

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

**19 MAY 2021**

**DAY 398**



**Gauteng Transcribers**  
**Recording & Transcriptions**

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TRANSCRIBERS:

B KLINE; Y KLIEM; V FAASEN; D STANIFORTH



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**PROCEEDINGS RESUME ON 19 MAY 2021**

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

**ADV SELEKA SC:** Morning Chairperson.

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

**CHAIRPERSON:** Good morning. I understood that Mr Barrie was delayed on the way.

**ADV BARRIE SC:** Pardon Mr Chairman.

**CHAIRPERSON:** I understood that you were delayed on the  
10 way or something.

**ADV BARRIE SC:** Ja I forgot that I had to fetch my wife from hospital and I had to make arrangements for that.

**CHAIRPERSON:** No that is fine. That is fine.

**ADV BARRIE SC:** Thank you Sir.

**CHAIRPERSON:** Okay alright. Good morning Mr Koko.

**MR KOKO:** Good morning Chair.

**CHAIRPERSON:** Thank you that you are back.

**MR KOKO:** I thank you too.

**CHAIRPERSON:** Mr Seleka I – we adjourned at around ten  
20 two days ago.

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:** I am hoping that two hours or so would be enough? How much time do you think you need?

**ADV SELEKA SC:** Are you asking the right person Chair?

**CHAIRPERSON:** The leader of evidence does not know

what is going to happen.

**ADV SELEKA SC:** Now I ...

**CHAIRPERSON:** Or did you take the attitude that now we are given Wednesday.

**ADV SELEKA SC:** No

**CHAIRPERSON:** So we can go wide.

**ADV SELEKA SC:** No not at all. Not at all Chair.

**CHAIRPERSON:** Ja.

**ADV SELEKA SC:** Because my estimation last time was  
10 that I could personally finish within an hour's time when we went into the Tegeta matters.

**CHAIRPERSON:** Ja.

**ADV SELEKA SC:** When we started the Tegeta matters.

**CHAIRPERSON:** Ja. Ja no, no I just want to have an idea you know so ...

**ADV SELEKA SC:** Ja let us budget – well let us estimate two hours for it. I hope it takes less than that.

**CHAIRPERSON:** Ja no that is fine.

**ADV SELEKA SC:** Yes.

20 **CHAIRPERSON:** If it takes less all the better.

**ADV SELEKA SC:** Yes indeed.

**CHAIRPERSON:** Ja. Okay alright.

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:** Mr Koko.

**MR KOKO:** Chair there is an audit trail on Tegeta which Mr

Seleka is not touching at all which is important for you when you make the judgment. Audit trail that is backed up by documentation.

**CHAIRPERSON:** Ja.

**MR KOKO:** That we cannot ignore.

**CHAIRPERSON:** Ja

**MR KOKO:** And I am going to try to refer to it. I felt under pressure last time.

**CHAIRPERSON:** Yes.

10 **MR KOKO:** The day before

**CHAIRPERSON:** Yes.

**MR KOKO:** And I...

**CHAIRPERSON:** No, no.

**MR KOKO:** I did not sleep properly.

**CHAIRPERSON:** No, no that is fine.

**MR KOKO:** That I did not go through.

**CHAIRPERSON:** Ja.

**MR KOKO:** The ...

**CHAIRPERSON:** No it is important that...

20 **MR KOKO:** These documents are dated, they are sequenced, they are proper.

**CHAIRPERSON:** Ja.

**MR KOKO:** And unless you look at that audit trail.

**CHAIRPERSON:** Ja.

**MR KOKO:** It is difficult to come in at the end and say tell

me about the 1.6 billion or tell me about the cooperation agreement.

**CHAIRPERSON:** No, no that is fine.

**MR KOKO:** For example I want to give you the cooperation agreement and show you how I am – how irregular and unlawful it is.

**CHAIRPERSON:** Ja, no, no, no.

**ADV SELEKA SC:** And Mr Seleka starts post that. So I really need to go through this audit trail.

10 **CHAIRPERSON:** No, no that is fine. We – it is important that with the allegations that have been made against people like you.

**MR KOKO:** Against me in particular.

**CHAIRPERSON:** The – the process is such that you do not have a lot of complaints when we are done that you have had a fair opportunity to put your side of the story. So Mr Seleka you know what Mr Koko is talking about?

**ADV SELEKA SC:** I do not know Chair.

**CHAIRPERSON:** Okay. Let us – let us start. You continue  
20 with questioning.

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:** As you had planned.

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:** When we are done with that to the extent that during that period Mr Koko might not have dealt with

some of the issues that he feels need to be dealt with I will take a break and you and Mr Barrie and Mr Koko can talk to identify what those issues are and then we can resume after that.

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:** And deal with them.

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:** Okay alright. Just administer the oath or affirmation again.

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

**MR KOKO:** Matshela Moses Koko.

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

**MR KOKO:** No.

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

**MR KOKO:** Yes.

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

**MR KOKO:** So help me God.

**CHAIRPERSON:** Thank you. You may be seated.

**MR KOKO:** Yes.

**CHAIRPERSON:** Yes Mr Seleka.

**ADV SELEKA SC:** Thank you Chairperson. I would start Chairperson by taking reference to Eskom Bundle 14(d). 14(d) is contains an affidavit and evidence placed or provided to the commission by Cliff Decker Hofmeyr, the affidavit of Mr Rishaban Moodley.

The affidavit start on page 882 – 8 – ja page 882 and deals with a number of aspects and I would like to pick it up from page 891.

**CHAIRPERSON:** We are dealing with Tegeta now?

10 **ADV SELEKA SC:** That is Tegeta matters yes Chair.

**CHAIRPERSON:** Okay and in particular about the penalties or not yet?

**ADV SELEKA SC:** What I...

**CHAIRPERSON:** What we are starting with

**ADV SELEKA SC:** Yes what – what we wish to deal with here firstly is the issue regarding he hardship clause.

**CHAIRPERSON:** Oh okay.

**ADV SELEKA SC:** Yes whether OCM invoked the hardship clause refer the matter to arbitration and whether the  
20 arbitration was pursued.

**CHAIRPERSON:** Yes is that not common cause?

**ADV SELEKA SC:** That the arbitration was pursued Chair.

**CHAIRPERSON:** Well the – I thought it is common cause that OCM invoked the hardship clause.

**ADV SELEKA SC:** Correct Chair.



**CHAIRPERSON:** Better steps were taken to pursue the arbitration route but it was not pursuant to finality.

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:** I thought that is common cause.

