Louw – so Mr Titi was actually on the phone and that we learnt afterwards with Mr Moyane during the whole incident and at one point apparently Mr Moyane gave Mr
20 Louw a call to come over to the boardroom and – and defuse whatever is going on there.

So Mr Louw arrived – he also brought along two other colleagues of mine and we started to have – Mr Louw then asked the Hawks to exit the room so that he can have you know – to talk to me. And the Hawks did so they exited.

Mr Titi remained and so we had a discussion – I explained to Mr Louw what is going on in my mind. I ex – also explained to him that you know I have not done this affidavit. The NPA is now waiting for this affidavit. And that I need to finish it and then Mr Louw want – well asked the Hawks if I can make a copy of that letter so that I can ...[word cut] ... they can have what they want and I said: Yes, you are most welcome. But then the Hawks said, no, they are not going to make a copy of it. So. And then
 10 there was the moment where I just thought to myself: Well, I am now – since the Hawks is out...

Mr Titi in a way sort of moved to the side and suspected that would be because Mr Louw was now there. And so I attempted to exist the door. But as I existed the room, there were the Hawks and they then physically grabbed me in the hand, took those documents out of my hand and off they went.

ADV FRANKLIN SC: Alright. You have explained to the Chair that at the time you received the Dr Pretorius letter,
 20 you were not particularly aware of what the annexures were. And you have also explained that at the point in time when you were told by the Hawks that they were after the annexure, you looked at it but it did not have any particular significance for you. Is that correct?

MR SYMINGTON: Yes.

ADV FRANKLIN SC: Subsequently, did you have occasion to examine the annexure in further detail and did you establish why it is that there was this urgent need by the Hawks and Mr Titi to retrieve that document?

MR SYMINGTON: So, Chair, yes. At that point we could read the words and understand that there is something there and maybe we should ...[intervenes]

ADV FRANKLIN SC: Yes, let me take you to the document. It is at page 722, WS-17. You have it?

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

ADV FRANKLIN SC: Is that the annexure that you have been talking about?

MR SYMINGTON: Yes, Chair.

ADV FRANKLIN SC: That is – there are two emails there. The bottom email is Brigadier Xaba to the attorney, Maphakela

MR SYMINGTON: Maphakela.

ADV FRANKLIN SC: Yes. There is an email address there. Sorry.

20 **MR SYMINGTON:** Yes.

ADV FRANKLIN SC: And then what he says at the beginning. He says:

“Please read that request from NPA and revert to me.

We need that statement as a matter of

urgency...”

And then at the top of the page, David Maphakela writes an email to Mr Moyane and to Atobogo Makwela(?). And it says the following:

“Only find this for our urgent attention. On ethical reasons, I cannot be involved in this one as I hold a different view to the one persuade by the NPA and the Hawks...”

MR SYMINGTON: Yes.

10 **ADV FRANKLIN SC:** Now can you explain to the Chair what you established having had an occasion to examine the annexure and to consider it?

MR SYMINGTON: Yes, Chair, that these were almost years apart. So, initially, back in 2016, this was the wording that we could see. We knew there was something there because why would a SARS lawyer say to the Commissioner:

20 “On ethical reasons, I cannot be involved in this one as I hold a different view to the one pursued by the NPA and the Hawks...”

Now this matter related to the early retirement of Mr Aden Pillay.

ADV FRANKLIN SC: Alright. Could you just identify for the Chair? You say a SARS lawyer who ...[intervenes]

MR SYMINGTON: Yes, David Maphakela of M4 Mashiane

Moodley Attorneys.

ADV FRANKLIN SC: A practicing attorney?

MR SYMINGTON: Yes, Chair.

ADV FRANKLIN SC: Yes, just explain again. I am sorry. You why would a SARS lawyer, when you are talking about a SARS lawyer. Is he an attorney who ...[intervenes]

MR SYMINGTON: That he present SARS in this – in I think the “rogue unit” matter.

ADV FRANKLIN SC: Alright. Can you explain again? I
10 cut you short.

MR SYMINGTON: No, sure. So that is all that we knew at that point that there was something there Chair. But it was only much later in April, around April 2018 about a month after Mr Moyane was suspended as the Commissioner. And we had an acting Commissioner at that point, Mr Mark Kingon.

And he and Mr Wayne Browton, who is also a SARS employee, had an interview with Mr Maphakela and Wayne then went about on, you know, and asked
20 Mr Maphakela: What is this mail all about? Why did you say to the Commissioner that on ethical reasons I cannot be involved in this one?

And Mr Maphakela then revealed that he wrote a legal opinion to Mr Moyane in November 2014 when SARS wanted to know his view on the lawfulness of the early

retirement of Mr Ivan Pillay.

And so he wrote a lengthy memorandum on it and advised that there is nothing unlawful about those elements which I listed in my memorandum and it happened to be the same that they asked of him. So.

And so that was the very first time that we became aware of this memorandum of Mr Maphakela which supported the outcome of my 2009 memorandum.

And the relevance of this is that not only was my
10 memorandum not revealed official by SARS to the Hawks or the NPA but this memorandum from Mr Maphakela are confirming the lawfulness of Mr Pillay's early retirement was also not made available, apparently, to either the Hawks or the NPA or both.

ADV FRANKLIN SC: Could I ask you, please, to look at VS-18, pages 278 to 291?

MR SYMINGTON: Yes. Yes, Chair.

ADV FRANKLIN SC: Do you ...[intervenes]

MR SYMINGTON: That is the opinion.

20 **ADV FRANKLIN SC:** That is the opinion that you have been referring to?

MR SYMINGTON: Yes.

ADV FRANKLIN SC: It is dated 5 November 2004.

MR SYMINGTON: Yes.

ADV FRANKLIN SC: So you say that was rendered on

that date to Mr Moyane. That is your understanding?

MR SYMINGTON: Yes, Chair.

ADV FRANKLIN SC: And then just going back to the VS-17 on page 277 where Mr Maphakela says:

“On ethical reasons, I cannot be involved in this one as I hold a different one by the one pursued by the NPA and the Hawks...”

Now what view do you understand him to be talking about?

10 **MR SYMINGTON**: It is this view that he expressed to in his November 2014 legal opinion.

ADV FRANKLIN SC: And when he says:

“I hold a different one by the one pursued by the NPA and the Hawks...”

What were the NPA and the Hawks pursuing?

MR SYMINGTON: Well, the NPA and the Hawks were on their way to charge Ivan and a number of other people and he, in his view, it was a lawful action that was taken by SARS.

20 **ADV FRANKLIN SC**: And when he says: I cannot be involved in this one. Do you understand what he is declining to become involved in?

MR SYMINGTON: I think it is this matter. These are the so-called “rogue unit” matter. So he was involved, is my understanding, representing SARS to some extent in what

was referred to as the “rogue unit” matter. And he was then also asked to be involved to represent SARS in this Ivan Pillay early retirement and I think that is what he means by this. What he means by ethical, it – I – if you would allow me to elaborate?

ADV FRANKLIN SC: Yes.

MR SYMINGTON: And this is in his words conveyed to Mr Kingon and Wayne Browton when they met, is that Mr Maphakela mentioned that he shared his view about the
10 lawfulness about the early retirement. Now not necessarily this document that is viewed, to both the NPA and the Hawks in a meeting and that is his – that is my understanding of his explanation why he used the word ethical.

ADV FRANKLIN SC: Alright. We will come back to that affidavit in due course. So this – the events of this rather bizarre day took place and then is it correct that you sent an email on the same day to Messrs Moyane and Kosie Louw which we find at VS-10, page 258?

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

ADV FRANKLIN SC: And you recorded the events ...[intervenes]

CHAIRPERSON: I am sorry. What page Mr Franklin?

ADV FRANKLIN SC: I am sorry, Chair. It is 258.

CHAIRPERSON: Okay.

ADV FRANKLIN SC: Is this a much shortened version of the story that you have just told about the events of the 18th of October?

MR SYMINGTON: Yes, Chair. And... ja, this is a version I wrote on the very same day because I thought I must write these things down when they are in my memory still very, very fresh, not realising that even years after that, you know, it remained in my memory as if it happened a week ago.

10 **ADV FRANKLIN SC:** And did you get any response from Mr Moyane to that email?

MR SYMINGTON: No, Chair.

ADV FRANKLIN SC: Now then would you look, please, at VS-11 which is on page 259?

MR SYMINGTON: [No audible reply]

ADV FRANKLIN SC: That is another email by you. It is on the subsequent day of the 19th of October 2016. It is to Moyane, Louw and Maphakela and the subject is Ivan Pillay.

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

ADV FRANKLIN SC: It speaks for itself. Could I ask you, that particular letter, if I could ask you to read, please, from... I am sorry. It is the one below.

MR SYMINGTON: Sure. This is the one that I wrote on the 18th.

ADV FRANKLIN SC: 18th. No, I am sorry.

MR SYMINGTON: On the 19th?

ADV FRANKLIN SC: Yes, I am just looking at this...

MR SYMINGTON: Sure.

ADV FRANKLIN SC: Yes, the second paragraph. You say:

“A couple of things need to happen today...”

MR SYMINGTON: Yes.

ADV FRANKLIN SC: Yes.

10 “Most importantly, I need to advise the NPA to the Pretorius from whom that NPA letter came, that I was prevented by the Hawks Delegation and the representative from the Commissioner’s office from completing the affidavit sought by the NPA.

I need to do this to ensure that the NPA is not left with an impression that I was uncooperative...”

20 So you saw the need to explain why you have not completed your affidavit. Is that correct?

MR SYMINGTON: Yes, Chair. And then I went on in the email and asked for guidance and I mentioned that I will be sending this off to the NPA at about 11:15 but Mr Moyane or Louw or anyone... Yes, to ...[intervenes]

CHAIRPERSON: Just give the facts.

MR SYMINGTON: ...to guide me in that... you know, to...to.. And so in response to this mail, I received a call from Mr Louw, asking me to join him in a meeting with Mr Moyane but I did not get the written response on this one.

ADV FRANKLIN SC: Alright. That meeting took place on the 20th of October?

MR SYMINGTON: Yes, Chair.

ADV FRANKLIN SC: You deal with it in paragraph 59.

10 **ADV FRANKLIN SC:** And could you explain to the Chair what transpired at that meeting and in particular what was Mr Moyane's reaction to the events that you had recorded?

MR SYMINGTON: Yes, so it was actually, you know, a very comfortable meeting. Mr Moyane expressed regret for what happened. And so that is essentially it that happened during that meeting Chair.

ADV FRANKLIN SC: And you say in paragraph 60 that Mr Moyane gave you an explanation.

MR SYMINGTON: Yes.

20 **ADV FRANKLIN SC:** Can you please tell the Chair what that explanation was?

MR SYMINGTON: Mr Moyane explained, Chair, that he sent his bodyguard, Mr Titi, over – together with the Hawks to make sure that nobody makes a copy of the NPA letter, Chair.

ADV FRANKLIN SC: Did that explanation make sense to you at the time?

MR SYMINGTON: Not at all Chair because that is not what happened. They actually wanted the document back. They were not – you know, it was not about preventing somebody to make a copy of the letter. What actually happened was that they wanted this letter back.

CHAIRPERSON: But what did you understand the purpose of that meeting to have been, the meeting involving
10 yourself, Mr Moyane and Mr Louw?

MR SYMINGTON: Chair, that is difficult. I assumed at that point, it was in reaction to the second email which I wrote which is this one on 259.

CHAIRPERSON: Yes.

MR SYMINGTON: At the top. To provide the guidance.

CHAIRPERSON: Guidance.

MR SYMINGTON: So when I got the call from Mr Louw, it was before 11:15 and then I decided, okay, I am going...

CHAIRPERSON: Ja.

20 **MR SYMINGTON:** But then, you know, things did not turn out like that.

CHAIRPERSON: But in terms of the content of the discussion at that meeting. Mr Moyane, you say, expressed a regret at what had happened. Was that the previous day? Ja, that would have been the previous day,

I think.

MR SYMINGTON: We are talking about two days ago, ja.

CHAIRPERSON: Oh, about two days before that?

MR SYMINGTON: Ja, ja.

CHAIRPERSON: And did Mr Louw say anything? Did you say anything in that meeting in connection with ...[intervenes]

MR SYMINGTON: I just expressed my surprise and I expressed my views about SARS values and things like
10 that because it was just a bizarre event. It was, you know... And that was about it. There was no real purpose for the meeting, apart from what was said.

CHAIRPERSON: Well, did you get any understanding of who it was that Mr Moyane thought might want to make a copy of the affidavit, of the letter that he did not want to make a copy?

MR SYMINGTON: Well, Chair, no. And what is somewhat weird about is that I had that letter since the morning.

CHAIRPERSON: Yes, yes.

20 **MR SYMINGTON:** Sitting on my own in my office with a photocopy machine readily available. So if I wanted to make copies of that letter and maybe the thought was that - oh, well, I do not know - distribution to the media or something like that. You know, I could have done it.

CHAIRPERSON: But basically his bodyguard did not say

to you: I am here to make sure that nobody makes a copy of the letter that is with you.

MR SYMINGTON: No.

CHAIRPERSON: He did not say that?

MR SYMINGTON: No, he actually wanted the letter.

CHAIRPERSON: He wanted the letter?

MR SYMINGTON: Yes.

CHAIRPERSON: Yes.

MR SYMINGTON: And when he asked for the letter, he did
10 not offer me another version or the same version in return.

CHAIRPERSON: H'm.

MR SYMINGTON: He just wanted the letter and revert
back to Mr Moyane's office.

CHAIRPERSON: Yes. Okay. Mr Franklin.

ADV FRANKLIN SC: Thank you. And at the meeting of
the 20th of October with Mr Moyane, you said that he
expressed regret. What did he express regret about?

MR SYMINGTON: Well, he said about what happened to
me.

20 **ADV FRANKLIN SC**: And did he fully understand what had
happened? In other words, did he ...[intervenes]

MR SYMINGTON: I do not know.

ADV FRANKLIN SC: Well, did he know – did you tell him,
apart from the two emails sent previously, did you explain
to him what had happened i.e. you had been kept there

against your will and that the documents had been taken from you?

MR SYMINGTON: Yes, Chair. So. But it was in overview of what happened but it was, you know, in even less detail of the emails that I have written to him. So he must have read the emails. That I assumed that he knew, more or less, what was – what sort of happened but an email which he wrote to me the next day, revealed something else.

ADV FRANKLIN SC: Yes.

10 **CHAIRPERSON**: But before you talk about that something else. Do you know whether he would have know in advance or given permission for the Hawks to come and meet with you and Mr Moyane?

MR SYMINGTON: Chair, yes, I think so because the letter, the NPA letter was delivered in his email box.

CHAIRPERSON: Yes.

MR SYMINGTON: So, and it is in that email letter that it is aid.

CHAIRPERSON: Yes. So he would have known that they
20 were going to come and see you based on that letter you say?

MR SYMINGTON: And so, I do not think in the letter it is said that the Hawks will visit.

CHAIRPERSON: Yes.

MR SYMINGTON: But Mr Louw said to me that the Hawks

will visit.

CHAIRPERSON: Yes.

MR SYMINGTON: So ...[intervenes]

CHAIRPERSON: So you do not know whether he knew or not in advance?

MR SYMINGTON: I would not know.

CHAIRPERSON: Ja. And you do not know whether the procedure at the time that the Hawks were going to come and interview anybody at SARS, the Commissioner – they
10 would consult the Commissioner or speak to the Commissioner first? You do not know whether there was such a procedure?

MR SYMINGTON: No, Chair.

CHAIRPERSON: Okay.

ADV FRANKLIN SC: Yes, Mr Symington, it seems you were not satisfied following the meeting of the 20th of October because you wrote a further email. Can I direct your attention to page 262?

MR SYMINGTON: Yes, Chair.

20 **ADV FRANKLIN SC:** That is an email from you on the 21st of October 2016 at 10:32 a.m. to Messrs Moyane and Louw and you thank the Commissioner for the meeting of yesterday. That is your meeting on the 20th which you have described.

MR SYMINGTON: Yes, Chair.

ADV FRANKLIN SC: And you say:

“I have again reviewed the events of Tuesday, this week, and the more I studied the records of the events, the more things simply makes no sense with due respect to the Officer of the Commissioner.

10 The explanation that Mr Titi was ordered to ensure that copies are not made of the document containing the request by the Hawks to respond to the NPA's questions, is not aligned at all with what actually happened for the following reasons...”

You then set out your reasons.

MR SYMINGTON: Yes, Chair.

ADV FRANKLIN SC: And did I ask you to look at point 9 in particular?

MR SYMINGTON: Yes.

ADV FRANKLIN SC: What you said there is:

20 “And then even more bizarre. Mr Titi and the Hawks proceeded to keep me in a confined space against my will and ultimately took the document from me and in a manner that, at minimum, was utterly vicious infringing and endless list of statutory and common law provisions, not to mention my personal rights

as both a human being and an employee of SARS...”

MR SYMINGTON: Yes, Chair.

ADV FRANKLIN SC: Mr Moyane responded to that email?

MR SYMINGTON: Yes, Chair.

ADV FRANKLIN SC: We see that at page 261. At the bottom of the page, there is an email from Mr Moyane dated 21 October 2016 to you and Kosie Louw.

MR SYMINGTON: Yes, Chair.

10 **ADV FRANKLIN SC**: He says in the second paragraph:

“I still reiterate that my points as per out discussion in the presence of Kosie, it would seem from your mail as if all what I had said does not meet the level of cordiality I expressed including an apology.

You are entitled to the course of action you choose to take...”

MR SYMINGTON: Yes, Chair.

ADV FRANKLIN SC: And then ...[intervenes]

20 **CHAIRPERSON**: I am sorry. I am trying to look where you are now Mr Franklin.

ADV FRANKLIN SC: I am sorry, Chair. It is 261.

CHAIRPERSON: 261?

ADV FRANKLIN SC: Yes, it is the second email at the bottom of the page.

CHAIRPERSON: I think I went ahead of you. Oh, ja, that is Mr Moyane's response. Is that correct?

MR SYMINGTON: Yes, Chair.

CHAIRPERSON: At 261?

ADV FRANKLIN SC: [No audible reply]

MR SYMINGTON: Yes, Chair.

CHAIRPERSON: Mr Franklin, is ...[intervenes]

ADV FRANKLIN SC: Thank you.

CHAIRPERSON: ...that the email you read?

10 **ADV FRANKLIN SC:** Yes, that is the response.

CHAIRPERSON: Okay.

ADV FRANKLIN SC: So just to reiterate. At page 262, was Mr Symington's letter in which he said:

"I have moulded over the events. I have moulded over the meeting of yesterday on the 20th and it still makes no sense to me at all..."

And he sets out the reasons why. And this then is the response from Mr Moyane to say he still reiterates his points as per the discussion and he says what I read as
20 a slight rebuke that you are not recognising the "cordiality that I showed to you".

MR SYMINGTON: Yes.

ADV FRANKLIN SC: What was your response to this mail? Did it lay your concerns? Did it provide any explanations for you?

MR SYMINGTON: Well, Chair... Well, no. Not at all. So I responded the next day in a last response. I think that was the very last one ever that we had any sort of email correspondence. So at the top of that very same page 261 is my response to his email which you will find at the bottom of that page.

ADV FRANKLIN SC: [No audible reply]

MR SYMINGTON: Ja, it was on the next... the same day, just a bit later.

10 **CHAIRPERSON**: So just to go back to a question I asked earlier on. The NPA letter or Dr Pretorius' letter was addressed to Brigadier Xaba.

MR SYMINGTON: Yes.

CHAIRPERSON: And not to Mr Tom Moyane ...[intervenes]

MR SYMINGTON: No.