**ADV SELEKA SC:** Yes – the

**CHAIRPERSON:** Because if it is common cause we do not need to spend time on it. We need to focus on those issues where there is – there are disputes.

**ADV SELEKA SC:** Yes. What the Chairperson was asking  
10 last time and engaging with Mr Koko on was why did OCM not pursue the arbitration?

**CHAIRPERSON:** Ja.

**ADV SELEKA SC:** And I thought the Chairperson's answer – I mean the answer to the Chairperson's question may lie in what is stated partly in this affidavit and in the affidavit of Mr 00:08:52.

**CHAIRPERSON:** Then we go straight to that ja.

**ADV SELEKA SC:** Straight.

**CHAIRPERSON:** No not to whether they invoked the clause  
20 or whatever.

**ADV SELEKA SC:** Ja.

**CHAIRPERSON:** Because if that is common cause the only issue is.

**ADV SELEKA SC:** Ja.

**CHAIRPERSON:** Why did they not pursue it to finality.

**ADV SELEKA SC:** Correct Chairperson.

**CHAIRPERSON:** And we can go straight to that.

**MR KOKO:** Chair it will – part of the audit trail I talked about the documents. I would like you to see the hardship notice.

**CHAIRPERSON:** Ja.

**MR KOKO:** It – because it is going to – I will inevitably refer to it.

**CHAIRPERSON:** Ja.

10 **MR KOKO:** But while we are here.

**CHAIRPERSON:** Ja.

**MR KOKO:** Can we go to it?

**CHAIRPERSON:** Maybe let us – let us leave that for later. And I may have seen it before but I am – I am willing to see it again. But if in response to his questions you have to refer to it then let us look at it when you – when you asked –

**MR KOKO:** Excellent.

**CHAIRPERSON:** Ja.

20 **MR KOKO:** Because the answer lies there Chair.

**CHAIRPERSON:** Ja okay alright.

**MR KOKO:** The rest is noise and waffling.

**CHAIRPERSON:** Ja. Mr Seleka.

**ADV SELEKA SC:** Thank you Chair. So if I go straight to which what you see here.

**CHAIRPERSON:** Do we have – do we have any affidavit or maybe it is what you said from OCM/Glencore that says here is the reason why we did not pursue arbitration to its finality?

**MR KOKO:** Yes there is Chair.

**CHAIRPERSON:** There is?

**MR KOKO:** Yes there is Chair.

**CHAIRPERSON:** Ja.

**MR KOKO:** It is in Clinton Ephron's affidavit.

10 **CHAIRPERSON:** Ja.

**MR KOKO:** And ...

**CHAIRPERSON:** Mr Ephron.

**MR KOKO:** Yes. And it is also in the transcripts

**CHAIRPERSON:** Okay. Okay.

**MR KOKO:** I know exactly what he said.

**CHAIRPERSON:** You know it – ja. Okay alright.

20 **ADV SELEKA SC:** Yes Chair thank you. There are two time periods Chair. There is a time period before the cooperation agreement where the hardship clause is invoked in 2013. So this affidavit talks about that. Then comes the cooperation agreement in 2014. Then they suspend the arbitration because they want to talk and reach an amicable solution. Those talks fail when Mr Molefe comes where he terminates the cooperation in 2015. Then the reinstatement of the arbitration starts. But then Mr

Clinton Ephron says the date of the arbitration was in May 2016. He says that in his affidavit. So May 2016 he gives the date the hearing was scheduled for 16 to 27 May 2016. Before then April 2016 Tegeta pays the full purchase price for the acquisition of OCM. So the pursuit of the arbitration gets to be over 00:12:10

**CHAIRPERSON:** Does it deal with why it was taking so long? Because arbitration is supposed to be fast.

**MR KOKO:** Chair this is the part that I am saying there is  
10 audit trail and in all respects you are being misled by your legal team and your investigation team. The audit trail speaks for itself.

**CHAIRPERSON:** Ja.

**MR KOKO:** The – and .

**CHAIRPERSON:** I will look at it.

**MR KOKO:** But let me tell you this. The hardship notice of 3 July 2013 was followed by an arbitration agreement of 12 December 2013 and that is ...

**CHAIRPERSON:** Is that the one we looked at the other  
20 day?

**MR KOKO:** Yes. And that is 180 days in between and that 130 days was not a coincidence because the arbitration clause 30 of the CSA and 2016 of the First Addendum says so. If you do not resolve the dispute or not 180 days from the notice period – date do you then – matter must go to

arbitration. And the matter was referred to arbitration. And you are right the arbitration – the arbitration agreement had even appointed the arbitrator and there was an arbitration after that and it had 90 days to conclude. But because Optimum and there is documentation to it there – here we have to through it. Mr Clinton Ephron says he was then approached in his transcript by Mr Bester to say rather than conclude the arbitration let us agree on a cooperation agreement. I - that i– false Chair. The only proposition is  
 10 that the arbitration was not taken to the – to its conclusion because the hardship notice has to show special circumstances which excludes the..

**CHAIRPERSON:** The export.

**MR KOKO:** The export conditions.

**CHAIRPERSON:** Ja.

**MR KOKO:** So that arbitration agreement of December 12, 2013 was bound to fail on that basis. The – but the second part of the arbitration why it was not taken to finality.

**CHAIRPERSON:** Its conclusion ja.

20 **MR KOKO:** Is that there was a – a clause 4 – 3.4..3 Notice you will find it in C – in Clinton Ephron’s affidavit of C – title CE – C2. It is dated 23 April 2013.

**CHAIRPERSON:** Ja

**MR KOKO:** It dealt with coal furnaces that the mine as it currently operates can no longer produce those qualities.

But that dispute was not included in the arbitration agreement. So the arbitration agreement not only stood to fail but it was not going to address the coal qualities. That is why they came – they came up with the cooperation agreement.

**CHAIRPERSON:** Let us – let us stop it there Mr Koko. As I said after Mr Seleka has finished questioning you to the extent that you will not have dealt with this issue that 00:15:43.

10 **MR KOKO:** But Mr Seleka has already in June 20 – in August 2016.

**CHAIRPERSON:** No that is fine.

**MR KOKO:** And that is 00:15:48.

**CHAIRPERSON:** But what I am saying is I will – we will deal with this. I do want to go through the document trail or whatever that you want to address. So – so I will allow you to take me through.