CHAIRPERSON: ...to SARS. So it would have been mister... It would have been Brigadier Xaba, I assume, who sent it to Mr Moyane?

20 **MR SYMINGTON**: [No audible reply]

CHAIRPERSON: I thought earlier on when you spoke... I thought the NPA had written directly to Mr Moyane.

MR SYMINGTON: No, no.

CHAIRPERSON: Oh.

MR SYMINGTON: So the NPA wrote to mister – to the

Hawks ...[intervenes]

CHAIRPERSON: To Brigadier Xaba ...[intervenes]

MR SYMINGTON: And the Hawks then asked the ...[intervenes]

CHAIRPERSON: The Commissioner.

MR SYMINGTON: ...attorneys representing SARS to forward – to – well, to deliver that letter to Mr Moyane.

CHAIRPERSON: Yes.

MR SYMINGTON: So that I would then - can be asked to
10 complete the affidavit.

CHAIRPERSON: To do the affidavit. Ja. Okay, okay. So except for the fact that this was, as I understand it an email or a copy, the letter actually had been meant for Brigadier Xaba by Dr Pretorius?

MR SYMINGTON: Yes, Chair.

CHAIRPERSON: Yes.

MR SYMINGTON: The thing in the letter it was asked that – and I was mentioned by name ...[intervenes]

CHAIRPERSON: Ja.

20 **MR SYMINGTON:** ...that I must do the affidavit.

CHAIRPERSON: Ja. Okay Mr Franklin.

ADV FRANKLIN SC: Thank you. Mr Symington, could I then just take you to the section of the affidavit in which you deal at page 139 with the apparent importance of the email that was attached to the Pretorius letter. You have

given your explanation to the Chair, but I would like to just cover this.

MR SYMINGTON: On page ...[intervenes]

CHAIRPERSON: Sorry, what page?

ADV FRANKLIN SC: Page 139, paragraph 78. Now what you say is that the electronic evidence provided includes video footage of the documents. And just stopping. That is the... you took off the documents while you being held in the boardroom. Is that correct?

10 **MR SYMINGTON**: Yes, Chair. I am just not on the same page.

ADV FRANKLIN SC: Sorry, paragraph 78, page 139.

MR SYMINGTON: 78. Yes, Chair?

ADV FRANKLIN SC: Yes.

20 “Including the email trail indicating that instead of forwarding the email from Pretorius directly to SARS, rather forwarded it to an attorney in private practice who then forwarded it to Moyane with a high suspicious statement that he could not be involved any further for ethical reasons...”

So that is the document that we have looked at, VS-17.

MR SYMINGTON: Yes, Chair.

ADV FRANKLIN SC: And then at 79, you have said that

when you received the Pretorius letter from Louw on the 18th of October, you paid no attention to the single annexure:

“...which, at first glance, simply looked like a covering email to which the letter was attached.

When preparing my affidavit in response to the questions posed in the Pretorius letter, I similarly ignored the annexure...”

10 Is that correct?

MR SYMINGTON: Yes, Chair. And I must mention that this normal in a way that if you receive a letter, document or whatever from the office of the Commissioner there would always be some indication of the origin of the... Sometimes it an email, sometimes it is just a letter itself, whatever. So Mr Louw drew my attention to the NPA letter and asked me to do the affidavit.

ADV FRANKLIN SC: [No audible reply]

MR SYMINGTON: The affidavit.

20 **ADV FRANKLIN SC:** Right. You then go on in this section of your affidavit to explain that you subsequently learnt more about the circumstances of VS-17 and why it had significance. And you had been through to that in relation to the opinion that

had been rendered sometime earlier in 2014, rather,
by Mr Makapela to SARS.

MR SYMINGTON: Yes, Chair.

CHAIRPERSON: So as you sit here today, Mr Symington,
what would you say was the reason why the Hawks were
insisting that you should give them in fact that letter?

MR SYMINGTON: So, Chair, I think it was the Hawks and
Mr Moyane that had an interest in receiving or retrieving
those mails because the November 2014 legal opinion was
10 not known at that point in time and the second reason, in
hindsight was what Mr – what David Makela ...[intervenes]

CHAIRPERSON: Ja, Makela.

MR SYMINGTON: Said to Mark and to Wayne was that he
shared his view with both Hawks and the NPA. So that is
why I think they had an interest in making sure that no one
sees that mail because it will lead to questions being
asked because why would an attorney say to his client on
ethical reason, you know?

CHAIRPERSON: Okay. Mr Franklin.

20 **ADV FRANKLIN SC:** Thank you, you have drawn a
conclusion in paragraph 91 at page 144 and you have said
– perhaps I should go back to the first – at paragraph 89,
page 142.

“Earlier the inference can be drawn that the time Mr
Moyane signed this letter he was aware that the

scope of the initial investigation had been expanded to include the Pillay retirement issue.”

Now that is the letter which I took you to a while ago in which he had given permission for you and three others to give information to the Hawks. Do you recall that?

MR SYMINGTON: Yes, Chair.

ADV FRANKLIN SC: And you have drawn conclusions as to the relevance of Mr Moyane being aware that the scope of the investigation under that case number had been
10 expanded to include the Pillay retirement issue and then at paragraph 91 you say:

Secondly, Mr Moyane withheld critical evidence including exculpatory evidence from the Hawks and/or the NPA relating to the criminal charges against Gordhan, Magashule and Pillay.”

What crucial exculpatory evidence are you talking about?

MR SYMINGTON: So, Chair, I am referring there to my memorandum of 2009 and then the legal opinion from David Mapakela. And, Chair, if I may? The reason I am
20 saying that first of all is that the memorandum of 2009, my memo was available, as I have said earlier to Mr Moyane on Mr Pillay’s HR file which was held in his office and Mr Moyane was also aware of David Mapakela’s legal opinion of November 2014.

ADV FRANKLIN SC: Right, I took you earlier to the letter

from the NPA to Mr Moyane in which he was invited to make representations as to why the charges should not be withdrawn – should be withdrawn, I cannot remember which way around. Mr Moyane then responded to Mr Abrahams in VS23, page 302. If you could turn to that?

CHAIRPERSON: 302?

ADV FRANKLIN SC: 302. Do you see that is a letter dated the 19 October 2016 from Mr Moyane to Adv Abrahams?

10 **MR SYMINGTON:** This is from Advocate Abrahams to Moyane.

ADV FRANKLIN SC: Page 302?

MR SYMINGTON: Yes, I am on 302.

ADV FRANKLIN SC: So that is from Mr Moyane to Advocate Abrahams.

MR SYMINGTON: Yes.

ADV FRANKLIN SC: Been a long day. He says:

“I acknowledge receipt of your letter.”

And then he says:

20 “Upon perusal of its contents I have no further submissions or representations to make on the matter. I am, however, indebted to the decisions of your office and the NPA.”

So he...

MR SYMINGTON: Yes, Chair, and this would be – well,

this would have been another opportunity for Mr Moyane to reveal what he knows about my memorandum and about the legal opinion of David Mapakela of November 2014. Another opportunity would have been much earlier when those 27 questions were given to Mr Gordhan in February of that year because that was why it spread news, SARS has a news service where the main highlights of whatever is reported in the media relating to SARS matters mostly, it would have included this one, is circulated amongst the
10 executives each day.

So even if he missed it on main media streams he, you know, would have known about it and that would have been an opportunity to say to Hawks or the NPA look, here is information that they – that Mr Gordhan relied upon back in March 2009. Well, a little bit later but here is the information.

So there was more – there was ample opportunity for Mr Moyane to hand over these views.

ADV FRANKLIN SC: Alright, you also testified about a
20 meeting which had been held between attorney Mapakela with Mr Kingon and Mr Broughton in April of 2018.

MR SYMINGTON: Yes.

ADV FRANKLIN SC: Could you look at paragraph 95 page 147 of your affidavit? There you say that:

“On that date Makapela met with Kingon and Wayne

Broughton, a senior SARS legal official. He explained that he had provided Moyane with his opinion on the Pillay retirement matter in November 2014 where he had expressed the view that Pillay's request was lawful. In the circumstances he was concerned about the legitimacy of the investigation into and proffering of charges against Gordhan *et al* in 2016. Makapela was of the view that it would be unethical of him to be involved in the matter and
10 this informed his comments to Moyane when he forwarded this email to him."

Is that correct?

MR SYMINGTON: Yes, Chair.

ADV FRANKLIN SC: And where did you get this information from about that meeting and what was said in the meeting?

MR SYMINGTON: So, Chair, there are two supporting affidavits, one from Mr Mark Kingon and one from Mr Wayne Broughton and I hope Mr Franklin would be able to
20 indicate where they are.

ADV FRANKLIN SC: Yes, I will take you to those in due course when I put some of the other affidavits to you.

MR SYMINGTON: Thank you.

ADV FRANKLIN SC: Following upon this incident at 2016 now you reported this to IPID.

MR SYMINGTON: Yes.

ADV FRANKLIN SC: The Independent Police Investigative Directorate, is that correct?

MR SYMINGTON: Yes, Chair.

ADV FRANKLIN SC: And that is VS29 which is part of the papers. We need not go to that. Did you set out full account of what had happened?

MR SYMINGTON: Yes, Chair.

ADV FRANKLIN SC: And what did you wish to happen as
10 a consequence of your complaint?

MR SYMINGTON: So, Chair, I wanted an investigation at least or charges be brought against the Hawks for, you know, the way that they dealt with me on that day.

ADV FRANKLIN SC: Yes and while I see this perhaps it is best to deal with it now, VS27, page 308, this is a letter which attorney Makapela wrote to Judge Nugent during the Nugent Commission of Inquiry hearings dated the 16 July 2018 and he sets out there what his various concerns were with the criminal investigation into the Pillay pension fund
20 matter, is that right?

MR SYMINGTON: Yes, Chair.

ADV FRANKLIN SC: And in 1.1 he says firstly he had advised SARS through an opinion dated 5 November 2014 that SARS acted lawfully with regard to the decision surrounding Pillay's pension benefits, correct?

MR SYMINGTON: yes, Chair.

ADV FRANKLIN SC: And then in 1.2, he talks about an opinion from Advocate Brassie SC, says:

“Although Advocate Brassie SC had provided an opinion or memorandum dated 11 November 2014, that differed with my opinion, I differed fundamentally with Brassie SC’s opinion or memorandum on the question of Mr Pillay’s pension fund benefits. To this day I still maintain my views expressed in my opinion dated 5 November 2014. Therefore, it would be unethical for me to assist the SARS and the SARS in an investigation that has no legal basis even at *prima facie* level. The important part is that since 5 November 2014 the Commissioner was aware of my views.”

MR SYMINGTON: Yes, Chair.

ADV FRANKLIN SC: You have seen that letter. Alright, so apart from your reporting of the incident to IPID you also launched a grievance against Mr Titi.

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

ADV FRANKLIN SC: This is dealt with in para 118, page 158 and following of your affidavit. Your grievance is attached as VS38 and that appears at page 382, is that right?

MR SYMINGTON: 382, you said? Sorry, Mr Franklin,

which page?

ADV FRANKLIN SC: 382.

MR SYMINGTON: Yes, Chair.

ADV FRANKLIN SC: That that investigation was – sorry, that grievance was then investigated.

MR SYMINGTON: Yes, Chair.

ADV FRANKLIN SC: And that was investigated by Mr Mothle, Mr Thipe Mothle of Mothle, Jooma, Sabdia Attorneys, correct?

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

ADV FRANKLIN SC: And is it correct that Mr Mothle produced a report on the 11 May 2017?

MR SYMINGTON: Yes, Chair, the report was actually dated the 31 March of that year but it was I think handed to myself or SARS on the 11 May.

ADV FRANKLIN SC: Alright, please would you turn to page 397 to page 434. Is that the so-called first report?

MR SYMINGTON: Yes, Chair.

ADV FRANKLIN SC: That was compiled.

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

ADV FRANKLIN SC: Could you summarise what the findings of the investigation were briefly and then we will...

MR SYMINGTON: Yes, Chair, it was – the report found that my grievance was valid and that Mr Titi should be – well, that this matter should go to a hearing.

ADV FRANKLIN SC: And did it go to a hearing?

MR SYMINGTON: No, Chair.

ADV FRANKLIN SC: Is it correct that an addendum report was subsequently produced by the same attorney and that addendum report is VS45 of the papers, is that correct?

MR SYMINGTON: Yes, Chair.

ADV FRANKLIN SC: You have dealt with this in paragraph 131 of your statement. You say that you heard nothing further on the issue until 25 July 2017 when
10 Rapholo sent an email to myself and Titi to which was attached an addendum report from Mothle.

MR SYMINGTON: Yes, Chair, that is right but what we should add is that – is that I also received a mail from Mr – what is his name at SARS, I will get to the name now, that said that I should not – I think it was on the day that the first report was handed over to me. It was explained to me that the matter, you know, that there would be a meeting of the parties and that I should reserve any input or any comment that I have in relation to this first report and that
20 never happened. The next thing I heard was – a mail also from SARS saying that the report has been referred back to the attorneys, back to Mr Mothle, to make final recommendations and which I assumed would have been recommendations on the charges that should be filed against Mr Titi. So I did not pay much attention. There

was nothing against me in the first report at all, so I had no concern.

And then the next email that I got in relation to this matter is the mail that Mr Franklin is referring to, in July, Mr Franklin, if I am right.

ADV FRANKLIN SC: Thank you. And VS45 on page 346 is an email from Rapholo to you and to Mr Titi dated the 25 July 2017.

MR SYMINGTON: Correct.

10 **ADV FRANKLIN SC:** And Ms Rapholo says the following:

“I had indicated in my mails to you that the...”

Sorry, that:

20 “Thipe Mothle of Mothle Jooma Sabdia was requested to provide a conclusive report on all findings related to the incident that gave rise to the grievance. He has now concluded that exercise and has provided his addendum report with recommendations to the organisation. A copy of the addendum is attached. The report has been considered by the organisation which has elected to accept the findings and recommendations made. See amongst the recommendations made was that charges be brought against both of you for possible misconduct highlighted in the report. Due to the dynamics involved in this matter it has been

decided that the disciplinary process be run by external parties, an external Chairperson as well as external initiator will be appointed to conduct the process. Details of the proceedings will be shared with you by your HR VP once the parties are appointed.”

What was your reaction to that?

MR SYMINGTON: So, Chair, I was very surprised to hear that on the very same – well, number one, that there was
10 now a second report by the same investigator on the same facts that have now not only reversed the findings on Mr Titi but recommended all charges, disciplinary charges, all of whom would have led to my immediate dismissal. None of them are, you know, that you get a final letter of demand and so on, all of them would have led to, you know, immediately dismissal of me.

ADV FRANKLIN SC: Could I ask you to look at paragraph 135, page 163. There you reach the conclusion in your affidavit.

20 **CHAIRPERSON:** Are we back to his affidavit?

ADV FRANKLIN SC: Yes, Chair. It is 135 at page 163. You say that:

“Clearly persons at SARS instructed Mothle to come up with charges against me after the first report exonerated me and concluded that there was merits

to me grievance against Titi and that he should face disciplinary action.”

Now what caused you to reach that conclusion?

MR SYMINGTON: Well, Chair, there was – who else at SARS would have gone back to Mr Mothle to ask for what was clearly a different outcome

ADV FRANKLIN SC: Then please look at para 146 at page 166. You say that your suspicions were later confirmed when during about April 2018 after Mr Moyane’s
10 departure Mothle was called to a meeting with SARS and asked to explain the circumstances giving rise to his addendum report.

“At the meeting attended by Kingon and others on behalf of SARS Mothle started that after he had issued the first report which exonerated me. He received a visit from Mokoena and Lebelo who pressurised him into changing his reports so as to implicate me in misconduct. Mothle duly buckled under pressure and issued the addendum report.

20 Kingon informed me of the above facts.”

Is that something, as you say here, that Mr Kingon reported to you?

MR SYMINGTON: Yes, Chair. But, of course, as you know, it later turned out that it was not in April 2018 that the meeting took place and the meeting took place at the

offices of SARS which is not the same meeting, of course.

ADV FRANKLIN SC: Yes, thank you. Chair, I am aware as regards the Commission's arrangements that an evening session is due to start shortly.

CHAIRPERSON: yes.

ADV FRANKLIN SC: What I have left with Mr Symington we can deal with fairly shortly tomorrow morning, if that is in order. There are a number of affidavits that I wish to put to him and I needed to [indistinct – dropping voice]

10 **CHAIRPERSON:** Yes. Well, you still have about eight minutes if that would be enough but you have been on your feet since morning and yesterday you were on your feet for a long time. If you prefer that we stop here and he finished tomorrow that would be fine as well.

ADV FRANKLIN SC: Yes, I am assuming that that is in order from Mr Symington and his representatives.

CHAIRPERSON: Yes.

ADV FRANKLIN SC: From the nods, I ...

CHAIRPERSON: I think all of us who are seated will say
20 that is in order.

ADV FRANKLIN SC: I am relieved, thank you.

CHAIRPERSON: Yes. So you will continue with him tomorrow to finish off?

ADV FRANKLIN SC: Yes, that is correct and Chair, may I just at this juncture with an eye on tomorrow's proceedings

refer to a letter which we made available to the Chair at lunchtime.

CHAIRPERSON: Yes, yes.

ADV FRANKLIN SC: As you know we still have Mr van Loggerenberg to lead and the schedule was that he would be led today and then tomorrow Mr Moyane would present himself in order to be questioned. The Commission received a letter today, as I understand it, following upon earlier indications and perhaps I can just read it to the
10 Chair.

CHAIRPERSON: Yes, into the record, ja.

ADV FRANKLIN SC: It is from Mabuza Attorneys, it is dated Tuesday the 24 March 2021 and it is addressed to Professor Mosala of the Commission and the subject is T S Moyane.

1. As indicated yesterday by our counsel to Adv Franklin SC and Adv le Roux, our client, Mr Moyane, is suffering from a serious illness.
2. He will accordingly unfortunately not be in a
20 position to prepare for and appear before the Commission as previously agreed.
3. We attached herewith a copy of a doctor's note for your attention.
4. We look forward to hearing from you so that any alternative arrangements may be

discussed and agreed.

5. Kindly advise the Commission Chairperson and any interested parties accordingly.”

And then a doctor’s note is attached.

CHAIRPERSON: Yes, okay.

ADV FRANKLIN SC: So it appears that Mr Moyane is unable to appear at this point.

CHAIRPERSON: Not appear tomorrow, okay.

ADV FRANKLIN SC: We will make practical arrangements
10 in due course but I thought had better just let that be known at this point.

CHAIRPERSON: Yes. No, that is fine, but effectively your [indistinct – dropping voice] will now be to use tomorrow to finish off Mr Symington’s evidence as well as to begin and lead Mr Loggerenberg’s evidence.

ADV FRANKLIN SC: That is correct.

CHAIRPERSON: Yes. Okay, no, that is fine. I am aware of the letter as you have said, you did read to me. So Mr Moyane is not able to appear tomorrow. Okay, I am going
20 to adjourn the day session of the hearing. The evidence leader for the next work stream Eskom is here? Okay, he is here. So we will take about 15 minutes adjournment to enable them to set up and then Mr Symington you will be back tomorrow.

MR SYMINGTON: Yes.

CHAIRPERSON: We will start at ten tomorrow. I think the last two days we have been started at half past nine. So we will be back here tomorrow at ten.

ADV FRANKLIN SC: Yes. Thank you, Chair, and I take it we are excused from the evening's session which deals with something different.

CHAIRPERSON: Yes, definitely you are excused, you need some rest.

ADV FRANKLIN SC: Thank you, Chair.

10 **CHAIRPERSON:** We adjourn.

INQUIRY ADJOURNS

INQUIRY RESUMES

CHAIRPERSON: Good afternoon Mr Seleka, good afternoon everybody.

ADV SELEKA SC: Good evening Chair.

CHAIRPERSON: You do not sound vigorous Mr Seleka. You sound like you have been standing the whole day.

ADV SELEKA SC: Ja.

CHAIRPERSON: Are you full of oomph?

20 **ADV SELEKA SC:** It will come, Chair.

CHAIRPERSON: It will come.

ADV SELEKA SC: I am sure it will come.

CHAIRPERSON: Okay, alright. Good afternoon Ms Daniels.

MS DANIELS: Good afternoon, Mr Chair.

CHAIRPERSON: Thank you once again for availing yourself. Hopefully today is the last time.

MS DANIELS: Yes, I hope so too.

CHAIRPERSON: I see Mr Seleka also nods, so hopefully today is the last time. Okay, alright. How much time has lapsed since she was testifying?

ADV SELEKA SC: I think about two weeks.

CHAIRPERSON: Oh. I think she testified last week?

ADV SELEKA SC: No, not last week.

10 **CHAIRPERSON:** Oh, anyway okay. Registrar
...[intervenes]

MS DANIELS: I am not sure Mr Chairman.

CHAIRPERSON: Please administer the oath or affirmation.
Well, it has been so many times we all cannot remember.

ADV SELEKA SC: That is right.

REGISTRAR: Please state your full names for the record?

WITNESS: Suzanne Margaret Daniels.

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

20 **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.

SUSANNE MARGARET DANIELS: (d.s.s)

CHAIRPERSON: Thank you.

ADV SELEKA SC: Thank you Chair.

CHAIRPERSON: Okay. You might, obviously Mr Seleka wish to remind the public where we are with Ms Daniels's evidence and what remains to be covered?

10 **ADV SELEKA SC**: Yes, Chair. Thank you. Ms Daniels is specifically back today to cover the issue regarding the penalties which is the penalties claim of 2.17 billion rand that Eskom intended pursuing against Glenco OCM. That penalty amount was ultimately settled with Tegeta after it had taken over OCM, at an amount that was significantly low, much lower than what had originally been the claim.

We have dealt with other aspects of her evidence and we have adjourned, we could not finish the penalties. We adjourned today for this specific purpose. There will
20 be, so that is the main focus for today. There will be an aspect that she has to clarify to the Chairperson in relation to McKinsey.

Those questions were put to her last time and she answered in a particular way she wishes to clarify her answers and we will give her the opportunity to do so at

the end. Now the last, on your appearance Ms Daniels the last time, well the penultimate time, so the second last time we traversed the issues of the penalties looking at the first opinion that CDH had given to Eskom.

Chair, for the purposes of reference we will specifically refer to Eskom Bundle 14 and her documents have now been moved to bracket D of Eskom Bundle 14. Ms Daniels, on your side you are using the soft copy, the documentation are not marked as in the hard copy. So for
10 your purposes, we will simply refer to the page numbers.

Just to recap, Chairperson let us go to that Eskom Bundle 14 bracket D. The bundle contains an affidavit of Mr Rishaban Moodley, an attorney from Cliff Decker Hofmeyr.

CHAIRPERSON: Yes, I have got it.

ADV SELEKA SC: And on page 984, page 984 was the first opinion memorandum dated 23 October 2013 which we traversed in the last, the second last appearance of Ms Daniels. Ms Daniels, we were about to go to the second
20 opinion of CDH.

Chair, what we hope to achieve with her evidence is for Ms Daniels to show you the various concerns that were raised. When were they raised, where are they contained and whether the concerns were the same throughout. Thank you, Chair.

Ms Daniels?

MS DANIELS: Yes.

ADV SELEKA SC: You can hear and see us?

MS DANIELS: I can hear and I can see you but I cannot see the Chairman.

ADV SELEKA SC: Okay.

MS DANIELS: Oh, there I can, okay.

CHAIRPERSON: Ja, okay.

MS DANIELS: Alright. Mr Chair?

10 **ADV SELEKA SC:** Yes.

CHAIRPERSON: Yes Ms Daniels?

MS DANIELS: With Mr Seleka's permission I am going to do it a little differently. I am going to start with where I got involved and then work backwards and show you in the previous opinions where they, where the themes are the same, if that is in order?

CHAIRPERSON: You say work backwards. I do not like working backwards generally speaking.

MS DANIELS: Oh, okay.

20 **CHAIRPERSON:** But you may not be meaning working backwards. As I understand it, you first want to testify about the role you played and then go to the opinions. Is that correct, is that what you meant rather than start with your opinions?

MS DANIELS: That is correct. So that I have a point of

reference for you.

CHAIRPERSON: Yes. Ja, you see.

MS DANIELS: It makes it easier for me.

CHAIRPERSON: That is not working backwards for me because your role, the role you played came first, not so and the opinions came later?

MS DANIELS: Yes.

CHAIRPERSON: And the opinions came later or was it not?

10 **MS DANIELS:** Yes, and then we there were opinions in existence already Mr Chair ...[intervenes]

CHAIRPERSON: When you came ...[intervenes]

MS DANIELS: That was the ...[intervenes]

CHAIRPERSON: When you got involved.

MS DANIELS: That was the 23rd, when I came in.

CHAIRPERSON: Ja, okay. I do not know what Mr Seleka has in mind, but for me you start with what you got involved in before we go to opinions. That is fine with me. If he feels differently for his plans, I am easy.

20 **ADV SELEKA SC:** Chair, her timing of involvement comes somewhere in the middle.

CHAIRPERSON: Quite in the middle?

ADV SELEKA SC: Ja.

CHAIRPERSON: So you wanted to go according to what happened when?

ADV SELEKA SC: That is right.

CHAIRPERSON: And when you, if opinions came before she got involved ...[intervenes]

ADV SELEKA SC: Yes.

CHAIRPERSON: You wanted to deal with those opinions.

ADV SELEKA SC: Correct.

CHAIRPERSON: And when you get to where she got involved, you wanted to make sure that that is in accordance with the sequence of events as they evolved at
10 that time as they unfolded at that time.

ADV SELEKA SC: That is right Chair.

CHAIRPERSON: Do you have some difficulty with that Ms Daniels?

MS DANIELS: No, Mr Chair. I will make it, I will fit in with that. It is just it will make it ...[intervenes]

CHAIRPERSON: You might not have much to say I assume about opinions that were given without your involvement and before you got involved.

MS DANIELS: Well, what I can do is I can confirm for you
20 that I have read them.

CHAIRPERSON: Ja.

MS DANIELS: You know, I was provided with them when I did get involved.

CHAIRPERSON: Ja.

MS DANIELS: And I can at least from that point of view,

give you insight into what they contain.

CHAIRPERSON: Yes, but from your point of view it would be much more convenient to start with what your role was and then look at the opinions, that is what you preferred.

MS DANIELS: Well, it was just from a point of reference in the documentation because essentially Mr Chair, the opinions did not change from 2013 ...[intervenes]

CHAIRPERSON: Ja.

MS DANIELS: To when I got involved.

10 **CHAIRPERSON:** Okay.

MS DANIELS: You know, from a substantive legal point of view.

CHAIRPERSON: Yes, I leave it to Mr Seleka. You have heard what she would prefer but she has said she can work with your plan as well. I leave it to you, up to you. I leave it to the two of you.

ADV SELEKA SC: If we can start with her role Chair.

CHAIRPERSON: Ja.

20 **ADV SELEKA SC:** I mean, I suppose in the end we will have a clear picture of the sequence of events, because I had already started leading her evidence on the first opinion.

CHAIRPERSON: Ja.

ADV SELEKA SC: But Ms Daniels, if you prefer to explain to the Chairperson first and foremost when you got

involved, what is it that you did and what opinions were given to you at that stage and what opinions you sought and were able to obtain, and then maybe we can go into the sequence of those opinions.

MS DANIELS: Alright, that works.

ADV SELEKA SC: Okay. Firstly, when did you get involved? How does the matter come to you, and what were you expected to do?

MS DANIELS: Mr Chair, I took over the role of acting head
10 of legal and compliance in September 2016, and at that stage Optimum had just come out of business rescue in August. It was one of those litigation matters on the list that Eskom had to contend with.

I, my first point of call was to try and understand what had gone before because now that Optimum had come out of business rescue, we could continue with the penalty claim for want of a better description. This would mean that we would be continuing with arbitration proceedings, and I wanted to understand firstly the merits of the claim
20 and understand what the issues were that were involved.

It was on that basis that my first request, having seen the documentation was to ask CDH to undertake an assessment of the claim for me. The reason for doing that was there had been a number of changes in the context. Obviously Optimum had now been taken over by TIGETA,

as the majority shareholder.

Internally Eskom the staff members who were involved and who would be the potential witnesses were no longer around and we needed to assess also the nature of the expert claims. In their opinion there were once again three issues.

It was around the contract management and it was around the sampling process. The calculation of the penalty, the interpretation of the penalty clauses and then
10 obviously the application of the penalty during the period involved from March 2012 to 2014 and then from June 2014 to May 2015.

So in this opinion, the assessment was around how would, is Eskom in a position to refute that it failed to comply with the CSA in respect of contract management procedures. Did it in fact waive its right to impose the penalties and the failure to calculate the penalty correctly.

So if you then, this is in December 2016 when I get the assessment, but if you go back and like I testified last
20 time, to the 2013 opinion which is in Bundle 14, my reference page is 984 ...[intervenes]

CHAIRPERSON: What page would that be Mr Seleka?

ADV SELEKA SC: It is the same Chair.

CHAIRPERSON: Okay.

ADV SELEKA SC: Page 984, Eskom Bundle 14(D).

CHAIRPERSON: Ja, okay.

MS DANIELS: Mr Chair, we did go into a bit of detail last time about you will recall the, you know the factual things but I just wanted to point out to you that once again in 2013, well not once again ... at the beginning of this story, the credibility of the sampling process was questioned, because of the procedure that Eskom followed.

The, at this point Eskom was already in renegotiation of the sizing parameters of the coal. So that
10 meant that Eskom was already not implementing the sizing penalty. So there is a risk, there was also a risk highlighted that the penalties that Eskom was imposing would be in contravention of the Penalties Act.

The attorneys also identified that perhaps given all these factors, there is a risk that Optimum would cancel the contract and well fundamentally there was also the issue that based on all these facts and the failure for Eskom to implement the contract manage procedure as set out in the contract, that it had in fact waived its right to
20 impose the penalties.

So this was at the start and you will remember the last time it was about the, at this point Eskom was going into detailed negotiations with Glencore to see how they could remedy some of the issues that were coming up in terms of managing and operating the coal supply to

Hendrina at the time.

So that was in 2013.

ADV SELEKA SC: Ja. Ms Daniels, what we identified last time from this memorandum were three categories of issues raised by CDH or concerns raised by CDH. The one on page 984 was in respect of coal quality, and then they gave a whole range of concerns relating to coal quality.

On page 986 they dealt with sizing specification and lastly on page 988 they dealt with coal quantity. In fact,
10 that is the second last. That is the penultimate. You also had what they referred to as a conveyor, conveyor availability dispute, which is on page 989.

But that ...[intervenes]

MS DANIELS: Yes ...[intervenes]

ADV SELEKA SC: This relates to the quantity of coal that was required to be supplied to Eskom.

MS DANIELS: Well, that was in terms of, that is why I am saying in terms of the context at that time, remember Eskom was going into discussions with Optimum on the
20 entire contract management and operational supply to Hendrina from Optimum.

So it covered a little bit more operation issues. In respect of the quality, the penalty issues it would relate to the sizing and the quality parameters. So that is what I highlighted. So the credibility of the sampling process, the

sizing specification and whether Eskom had the right to actually impose those penalties, were the key issues.

The other issues are just in the context of the memo, you know was because of what Eskom was going into.

ADV SELEKA SC: So you would have been given this memorandum at the time when you took over this matter?

MS DANIELS: Yes, it was part of the, it was actually part of the assessment of the merits. You will see that it is
10 annexed to that memo as well, so that I could get a full picture of what the issues were.

ADV SELEKA SC: Yes. On quality, if you go back to page 984. I wonder whether you could succinctly identify just by way of recollection, the issues that related to coal quality. Because my recollection on coal quality was that Eskom had failed to raise an objection or notify OCM that their quality of coal was inferior within the timelines specified in the contract and as a result they would then to have been deemed to accept that coal that was delivered was of
20 acceptable quality.

MS DANIELS: Yes, that is correct Mr Chair. I classified that as Eskom's failure to manage the contract in terms of the processes and that is the detail of the process, that had Eskom not provided those notices in terms of quality, then it in effect lost its right to then claim it at a later

stage.

You will see from the documentation that there is this, at that stage there is this sort of reservation of rights, and I think that became a dispute because in terms of the actual contract management, there were no notifications provided to Optimum to say that you have failed to meet this quality specifications and therefore we can impose the penalty.

10 In terms of the contract itself, if there was no notification that right then fell away and it was deemed, CDH does call it a deeming provision. It was then deemed that Eskom accepted the quality as was provided.

CHAIRPERSON: Okay. Mr Seleka?

ADV SELEKA SC: Yes, Chair?

CHAIRPERSON: This memorandum ...[intervenes]

ADV SELEKA SC: Yes.

CHAIRPERSON: That you said we should go to 984.

ADV SELEKA SC: Yes.

20 **CHAIRPERSON:** Is a memorandum by, is that by the attorneys?

ADV SELEKA SC: Correct.

CHAIRPERSON: That is their opinion.

ADV SELEKA SC: Yes.

CHAIRPERSON: Does it deal with that particular issue as well?

ADV SELEKA SC: Yes.

CHAIRPERSON: The issue that you have just raised.

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

CHAIRPERSON: About the failure to notify, to give notice ...[intervenes]

ADV SELEKA SC: Yes.

CHAIRPERSON: In terms of, is it Clause 16 of or is it 26 of the coal supply agreement?

ADV SELEKA SC: It is in terms of, it is in terms of Clause

10 3.6 Chair.

CHAIRPERSON: Oh ja, 3.6 ja.

ADV SELEKA SC: Yes, yes.

CHAIRPERSON: Where does it deal with that issue, this memo?

ADV SELEKA SC: The ...[intervenes]

CHAIRPERSON: Oh, I assumed that you dealt with it when I heard you. Well, that is in respect of coal quantity, that is quantity not quality.

ADV SELEKA SC: It is, they set out let us see, in
20 paragraph, paragraph 4 dealing with the penalty and payment rejection provisions. Paragraph 4.1 impose a penalty for abrasiveness. In 4.2 impose a claim in reduction or adjustment in terms of Clause 3.6 for any coal which fail to comply with either the sizing specification, [indistinct] value, ash content, moisture and volatility on

the following sliding scale.

So 4.2 will lead us today, so it gives you what you should do.

CHAIRPERSON: Oh, 4.4 refers to Clause 3.6?

ADV SELEKA SC: Correct.

CHAIRPERSON: “The nature of the volatiles of coal is that should it exceed the prescribed range contemplated by Clause 4.4.1 of that rule, 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 agenda in order to ensure that the intention of the parties is correctly portrayed, as the CSA with the first addendum as it currently stands, Eskom’s remedy for coal which does not meet a volatile quality parameter is limited to the payment reduction contemplated by Clause 3.6 of the first addendum, and the other remedies provided specific performance bearing, provided that Eskom has evidence of the people who negotiated the first addendum available to prove the common mistake and that the arbitrator shall rectify the common

mistake of the parties.”

What really I was looking for is whether they express any opinion, if they do, along the lines of what Ms Daniels is saying ...[intervenes]

ADV SELEKA SC: Yes.

CHAIRPERSON: Namely failure to give the notification contemplated in Clause 3.6, results in Eskom would have resulted in Eskom losing any right it might have had to reduce payment or reduce price.

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

MS DANIELS: Mr Chairman, may I just ...[intervenes]

CHAIRPERSON: Yes.

MS DANIELS: You will find it in paragraph 7.5.

CHAIRPERSON: 7.5.

MS DANIELS: Which is on page 988.

CHAIRPERSON: Oh, yes I see:

20 “Eskom has waived its rights to impose and [indistinct] payment reduction for certain of the months, OCM failed to supply and deliver coal, which complies with the sizing specifications due to Eskom failure to inform OCM of the payment reduction and calculation thereof timorously as required by the terms and conditions of the CSA read with the agenda.”

Yes, no that is what I was looking for, but what I

want to ask is whether you are aware as a matter of fact, that Eskom did not during the entire relevant period, give such notices as are contemplated by Clause 3.6 to OCM or is that something you are not sure about?

MS DANIELS: Mr Chair, from my experience and it was very sporadic. I was the contract manager in primary energy before I rose through the ranks. I was head of the contract management unit in primary energy and it was a problem.

10 So there was not just on the Optimum contract, but on all the contracts, that Eskom was sporadic in you know, issuing these notices. The detail of when and how you know, it the reason for that is quite you know, not complicated, from my perspective there was always a change in staff.

 You know, the contract managers. So you will see that there were periods when it was done fastidiously and then there were periods when you know, nothing happened because it was in formal relationship with the suppliers.

20 So it is a problem in Eskom and in this instance, as at 2016 when you look, when one looks back, it was sporadic.

CHAIRPERSON: Well, what I am talking about is if you look at the period to which Eskom's claim against OCM related which I understand would have been from about 2012 ...[intervenes]

MS DANIELS: Yes.

ADV SELEKA SC: March, March 2012 yes.

CHAIRPERSON: Ja, March 2012 ultimately I think to March or April or May 2015 if I am not mistaken.

ADV SELEKA SC: May 2015.

CHAIRPERSON: May 2015, if you look at that while you were at Eskom was their occasion for you to say I want to know as a matter of fact whether during this period we do have proof of such notifications as having sent to OCM and
10 you got an answer that there were none or you got an answer that there were some but not everything, not for the whole period?

MS DANIELS: There was some Mr Chair, there was some in the early stages.

CHAIRPERSON: Yes. In the early stages of the period, we are talking about.

MS DANIELS: Of the period that we are talking about.

CHAIRPERSON: H'm, do you have a recollection of the sense you had whether if you – if Eskom wanted to use
20 those that were available it would – they would have covered maybe half the period, a quarter of the period or only a few, 25%, 10% of the entire claim or period, do you have a sense of how much they would cover in terms of how much of the claim they could – be used to prove?

MS DANIELS: It was – it was a small amount Mr Chair in

terms of the contract management. I would not hazard a guess now.

CHAIRPERSON: Ja, ja, but it was a small amount.

MS DANIELS: You know, it was a small proportion, and that is why it was as big issue, you will see that it becomes an issue in terms of – it is always the first issue that CDH raises, is that our ability to prove that we had managed in terms of clause 3.6.

CHAIRPERSON: Yes, and I guess that in this opinion, I
10 guess CDH would have asked Eskom, do you have this proof of...[intervenes].

MS DANIELS: Yes, and I think Mr Moodley's affidavit does actually – he mentions the occasions in which he's asked.

CHAIRPERSON: Yes, yes, now this memorandum, this opinion is dated 23 October 2013 which is rather early in the period. When Mr – this would have been less than a year before Mr Molefe – no, no this would have been less than two years before Mr Molefe came to Eskom because
20 he came in April 2015, ja 2015. Do you know whether – that there was this problem about this claim of Eskom's against OCM was brought to his attention?

MS DANIELS: Yes, it was Mr Chair, I can confirm that I was in one meeting with Advocate Tsholanku who was head of legal at the time and Mr Moodley...[intervenes].

CHAIRPERSON: Advocate who?

MS DANIELS: Tsholanku.

CHAIRPERSON: I think give the spelling Mr...[intervenes].

ADV SELEKA SC: Tsholanku [spelt into the record].

CHAIRPERSON: Okay, so you're in a meeting with him and with who else?