**MR KOKO:** But the point is Chair what happened to the arbitration agreement of December 12, 2103? That is the  
20 issue.

**CHAIRPERSON:** Ja. No that is fine. Mr Seleka.

**ADV SELEKA SC:** Thank you Chair. Chairperson the affidavit of Mr Clinton Ephron I will just read the paragraph it say:

“Eskom termination of the settlement

process led to the hardship arbitration being recommenced on 23 June 2015 and a hearing was scheduled for the period 15 to 27 May 2016."

**CHAIRPERSON:** I cannot understand why ...

**MR KOKO:** Chairman you cannot understand...

**CHAIRPERSON:** I mean what is the – what is the point of going to arbitration if you are going to take almost a year to get – to get to a hearing.

10 **ADV SELEKA SC:** Ja I – I..

**CHAIRPERSON:** But anyway you cannot answer that question.

**ADV SELEKA SC:** I cannot answer that question Chair. That...

**CHAIRPERSON:** Okay. Okay.

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:** Let Mr Koko do not address me on the issues now. I will give you a chance later.

**ADV SELEKA SC:** Yes.

20 **CHAIRPERSON:** Let us allow Mr Seleka to put his questions.

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

**CHAIRPERSON:** And when – when he is done then we will see how we deal with the issues that you want me to be alive to.

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:** Okay.

**ADV SELEKA SC:** So for that reason Chair then we should shift the files – change the files. Let us go to File 18(a).

**CHAIRPERSON:** What bundle?

**ADV SELEKA SC:** Eskom Bundle 18(a).

**CHAIRPERSON:** Okay.

**MR KOKO:** Chair Mr – before we do that. Mr Seleka has made certain submissions and he has made them I tried to  
10 count last night this is the fourth time he makes it which are false and I do not know when to deal with that but it is false that Mr – that the cooperation agreement was terminated by Mr Molefe. It is false, completely false and it is...

**CHAIRPERSON:** I think he said Eskom.

**MR KOKO:** No he keeps on saying...

**CHAIRPERSON:** At least now he was reading from Mr Ephron's affidavit.

**MR KOKO:** Chair you see...

**CHAIRPERSON:** Ja.

20 **MR KOKO:** Ms Thuli Madonsela has created a story that says Mr Molefe was brought to Eskom to terminate the cooperation agreement and force Optimum into conditions of hardship. Mr Molefe – Mr Seleka continues with that story line which is false and not backed up documents. I want to show you even in the – even in the affidavit of OCM



they do not support – they do not say so.

**CHAIRPERSON**: Okay make a note – make a note of it I will give you a chance to deal with it later on.

**ADV SELEKA SC**: Yes.

**MR KOKO**: Chair please.

**CHAIRPERSON**: Just make a note.

**MR KOKO**: Please because it is blatantly false.

**ADV SELEKA SC**: Ja.

**CHAIRPERSON**: Ja. Make a note of all the issues that you  
10 would like address before you leave the witness stand today.

**MR KOKO**: 18(a).

**ADV SELEKA SC**: 18(a). Thank you Chairperson.

**CHAIRPERSON**: Ja okay alright. Alright you do have something to write on there if you want to make notes.

**MR KOKO**: Yes I do.

**CHAIRPERSON**: You do okay alright. Bundle 18 page?

**ADV SELEKA SC**: Page 423.

**CHAIRPERSON**: Okay.

20 **ADV SELEKA SC**: Chair I am going not to respond to some of these things.

**CHAIRPERSON**: Ja that..

**ADV SELEKA SC**: But can I say something on this one? We shall visit the issue with Mr Molefe.

**CHAIRPERSON**: Ja.

**ADV SELEKA SC:** We produce his letter to him remember Chair he was asking for the letter to see what it was worded and we – we had – we had to print out a – his signed letter to give it to him. After the adjournment he said okay it is fine he accepts this is what he wrote in that letter.

**CHAIRPERSON:** Ja.

**ADV SELEKA SC:** So I am not sure why...

**MR KOKO:** But Chair would you...

**ADV SELEKA SC:** I am not sure why – why...

10 **CHAIRPERSON:** Let him finish Mr Koko.

**ADV SELEKA SC:** Can I finish?

**MR KOKO:** Chair we are going to go back to that...

**CHAIRPERSON:** Hang on – hang on let him finish Mr Koko.

**ADV SELEKA SC:** Yes. So the – that I am making false submissions cannot be any further from the truth.

**MR KOKO:** Chair we going to go...

**CHAIRPERSON:** Ja.

**MR KOKO:** We are going to go to the letter of May 11<sup>th</sup>.

**CHAIRPERSON:** Can we start Mr Koko make a note.

20 **MR KOKO:** Which page?

**CHAIRPERSON:** Make a note.

**ADV SELEKA SC:** 423.

**CHAIRPERSON:** 423?

**ADV SELEKA SC:** 423

**CHAIRPERSON:** Okay.

**ADV SELEKA SC:** So Chair so that the Chairperson knows what I am dealing with and can indicate. Chair this is the emails between Mr Koko and Mr Joel Raphela prior to the letter to the DMR.

**CHAIRPERSON:** And Mr?

**ADV SELEKA SC:** Joel Raphela.

**CHAIRPERSON:** Okay.

**ADV SELEKA SC:** Before Mr Koko addresses a letter to the DMR where – which he will explain to you why it was written  
10 to the DMR

**CHAIRPERSON:** Ja.

**ADV SELEKA SC:** Now Mr Koko during your explanation in the evening session of two days ago you told the Chairperson two things about this – your communication with Mr Raphela. One is that in your email to Mr Raphela you said these people are threatening us with Ramaphosa. There are the emails on page 423 and 424. Chairperson by way of in a chronolo...

**MR KOKO:** No, no, I wish to a point to sit – what about the  
20 – in emails I said what?

**ADV SELEKA SC:** Yes I will tell you. In a chronological order Chair they start on page 424.

**MR KOKO:** No, no Chair Mr Seleka said something I do not understand.

**CHAIRPERSON:** Yes he what – he says he wants to – he

will clarify to you but he now wants to give the context before he puts the question to you.

**MR KOKO:** Okay.

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:** Ja.