MS DANIELS: With Mr Moodley from CDH, Mr Molefe and Mr Koko was there as well.

10 **CHAIRPERSON:** Yes.

MS DANIELS: And they were explaining to Mr Molefe and Mr Koko the issues that we had.

CHAIRPERSON: H'm and do you have a recollection of when that would have been, not necessarily the date but when in relation to April 2015 when Mr Molefe came to Eskom and would it have been 2015 or 2016 or is that something you are not able to remember?

MS DANIELS: Well, I'm not able to remember but I can give you context because Mr Molefe and Mr Koko were
20 going into meetings with Optimum.

CHAIRPERSON: Yes.

MS DANIELS: And Mr – what's his name, Mr Ephraim.

CHAIRPERSON: Yes.

MS DANIELS: You know, so it was round about that period and they were taking them through, that these are

the issues involved.

CHAIRPERSON: H'm and what was said about Eskom's claim against OCM in regard to – in that meeting?

MS DANIELS: There was always the issue, Mr Chair, of how would Eskom prove, you know, the R2.1billion.

CHAIRPERSON: And was there an answer given as to how Eskom would prove that?

MS DANIELS: Answer from who, Mr Chair?

CHAIRPERSON: From anybody in the meeting.

10 **MS DANIELS:** I think the issues were that we were saying be careful – well from the legal team they were saying, be careful to say that Eskom, you know, has a definite claim of R2.1billion because of these issues that we had.

CHAIRPERSON: Yes.

MS DANIELS: Because we are – we will not be able to prove R2.1billion.

CHAIRPERSON: Yes.

MS DANIELS: And the issue got – you know, the issue is, essentially an application of the sizing – this was a quality
20 penalty issue to make it simple. So, for example, if you included the sizing you get a claim of R1.4billion, if you exclude it you get a claim of R490million, you know.

CHAIRPERSON: Yes, yes.

MS DANIELS: And then you still have issues, so there's already a problem with proving that the sizing parameter is

actually a legitimate penalty claim because we are – we have started negotiating with these people. So, in terms of the contract once you start negotiating the sizing parameter actually does not apply so you can't impose the penalty.

CHAIRPERSON: Yes.

MS DANIELS: And then the other issue is, you have not imposed the notification process in terms of the contract management so your ability to claim in respect of the other
10 qualities also falls away, you know. So, it was a layered approach, so the caution at that time, both from the legal team and also the operations team, I think I read in Mr Bester's affidavit at the time that he had also cautioned Mr Molefe about, you know, using the figure of R2.1billion because of the problems is that, yes you can – we have calculated R2.1billion but these are the issues that are involved, you know...[intervenes].

CHAIRPERSON: Continue, I'm sorry continue.

MS DANIELS: At best we could claim something, but we
20 need to work out what that something is.

CHAIRPERSON: If, as a matter of fact, you had no proof as Eskom that you had issued these notices in terms of clause 3.6, let us say at all for the entire period, how much of the claim would that affect, of the R2.1billion or something, more or less or is that too much...[intervenes]?

MS DANIELS: Mr Chairman, may I answer it this way and then you can tell me if it happens. The 577 that we eventually settled at, you know, knowing the totality of what I know now, I think we were lucky to get to that number.

CHAIRPERSON: H'm, h'm so your sense is that the failure to give notice as contemplated by clause 3.6 would have affected at least – not less than R1.5billion maybe even R1.8billion?

10 **MS DANIELS:** Yes.

CHAIRPERSON: Of the R2.1billion?

MS DANIELS: Of the R2.1billion.

CHAIRPERSON: Yes, so a substantial amount, much more than 50%?

MS DANIELS: Yes.

CHAIRPERSON: Okay, alright, Mr Seleka?

ADV SELEKA SC: Thank you Chair. Ms Daniels, I think you earlier gave a breakdown of the figures in respect of sizing and quality, maybe that might answer the
20 Chairperson's question. What figure did you give in respect of sizing?

MS DANIELS: I said if you included – it was about R1.4billion.

ADV SELEKA SC: Ja.

MS DANIELS: And if you exclude it, it was R490million.

ADV SELEKA SC: So, the R490million would only relate to quality?

MS DANIELS: Ja, in terms of coal language, sizing is also part of quality.

ADV SELEKA SC: Oh, sizing is also part of quality?

MS DANIELS: Ja, so – please forgive me but the reason we use sizing separately is because of the provision relating to sizing that was then waived...[intervenes].

CHAIRPERSON: So, sizing would also be affected by
10 failure to give notice under clause 3.6?

MS DANIELS: Yes, Mr Chairman, but there was a specific – there was an added complication with the sizing parameter because it said in the contract, and I think it is in 3.6 but it said in the contract that, should there be a problem with sizing and the supplier brings it to your notice then the provisions – then we'd re-negotiate the sizing and the penalties would not apply while that re-negotiation is happening.

CHAIRPERSON: Okay, okay.

20 **MS DANIELS:** So, that's why I say, there was this added layer of, you know, when you start with this globular figure of R2.1billion, when you start unpacking it, it gets complicated and these are the issues that CDH raises in 2013, 2015 and 2016 and 2017.

ADV SELEKA SC: Ja.

CHAIRPERSON: Okay.

ADV SELEKA SC: Just quickly on quality, I see – it seems, and you can confirm, that the operative paragraphs in respect of quality was, in this memo, 4.4 and paragraph 5 and 4.4 read with 5 referred to that abolishment – they used the word abolishment of Eskom's rights to an outright rejection of payment for coal which fails to comply with the volatile quality parameter and they say this may well have been an unintended consequence of the amendment of the
10 CSA which is the supplier...[intervenes].

MS DANIELS: Yes.

ADV SELEKA SC: That is taken further in paragraph 5 on page 986 where they say,

“Save for the payment reduction contemplated in clause 3.6 of the first addendum and the reduction of the purchase price for the abrasiveness level of coal in terms of the second addendum, all other penalty provisions relating to the failure to meet the quality specification of coal in terms of the CSA
20 have been abolished. The only additional remedy available to Eskom, should OCM fail to supply and deliver the correct quality of coal is the following. 5.4 is specific performance – I mean 5.1”.

Yes, so what they're saying, you can't impose a penalty, you can ask them to comply with the agreement.

MS DANIELS: Yes, so the order for specific performance.

ADV SELEKA SC: Yes, and then 5.2 which is another remedy available to Eskom, they say,

10 “In terms of clause 3.5 of the first addendum, Eskom may take steps to dry wet coal which exceeds the moisture content limit of 10% of OCM’s expense, however, OCM must stop all supply of coal to Eskom in the event that the hourly moisture content is measured at 2 hourly intervals of coal delivered under the clauses they mentioned, will only continue deliveries when the moisture content, the two hourly interval is less than 12% or alternative”,

So, it seems from the reading of this, that Eskom’s right to impose a penalty in respect of quality was apparently in the amendment of their CSA taken away.

MS DANIELS: It was taken away in the sense that it required a far more rigorous contract management approach to apply than before.

20 **ADV SELEKA SC:** Ja but CDH is raising this as a concern that it seems – when you amended the CSA you took away your rights to impose a penalty in respect of quality.

MS DANIELS: Yes.

ADV SELEKA SC: And they say this – it may well have been an unintended consequence, if you go back to

paragraph 4.4 but they go onto say in that paragraph, you will need people who negotiated that amendment to confirm whether that was the intention of the parties.

MS DANIELS: That is correct and the person – the lead negotiator at the time had already left Eskom I think, I was part of that team and the other people, I think they had also left Eskom it was a – there were very few people who would be able to testify as an expert on what – well testify on the intention of the parties but CDH did say that we
10 would have to go to court to get a rectification of the agreement.

ADV SELEKA SC: Ja, but that didn't happen?

MS DANIELS: No that did not happen.

ADV SELEKA SC: That did not happen, so on my reading of this, tell me if I'm correct, CDH is saying, well if you are imposing a penalty in respect of quality it seems to me that you don't have that right because you've taken it away. The only right you have is to tell OCM to comply with the agreement, ask for a specific performance or you dry the
20 coal that has too much moisture, you bring it down to the level that is acceptable.

MS DANIELS: In simple terms yes, Mr Seleka but I would just add that number one, what CDH was saying is, you need to notify them okay, if you want to apply the penalties you need to notify them that you're not happy with the

quality so that the penalty can apply. You need to make sure that you are clear about the sizing requirements because right now you are negotiating with them and therefore you have waived your right to impose any sizing issue. In respect of the moisture, you need to dry out the coal and charge OCM for that drying out process and as I told you last time you need to fix – you know, they needed to fix the hammer sampler because that's where the moisture testing was also being done. So, in layman's terms what CDH was telling Eskom is, you need to get your house in order if you want to apply this penalty regime as it states and obviously, firstly, go to court and get the rectification that you require.

ADV SELEKA SC: Yes, so that's the first opinion you have quantity as well then there's a dispute about a conveyor belt issue, do you have anything more to say, you were talking about reservation of rights at the end of the opinion.

MS DANIELS: Sorry, I've lost my place.

20 **ADV SELEKA SC:** It will be page 989.

MS DANIELS: Just, can you...

ADV SELEKA SC: On which page are you?

MS DANIELS: I'm now on 989.

ADV SELEKA SC: Ja, under conclusion.

MS DANIELS: Yes, I'm just reading it again.

ADV SELEKA SC: Ja they make certain observations there in conclusion.

MS DANIELS: Ja, they say that, you know, OCM will not accept, will just not accept it at face value, the risks identified in respect of the payment and then if Eskom wants to proceed with the claim it should not do a set-off and Eskom should rather demand the payment.

ADV SELEKA SC: H'm I see paragraph 10 they say,

10 "In light of the risks identified in Eskom applying the payment reduction for OCM's failure to comply with the sizing specification at this stage, we advise that it would be prudent to first address all the concerns in order to ensure that Eskom will be in a better position to impose the payment reduction and subsequently enforce any claim for the reduction of the purchase price due to OCM's failure to comply with quality or quantity specification",

20 Now that sizing specification had to do with that – the hammer you referred to, the hammer sampler that Eskom was using that was misaligned and not doing proper sampling, do you know whether that was ...[intervenes].

MS DANIELS: That's correct.

ADV SELEKA SC: Do you know whether that was ever corrected at the time you were there?

MS DANIELS: To the best of my knowledge, it was not Mr

Chairman...[intervenes].

ADV SELEKA SC: Say again.

MS DANIELS: During this time, it was not corrected.

ADV SELEKA SC: But even if corrected would it affect the situation, the historic situation, would it have affected the historic situation?

MS DANIELS: No, it would not have because of the other issues that this memo identifies, you know, I mean the contract did not apply retrospectively.

10 **ADV SELEKA SC:** Yes, so this...[intervenes].

MS DANIELS: Sorry, the penalty regime was not retrospective it was actually contemporaneous.

ADV SELEKA SC: Yes, so this particular concern would have been drawn to the attention of the Executives you have mentioned, Mr Molefe and Mr Koko?

MS DANIELS: Yes, you will see at the time this memo is addressed to Mr Johan Bester in Primary Energy so both at operational level and then at Executive level, people were aware of what the issues were.

20 **ADV SELEKA SC:** Ja, I recall in your affidavit, you do mention that these concerns were also drawn to the attention of Mr Anoj Singh.

MS DANIELS: Yes, I just can't recall if it was in this kind of detail, but I had provided the latest, you know, the ones that I was involved in, those memos to Mr Singh.

ADV SELEKA SC: Yes, do you want to take us to the second opinion or somewhere else?

MS DANIELS: I think the second opinion is in March 2015, Mr Chairman and that is on page 992 in my bundle, Eskom Bundle 14.

ADV SELEKA SC: Yes, it is sent to you or to Eskom by email which is on page 991.

MS DANIELS: Yes, the date is incorrect on this one it says 17 March 2014 but it's in fact, 2015...[intervenes].

10 **CHAIRPERSON:** That's interesting, why would anyone in March write the previous year, I can understand when its January, people take time to get used to the new year but why would anyone, in March 2015 still be writing 2014 on the date?

MS DANIELS: I think you must ask Mr – who wrote this memo...[intervenes].

CHAIRPERSON: Why do you say 2014 is wrong it should be 2015?

20 **MS DANIELS:** I'm just basing it on the fact that the memo is -the covering email is dated 2015 Mr Chairman and it's 17 March 2015, so I'm just assuming I may be wrong.

ADV SELEKA SC: Chair there is another way to look at – to resolve that issue.

CHAIRPERSON: Ja.

ADV SELEKA SC: We would have to go to – since this is

an Annexure to Mr Moodley's affidavit.

CHAIRPERSON: Ja.

ADV SELEKA SC: We'll have to go to his affidavit which is...[intervenes].

CHAIRPERSON: Well, I recently saw a document dated March 2020 and the question arose whether there was a mistake it was meant to be March 2021 and I said, well in March 2021 nobody would be confused about which year it was. So, it looks like I may not be entirely correct, I just
10 wouldn't understand it, I mean in March you've been – everyone knows it's a quarter of the year gone yes, but you were saying, let's look at the affidavit Mr Seleka.

ADV SELEKA SC: Yes, on page 907.

CHAIRPERSON: 907?

ADV SELEKA SC: Yes, paragraph 45.5, ja.

CHAIRPERSON: Yes.

ADV SELEKA SC: So, 45.5 which reads,

20 "Prior to the lapsing of the corporation agreement CDH provided updated legal advice on the penalty claim and related risks on 17 March 2015 to, and then mentions the names, Ayanda Nteta, Andrea Williams, Ken Pillay, and other Eskom officials, see items 17.2 of the Bundle",

Now that email with the attachment to it Chair, is that 17.2 then you will see there quoting certain portions

from that email – I mean from the document itself, the memorandum which is dated 17 March 2014.

CHAIRPERSON: Have you seen anything like that?
[Laughter].

ADV SELEKA SC: Not at all.

CHAIRPERSON: Ms Daniels have you seen anybody who, in March, doesn't know which year they are in, they are still thinking of the previous year?

MS DANIELS: Oh, Mr Chairman, I've – you know time has
10 become such an issue these days, I'm a little bit more forgiving.

CHAIRPERSON: It's like, were they sleeping for three months, okay anyway. [Laughter].

ADV SELEKA SC: In paragraph 1 Chair, ja this may well be conclusive, paragraph 1 of that memo reads,

“We refer to the meeting held...[intervenes].

CHAIRPERSON: Oh, I'm sorry I'm at 984 I should be somewhere else.

ADV SELEKA SC: Oh.

20 **CHAIRPERSON:** I'm at the memo that is at 984, it goes to another page.

ADV SELEKA SC: Go to the one 992, Chair.

CHAIRPERSON: 992?

ADV SELEKA SC: Yes, that one.

CHAIRPERSON: I think I was there and then I found

myself back here.

ADV SELEKA SC: Yes, that very one with the 2014 date.

CHAIRPERSON: Ja.

ADV SELEKA SC: Maybe...[intervenes].

CHAIRPERSON: Yes.

ADV SELEKA SC: Yes, that will help,

“We refer to the meeting held on 11 March 2015”.

CHAIRPERSON: Yes, very strange, okay I will assume
that for some reason they thought it was till 2014 but it
10 was 2015, okay let's continue.

ADV SELEKA SC: Yes, Ms Daniels, so what do we find in
this memo?

MS DANIELS: Mr Chairman I think here you know this –
once again the context was that the memo – this meeting
was asked to explain the penalty provisions in terms of the –
you will see the people they were coal supply managers, the
internal legal team as to the application of the penalty
provisions in the contract once again. And this is March
2015.

20 I think here CDH is a little bit more emphatic about
the fact that Eskom has not applied the penalty regime for
the last three years. So that means the period from 2012 to
20 – well I am assuming the date of the memo 2015 but
Eskom actually has not applied the penalty regime.

It is here that they talk about those accrued rights

but they also talk that you know what the figures are still not okay but they do repeat again the same issues. The interpretation of the – of the Clause 3.6 so it has not been rectified at this stage.

ADV SELEKA SC: If I may Ms Daniels I think as you highlight the points in the memo you could do so by reference to the paragraph numbers. I see paragraph 4 deals specifically with that first point you mentioned which is Eskom's failure to impose payment reductions for
10 approximately three years.

MS DANIELS: Yes. So you know it starts off saying Eskom has for approximately three years not imposed any payment reduction. So Mr Chairman to answer your previous question it would then seem that they had looked at the documentation that we had.

CHAIRPERSON: Yes.

MS DANIELS: You know and come to that conclusion that we actually had not imposed it.

CHAIRPERSON: Hm.

20 **MS DANIELS:** And they also in paragraph 3 talk about this concept of accrued rights and you will see they put it in inverted commas because of all the issues that they late – that they have identified and will continue to identify you know as to how one applies that.

ADV SELEKA SC: Ja. And ...

MS DANIELS: Under paragraph 3 of the memo.

ADV SELEKA SC: Ja.

MS DANIELS: And once again you will see that they – the issues are the interpretation of the Clause 3.6 and 4.1 the sampling process, the disputes around the sampling process. The negotiation around the sizing component which is in 4.3 and then there was the hardship dispute which was raised by Optimum. So there are more issues you know added.

And then again is the year is – in paragraph 5 they
10 go to more detail. So it gets a little bit more what is the word? Emphatic at this point where they say you know we understand that Eskom has not imposed penalties for sizing for the period from March 2012.

And then they set out the reasons why they say that. And then they also say in order to protect your rights this is what you need to do.

ADV SELEKA SC: And...

MS DANIELS: And that is – and that you see in I think it is paragraph 5. I am reading from another screen to make it
20 easier.

ADV SELEKA SC: Ja. And as I understand – well we dealing with sizing penalties. The portion of the claim the R2.17 billion relating to sizing was ultimately abandoned as I understand from the papers.

MS DANIELS: Yes from the – you would see that in the – in

the last memo where we calculated that was the R1.- I think it was R1.4 billion.

ADV SELEKA SC: Yes. We will – we will get to it.

MS DANIELS: We will get there but it was – that was the size because – because of this – this reason that misses in 2015 when we – when this was pointed out.

ADV SELEKA SC: Okay. Any other points you wish to draw to the Chairperson's attention?

MS DANIELS: I think – Mr Chair it is the same issues again
10 you know I think you just – I want you to take note that once again it is the interpretation of the clause. It is the disputes regarding the sampling process, the sizing issue you know these are not new issues.

CHAIRPERSON: Okay thank you.

MS DANIELS: So this is in 2015.

ADV SELEKA SC: Yes. The – so this once again...

CHAIRPERSON: So – I am sorry Mr Seleka. So in 2013 CDH gives an opinion where it raised these issues about the problem that Eskom did not give notice in terms of process
20 3.6 in terms of quality or poor quality of coal and that therefore it could not pursue any claim in the absence of any proof that it had given those notices but even after that opinion 2013/2014 we are now in 2015 there is another opinion still Eskom has not made sure that it gives the notices contemplated under Clause 3.6 whenever OCM did

not supply coal of the required standard. Is that correct?

MS DANIELS: That is correct Mr Chair.

CHAIRPERSON: And hence in the 2015 opinion the same point is still being made. Is that right?

MS DANIELS: Yes. That is correct. I think just as CDH is much more emphatic in saying we did not impose the penalties.

CHAIRPERSON: Yes. Yes.

MS DANIELS: You know they – they saying it stronger than
10 the earlier opinions.

CHAIRPERSON: Yes.

MS DANIELS: Even though they say they still extracting documentation they do say it much more bolder that we did not impose the penalties.

CHAIRPERSON: And one would have thought that in any event if Eskom was serious about enforcing penalties at least after – or by the time of this opinion 2015 opinion one would have thought that Eskom would have been able if they if they did have proof of having given such notices that they
20 would have provided those to CDH to say no now we do have proof. We might not have had proof prior to your 2013 opinion but now we are wiser and we have got proof. Is that right?

MS DANIELS: That is right Mr Chairman I would just also say that you must bear in mind that during 2014 there was

that cooperation agreement with Glencore in place of Glencore/Optimum and that the parties were endeavouring to sort out these issues. This is – and they come to a conclusion and that is then what goes to the board and the board says you know Mr Molefe must sort this out.

CHAIRPERSON: But...

MS DANIELS: So – so that is the only for want of a better word mitigating factor.

CHAIRPERSON: Ja.

10 **MS DANIELS:** That give it – you know just take into consideration.

CHAIRPERSON: But of course everyone protects their respective positions during negotiations.

MS DANIELS: Yes.

CHAIRPERSON: You would have thought that Eskom would say well we are not going to have a situation where our negotiating position – our bargaining position is weakened. If you provide us with poor quality coal we will serve you with the notices in terms of Clause 3.6 but whether or not we
20 will impose the penalty we will see that later after negotiations but we cannot not issue the notices because failure to issue the notices means that we lose the right to impose the penalty. We do not want to lose that right. One would have expected Eskom to have acted on that basis. Would you agree?

MS DANIELS: Yes I agree with Mr Chair and just if my
00:10:14 position in defence of Eskom at the time ...

CHAIRPERSON: Oh is it because...

MS DANIELS: I think they did ...

CHAIRPERSON: Is it because you were the legal person
you did not tell them listen...

MS DANIELS: No, no I was not the legal person at the time
but I am just – I am still – something 00:10:34 has an
allegiance to Eskom. They did try it halfway Mr Chairman
10 and I think you know that – from the documentation you can
see that that they did put the clause in the cooperation
agreement but you are correct they ought to have done the
second bit as well in terms of the notices given what CDH
had said and that there had been no application for
rectification. So the preservation of rights clause in the
cooperation agreement did not go that far.

CHAIRPERSON: Oh okay well you mention an important
point because I do not recall the provisions of the
cooperation agreement. Are you saying that that agreement
20 had a clause that sought to protect Eskom's position to the
extent that during the operation of the cooperation
agreement Eskom might not issue notices?

MS DANIELS: Yes I just cannot remember the specific
wording so I said that covered some of what you – what you
are asking.

CHAIRPERSON: Oh okay.

MS DANIELS: But it may not have gone as far as...

CHAIRPERSON: It should. Ja.

MS DANIELS: As it should have.

CHAIRPERSON: Okay.

MS DANIELS: But all I am just asking you to bear that in mind.

CHAIRPERSON: Yes.

MS DANIELS: So that would have – you know that is
10 another reason why we – we found ourselves in the position
that we did in 2016/2017.

CHAIRPERSON: Yes okay.

ADV SELEKA SC: I think Chair they – the clause reserved
Eskom's right to claim for penalties but after the duration of
the negotiations. So you are right that we would not issue
you but we reserve that right to do so after. But then it
would apply prospective.

CHAIRPERSON: Yes, yes it would not affect the...

ADV SELEKA SC: It would not affect the ...

20 **CHAIRPERSON:** The previous one.

ADV SELEKA SC: That is correct.

MS DANIELS: Well that is why I am saying it is – it did not
go as far as one would have expected it to go.

CHAIRPERSON: Yes.

MS DANIELS: You know.

CHAIRPERSON: Yes but – but also I guess in fairness to Eskom there is no way OCM would have agreed that they should cover – they should cover the period before the cooperation agreement because that would resuscitate claims that otherwise had prescribed. So OCM would not have agreed to that. So okay alright.

ADV SELEKA SC: And they going to weaken that – that clause substantially I think in the next – in the next opinion they show that Eskom ultimately agreed to a specification
10 that met the coal that was supplied by OCM. So then you can go back and say I am claiming.

CHAIRPERSON: Ja.

ADV SELEKA SC: When you have lowered your specification to accept the coal.

CHAIRPERSON: Ja.

ADV SELEKA SC: Which was already supplied.

CHAIRPERSON: Okay we are at ten past six so.

ADV SELEKA SC: We will expedite it. Yes Ms Daniels you are now talking about the waiver which the Chairperson
20 eluded to you remember that the BTC Chairperson in fact I think it is the meeting of the 8th of February 2017 also said it means looking at this what we have gone through now Eskom's failure to enforce its rights it seems that Eskom has waived its rights to enforce the penalties. You remember that? Do you remember that?

MS DANIELS: Ja I am not specifically but I will look at the – where the document – but you must if you reading from the document then it is there.

ADV SELEKA SC: The minutes I think is of the 7th or the 8th of February 20 – you do not have to go there now we will come to it.

MS DANIELS: Okay.

ADV SELEKA SC: As we – as we navigate our way through this.

10 **MS DANIELS**: Ja.

ADV SELEKA SC: Let us go to the – that was..

MS DANIELS: It is sort of – Mr Chair just to give context so that the kind of detailed explanation we did at the February meeting as well that we are offering now.

ADV SELEKA SC: Yes. Just go to the next opinion I think we are on the 2nd you say it has raised – by this time – by the time of this opinion March 2015 you are still not involved in this matter?

MS DANIELS: No.

20 **ADV SELEKA SC**: Okay. We know that the third opinion that is the one you asked for. You come on board on the – I

CHAIRPERSON: The third opinion is – starts from where?

ADV SELEKA SC: The third opinion Chair.

MS DANIELS: 1042.

CHAIRPERSON: 1042. Okay thank you. That is where you

– that is the one you going to now?

MS DANIELS: Yes.

CHAIRPERSON: Mr Seleka.

ADV SELEKA SC: Yes Chair.

CHAIRPERSON: Okay. Continue.

ADV SELEKA SC: Continue Ms Daniels.

MS DANIELS: Mr Chair here I had asked for – I – in – at
this point in time I – acting head of Legal and Compliance
and Optimum was one of the issues – one of the litigation
10 matters on the table and I had asked for an assessment of
the merits and just a high level overview of what the issues
were. And once again CDH tells Eskom the claims potential
weakness are Eskom's compliance with the contractual
requirements in terms of you know its failure to manage the
contract the rectification of Clause 3.6 once again that that
is the entire quality penalty regime and the integrity of the
sampling process.

ADV SELEKA SC: At which page?

MS DANIELS: And you will find that ...

20 **ADV SELEKA SC:** I think it is page 1046 Chair.

MS DANIELS: Is yes 1046.

ADV SELEKA SC: Yes.

MS DANIELS: Paragraph – it is under heading See the
Eskom Claim and its potential weaknesses.

ADV SELEKA SC: So Ms Daniels are you saying the issues

are the same?

MS DANIELS: Yes Mr Chair they – they have not really changed.

ADV SELEKA SC: I got the – the minutes of 8 February 2017 I will quickly read to you it says:

“The chairman opined that Eskom had by its actions effectively given up its rights in respect of sizing. As it had decided not to...”

CHAIRPERSON: Where are you reading from now?

10 **ADV SELEKA SC:** That will be page 1134 Chair. Sorry Chair.

CHAIRPERSON: 1134?

ADV SELEKA SC: 1134.

CHAIRPERSON: Oh. Okay I was still on the opinion.

ADV SELEKA SC: No you are right there Chair. I just wanted to read to Ms Daniels.

CHAIRPERSON: Oh okay.

ADV SELEKA SC: I just want the Chairperson of the BTC said.

20 **CHAIRPERSON:** Ja.

ADV SELEKA SC: It is 1134.

CHAIRPERSON: Continue.

ADV SELEKA SC: The fourth paragraph from the top.

“So the chairman opined that Eskom had by its actions effectively given up its rights in

respect of sizing as it had decided not to enforce penalties on the sizing issue. Mr Moodley which is the attorney writing this memoranda agreed that from a commercial perspective the above statement was correct. Dr Naidoo added that by virtue of Eskom continuing to accept the out of spec code it was effectively giving up its right to penalise from sizing.”

10 So the BTC itself was raising this concern that Eskom seemed to have waived its rights. Well that it has effectively waived its rights we would reclaim on sizing. You see that Ms Daniels?

MS DANIELS: Yes that is correct.

ADV SELEKA SC: But it was a mis..

MS DANIELS: That is why I say this Chair.

ADV SELEKA SC: Yes proceed.

MS DANIELS: That that was already stated you know from – from the beginning in 2013 when CDH started opining on
20 these issues. So the theme throughout has been Eskom you have a problem. You actually cannot enforce your claim.

CHAIRPERSON: Hm.

ADV SELEKA SC: And then Chair if we may go back to the opinion?

CHAIRPERSON: Ja.

ADV SELEKA SC: On page 1047. So ...

CHAIRPERSON: Well before you go to 1047 at 1046.

ADV SELEKA SC: Yes.

CHAIRPERSON: I am attracted by 3.3 which says:

“The issues of consent relating to the claim
has always been amongst others the
following.”

Ms Daniels has been saying there it was always the
same concerns and the difference was that as time went on
10 CDH was becoming more and more emphatic.

ADV SELEKA SC: Yes.

CHAIRPERSON: In terms of raising these concerns.

ADV SELEKA SC: Yes.

CHAIRPERSON: Is that right Ms Daniels?

MS DANIELS: Yes that is correct Mr Chair.

CHAIRPERSON: Hm. Okay Mr Seleka you can go to 1047.

ADV SELEKA SC: Then 1047 Ms Daniels they set out the
potential defence that OCM has.

MS DANIELS: Yes.

20 **ADV SELEKA SC:** You have looked at those as well?

MS DANIELS: Yes I have and they do say there is you know
the disputes that they – they say:

“There is no reasonable basis to justify a
penalty of this amount which is the R2.2
billion having regard to the history and

background circumstances surrounding the imposition of the penalties arising out of the C – CSA which is Coal Supply Agreement and that Eskom has no reasonable prospect of recovering this amount in an arbitration.”

ADV SELEKA SC: Next point. OCM.

MS DANIELS: And then it also says Eskom – OCM may not be able to settle the claim and then this specific defences was that the CSA included a renegotiation clause which was
10 already activated. That is in 4.1.2. And that was in April 2013 as you see from 4.1.2.2 and the fact that Optimum had actually issued that notice and that the people were negotiating – the teams were negotiating in 2013/2014.

ADV SELEKA SC: So in other words...

MS DANIELS: And then they do set out...

ADV SELEKA SC: In other words you can impose the penalty – penalties when we are busy renegotiating the specifications of coal to be supplied.

MS DANIELS: Yes you will see from the agreement Mr Chair
20 that it specifically says where there is an issue – because sizing was a problem. Where there was an issue raised in respect of sizing and the supplier issued the notice that the parties would enter into negotiations. So from that point of view then the sizing specifications for effect was staid and they had to renegotiate a new one. So that affected the

claim that we had in respect of sizing.

ADV SELEKA SC: Yes. Then let us go down to 4.1.2.5 I see there that this renegotiation process they say was eventually subsumed into the broader settlement discussions which culminated in the signing of the cooperation agreement in May 2014 which suspended all the penalties. During the settlement discussions there were extensive negotiations on this specifications with primary energy and the Hendrina Power Station and ultimately a specification
10 was agreed in relation to sizing which matches that which OCM delivered during the period from March 2012 – from 2012 I beg your pardon to 2015. If this is a specification that the power station was capable of accepting then clearly the delivery of coal meeting that size specification during most of 2012 to 2015 could not have caused any meaningful damage to the power station.

So Eskom seems to have then agreed as I was alluding earlier to a specification that matched the coal that was ul – already supplied.

20 **MS DANIELS:** Yes and therefore its claim in respect of payment reduction or penalty fell away.

ADV SELEKA SC: Ja. Okay well those are the defences of OCM they carry on maybe we could go to – because we mainly concerned with the weaknesses that were apparent from the very beginning in Eskom's claim. Let us see the

next opinion. So this opinion you requested it.

MS DANIELS: Yes.

ADV SELEKA SC: And you obtained it. You obtained it from CDH ?

MS DANIELS: Yes I did. It was in December 2016.

ADV SELEKA SC: Ja it is dated 2 December 2016.

MS DANIELS: Yes that is when it arrived.

ADV SELEKA SC: And you were – and would you have followed the same process of raising these concerns with
10 your executives?

MS DANIELS: Yes this I discussed with Mr Singh and Mr Koko.

ADV SELEKA SC: And – and you do speak about Mr Koko's attitude here about settlement. Can you just quickly touch on that for the Chairperson?

MS DANIELS: Yes Mr Chair Mr Koko was appointed acting Chief Executive on the 1st of December 2016 and with effect from that date his position altered in terms of the first matter to the extent that he had told me that he would be happy if
20 we settled this claim at around about R500 million.

At that stage I was still saying well you know we – how do we go from R2.1 billion to R500 million and it would not look good for Eskom to settle.

At that stage I was making that statement not understanding the full import of what had gone before but

from a perspective of we had gone out into the media, we had said R2.1 billion is what is owed by Eskom and we had paid such a – such an issue of it that we would – we could not just walk away.

ADV SELEKA SC: So...

CHAIRPERSON: Well Mr Koko became acting Group CEO in December 2016 or early January 2017 is it not?

MS DANIELS: It was December 2016 the formal – the board ...

10 **CHAIRPERSON:** Ja when Mr..

MS DANIELS: Approved the appointment.

CHAIRPERSON: When Mr Molefe left.

MS DANIELS: Yes.

CHAIRPERSON: Ja but how could you have said to him – how could you move from R2 billion to R400 and something million when you knew based on these opinions as you indicated earlier that more than 50% of – much more than 50% of this claim would be defeated by the fact that Eskom had not issued notices in terms of Clause 3.6?

20 **MS DANIELS:** So what I am saying Mr Chair when the conversation started that was my position not having read all the detail yet.

CHAIRPERSON: Yes but you knew...

MS DANIELS: As I came to know of what was actually involved.

CHAIRPERSON: When – when did you get involved in the – in the issue of the penalties? I thought you got involved much earlier than December 2016.

MS DANIELS: I cannot remember when it exactly I – I took over in September and during that period we – we started evaluating all the – there was about 278 litigation matters.

CHAIRPERSON: But..

MS DANIELS: Live litigation matters so that we were going through them. What I had asked CDH to do was do an
10 assessment for me and that assessment is dated the 2nd of December.

CHAIRPERSON: Yes.

MS DANIELS: So from that we started working through it.

CHAIRPERSON: Yes but..

MS DANIELS: So I had not yet had the opportunity like the detail that I am giving you now you will see that the memo for 2 December has all of these opinion attached to it. So when I started the conversation with Mr Koko it was not to – it was not having had full insight into all of this. My insight
20 was based on we had from a – from a company perspective we had gone out and said we are claiming R2.1 billion how do you get to R500 million?

You know not from a – not from having read all of this. I then started going through all of this when I received it.

CHAIRPERSON: When did you become Head of the Legal Department?

MS DANIELS: In... I took over from Mr Selanka/Selanko(?) in September.

CHAIRPERSON: In September 2016?

MS DANIELS: Yes.

CHAIRPERSON: Yes. So are you saying that as in December before you actually got this advice or opinion of 2 December 2016 until you have had a chance to read it
10 and see the previous opinions, you were not aware of the previous opinions?

MS DANIELS: No, I was not. They were all attached to this December 2016 opinion that I got.

CHAIRPERSON: I would have thought that your predecessor would have made sure that such important documents were made available to you when you came in. You say that was not the case?

MS DANIELS: It was actually not the case Mr Chair. I would have thought too but it was actually not the case. It
20 was only when I got this... You will see from the memo in the bundle that all of these memos were attached to the December 2016 assessment and it was at that point that I could then read through all of those memos ...[intervenes]

CHAIRPERSON: But ...[intervenes]

MS DANIELS: ...including the technical reports.

CHAIRPERSON: But I thought that you said earlier on, you were present at a meeting involving somebody from CDH where Mr Molefe was present and where he was cautioned about talking about that claim for R 2.1 billion because there was a problem with the fact that Eskom had not given notices in terms of Clause 3.6?

MS DANIELS: Mr Chair, I was present at the meeting. I did not have the documentation. All I know is, from what I recall from that meeting, he was made aware of the issues
10 relating to the claim.

CHAIRPERSON: Yes, but if he was made aware, he was made aware in your presence and if you were not one of the people who were making him aware, it means at least, you became aware that this R 2.1 billion claim was problematic because you were there when he was cautioned.

And that would, obviously, have been some time – or that would have been before Mr Koko took over before your discussion with Mr Koko.

20 So by the time you had the discussion with Mr Koko, even if you may not have read this latest opinion that you obtained, you would have known that there was this caution that was given.

And I would have thought that once you were told about – you were aware of the caution, you would

have known that the caution was based on opinions and you would have wanted to see those opinions if you had not already seen them. And how could you not have seen them before they were attached to this opinion?

MS DANIELS: I was not in a legal capacity in that stage Mr Chairman. So I always knew that there was an issue from that stage but I did not know the exact – what is the word? – ambits of the issues and that is why I asked for the assessment.

10 **CHAIRPERSON:** Yes, but I mean, what position were you – did you occupy at the time of that meeting involving somebody from CDH, yourself and Mr Molefe? What was the position ...[intervenes]

MS DANIELS: At that stage I was still in Group Commercial.

CHAIRPERSON: Group Commercial. That would have been 2015 or 2016. Do you – are you able to say?

MS DANIELS: It probably would have been roundabout 2015 because I became Company Secretary in
20 October 2015.

CHAIRPERSON: Yes, but you see, I may have difficulty with the idea that you are present at such a meeting where Mr Molefe is cautioned the way you said he was cautioned about this claim but when you become Head of Legal, nothing says to you: But I must see those opinions

because this is a very big claim. It is quite an important claim.

MS DANIELS: But that is why I asked for the assessment Mr Chairman.

CHAIRPERSON: No, no. I understand asking for that but before you asked for it, I would have thought you would have wanted to see the opinions that were in existence already that that caution was based on. In other words you say: You know, I remember that meeting. This was the
10 caution given and let me see those opinions first. Because those opinions ...[intervenes]

MS DANIELS: Well, that is what ...[intervenes]

CHAIRPERSON: ...could have an answer for you. Then you do not have to pay for another legal advice when there are opinions that give you the legal advice.

MS DANIELS: But they were all attached to this ... opinion, anyway.

CHAIRPERSON: Yes, but what I am saying is. If you remembered that this claim – it was in regard to this claim
20 that at the meeting that you attended, Mr Molefe was cautioned and told that do not be too strong on this R 2.1 billion claim because it is problematic because there was no – there were no notices issued by Eskom.

It seems to me that probably that you ought to remember that when you are Head of Legal that this claim,

I remember we told Mr Molefe there is a problem. And to the extent that in that meeting you would have been aware that there were legal opinions that already been furnished. I would have expect you to want to find those opinions even before you could ask for another.

Because why would you want to pay for another opinion if you have opinions that already give you the answer that you are looking for?

MS DANIELS: Mr Chairman, I just want to maybe correct
10 the opinion. This was not in isolation. I did have these conversation with Mr Moodley. And that is why I asked him for an overall assessment, you see, not just an opinion. And that is why he attached all those opinions to the assessment that he gave me.

CHAIRPERSON: H'm. Mr Seleka.

ADV SELEKA SC: Yes. Now did you engage with Mr Bester having regard to this opinions, Ms Daniels? Because I saw the first one was addressed to him.

MS DANIELS: Mr Bester was not at that time Mr Seleka.

20 **ADV SELEKA SC:** Oh, he had already left?

MS DANIELS: He had already left.

ADV SELEKA SC: And Mr Selanka/Selanko(?) or Advocate Solanka.