**ADV SELEKA SC:** So they start from – it is the bottom email on page 424 and they go up in that sequence Chair to the page before. Firstly it is email on 5 December 2015 at 12:42 pm from Matshela 2010 – [matshela2010@yahoo.com](mailto:matshela2010@yahoo.com)

10 and the email simply says:

“Please review and advise.”

And you will see ...

**CHAIRPERSON:** The email was to whom?

**ADV SELEKA SC:** This email Chair we – we picked up from the reply that it was to Mr Joel Raphela.

**CHAIRPERSON:** Okay.

**ADV SELEKA SC:** And you will see the – the reply is the top one on Saturday December 5 which is the same day at 8:45 pm and the email comes from Maleotlala Raphela –

20 [maleotlala@gmail.com](mailto:maleotlala@gmail.com) and he writes:

“Receipt of your email and its contents noted with thanks. Letter is being reviewed and to – I think is it too good – and will be sent back with comments covering. Significance of 31 December 2015 and we

absence of decision makers around that time  
I there – tingly all three time without reliable  
suppliers come 1 January and number of  
megawatt being risked. A more detailed  
comment will be sent tomorrow.”

Now Chair what was sent and Mr Koko will confirm that is a  
draft I think to Mr Raphela. But then it carries on on the  
next page where Mr Raphela then gives detailed comments.

**CHAIRPERSON:** The page before or next page?

10 **ADV SELEKA SC:** The page before.

**CHAIRPERSON:** Ja.

**ADV SELEKA SC:** Ja. 423.

**CHAIRPERSON:** Which is 423.

**ADV SELEKA SC:** 423 thank you Chair.

**CHAIRPERSON:** Ja. Okay.

**ADV SELEKA SC:** So now it is on the 6<sup>th</sup> of the 12<sup>th</sup> – the  
6<sup>th</sup> of December 2015 at 14:50 from Mr Raphela the email to  
Mr Matshela – matshela2010 and it is a Re Re – so it is a  
double reply it says:

20 “My 3G not working hope you receive this.  
Further to my email of yesterday I am  
proposing the following. At OCM current  
supply arrangement with the business  
rescue practitioners and on 31 December  
2015 and we are concerned that they are

renegotiating or continuation of current arrangement are on the Eskom's or the national grid."

But then he carries on there Chairperson. I want to ask Mr Koko this is regard to what he said to the Chairperson in the evening session two days ago. In a long winded explanation that Mr Koko gave he threw something into it.

**MR KOKO:** Chair my response were not long winded and I take exception to that. I take exception to that.

10 **CHAIRPERSON:** Well in – I guess in his explanation will do Mr Koko.

**MR KOKO:** No Chair I – I do not tolerate such discussion – such approaches.

**ADV SELEKA SC:** And he said in my emails to Joel Raphela I said these people are threatening us with Ramaphosa. And my question to him is he should show the Chairperson where did he say that in his emails to Mr Raphela?

20 **MR KOKO:** Chair go again Mr Seleka is off 00:26:09. The transcripts will show you exactly what I said and I am beginning not to like this Chair. Mr Seleka has done it many times putting words in my mouth and I have referred you in particular to the transcripts. You can see today I am not in a good mood. I said to you I told Mr Raphela that Optimum keeps on threatening us with Mr Ramaphosa. He

then said to – he summarised what we discussed and he then said to me I must put in writing. I said to him...

**CHAIRPERSON:** You want to remain factual.

**MR KOKO:** I want to remain factual.

**CHAIRPERSON:** Yes.

**MR KOKO:** That is what I told you.

**CHAIRPERSON:** Ja so in other words from what you said it is clear that you did not put it in writing.

**MR KOKO:** Exactly.

10 **CHAIRPERSON:** But in the disc – you were saying in the discussion.

**MR KOKO:** Yes.

**CHAIRPERSON:** That is what you said.

**MR KOKO:** Yes.

**CHAIRPERSON:** Ja.

**MR KOKO:** So I do not – I am – Chair I am going to put a stop to this type of line that puts words in my mouth that I never said. When the transcripts are in black and white. I am saying this Chair because I – I was – I went to bed last  
20 night very aggrieved because I watched the travelling agents here. I watched them reading paragraphs in their affidavit that they disowned. I have constantly told you that your legal team and your investigating people are coaching these witnesses to the extent that they come here and say this is not me. I did not write this. And nothing happens. I

wrote to you at the beginning that your investigators Mr Seleka in particular are coaching these witnesses but getting upset.

**CHAIRPERSON:** But.

**MR KOKO:** I do not like it.

**CHAIRPERSON:** But in as far as the – Mr Koko obviously if you have something to say about the travel agents we – you can deal with that in due course.

**MR KOKO:** I do have.

10 **CHAIRPERSON:** But my recollection is that as far you were concerned – as far as what they had to say about you I did not think that there was anything in dispute between your version and their version. But you can deal with it later on.

**MR KOKO:** Chair I...

**CHAIRPERSON:** Let us continue.

**MR KOKO:** I have a lot to say but I do not want to be distracted about the falsehood that Mr Seleka just said now.

**CHAIRPERSON:** Ja. Mr Seleka.

**ADV SELEKA SC:** Thank you Chair. Okay I have my notes  
20 Chair but we will see the transcript. And then Mr Koko you said

“I went to the DMR and I told them I do not have coal you have to work with me.”

**MR KOKO:** That I said.

**ADV SELEKA SC:** Well can you tell the Chairperson – well



let me – let me say this to you then you can comment  
00:29:17. That statement if you made it at all to the DMR.

**MR KOKO:** I did – I did make it.

**ADV SELEKA SC:** Where did you make it?

**MR KOKO:** I met Mr Raphela. I drove to meet him in Pretoria North. We met I think the restaurant was Spur and I did so on two occasions. The first occasion was after the meeting I had with the business rescue practitioners on the 28<sup>th</sup> of October 2014 at 2015 that the meeting that was  
10 followed by a letter on the 29<sup>th</sup> of October 2015. It is part of the audit trail I want to give you. I met him again at the same restaurant after I received the letter of – on the 3<sup>rd</sup> of November 2015 and that letter need me not want to speak again to the business rescue practitioners. It told me four things, as well.

**ADV SELEKA SC:** Sorry, which letter?

**MR KOKO:** We will find it in ...[intervenes]

**ADV SELEKA SC:** Just give me the date?

**MR KOKO:** 3 November 2015. I have got it. It is in  
20 Bundle 15(c). It is in Bundle 15(c). That letter – and Chair, this is the audit trail that you left.