MS DANIELS: We did not get a chance to talk about the Optimum arbitration in this detail. And basically what I had

to do was, you know, ask... CDH was the Primary Energy advisor and I had to ask them. The legal advisor that was involved in the matter had also left Eskom. So it was having to go back and ask the external advisor to provide me with the issues and then compare it to what we had.

ADV SELEKA SC: So you were saying Mr Koko was expressing the view that a settlement – he will be happy with a settlement of R 500 million. Did you, apart from saying: Well, we have already made a song and dance
10 about R 2.1 billion, did you have any specific amount in mind?

MS DANIELS: No, not at that stage. I, as I said, I have not read all the opinions yet and I have not familiarised with the depths of the issue.

ADV SELEKA SC: H'm.

MS DANIELS: My issue were more from a corporate perspective that we had gone out, we had said we were going to do this and you know, this about-turn, you know, it just want not good from a corporate perspective.

20 **ADV SELEKA SC:** Was this the first time that he expressed a view of a settlement at R 500 million?

MS DANIELS: Yes, this was the first time that he had expressed it to me.

ADV SELEKA SC: Okay. Are you able to move onto the fifth or the fourth opinion? We know that ...[intervenes]

MS DANIELS: So ...[intervenes]

ADV SELEKA SC: We know that you, ultimately, approaches BTC, that meeting I referred you to on the 8th of February 2017. Mr Moodley was also there. Is it you and him or just him who took the BTC through the issues that had been raised in their memo?

MS DANIELS: I was at the meeting, Mr Joubert. But I had asked him specifically to come because of his involvement in the matter as Eskom's legal representative.
10 By that time, I had now the opportunity to go through all the issues, discussed it with him. The arbitration, I think had – we had initiated it again.

But given all these issues – and I like I said that I was not, you know, I was not comfortable going ahead. We know had – we did not have any witnesses, physical witnesses at this point in time.

You know, the proof of the claim was now here. How do we prove this? And we had a change in attitude by the executives and you know I was not comfortable making
20 that decision on my own.

ADV SELEKA SC: What was the decision?

MS DANIELS: Well, to settle the matter.

ADV SELEKA SC: H'm. So that was discussed at this BTC meeting on the 8th of February 2017?

MS DANIELS: Yes, I wanted a specific mandate, if that

was to be the case, to then settle. Because the settlement – I think the attorneys for Optimum did initiate a settlement. And when they got to the settlement discussions and when we got to the arbitration, the arbitrator also asked as a standard practice with the parties concerning to settling the matter.

ADV SELEKA SC: H'm. Was BTC the right committee in regard to this issue? Because BTC was kind of pushing you back, saying this is not a procurement matter. It is a
10 litigation matter. Why are you asking for our approval?

CHAIRPERSON: We are at twenty to seven Mr Seleka.

ADV SELEKA SC: Ja.

CHAIRPERSON: So I just want you to be aware. I think we have been on penalties for, what, close to two hours?

ADV SELEKA SC: Yes, Chair. It is the ...[intervenes]

CHAIRPERSON: Okay but do what you need to do.

ADV SELEKA SC: Yes.

CHAIRPERSON: As long as you are aware of the time.

ADV SELEKA SC: Yes. Let us beat the seven o'clock
20 time, Ms Daniels. [laughs]

MS DANIELS: [laughs] We are almost done Mr Chair.

ADV SELEKA SC: Yes, we are almost done.

MS DANIELS: [laughs]

CHAIRPERSON: H', h'm. [laughs]

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

MS DANIELS: Uhm ...[intervenes]

ADV SELEKA SC: H'm?

MS DANIELS: Mr Seleka, in my experience in Eskom, whenever we had issues relating to contractual matters, you know, that is the committee that we went to. I know you have asked me this question and one would have to look at it but in my – in the practise in Eskom that is the committee that I went – that we went to and that is why I said that we should go there.

10 **ADV SELEKA SC:** There is a last opinion which is dated 10 March 2017. Was that opinion given as a result of what was discussed at BTC? It is on page 1074.

MS DANIELS: 1074, ja.

ADV SELEKA SC: And that would be the last opinion ...[indistinct]

MS DANIELS: Yes. At the BTC meeting, I was given the mandate to settle and they also added that no less than R 500 million. And what this opinion that I asked for, was a consolidation of – and you will see it is written for the
20 purposes of settlement because I wanted one point of reference with the issues in terms of we had now gone through a series of discussions with Optimum.

There were a couple of issues that they raised in terms of the calculation of the penalties which had caused a to-and-fro Mr Chairman. And also, in that calculation,

Eskom picked up further errors that it made. So, you know, that was another issue.

But the fundamentals were still the same when it came to the issues. Eskom only had to comply with the contractual provisions in terms of notices, still at this point. We still needed to rectify Clause 3.6 and we still had the issue of the integrity of the sampling process.

So the issues, really, had not changed. In addition to the financial calculations, we then put together
10 all of that information into one document and this is the combination of that.

ADV SELEKA SC: And there is another aspect I see from there which I do not know whether you have mentioned. The double charging of R 158 million for the period ...[intervenes]

MS DANIELS: Oh, yes. Yes. My apology. That was in terms of the financial calculations. This R 158 million had already been deducted in 2012. In the first period, 2012 to 2014.

20 **ADV SELEKA SC:** Ja. So the amount at which a settlement was arrived at was actually less than R 577 million. It became R 419 million with further deductions to that amount and we got – you dropped it down to R 255 million. Chair, you will find that on page 1080 and 1081 of this last opinion.

CHAIRPERSON: Thank you.

ADV SELEKA SC: 1080 and 1081. And even of the R 255 million, Tegeta did not pay the full amount. You ...[intervenes]

MS DANIELS: That I have to know...

ADV SELEKA SC: Yes?

MS DANIELS: ...did not pay the full amount. [Speaker not clear.]

ADV SELEKA SC: Yes.

10 **MS DANIELS:** ...the main interactions to the Commission.

ADV SELEKA SC: You came to know when?

MS DANIELS: With my interactions with the Commission because I was not aware that they did not pay the full amount.

ADV SELEKA SC: Alright. You ...[intervenes]

MS DANIELS: The R 255 million.

ADV SELEKA SC: Ja.

MS DANIELS: I was – I, effectively, left Eskom in October 2017.

20 **ADV SELEKA SC:** Ja. You were part of the Settlement Team, Ms Daniels ...[intervenes]

MS DANIELS: Yes.

ADV SELEKA SC: ...within Eskom. I see from the settlement that Tegeta was given 20-months to make this payment of R 255 million. Why was that – why was that

leniency afforded to them?

MS DANIELS: I think it was over the period of the contract Mr Chairman. There was also the additional hardship claim that they were instituting and I think there was another – there was another issue outside of the arbitration.

ADV SELEKA SC: Sorry, I do not understand when you say that period of repayment was in relation to the agreement. What do you mean?

10 **MS DANIELS:** [No audible reply]

ADV SELEKA SC: Because the settlement stood on its own. It is an agreement on its own. Why could they not pay this amount in two months?

MS DANIELS: Well, they had instituted a hardship claim at the same time, separate from the arbitration.

ADV SELEKA SC: Yes, which is separate from that.

MS DANIELS: Yes.

CHAIRPERSON: So... I also do not understand. Why do you give them so much time after you have reduced the
20 amount, the claim so much? Why do you give them almost two years?

MS DANIELS: So Mr Chairman, I am actually not sure. I must be honest. I am not sure. I cannot...

ADV SELEKA SC: Ja.

CHAIRPERSON: H'm.

MS DANIELS: I could not find the reason in the
...[intervenes]

CHAIRPERSON: I mean, that is ...[intervenes]

MS DANIELS: ...the documentation that I have. I must
be... I...

CHAIRPERSON: It is quite strange ...[intervenes]

MS DANIELS: To be quite honest.

CHAIRPERSON: You have a situation where, as far as
this claim was concerned, when the claim was against OCM
10 under Glencore, there was a very rigid attitude to say: We
are pursuing this claim. You have to pay. And Mr Molefe
has admitted here that that was his attitude.

ADV SELEKA SC: H'm.

CHAIRPERSON: And then now, when the claim is against
OCM under Tegeta, suddenly the attitude is: We can
reduce the claim from R 2.1 billion up to – is it two-
hundred and something million?

ADV SELEKA SC: R 255 million.

CHAIRPERSON: R 255 million. Even that R 255 million,
20 we give you close to two years to pay. It is such a
different attitude compared to the attitude displayed
towards Glencore. I guess you accept that?

MS DANIELS: No, I agree with you Mr Chairman.

CHAIRPERSON: H'm.

MS DANIELS: And that is why... I mean, you know, this

was – if you look at all this history objectively, we ought to have settled way back, whether – even with Glencore.

CHAIRPERSON: And ...[intervenes]

MS DANIELS: You know.

CHAIRPERSON: ...what reason would you advance why you did not settle with Glencore?

MS DANIELS: It was the... the tone of the executives at the time, Mr Chair.

CHAIRPERSON: It was because of the executives?

10 **MS DANIELS**: Ja. This is, ultimately, an executive decision.

CHAIRPERSON: Oh, okay ...[intervenes]

MS DANIELS: Notwithstanding the legal advice ...[intervenes]

CHAIRPERSON: But was the ...[intervenes]

MS DANIELS: [Indistinct]

CHAIRPERSON: ...was the legal advice the same ...[intervenes]

20 **MS DANIELS**: ...receiving the claim. [Distortion present in transmission – speaker unclear.]

CHAIRPERSON: Was the legal advice the same under both periods, the period – the Glencore period and the Tegeta period? Was the legal advice to the executives the same?

MS DANIELS: Yes.

CHAIRPERSON: Namely ...[intervenes]

MS DANIELS: You will see, that is why we went through the opinions. The same themes, the – you know, the issues just got a little bit more crystallised ...[intervenes]

CHAIRPERSON: Yes.

MS DANIELS: ...as time went by but ...[intervenes]

CHAIRPERSON: Yes. No, I see ...[intervenes]

MS DANIELS: ...but quite fundamentally the same.

CHAIRPERSON: No, I see the external legal advice. I am
10 talking about the internal legal advice. Do you know what the internal legal advice was from the legal people within Eskom to the executives?

MS DANIELS: I am not sure ...[intervenes]

CHAIRPERSON: ...to this case?

MS DANIELS: The bulk of that one meeting where I was present with Mr Selanka/Selanko(?) You would have to ask him about how he dealt with it. My reliance was on the external advice.

CHAIRPERSON: H'm.

20 **MS DANIELS:** Because that had been the only consistent presence throughout this matter.

CHAIRPERSON: H'm.

MS DANIELS: In find the energy to staff change. You know, in the legal department the staff changed. So the – but the constant for this period under discussion was Cliff

Decker Hofmeyr.

CHAIRPERSON: H'm.

ADV SELEKA SC: H'm.

CHAIRPERSON: Apart from the Group CEO at the time when the Group CEO was Mr Brian Molefe, which other executives were involved in this matter and would have been aware of the external legal advice and would have been – would have had an influence on what attitude should be adopted by Eskom?

10 **MS DANIELS:** During the period 2013 to twenty... Well, up until 2016, Mr Koko was Head of Group Technology and Commercial.

CHAIRPERSON: H'm?

MS DANIELS: And miss... Primary Energy fell under his watch.

CHAIRPERSON: Yes.

MS DANIELS: So he would have been aware.

CHAIRPERSON: H'm?

MS DANIELS: There actually was.. CDH actually
20 addressed such an opinion to him on, you know, the implications of business rescue on the Optimum contract. So he would have been aware.

And in my time, there was a Head of Primary Energy, Mr Chair, during 2013/2014 and that was Ms Carrim Maraj but she would have reported to Mr Koko.

CHAIRPERSON: Okay.

MS DANIELS: In 2015, he was still in charge and then he became Head of Generation. Coal issues would have been important to him because he would have been the recipient of the coal as the power station side of things. So he was the constant there. In – when I took over, I was – my direct report – I had to report directly to Mr Singh as the Chief Financial Officer and then also to Mr Koko as the acting Group Chief Executive.

10 **CHAIRPERSON:** Okay. Mr Seleka.

ADV SELEKA SC: Thank you, Chair. Ms Daniels... Chair, I am going... I think we have covered the penalties. You know, they end up with that settlement, the payment which is listed under the settlement amount. Tegeta has still been given a temporary relief where the penalties are waived for a period of over 12-months until they go into business rescue in February 2018.

Ms Daniels, the – I want to turn my attention to that issue of McKinsey and Trillian. Chair, it relates to the
20 meeting – the legal review which was required to be obtained pursuant to that Oliver Wyman report. They said you can pay this amount but, really, I am not given you a legal opinion. You must ...[intervenes]

CHAIRPERSON: Yes, I remember that.

ADV SELEKA SC: Yes. You must obtain your own legal

review.

CHAIRPERSON: Yes, okay.

ADV SELEKA SC: Ms Daniels and Mr Prish Naidoo - Govender. Prish Govender were engaging CDH to get that legal review but they came to the BTC on the 13th of December 2016 without having obtained that legal review. But the submission to BTC, Ms Daniels, had a paragraph that conveyed the message that CDH had been retained to essentially provide the legal review and that it
10 had advised that you could settle the matter and pay McKinsey and Trillian, and at that stage it was specifically Trillian, the R 134 million.

Now Mr Moodley said, by that stage, he had not given the legal review. And the question to you was whether, did you tell the BTC that you had not obtained a legal review?

Now your answer to me was in the affirmative, that you did tell the BTC you have not obtained the legal review but I have listened to the audio of that meeting and
20 it shows otherwise. It show that you, in fact, told the BTC that you have obtained the legal review.

Your comment on that? I have also made you listened to that audio.

MS DANIELS: Mr Chair, I do have correct my response to Mr Seleka. Mr Seleka, is correct. He had me listened to

that tape. I was obviously wrong in my recollection of the events of that day. What I did say and it is clear from the audio that the legal opinion was to be obtained in respect of future payments.

ADV SELEKA SC: ...in respect of the 134 million. Well,
in respect ...[intervenes]

MS DANIELS: Not in respect of the 134 million.

ADV SELEKA SC: Sorry, in respect of the 134 million you told them that you have received a legal review from CDH
10 which was incorrect.

MS DANIELS: I was incorrect, that is what it sounds like but that was not the intended message but I accept having listened to it with Mr Seleka that that is how it sounds, so I do have to correct that.

ADV SELEKA SC: Ja. Chair ...[intervenes]

CHAIRPERSON: I did not listen to the audio. Did you say to – is it the BTC?

ADV SELEKA SC: BTC, yes.

MS DANIELS: Yes, Chair.

20 **CHAIRPERSON:** Did you say to the BTC you had obtained an opinion, a legal opinion in circumstances where you had not obtained any such opinion?

MS DANIELS: Well, my intention was actually to say that I had briefed the attorneys but from the language that was used and I listened to it a number of times, it does sound,

like I said, I have the legal opinion and that is why I am saying it was incorrect.

CHAIRPERSON: Yes, but you cannot make that mistake, can you? If you want to say you have instructed attorneys or you briefed lawyers to obtain an opinion, you cannot say I have obtained an opinion. You cannot make that mistake, is it not?

MS DANIELS: I did not use the word I have obtained, Mr Chair, I said I got but listening to it, that is what – listening
10 to it now and objectively listening to it ...[intervenes]

CHAIRPERSON: So what did you say? Just tell me what you said?

MS DANIELS: I got the attorneys to do an opinion but that does not – that is not clear at all.

CHAIRPERSON: Okay, I am sorry, if you said you got attorneys to do an opinion, it depends what else you said. Did you create the impression to say the least to the BTC that an opinion had been provided to you, when you listen to the ...[intervenes]

20 **MS DANIELS:** When I listen to ...[intervenes]

CHAIRPERSON: ...to the tape, is that what you in effect say to the BTC?

MS DANIELS: Yes, Mr Chair, and that is why I am saying that was not what I was intending to but if you listen to the tape that is what it sounds like and I have to ...[intervenes]

CHAIRPERSON: Is it what it sounds like or it is what you said, what you say in the tape?

MS DANIELS: It is what I said.

CHAIRPERSON: Yes but my question is, how can you make that mistake? I mean, if you ask for an opinion from lawyers and you have not received it, there is no way you can say you have got it because if you have got it you probably have read it and you would know what it says. If you say you have got it and you do not have it, it must
10 mean you intended to misrepresent the position.

MS DANIELS: Mr Chairman, I cannot – I will say that I did not intend to misrepresent.

CHAIRPERSON: But how did it come about?

MS DANIELS: But if I listen to it now that you could draw that conclusion and that is why I am saying, you know, I made a mistake there. It was not how I intended to convey it. But, you know, it is in the past and I can only say I am sorry, you know, it did – and from – if I listen to it objectively now, it creates the gap for that payment but
20 that was not my intention at the time, you know, there was not a deliberate intention to misrepresent.

CHAIRPERSON: What as the context of that statement in terms of the discussion? What was the context, why was it necessary to tell the BTC about the opinion?

MS DANIELS: We were talking about the audit opinions, Oliver Wyman opinion and the legal opinion.

CHAIRPERSON: Continue? Just tell me the context of the statement? Somebody said something and somebody said something until it came to a point where you made that point. That is what I would like to hear.

MS DANIELS: Okay. So the discussion was around the – I think it was Mr – the Chairman of the BTC made certain comments about a settlement agreement, etcetera, at the
10 stage of ...[intervenes]

CHAIRPERSON: What did you say about it because I take it you listened to – you recently listened to the audio, so you – have got it there?

MS DANIELS: Yes, yes.

CHAIRPERSON: Okay, I am sorry, I think Mr Seleka wants to play it for me. Okay?

RECORDING PLAYED TO THE COMMISSION

CHAIRPERSON: I cannot hear properly.

ADV SELEKA SC: I can email – let me email it to them,
20 Chair. There is the sound issue.

CHAIRPERSON: Oh, then they will play it from there? Okay.

ADV SELEKA SC: Yes. But maybe Ms Daniels can explain the context in the meantime.

CHAIRPERSON: Ja, while they are sorting it out. Are you able to tell me the context, Ms Daniels?

MS DANIELS: Mr Chair, what the Chairman was talking about, he was giving the history of McKinsey and I cannot – there is a – he then asked – I cannot remember what the question was, you will hear it from the tape, but what I said was, there was an audit opinion, there was the Hon Wyman opinion and I had got an opinion from CDH.

CHAIRPERSON: And did you tell them what the opinion
10 was about and what it said?

MS DANIELS: And then I said that there was – the opinion was going to be on the future payments. In respect of the 134 million – I must just look at my notes. I think I used – you will have to listen to the tape but it was around the 134 million and then I said that the CDH opinion would be in respect of the future payments.

CHAIRPERSON: But did you tell the BTC what the opinion was saying about the – is the 34 million?

ADV SELEKA SC: 134.

20 **MS DANIELS:** The 134 million.

CHAIRPERSON: Ja, did you tell the BTC what your legal opinion said that you said you had obtained or received or got?

MS DANIELS: I do not think I said it out – you can hear on the tape, I think it was – I said it was payable but I do

not think it was in respect of legal opinion, I just need to listen to it again. We listened to it, I think it was yesterday, Mr Chairman.

CHAIRPERSON: Okay. Mr Seleka, what is your recollection of what emerges from the audio, from the tape in terms of...

ADV SELEKA SC: Yes.

CHAIRPERSON: What she said about the opinion, about the 134 million?

10 **ADV SELEKA SC:** Ja. Ms Daniels did not specify what the opinion says. What she says is – Oliver Wyman did the financial assessment so in respect of the claim that McKinsey and Trillian has. Oliver Wyman did the financial assessment, an internal audit was done by Molefe and Company and then I got – she says:

“I got Cliffe Dekker to give us legal review.”

Then she says something – it is not clear what she is saying but effectively in respect of the payment sought to be approved and she goes on to say:

20 “And for the remainder...”

Which is the remainder of the amount.

“...we will get a legal opinion on how we deal with that to protect ourselves.”

But the details of the opinion are not given. But the paragraph in the submission, Chair, drives the

...[intervenes]

CHAIRPERSON: In the submission that was given to the BTC.

ADV SELEKA SC: The BTC.

CHAIRPERSON: Ja.

ADV SELEKA SC: There it is very clear that what is conveyed is that Cliffe Dekker have been retained to give advice that Eskom can settle with McKinsey and Trillian and pay the settlement amount and it will avoid further
10 claims. So this becomes the basis on which BTC approves the payment of 134 million.

CHAIRPERSON: Yes. Is there anything that was said about the legal opinion that may have influenced BTC to settle in terms of the context of the discussion?

ADV SELEKA SC: No.

CHAIRPERSON: No.

ADV SELEKA SC: That submission ...[intervenes]

CHAIRPERSON: Oh, in terms of the submission and/or the discussion in the tape.

20 **ADV SELEKA SC:** Ja, what - you hear Mr Zethembe Khoza saying we have obtain external legal opinion, they have checked the contract, Deloitte have looked at the figure, Deloitte have recommended payment now of a figure and payment in the future of another figure. So, you know, that says, okay, the lawyers have looked it, the

accountants have looked at it and this is the figure we have to pay now, other figures will be paid in the future.

The closest you get what the lawyers are allegedly saying, it is in the submission, paragraph 8 in the submission.

CHAIRPERSON: Yes and that says?

ADV SELEKA SC: That says that they essentially they are advising that you settle with McKinsey.

CHAIRPERSON: Yes.

10 **ADV SELEKA SC:** Pay them the amounts so that you avoid future claims.

CHAIRPERSON: Yes, yes, yes. Okay and that submission had been prepared by Ms Daniels or by somebody else?

ADV SELEKA SC: Ms Daniels, who prepared the submission?

CHAIRPERSON: Can you recall?

MS DANIELS: Mr Prish Govender prepared the submission, Mr Chairman. As I had indicated at the
20 previous occasion, that was done in anticipation that it would have been completed but by the time we got to the meeting it was not completed.

ADV SELEKA SC: Ja. But wait, he did not – is this is not the submission that you also signed?

MS DANIELS: Yes, I did sign it.

ADV SELEKA SC: Is this the very submission that Mr Koko says he refused to sign?

MS DANIELS: Oh, no, no, no, sorry, those are two different things, Mr Seleka, Mr Chairman.

ADV SELEKA SC: Okay, but let us concentrate on this one.

MS DANIELS: Those are two different things.

ADV SELEKA SC: Let us concentrate on this one. Who signed this one?

10 **MS DANIELS:** This was signed by Mr Govender and I think Mr Singh and Mr Mabalane.

ADV SELEKA SC: Oh, you did not sign it?

MS DANIELS: No, I did not sign this one.

ADV SELEKA SC: Okay.

CHAIRPERSON: So you were mistaken earlier when you said you signed it or were talking about ...[intervenes]

MS DANIELS: No, I was talking about ...[intervenes]

CHAIRPERSON: The other one.

20 **MS DANIELS:** The letter that we spoke about, Mr Chairman.

CHAIRPERSON: Oh, okay.

MS DANIELS: But in terms of this December submission I did not sign it.

CHAIRPERSON: Did you have any input in it even if you did not sign it?

MS DANIELS: Yes, as I said that that clause in respect of the legal review, as I testified earlier, that was done in anticipation that it would be completed but it was not completed by the time we got to the meeting.

CHAIRPERSON: So that is the clause that says what?

MS DANIELS: Is it okay if you can just give the page?

ADV SELEKA SC: It is quoted in Mr Moodley's affidavit, Chair. I recall he quoted because he complains about that aspect. It is page 943 of the same Eskom bundle 14(d).

10 **CHAIRPERSON:** Yes, just go ahead and read.

ADV SELEKA SC: It reads under paragraph 96, he quotes, 8:

“External legal review”

CHAIRPERSON: I am sorry, you said 9...?

ADV SELEKA SC: 943.

CHAIRPERSON: Okay.

ADV SELEKA SC: 943 says:

“Cliffe Dekker Hofmeyr...”

This is clause 8.

20 “Was retained to conduct a review and a conclusion is that Eskom needs to enter into a termination agreement with the parties to bring the matter to finality. This will absolve Eskom from any further liability once the termination agreement is in place.”
It is quote under paragraph 96.

CHAIRPERSON: Yes, okay. Yes, okay, alright.

ADV SELEKA SC: That is the [indistinct – dropping voice]

CHAIRPERSON: And this was provided on the 12 December 2016, this external legal review.

ADV SELEKA SC: The review, Chair, the review was not granted.

MS DANIELS: No.

ADV SELEKA SC: Was not given at that stage.

CHAIRPERSON: Oh, that is when – okay, no, I can see.

10 **ADV SELEKA SC:** Ja, what Mr Moodley is saying here is they are busy drafting the submission internally in Eskom, he gets the submission on the 12 December and he sees this paragraph 8 inserted in the draft document.

CHAIRPERSON: Yes.

ADV SELEKA SC: And it should not be there because he has not given a legal review or legal opinion.

CHAIRPERSON: Oh.

ADV SELEKA SC: Yes. So he says then he raised the issue with Ms Daniels that ...[intervenes]

20 **CHAIRPERSON:** Okay, this is the clause that you said makes it clear in the submission.

ADV SELEKA SC: Correct.

CHAIRPERSON: Yes.

ADV SELEKA SC: Yes.

CHAIRPERSON: Well, certainly, Ms Daniels, here this

clause was saying that Cliffe Dekker has given an opinion to the effect that Eskom should enter into a termination agreement to bring the matter to finality and that was factually not correct, is that right?

MS DANIELS: That is correct, Mr Chairman, and that is why I said, you know, the last time that I had done that in contemplation that it would be completed but it was not by the time we got to the meeting.

CHAIRPERSON: But how would you have known what
10 conclusion Cliffe Dekker would reach? You ask Cliffe Dekker to give you an opinion, if you have not received the opinion you cannot know what conclusion they will reach, is it not?

MS DANIELS: Yes, that is correct.

CHAIRPERSON: Yes and therefore you cannot say to the BTC what their conclusion is going to be on the basis that you expected or you cannot – your explanation cannot be that I expected that their opinion would have arrived because even if you expected their opinion would have
20 arrived by the time of the BTC you would not know what their opinion would be. So you could not start telling – preparing a memo that says what the opinion is. If you wanted to say anything, you might say I have asked for an opinion, I have not got it, but my view is that it is likely to say blah, blah, blah, blah but you cannot begin to say what

that conclusion will be and here you say and the conclusion is that Eskom needs to enter into a termination agreement.

So, in other words, what I am putting to you is when you say to me that you put in this clause in the submission on the basis that you thought by the time the BTC said the opinion from Cliffe Dekker would have arrived, I am saying that that is not convincing to me because you have asked them for an opinion but you do
10 not know what opinion they will give you therefore you cannot tell the BTC what the opinion says or will say. What do you say to that?

MS DANIELS: I accept that, Mr Chairman, I should have made it – I should have said it differently.

CHAIRPERSON: But it goes beyond that – it gives the impression that you may be deliberately sought to misrepresent the position to the BTC because for the reason that I have just been giving you that if I asked you for an opinion, until I get that opinion, I do not know what
20 you would say and therefore I cannot start telling - I cannot say to Mr Seleka you have reached this conclusion, I cannot say before I get it what you will say, I will have wait until then. Ca you - you understand?

MS DANIELS: I understand what you are saying Mr Chairman and I do accept it. I mean now looking at it in

the cold, hard, objective light, I do realise that it was not – it did not come across as I had intended it to and I do accept responsibility for that and I do apologise for that. There was no deliberate intention in my part to mislead anybody. You know, I – but having listened to both the audio, you know, and also reading it and your questioning now and Mr Seleka's questioning, I do accept that and I do apologise.

CHAIRPERSON: Mr Seleka?

- 10 **ADV SELEKA SC:** You see, Dr Khoza who comes before Ms Daniels in the audio talks along the same lines, Ms Daniels, about the legal review or a legal opinion being obtained. Well, let me say this also because your statement to the BTC went further to say that in regard to the remainder we will get a legal opinion. But you know the remainder which is the amount that was yet to be paid, those amounts were paid even again before the legal opinion was obtained. That legal opinion was received on the 17 April 2017 and finally on the 28th – did I say April?
- 20 Sorry, February.

MS DANIELS: February.

ADV SELEKA SC: And then the final one on the 28 February, payments to Trillian and McKinsey had already been paid, payment.

MS DANIELS: But you will remember that that instruction

was provided to – settle by Mr Govender directly to CDH to settle and the – I think the invoices were signed off by Mr Govender and Mr Mabalane around about the 14th, so they did not wait for the legal opinion to come in.

ADV SELEKA SC: Ja, that is another problem is it not?

MS DANIELS: Yes, it is.

ADV SELEKA SC: So Mr Salim Essa's company was paid without Eskom having obtained a legal opinion that it should not pay which is what the opinion ultimately alluded
10 to.

MS DANIELS: That is correct and he – well, the opinion went further than that and said that Eskom should not have paid in its entirety.

CHAIRPERSON: Well, Ms Daniels, this clause and what your evidence is about, how it came about, troubles me. As we speak, is your position that with the questioning that has happened you will still maintain that you did not intend to say to the BTC Cliffe Dekker had concluded in the way that the clause says or do you accept that you did intend to
20 convey that to the BTC?

I ask that because you did say earlier on your take responsibility, I think, for the clause and I did say earlier on that it seems to difficult for me to accept that you could say – you could write that Cliffe Dekker had concluded that Eskom needed to enter into a termination agreement

without intending to convey that to BTC, the BTC.

So I just want to let you tell me once again where you stand about it. Do you still say you did not intend to convey that or do you say look, I accept that that is what I intended?

MS DANIELS: Mr Chairman, I think I want to answer it this way. I accept I should not have said that, okay? I accept that it is – on the – as it says there, it is deliberate. All I am saying to you is from my perspective there was no
10 intention to mislead. I should have looked at it more closer.

CHAIRPERSON: Okay, alright. Mr Seleka?

ADV SELEKA SC: Ja, thank you, I have reached the end.

CHAIRPERSON: Yes.

ADV SELEKA SC: I know Ms Daniels wanted to give you evidence and on certain things but we are now nearly at half past seven.

CHAIRPERSON: Yes, but I wanted to finish with her evidence today. What were the other matters? I know
20 there is the issue of the pre-suspension letters.

ADV SELEKA SC: Yes, she wants to address you on that.

CHAIRPERSON: Yes, was there – is there something else other than that? From your side you are done, it is just that she wants to?

ADV SELEKA SC: Yes.

CHAIRPERSON: Or did you not want to – okay, let us talk about those pre-suspension letters, Ms Daniels.

ADV SELEKA SC: Yes.

CHAIRPERSON: I think Mr Khoza, Mr Zethembe Khoza when he testified before the Commission said that those pre-suspension letters had properties which suggested that they were in your computer on the 10 March 2015 as well as in Mr Salim Essa's computer on the same day. I am sure you heard about that, that part of his evidence. What
10 do you say about that?

MS DANIELS: Mr Chairman, I just want to repeat that it was – it was a template that was created by me, not the suspension letters but it was an Eskom letterhead template and that was to generate those letters. I do not accept, I reject what Mr Khoza says in terms of the fact that I worked with Mr Essa on those letters. At the time of the creation of those letters, I was actually in Pretoria, in the face to face discussion at my home with Mr Marokane.

Telling him what had happened on the, earlier that
20 afternoon.

CHAIRPERSON: The, those suspension letters that Mr Khoza was referring to, do we have them in one of the bundles here or not?

ADV SELEKA SC: The ...[intervenes]

CHAIRPERSON: The ones he was talking about.

ADV SELEKA SC: Yes, ja.

CHAIRPERSON: Because if they are, if we have got them I would like to see them, because I want to see whether they are just templates or they have got information relating to the individuals who were suspended on the 11th.

ADV SELEKA SC: The pre-suspension letters?

CHAIRPERSON: Ja, that Mr Khoza refers to.

ADV SELEKA SC: They have the, they are individualised.

CHAIRPERSON: Yes.

10 **ADV SELEKA SC:** They have Mr Mathona and Mr Maropane.

CHAIRPERSON: Yes.

ADV SELEKA SC: Mr Koko.

CHAIRPERSON: Yes.

ADV SELEKA SC: And they have information pertaining to them.

CHAIRPERSON: Yes.

ADV SELEKA SC: It is the metadata ...[intervenes]

CHAIRPERSON: Ja.

20 **ADV SELEKA SC:** Which then shows who is the author and who is the last [indistinct].

CHAIRPERSON: Yes.

ADV SELEKA SC: Ja. I do not, I know we have ...[intervenes]

CHAIRPERSON: Okay.

ADV SELEKA SC: Put those questions here.

CHAIRPERSON: Okay.

ADV SELEKA SC: But I do not think we have a file.

CHAIRPERSON: Okay, no I do not need to see them because what you have told me, is enough.

ADV SELEKA SC: Yes.

CHAIRPERSON: Now, so you say Ms Daniels, you know when they were created, those letters and at the time that they were created, you were not at Eskom, you were rather
10 you said you were in Pretoria. Okay. Now no, I am I do not know a lot about technology, but in terms of when they were created, is that what you see from the letters themselves, properties, the metadata, or whatever?

MS DANIELS: Yes, Mr Chairman and that is why I can tell you because I think it says, I do not remember exactly the time, but it said 16H38 PM, and this is from the metadata. Like you I have learnt a lot about, only learnt about it through this process.

It says and also when you create a template, the
20 creator would also be myself. That could also be when I created the template, you would see it is created by Susanne Daniels and you know, then people can change it, but I looked at the timing of the creation of those letters and at that time, I was speaking to Mr Marokane face to face.

CHAIRPERSON: They have been created from your desktop and not from your laptop?

MS DANIELS: When I created those letterhead templates, they were stored on my Eskom computer. So at that stage I think I had a laptop.

CHAIRPERSON: Yes, but what I am suggesting is if they were created in your laptop, the fact you say you were in Pretoria with somebody might not have any significance, because you could have created them where ever you were
10 if it was a laptop, but if they were created on the desktop and you say you were not at Eskom at that time, that might have prudence.

MS DANIELS: Well, what I am saying to you Mr Chairman, is that I could not possibly have been on my laptop either at that time because I was face to face with, in a conversation with Mr Marokane and that conversation lasted quite a while.

CHAIRPERSON: About how long? An hour, two hours?

MS DANIELS: He was, I think he was at my house for
20 about an hour or more.

CHAIRPERSON: Yes, and the time when they were created fell within that period?

MS DANIELS: Within that period, Mr Chair.

CHAIRPERSON: Yes, but in terms of whether it was, they were created in the laptop or on the desktop, is there

clarity on that?

MS DANIELS: I do not think you, I do not think you can get that from the documentation. I you know, do not have them and from what I can see from the forensic, Mr Seleka gave me Ms Stein's affidavit as well, and her forensic investigators confirm that it was from a letterhead template.

So you know, that is the best. I am not a forensic scientist, so ...[intervenes]

10 **CHAIRPERSON:** Ja.

MS DANIELS: We will have to wait for that, but from what I am saying to you is at the time of the creation of those letters, from what I see, I was not physically with Mr Essa or working with him because I was actually talking, relaying the events to Mr Marokane face to face at my house.

CHAIRPERSON: And did you say the time was half past six on the 10th of March?

MS DANIELS: I think it was, it says 16H38 or 16H40 on those letters and that was the time that Mr Marokane and I
20 were in conversation.

CHAIRPERSON: And that is PM?

MS DANIELS: PM, yes.

CHAIRPERSON: Yes, and you say you would have had, so you are not, is the position that what is important is that you were busy with somebody as opposed to being away

from Eskom? That is important.

MS DANIELS: Yes, I think just, you know I mean as we know these documents can be done anywhere. What I am saying is physically I was face to face with Mr Marokane, and he can tell you that at no stage did I step out to go and do something.

I was telling him what had happened that day.

CHAIRPERSON: Oh, is that when according to your evidence you told him about your meeting with Mr Koko
10 and with Mr Salim Essa?

MS DANIELS: Mr Essa, yes.

CHAIRPERSON: Okay.

MS DANIELS: So I could not be drafting suspension letters or pre-suspension letters with Mr Essa when I am talking to Mr Marokane about what happened earlier that day.

CHAIRPERSON: Yes, yes. Now Mr Seleka, is there anything else about these suspension letters that you think needs to be clarified? I know that more investigation must
20 be done.

ADV FRANKLIN SC: That is right and we are nearly at the end Chair of that.

CHAIRPERSON: Ja. Okay.

ADV SELEKA SC: Ja, ...[intervenies]

CHAIRPERSON: So it may be that she might be asked in

due course to comment once the investigation has been completed?

ADV SELEKA SC: Yes, yes.

CHAIRPERSON: Ja, okay alright. Can I go back to the issue of your meeting with Mr Koko and Mr Salim Essa, which is your version on the 10th of March. On that day was it your first occasion to go to those offices where you met Mr Koko and Mr Salim Essa?

WITNESS: Yes, Mr Chairman that was the first time.

10 **CHAIRPERSON:** Did you subsequently ever go to those offices after 10 March at any stage before ...[intervenes]

MS DANIELS: Not ...[intervenes]

CHAIRPERSON: Before you gave evidence before the commission?

MS DANIELS: Not at those offices.

CHAIRPERSON: Not to, but to the even if the company had left, but to that spot. Did you ever go there ...[intervenes]

MS DANIELS: No, not to that spot. The Trillian offices
20 then moved ...[intervenes]

CHAIRPERSON: Ja.

MS DANIELS: About a block ...[intervenes]

CHAIRPERSON: Yes, now ...[intervenes]

MS DANIELS: Forward.

CHAIRPERSON: So is your evidence that therefore maybe

between 10 March, before 10 March you say you had never been to those offices?

MS DANIELS: No, I have not been to those offices.

CHAIRPERSON: And since then and during the time when you have been giving evidence from time to time to the commission, have you gone there again to identify where the offices were where you met them or have you not?

MS DANIELS: Yes, I have Mr Chairman. I have been with the investigating team to show them where it was.

10 **CHAIRPERSON**: Yes, have you signed an affidavit after that to say what happened when you went there to identify the place or not yet?

MS DANIELS: I have not been asked to do that, but I am happy to do that.

CHAIRPERSON: But were you able to remember where the offices were where that meeting was held when you sent again?

MS DANIELS: Yes.

CHAIRPERSON: Yes. Okay, are there any features that
20 made you remember?

MS DANIELS: Hm ...[intervenes]

CHAIRPERSON: Or anything that made you remember I mean so many years after, if you did not go there again in 2015, 2016, 2017.

ADV SELEKA SC: No, but she, sorry ...[intervenes]

MS DANIELS: Mr Chairman, that the offices are fairly standard from the outside.

CHAIRPERSON: Yes.

MS DANIELS: The feature was that it was quite close to the entrance and you know, I could remember that.

CHAIRPERSON: Yes.

MS DANIELS: And I mean, that was such a what is the word?

CHAIRPERSON: And, so ...[intervenes]

10 **MS DANIELS:** It was such a life changing moment, you know ...[intervenes]

CHAIRPERSON: Ja.

MS DANIELS: In the course of the last couple of years.

CHAIRPERSON: Did you recognise ...[intervenes]

MS DANIELS: That it is actually very difficult to forget.

CHAIRPERSON: Did you recognise the place where the offices were in the building without anybody's assistance?