**ADV SELEKA SC:** Ja.

**MR KOKO:** I will make sure we go through. On the 22<sup>nd</sup> – on the 20<sup>th</sup> of August 2016 – 2015, we get a letter, it is in my bundle, it is in 15(c), that says we are stopping the

band(?). You will not get coal. You have got until the 24<sup>th</sup>, on Monday, to decide what to do from the Business Rescue Practitioners.

I then write a letter to Mr Molefe and we will go into that letter. I then asked the senior counsel's opinion. The interim agreement that the Business Rescue Practitioners proposed was a 30-day agreement.

**CHAIRPERSON:** Hang on one second, Mr Koko. You know, Mr Seleka?

10 **ADV SELEKA SC:** Yes, Chair?

**CHAIRPERSON:** I am wondering whether it is not best that we start with this trial that Mr Koko wants ...[intervenes]

**MR KOKO:** Chair, we will not go fast.

**CHAIRPERSON:** Because no matter how I say let us finish your questions and then get to it ...[intervenes]

**ADV SELEKA SC:** Yes.

**MR KOKO:** Chair ...[intervenes]

**CHAIRPERSON:** ...we will not go back to it.

20 **MR KOKO:** We will not go far without an audit trial.

**CHAIRPERSON:** If we do it ...[intervenes]

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

**CHAIRPERSON:** ...then whatever questions you have later on then at least he does not have to tell me anything about the trial because he would have dealt with it.

**ADV SELEKA SC:** There is no way ...[intervenes]

**CHAIRPERSON:** Okay. He feels strongly about it and ...[intervenes]

**MR KOKO:** Chair, I do.

**CHAIRPERSON:** So would it then work if we do it that way or would that ...[intervenes]

**MR KOKO:** And I will not be long. If you just ...[intervenes]

**ADV SELEKA SC:** No ...[intervenes]

10 **CHAIRPERSON:** Thirty minutes. Okay.

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

**CHAIRPERSON:** Okay let us do it then. Is that fine?

**ADV SELEKA SC:** The audit trial?

**CHAIRPERSON:** Ja, is that fine?

**ADV SELEKA SC:** Chair, I ...[intervenes]

**CHAIRPERSON:** He says it will take 30-minutes.

**ADV SELEKA SC:** No, I know Mr Koko takes long, Chair.

**CHAIRPERSON:** H'm?

20 **ADV SELEKA SC:** I am reluctant to agree because I know that Mr Koko takes long.

**MR KOKO:** Chair, on that particular point ...[intervenes]

**CHAIRPERSON:** But you say we are not starting.

**MR KOKO:** Exactly.

**CHAIRPERSON:** With what you want. You see, once he has dealt with it ...[intervenes]

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:** ....he goes back – I cannot tell you have told me about it.

**MR KOKO:** Exactly, Chair. You can shut me down.

**CHAIRPERSON:** So in that way – ja, I can shut him down. So I think let us do that now because he is the one who wants to deal with it.

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:** If it suits you, we can give him the  
10 platform.

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:** He makes sure that I have the bundle. You have there the bundle.

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:** Then he goes through without you having to ask him a lot of questions.

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:** You can ask him questions after.

**ADV SELEKA SC:** No, that is ...[intervenes]

20 **CHAIRPERSON:** He goes through and he finishes it.

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:** What – you said Bundle 15?

**MR KOKO:** 15(c), Chair.

**CHAIRPERSON:** 15?

**MR KOKO:** 15(c).

**CHAIRPERSON**: Ja, is there an A or B ...[intervenes]

**MR KOKO**: 15(c).

**CHAIRPERSON**: 15(c). Ja, let us go to it and...

**ADV SELEKA SC**: Thirty-minutes, hey?

**MR KOKO**: [No audible reply]

**CHAIRPERSON**: Just tell us on what page we must start on, Mr Koko.

**MR KOKO**: Chair, 15(c), 1590.

**CHAIRPERSON**: 1590, okay. Okay just announce again,  
10 Mr Koko, what topic this deals with?

**MR KOKO**: This deals with the acquisition of Optimum by Glencore.

**CHAIRPERSON**: By Tegeta?

**MR KOKO**: By Glencore.

**CHAIRPERSON**: Oh, okay alright. Yes, by Glencore, ja.

**MR KOKO**: Yes.

**CHAIRPERSON**: Okay.

**MR KOKO**: And then maybe just to identify the document.

**CHAIRPERSON**: Ja.

20 **MR KOKO**: Please go to one five – page 1581.

**CHAIRPERSON**: 1581?

**MR KOKO**: Yes.

**CHAIRPERSON**: Yes, I have got 1581.

**MR KOKO**: You will see that is a document that was published by ...[intervenes]

**CHAIRPERSON:** I just want to make sure the transcript has got, as we are now using Eskom Bundle 15(c). Okay alright. Glencore International proposed to be renamed Glencore Extractor PLC, right. That is at 1581.

**MR KOKO:** And Chair, I need you to go to 1590.

**CHAIRPERSON:** Yes, I got – I am there.

**MR KOKO:** And you have got the highlighted part there? I want to read them.

**CHAIRPERSON:** Ja.

10 **MR KOKO:** And during the second half of 2011  
...[intervenes]

**CHAIRPERSON:** I am sorry. You said you wanted to identify the document first. You did not say what it is.

**MR KOKO:** Oh, it a document by Glencore ...[intervenes]

**CHAIRPERSON:** Ja.

**MR KOKO:** ...during the measurement structure.

**CHAIRPERSON:** Ja.

**MR KOKO:** And it was issued for – to the investors.

**CHAIRPERSON:** Is that before Glencore acquired  
20 Optimum?

**MR KOKO:** Before Glencore acquired Optimum.

**CHAIRPERSON:** Okay alright. Continue.

**MR KOKO:** It says:

“During the second half of 2011, Glencore  
acquired a 31.2% interest in Optimum Coal for

382 million Dollars.

Following the receipt of applicable for approval, a consortium of Glencore and Cyril Ramaphosa and prominent South African businessmen, who is Glencore's local BEE partner, completed the acquisition of the additional interest of Optimum on 26 March 2012..."