MS DANIELS: Yes. I did.

20 **CHAIRPERSON:** Okay. Mr Seleka, you wanted to say something?

ADV SELEKA SC: Yes, Ms Daniels I remember from your affidavit that there was another occasion you say Mr Koko drove with you to these offices. He went into a board room with Mr Salim Essa and left you at the reception area. Was that before or after the 10th of March 2015?

MS DANIELS: That was after the 10th of March Mr Chairman, but then they had moved to another office. That is why I am saying that office was a block away. I understood Mr Chairman asking me had I been back to that, the 10th of March office.

CHAIRPERSON: Oh, so the occasion that Mr Seleka refers to which is a different occasion from the occasion of the 10th of March, you went with Mr Koko to different offices, but where he went to see Mr Salim Essa.

10 **MS DANIELS:** Yes, that is correct Mr Chair and it was still at Melrose Arch.

CHAIRPERSON: Yes, in the same building or a different building?

MS DANIELS: A different building.

CHAIRPERSON: Yes, okay.

ADV SELEKA SC: And then there was on a Saturday when Mr Essa gave you a telephone call and asked you to come and meet with him at Melrose Arch. Was that meeting at a different place in Melrose Arch or the same place?

20 **MS DANIELS:** That was at a different place. We met at the African Pride Hotel, the reception there and then we walked to what, it was an apartment block.

CHAIRPERSON: Mr Seleka?

ADV SELEKA SC: Yes.

CHAIRPERSON: Is that the, is that the one where there

were other people?

MS DANIELS: Yes Mr Chair, that is where I saw Mr AJ Gupta and ...[intervenes]

CHAIRPERSON: Ja.

MS DANIELS: And Ms Duduzeni Zuma.

CHAIRPERSON: Ja.

MS DANIELS: And ...[intervenes]

CHAIRPERSON: I remember you testifying about that.

MS DANIELS: Yes.

10 **ADV SELEKA SC:** Ja. The, I know the pre-suspension letters we had touched on that on I think the second or the third occasion when she appeared.

CHAIRPERSON: Oh, okay.

ADV SELEKA SC: But I did want to, I did want to come back to it once we have the expert affidavit.

CHAIRPERSON: Ja, no that is fine.

ADV SELEKA SC: Which we will in any event have to come back to it.

CHAIRPERSON: Ja. I guess depending on what the
20 expert says, ja. Okay, alright. Other than what you have been able to say now Ms Daniels in response to my questions about the issue of the, excuse me ... pre-suspension letters.

Was there something else you wanted to say about them?

MS DANIELS: Not specifically Mr Chair. I think I have covered them in my affidavits on my previous testimony. I just wanted to highlight you know, that the new information because I checked with Mr Marokane on the times that we met.

CHAIRPERSON: Okay.

MS DANIELS: The ...[intervenes]

CHAIRPERSON: Okay, well we are going to adjourn and as I understand the position from Mr Seleka, he is done
10 with your evidence except in so far as the first, further investigation about the pre-suspension letters might make it necessary to call you back or ask for your comment, arising out of whatever the further investigation may reveal.

He is done, therefore unless there is something else you want to say, I am ready to thank you and then to adjourn.

MS DANIELS: There was just one other issue that I wanted to bring to your attention Mr Chairman.

20 **CHAIRPERSON:** Yes.

MS DANIELS: It is in my affidavit, but I just wanted to raise it with you.

CHAIRPERSON: Ja.

MS DANIELS: Or just you know, highlight it to you.

CHAIRPERSON: Ja.

MS DANIELS: I have been provided with the affidavit of Mr Khoma, Khulani Qoma who was the board spokesperson at the time during the tenure.

CHAIRPERSON: Is that Qoma ...[intervenes]

MS DANIELS: And ...[intervenes]

CHAIRPERSON: Is that Qoma?

ADV SELEKA SC: That is right, Chair.

CHAIRPERSON: Alright, what is his name?

MS DANIELS: Yes.

10 **ADV SELEKA SC:** Khulani.

MS DANIELS: That is correct. That is ...[intervenes]

ADV SELEKA SC: Khulani.

CHAIRPERSON: Oh, okay ja Khulani Khoma, yes. Khoma will be Qoma, is that right?

MS DANIELS: And ...[intervenes]

ADV SELEKA SC: That is correct, Chair.

CHAIRPERSON: Ja, just for the transcribers, yes.

MS DANIELS: That is correct.

CHAIRPERSON: Continue.

20 **MS DANIELS:** Okay, so in his affidavit he talks about Mr Khoza bragging about he stopped Mr Koko's suspension. This is the suspension in 2017, March 2017. I just wanted to give you context. That, the event that led to that was Minister Brown provided information to Dr Ngobane and I go into detail so I am not going to go into it, in my

affidavit.

So I am not going to go into too much detail here, unless you, you know ask me questions.

CHAIRPERSON: Hm.

MS DANIELS: Minister Brown asked Dr Ngobane to investigate a number of companies. One of them was a company that had gotten a tender for two hundred and something million and then it had grown to over a billion. In that investigation it ended up that was the company that
10 Mr Koko's step daughter then owned and the board subsequently instituted an investigation.

At this point in time there were other, in March 2017 there were other complaints about Mr Koko. It was discussed at a meeting of the people and governance committee, and it the committee decided to issue a notice to Mr Koko to explain the allegations and give him, you know follow a sort of pre-suspension process and in that case, in that instance I did draft the notice of pre-suspension for Mr Koko.

20 It was the 1st of March 2017. The meeting happened, was scheduled to take place at six o'clock that evening. Members of the board were there, so I drafted the notice and we attached the memorandum. Dr Ngobane, the meeting took place.

A long story short, Mr Koko was not suspended at

that meeting. Mr Khoza and this was in Mr Qoma's affidavit. Mr Khoza explained to Mr Khomo that he stepped out of that meeting and phoned one of the G brothers, which we know ...[intervenes]

CHAIRPERSON: One of the G brothers?

MS DANIELS: One of the G brothers. This is one of the Gupta brothers.

CHAIRPERSON: Who are the G brothers?

MS DANIELS: Excuse me?

10 **CHAIRPERSON:** Who are the G brothers?

MS DANIELS: The Gupta brothers.

CHAIRPERSON: Is that how you call them?

MS DANIELS: Well, Mr Khoza called them, he said he called one of the G brothers ...[intervenes]

CHAIRPERSON: Oh, that is what he said?

MS DANIELS: That is what he said.

CHAIRPERSON: It is not what you say.

MS DANIELS: First of all ...[intervenes]

CHAIRPERSON: Oh, okay.

20 **MS DANIELS:** So ...[intervenes]

CHAIRPERSON: Okay.

MS DANIELS: So he said he had called one of the G brothers. One of those G brothers called ...[intervenes]

CHAIRPERSON: Or rather that is what Mr Qoma says Mr Khoza said?

ADV SELEKA SC: Yes.

MS DANIELS: Yes.

CHAIRPERSON: Okay.

MS DANIELS: Sorry for the complication.

CHAIRPERSON: Ja.

MS DANIELS: But I will, you will understand why I say so.

CHAIRPERSON: Okay, alright.

MS DANIELS: So then one of those G brothers then called Minister Brown. Minister Brown then called Dr Ngobane
10 and stopped the suspension on that day. That is then consistent with what happened because Dr Ngobane came out of that meeting, handed me back the suspension letter, the notice of suspension that I had drafted and said that he would explain to me later what needed to happen.

So this was in March 2017. So you will know that Dr Ngobane resigned in June 2017 as Chairman.

CHAIRPERSON: Yes.

MS DANIELS: Mr Khoma and I met with Dr Ngobane, because we did not actually, we were for all intents and
20 purposes in his office, you know as the company secretary and the board spokesperson.

CHAIRPERSON: Both of you?

MS DANIELS: And then we met with him to have lunch, and Mr Khoma then relayed to him what Mr Khoza had told him in my presence. So it was at that point that Dr

Ngobane burst out laughing and said that is exactly what happened in the meeting.

He could confirm that Mr Khoza had stepped out of the meeting, he had come back. Dr Ngobane then did get a call from Minister Brown and that is why Mr Koko was not suspended on that day, because he was instructed to halt the suspension.

CHAIRPERSON: Do you ...[intervenes]

MS DANIELS: So I just wanted to confirm that what he
10 said was actually how he relayed it. Dr Ngobane did not
you know, did not express any ... he was just saying yes,
that is how it happened. He did not express an opinion on
that Khoza called the Gupta brothers.

CHAIRPERSON: Now you say in your affidavit you deal
with what Mr Koko was supposed to be suspended for.

MS DANIELS: Yes.

CHAIRPERSON: And well, I assume Mr Koko has been
giving you affidavits. So what was he supposed to be
suspended for? Why was he supposed to be suspended?

20 **MS DANIELS:** There were complaints, he had to answer
about tender manipulation, work place bullying. He was
undermining the various tender committees operations, and
things like that. There was a detailed memo that was
attached to the notice of the suspension.

CHAIRPERSON: Do we have that memo by any chance Mr

Seleka, in the bundles?

ADV SELEKA SC: Not in the bundles Chair, it is a matter that I do not think the investigators have investigated.

CHAIRPERSON: Yes.

ADV SELEKA SC: It is a matter that deals with the intended suspension of Mr Koko in 2017.

CHAIRPERSON: Yes. Well, the only reason I am interested in is that you remember that in 2015 Mr Koko was the only executive who returned from suspension.

10 **ADV SELEKA SC:** Yes.

CHAIRPERSON: The other executives did not return and that seemed to give him the [indistinct] to the extent that the others might not have referred to leave, and I am wondering if when there was cause for him to be suspended, there was intervention.

You see, if the position is that in 2017 he was suspended, when he was supposed to be suspended, part of the reason why or the reason why he was not suspended is because either a Gupta brother intervened or the
20 minister intervened, in circumstances where the board should have suspended him.

It might have a bearing ...[intervenes]

ADV SELEKA SC: Yes.

CHAIRPERSON: On whether his return in 2015 might be because of any relationship he might have with, he might

have had with the Gupta associates, such as Mr Solomon is alleged to have been because Mr Abraham Masongo have said he called them separate occasions to a meeting with himself and Mr Solomon Essa at Melrose Arch on the 10th of March, where they talked about the suspension.

They told him about the suspension, that is Mr Salim Essa and Koko. Told them about the suspensions of the executives that were yet to happen and that maybe some members of the board did not know anything about it.

10 **ADV SELEKA SC:** Yes.

CHAIRPERSON: Now of course he has denied that. he has denied that such meetings took place, but if after I have heard all the evidence, if I were to conclude that indeed those two meetings did take place, in turn it may ... the expression would be did that relationship influence anything, how he was treated and so on.

ADV SELEKA SC: Yes.

CHAIRPERSON: So ...[intervenes]

ADV SELEKA SC: We can ...[intervenes]

20 **CHAIRPERSON:** It may be important to collect at least the basic facts.

ADV SELEKA SC: Yes.

CHAIRPERSON: In relation to that.

ADV SELEKA SC: Yes.

CHAIRPERSON: So but what you were saying Ms Daniels,

is you were present at a lunch at which Mr Qoma and Dr Ngobane were present, where Mr Qoma mentioned this issue which he has dealt with in his affidavit about Mr September Khoza, and Dr Ngobane did not deny or question that, and instead confirmed that that is what happened.

MS DANIELS: Yes, that is correct Mr Chair, and I do put more detail in my affidavit but that is the correct ...[intervenes]

10 **CHAIRPERSON:** And you say indeed the board did not suspend Mr Koko despite the fact that documents had been placed before it which indicated that he should have been suspended, is that correct? Is that what you say?

MS DANIELS: That is correct, Mr Chair and I would also go further. There was a unanimous decision by the people in governance committees ...[intervenes]

CHAIRPERSON: Yes.

MS DANIELS: To proceed on that day.

CHAIRPERSON: That he should be suspended.

20 **MS DANIELS:** That he should be, that suspension proceedings should start and that is why I prepared you know, the notice to ... the first one is:

“We intend you to suspend you. You have 48 hours to respond to these allegations.”

CHAIRPERSON: And I guess there ought to be minutes of

that people and governance committee ...[intervenes]

MS DANIELS: Yes, there are minutes. There are minutes and ...[intervenes]

CHAIRPERSON: Yes.

MS DANIELS: The recording is also available.

CHAIRPERSON: There is also the recording. Now you said after the meeting Dr Ngobane returned the memo or documentation back to you that had been given to him that related to the proposed suspension. Is that right?

10 **MS DANIELS:** That is correct, Mr Chair.

CHAIRPERSON: You did not attend that board meeting, did you?

MS DANIELS: No, I was ...[intervenes]

CHAIRPERSON: You had [indistinct]

MS DANIELS: I was asked to be on standby but I was not asked to record it.

CHAIRPERSON: Yes.

MS DANIELS: But I was not present.

CHAIRPERSON: Yes. Who would have been the company
20 secretary at that time?

MS DANIELS: I was the company secretary.

CHAIRPERSON: Oh.

MS DANIELS: This was just ...[intervenes]

CHAIRPERSON: Does the company secretary not always attend?

MS DANIELS: A meeting of the board members.

CHAIRPERSON: Oh, it was an in committee, is it called in committee?

MS DANIELS: Yes. Well, ...[intervenes]

CHAIRPERSON: When they want to exclude you. When they want to exclude you.

MS DANIELS: Yes, they just excluded because I was told to be there for the meeting.

CHAIRPERSON: But does there ...[intervenes]

10 **MS DANIELS:** ...then they told me no.

CHAIRPERSON: Isn't there a legal provision that says the Company Secretary should always be there in a Board meeting?

MS DANIELS: It is not a legal provision Mr Chair.

CHAIRPERSON: Ja, what is it?

MS DANIELS: You know it is not binding ...[intervenes]

CHAIRPERSON: What is it?

MS DANIELS: It is best practice that you know, that the company Secretary should be present.

20 **CHAIRPERSON:** No, no I have seen something I just do not know whether it is a law or an MOI Memorandum of Incorporation and I do not know whether it was in regard to Eskom or in regard to Transnet or in regard to Denel but I seem to think I have seen something that is to the effect that the company Secretary should attend or is entitled to

attend Board meetings.

MS DANIELS: Yeah, I was asked to not attend.

CHAIRPERSON: Oh.

MS DANIELS: I was asked by Dr Ngubane to be on standby but I was not in attendance.

CHAIRPERSON: Did you ever see the minutes of that meeting afterwards, that Board meeting?

MS DANIELS: There were really no Board minutes of that meeting.

10 **CHAIRPERSON:** Or when the company secretary is not there, they do not take them, they do not take minutes.

MS DANIELS: Mr Chair, that became a chat with Mr Koko if the evidence of the Board members, you know, they did testify about it the at the Parliamentary Committee because, but it was not then a formal meeting. They just - they gave it to Mr – they did give the memo to Mr Koko to then comment on.

CHAIRPERSON: But – so you said Dr Ngubane told you that he would tell you later what - why they did not
20 suspend or did not act in accordance with the memorandum that you had given them.

MS DANIELS: Yes, that is correct but he did not get a chance, I think circumstances overtook.

CHAIRPERSON: So he left before he could tell you?

MS DANIELS: Yeah, he did not tell me the full but at that

lunch, he then confirmed that this is how the events unfolded at that meeting.

CHAIRPERSON: Yes, and you left in October 2017, you said?

MS DANIELS: Yes it was.

CHAIRPERSON: So by the time you left had that matter, or had those allegations been further investigated at Eskom had anything happened, or nothing ever happened on those allegations?

10 **MS DANIELS:** Mr Chairman, some of the allegations were investigated, I am not sure what the outcome what the outcome was.

CHAIRPERSON: So, you do not know whether the Board might have said, well we are not sure that this issue has been looked at properly before we reach this stage of asking him, that is Mr Koko to make recommendations why he should not be suspended.

You do not know whether they might have said that but based on what Dr Ngubane said at the lunch when Mr
20 Gama was there you say the position seems to be that Mr Koko was not suspended or that notification was not given to him because of the intervention by either the Minister or somebody from the Gupta brothers.

MS DANIELS: At that point, yes Mr Chair. What did happen was the Board did investigate the matter of the

impulse, you know, the impulse, that one was investigated.

CHAIRPERSON: Was that one of the issues?

MS DANIELS: But that was not one of the issues on the memo.

CHAIRPERSON: Yeah, okay. But just to remind me did Mr Gama at that lunch meeting, during that lunch did he say Mr Zithembe Khoza said he had phoned one Gupta brothers about this proposed cause of action against Mr Koko and that Gupta brother had phoned the Minister and
10 the Minister had phoned Dr Ngubane or did he say Mr Khoza said he phoned the Minister and the Minister phoned Dr Ngubane?

MS DANIELS: No, what he said was at the meeting of the 2nd of March, Mr Khoza said to him, this is what - he was in the meeting of the 2nd of March, with the Board members and Mr Koko. Mr Khoza said that he left that meeting, he stepped out of that meeting and he called one of the G-brothers.

CHAIRPERSON: Yes.

20 **MS DANIELS:** To tell them what was happening.

CHAIRPERSON: Yes.

MS DANIELS: He then came back into the meeting. It was one of those G-brothers who phoned Minister Brown and Minister Brown phoned Dr Ngubane in the meeting and told him to stop the suspension.

CHAIRPERSON: Okay, alright that is fine, Mr Seleka.

ADV SELEKA SC: Chair I wanted to find out from Ms Daniels, because I heard her mention there are minutes and the audio is available. So, but here lately, she was saying there are no minutes of the Board. So which minutes did you say are available and the audio?

MS DANIELS: The minutes of the of the meeting where the decision to suspend Mr Koko is available.

ADV SELEKA SC: Oh, so the meeting to execute the
10 decision is the one which does not have minutes.

MS DANIELS: Yes.

CHAIRPERSON: Okay, it is the minutes of the P&G Committee that you say are there, are available which said Mr Koko should be suspended. It is the minutes of the meeting of the full Board that you say are not there, is that correct?

MS DANIELS: Yes, Mr Chair the P&G took place at – round about lunchtime that day.

CHAIRPERSON: Ja.

20 **MS DANIELS:** The meeting with Mr Koko took place in the evening of the same day.

CHAIRPERSON: Okay, it is an evening meeting.

MS DANIELS: I have the minutes of the meeting of the lunchtime meeting for want of a better word. I just cannot remember what time it was where it was a unanimous

decision to initiate suspension proceedings against Mr Koko.

The meeting of the 6th was not a full Board meeting of the 6th of the – at 6PM that evening but that meeting was not minuted.

CHAIRPERSON: But you say it was a Board meeting?

MS DANIELS: It was Board members, I am not sure how many Board members attended that meeting but it was definitely Dr Ngubane, Mr Khoza and Ms Klein was there.

10 **CHAIRPERSON:** Okay, alright. You say you do have the minutes of the P&G meeting, lunch meeting?

MS DANIELS: Yes, I do.

CHAIRPERSON: You do, okay so, Mr Seleka can get those from you. Okay, no, that is fine, then. Thank you very much, Ms Daniels for availing yourself quite a number of times. We appreciate it. So as I said, it may be that you might still be asked to deal with something arising out of the further investigation relating to the pre-suspension letters, but other than that, thank you very much.

20 **MS DANIELS:** You are welcome Mr Chairman.

CHAIRPERSON: We are going to adjourn then and tomorrow, I already made the announcement that we will start at ten and we will continue with Mr Symington's evidence and thereafter it would be Mr Van Loggerenberg who will give evidence that is for SARS, and then in the

evening session, I will hear the evidence of Mr Anoj Singh.

ADV SELEKA SC: Correct, yes.

CHAIRPERSON: We adjourn.

INQUIRY ADJOURNS TO 25 MARCH 2021