Chair, I want to stop there. So I – the first point  
10 I want to put to you is that Optimum paid – Glencore paid 382 million Dollars in – to buy 31.2% stake in Optimum. It then paid – and it means that by October 2011, Glencore was effectively a shareholder, 31.2% shareholder of Optimum. On 26 of March, they paid another 382 million Dollars to acquire additional 30% of ...[intervenes]

**CHAIRPERSON:** Well, where do you see – I do not see that 392 in regard to 26 March. Where is it?

**MR KOKO:** [No audible reply]

**CHAIRPERSON:** Well, I see R 38.00 per share later in the  
20 highlighted portion.

**MR KOKO:** Chair, it is not properly written here but I also – I have it now and that I can give you through during break.

**CHAIRPERSON:** Okay.

**MR KOKO:** I have it. I have it.

**CHAIRPERSON**: Okay.

**MR KOKO**: I do not want to waste time.

**CHAIRPERSON**: Alright. That is fine.

**MR KOKO**: But all in all, Glencore paid 760 million Dollars to buy Optimum. And the point I am making is. They had two-stepped(?) it. October 2011 and then they doubled their investment in March 2016(sic). By October 2011 ...[intervenes]

**CHAIRPERSON**: 2012.

10 **MR KOKO**: Ja.

**CHAIRPERSON**: March 2012.

**MR KOKO**: By October 2011, they had – they were in a position to ask for all what they need. They were the shareholder of Optimum. So they cannot come here and lie to you that we did not have information to do due diligence. You were a 31% shareholder and you doubled your 31% shareholding.

You cannot come to this Commission and say you did not do a due diligence because you did not want to  
20 increase the shares of Optimum when you are already a shareholder. That is the first part. So they are lying to you.

Chair, I do not want to go to the document but this happened in October 2011. You will remember there was an arbitration that was concluded on the



12<sup>th</sup> of April 2011. That was signed by Mr Marokane. That dealt with all the disputes and rights of parties and dealt with the issue of quantity, it dealt with the issue of quality and confirmed(?) all the rights. So ...[intervenes]

**CHAIRPERSON:** Is that the settlement agreement?

**MR KOKO:** It is the settlement agreement.

**CHAIRPERSON:** Ja.

**MR KOKO:** Addendum 2.

**CHAIRPERSON:** H'm.

10 **MR KOKO:** Right. So for all intense and purposes, Glencore was aware of all of this because they were a 31% shareholder. They cannot come and say they did not know. Mr Ramaphosa then became the Chairman of Optimum on the 26<sup>th</sup> of March, replacing Mr Bobby Godsell.

So if we are going to implement a settlement agreement of 12 April 2016, it means that Optimum had – on the first day they had to start paying penalties or Eskom had to start deducting penalties because all the disputes were resolved.

20 Chair, from day one that Optimum took over Optimum on the 26<sup>th</sup> of April they have never paid penalties other than the – index. They never did.

**CHAIRPERSON:** Ja.

**MR KOKO:** And they was no reason why.

**CHAIRPERSON:** You say from the time that Glencore took

over ...[intervenes]

**MR KOKO**: From ...[intervenes]

**CHAIRPERSON**: ...took Optimum over and ...[intervenes]

**MR KOKO**: Ja.

**CHAIRPERSON**: ...and just buying the majority shares.

**MR KOKO**: Yes.

**CHAIRPERSON**: Is it?

**MR KOKO**: Yes. They never deducted penalties. There was no reason why because there was an arbitration  
10 agreement, there was a settlement agreement which says Optimum must do that and they did not do it. And here I am saying in my affidavit because an ace up their sleeves that they had and I have no – because of this Commission, the ace up their sleeves at all material times has been Cyril Ramaphosa. But on the 23<sup>rd</sup> of April, they then issued – it is another... They then ...[intervenes]

**CHAIRPERSON**: Is that 2012 or which year?

**MR KOKO**: On the 23<sup>rd</sup> of April 2013.

**CHAIRPERSON**: Ja.

20 **MR KOKO**: They then issued a notice. I am going to take you that notice. It is very important Chair because you will... [Speaker moves away from microphone]

**ADV BARRIE**: It is at page 1799 of this bundle, Chair.

**MR KOKO**: 1799.

**CHAIRPERSON**: Thank you.

**MR KOKO:** Yes, Chair. Now you will see that this is a notice. It is letter from Mr Riaan du Plooy of Optimum to Pam Pillay of Eskom and it is dated 23 April 2013 and the title of the letter is Hendrina Coal Supply Agreement, Size and Specification. And if you – it says – if I take you to paragraph point 3. It says:

10 “OCH has now reached the conclusion that its size and specifications set out in Clause 3.43 of the first addendum are no longer realistically representative of the coal which OCM can reasonably be expected to achieve from the exploitation of the coal deposit.

It has been the OCM’s view OCM conducting its operation in a proper manner...”

And then if you go to paragraph 46(?):

“We, therefore, hereby formally notify Eskom that we wish to renegotiate specifications as set out in 3.4 of the first addendum as contemplated in Clause 3.44 and 3.45...”

20 Chair, I took you to the first addendum that – now Eskom and Mr Argon(?) refers to this attachment, is that we stopped deducting penalties because of this document.

**CHAIRPERSON:** I am sorry. Who says that?

**MR KOKO:** It is Gert Opperman in his transcript.

**CHAIRPERSON:** He says Eskom stopped imposing penalties because of this document?

**MR KOKO:** Because of this letter.

**CHAIRPERSON:** Okay alright.

**MR KOKO:** Chair, it is on page 62. You will find that on page 62 of Mr Gert Opperman's addendum on Day 62 ...[intervenes]

**CHAIRPERSON:** Okay.

**MR KOKO:** ...of the proceedings.

10 **CHAIRPERSON:** Okay.

**MR KOKO:** I can read to you.

**CHAIRPERSON:** Yes.

**MR KOKO:** But I will not ...[intervenes]

**CHAIRPERSON:** No, that is fine. Ja.

**MR KOKO:** Now Chair ...[intervenes]

**CHAIRPERSON:** Now let us just get what this letter says.  
We..

20 "OCH has now reached the conclusion that its size and specifications set out in Clause 3.43 of the first addendum are no longer realistically representative of the coal which OCM can reasonably be expected to achieve from the exploitation of the coal deposit..."

Basically, OCM is saying: We cannot meet the contractual requirement relating to the specification. Is

that right?

**MR KOKO**: Correct.

**CHAIRPERSON**: Yes. And what do they propose should happen?

**MR KOKO**: To renegotiate the contract.

**CHAIRPERSON**: “We, therefore, hereby formally notify  
Eskom that we wish to renegotiate the  
specifications as set...”

So they want to renegotiate so that there is an  
10 addendum to the contract as far as the specifications are  
concerned?

**MR KOKO**: Correct.

**CHAIRPERSON**: Okay.

**MR KOKO**: Correct.

**CHAIRPERSON**: H’m?

**MR KOKO**: Now what they did not mention in that  
contract. They say 2.43, 2.44, 2.45. They do not mention  
3.46 which I want to take you to.

**CHAIRPERSON**: Ja. But before we go there. The letter  
20 would only have penalties – would only affect penalties  
insofar as there may have been a failure on their part to  
comply with the contract in terms of specifications of the  
coal because they are saying they want to renegotiate that.

**MR KOKO**: Correct.

**CHAIRPERSON**: Ja, okay.

**MR KOKO:** Now this is not a reason for Eskom not to deduct the penalties.

**CHAIRPERSON:** Yes.

**MR KOKO:** It is not.

**CHAIRPERSON:** Ja.

**MR KOKO:** So if Eskom decides to not deduct penalties, it is unlawful. It is an unlawful activity and it is in contravention with Clause 55, 51 and 50 and 51 of the PFMA.

10 **CHAIRPERSON:** Well, maybe one would not say it is unlawful because they are not under an obligation to impose penalties. It is a right they have which they can use if they want and not use if they do not want. That is Eskom.

**MR KOKO:** No, Eskom has got an obligation, Chair.

**CHAIRPERSON:** To impose a penalty?

**MR KOKO:** Yes. Clause – I can take you a clause, Clause 9.3.

**CHAIRPERSON:** Okay. Please, at some stage, take me  
20 there so that I can have a look, so that I can understand your ...[intervenes]

**MR KOKO:** The only remedy in the coal supply agreement for Eskom for non-compliant coal, we have discussed it the other day, are two. Rejection or penalties.

**CHAIRPERSON:** Yes, but my understanding what one

would expect from the contracts such as this, is that, the issue of penalties would be there for Eskom's benefit and if, for whatever reason, Eskom thought it was in its interest not to enforce the penalties, even though it is entitled to do, enforce them if it wants to, it would be within its right not to enforce.

But the – but one they are – once Eskom says to Optimum pay these penalties because of A, B, C, D then Optimum is obliged to pay. That would be what one would  
10 expect.

**MR KOKO**: It is excellent, Chair. And with your point will apply when I deal with the corporate(?) agreement.

**CHAIRPERSON**: Ja.

**MR KOKO**: Eskom has not waived its right ...[intervenes]

**CHAIRPERSON**: Ja.

**MR KOKO**: ...to not – did not deduct penalties.

**CHAIRPERSON**: Ja. No, no. I think we maybe we involved in some – you are saying right now, now ...[intervenes]

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

**CHAIRPERSON**: ...then what – are going to say ...[intervenes]

**MR KOKO**: No, no, no ...[intervenes]

**CHAIRPERSON**: Yes, ja.

**MR KOKO**: ...I am saying Eskom has not ...[intervenes]

**CHAIRPERSON:** Ja.

**MR KOKO:** ...Eskom has not set down ...[intervenes]

**CHAIRPERSON:** Ja.

**MR KOKO:** ...and say in the interest of Eskom  
...[intervenes]

**CHAIRPERSON:** Ja.

**MR KOKO:** ...we know we have to deduct penalties but we  
think it is in the best interest of both parties that we do not  
do that.

10 **CHAIRPERSON:** Ja, ja.

**MR KOKO:** Eskom... [Speaker not clear]

**CHAIRPERSON:** Ja, okay.

**MR KOKO:** And therefore, the people who are  
administering the contract, they are obliged to deduct the  
penalties.

**CHAIRPERSON:** Okay, ja. You see, when you are talk  
about the people who are administering within Eskom.

**MR KOKO:** Yes.

**CHAIRPERSON:** Then ...[intervenes]

20 **MR KOKO:** Yes.

**CHAIRPERSON:** ...the obligation part makes sense.

**MR KOKO:** Yes.

**CHAIRPERSON:** Because they are people within Eskom.

**MR KOKO:** Yes.

**CHAIRPERSON:** If their job is penalties that should be



imposed, they should be imposed.

**MR KOKO**: Yes.

**CHAIRPERSON**: Ja.

**MR KOKO**: Yes. And that is the report(?) And Eskom has not – they are obliged to deduct penalties. Those people have not done that.

**CHAIRPERSON**: Ja, okay.

**MR KOKO**: And the letter of CE2(?) will refer to, it is not a license(?) for them not to do that. In fact... we do not do  
10 it. [Speaker unclear]

**CHAIRPERSON**: Ja.

**MR KOKO**: They are breaking Eskom rules and they are breaking the PFMA' rules.

**CHAIRPERSON**: Ja.

**MR KOKO**: So, Chair, if you go to nine – 70 – page 7016.

**CHAIRPERSON**: 1760?

**MR KOKO**: Yes.

**CHAIRPERSON**: Yes, start by telling us what that document is.

20 **MR KOKO**: It is a first addendum to the Coal Supply Agreement. You will recall that the Annexure 3 – CE2 referred to 3.44 and 3.45.

**CHAIRPERSON**: Ja.

**MR KOKO**: And 3.44 is – deals with what happens in the event that Optimum feels that they can no longer meet the

specifications in the Coal Supply Agreement. So they – you can – they are entitled in terms of this document, in this clause to ask for renegotiations of the Coal Supply Agreement.

**CHAIRPERSON:** H'm, h'm.

**MR KOKO:** But it does not end there, Chair. If you go to 3.46.

**CHAIRPERSON:** H'm?

**MR KOKO:** 3.46 says: In the ...[intervenes]

10 **CHAIRPERSON:** ...did not refer in the letter, you may be saying.

**MR KOKO:** To which they did not refer in the letter.

**CHAIRPERSON:** Ja, okay.

**MR KOKO:** Yes.

20 “In the event that the parties shall fail for whatever reason to reach such agreement, such failure to reach agreement shall constitute a dispute which shall be dealt with in accordance with the provisions of Clause 6...”

**CHAIRPERSON:** No, the matter on which they would be failing to reach agreement is quality ...[intervenes]

**MR KOKO:** Is quality.

**CHAIRPERSON:** ...of coal, ja.

**MR KOKO:** It is quality of coal.

**CHAIRPERSON**: Alright.

**MR KOKO**: So ...[intervenes]

**CHAIRPERSON**: And quality of coal, does – oh, the specification would include quality?

**MR KOKO**: Correct.

**CHAIRPERSON**: Okay alright.

**MR KOKO**: Ja.

**CHAIRPERSON**: Okay.

**ADV SELEKA SC**: Tegeta specifically says size and  
10 specification ...[intervenes]

**MR KOKO**: It the size and specification.

**CHAIRPERSON**: Sorry?

**MR KOKO**: Size and specification is quality – is part of the quality – it is free scale(?) property(?) of the coal's size and specifications.

**CHAIRPERSON**: Yes, specification.

**MR KOKO**: Yes.

**CHAIRPERSON**: Ja.

**MR KOKO**: Now Clause 6 is the Arbitration Clause.

20 **CHAIRPERSON**: H'm? Yes, you want us to go there or we do not need to?

**MR KOKO**: We do not need to go there.

**CHAIRPERSON**: Ja.

**MR KOKO**: All that I am saying ...[intervenes]

**CHAIRPERSON**: The Arbitration Clause.

**MR KOKO:** All that I am saying is that I think I can no longer meet the specifications. Let us renegotiate the agreement – the dispute arbitration.

**CHAIRPERSON:** Ja.

**MR KOKO:** As simple as that.

**CHAIRPERSON:** Ja, ja.

**MR KOKO:** And the only arbitration agreement was done, was in December 2016. So this dispute should have found its way in the December 2016 Arbitration Agreement and  
10 did not.

**CHAIRPERSON:** Is this of the 2011 settlement agreement.

**MR KOKO:** It is after the 2011 settlement.

**CHAIRPERSON:** Oh, okay. So the only arbitration that came after this is 2016?

**MR KOKO:** No, is December 2013.

**CHAIRPERSON:** 2013?

**MR KOKO:** December 2013.

**CHAIRPERSON:** Okay.

**MR KOKO:** 12<sup>th</sup> December 2013.

20 **CHAIRPERSON:** Yes, fine.

**MR KOKO:** Which was – for the reasons I have told you. I have told you that the specific circumstances do not include export.

**CHAIRPERSON:** The special circumstances.

**MR KOKO:** The special circumstances include export.

**CHAIRPERSON:** Ja.

**MR KOKO:** Secondly, the size and specification that is a fact here, I have referred you to an affidavit of Mr Gert Opperman, paragraph 60, that the actual... was there operations. The problem was the secondary crusher at the substations as they operated wrongly.

**CHAIRPERSON:** H'm, h'm.

**MR KOKO:** So they would not been banned(?). In any event, Mr Voges stopped it in October 2015. So either  
10 way, those disputes, they were bound to lose. That is why they then entered into a Cooperation Agreement in – on the 23<sup>rd</sup> of May 2016. And Chair, I do not want to take it to my... I – the purpose of the Cooperation Agreement did three things... three things. To state arbitration of December 2013. Put it on hold. One.

Two, to suspend penalties that Eskom was not deducting. So they wanted to regularise that. Four, was to enter into a fourth addendum and it was signed on the 23<sup>rd</sup> of April. Now Chair, this is the very important part. It was  
20 signed – the person who signed it had no authority to sign.

**CHAIRPERSON:** Who was that again?

**MR KOKO:** Ms Maharaj.

**CHAIRPERSON:** Sorry?

**MR KOKO:** Ms Maharaj.

**CHAIRPERSON:** Yes.

**MR KOKO:** It was an unlawful act and I am going and show you – show this to you. I am going to take you to Bundle 15(a).

**CHAIRPERSON:** Bundle 15(a).

**MR KOKO:** M... 49. [Speaker unclear]

**CHAIRPERSON:** Just what page?

**MR KOKO:** ...page 690.

**CHAIRPERSON:** Page?

**MR KOKO:** 690.

10 **CHAIRPERSON:** Six, nine, zero?

**MR KOKO:** [No audible reply]

**ADV BARRIE:** Chair, just for the record. This is the document, 32.1034, Eskom Procurement and Supply Management Procedure.

**CHAIRPERSON:** Okay.

**ADV BARRIE:** It starts at page 595 of this bundle.

**CHAIRPERSON:** Okay.

**MR KOKO:** Chair ...[intervenes]

20 **CHAIRPERSON:** Page 595, that is where the document starts and the page that you want me to go to is?

**MR KOKO:** 690.

**CHAIRPERSON:** Six, nine, zero.

**MR KOKO:** [No audible reply]

**CHAIRPERSON:** Yes, I am there Mr Koko.

**MR KOKO:** Chair, for every contract that is – all contract

in Eskom are approved by a Tender Committee. We call it PTC, Procurement in the Committee. They have got a different delegation of authority and the highest Board Tender Committee is the one with the board that adjudicate tenders, more than R 750 000,00... R 750 million.

And nobody in Eskom is allowed to change the terms and condition of the contract unless it has got an approval of the original Procurement and Tender Committee that approved it. You are delegated. If you  
10 want to make changes on the procurement, on the terms and conditions you go to the board.

The Cooperation Agreement changed the terms and conditions of the Coal Supply Agreement. Did that. Now, I am going to read to you the foot of page 690.

“It must be noted that there is a difference between Eskom internal governance process to authorise a modification and a contractual process to effect a change to the works information or – requirement specifications,  
20 terms and conditions of the contract.

Internal governance process must first be followed via a formal modification process before changes to the work information or employers requirement specifications including quantities and/or design can be given effect at

the compensation events of the written(?) orders...”

So you have to follow the internal governance process and the internal governance process, you will find it at page 691.

**CHAIRPERSON**: This is an internal Eskom document which sets out in this paragraph that if you want to change anything in a contract you must follow official modification processes.

10 **MR KOKO**: Correct.

**CHAIRPERSON**: Okay alright.

**MR KOKO**: Correct.

**CHAIRPERSON**: H’m?

**MR KOKO**: Chair, on page 69(?), bullet point 3, it refers to what we call a commercial ...[intervenes]

**CHAIRPERSON**: Sorry, what page?

**MR KOKO**: Page 69, the next page.

**CHAIRPERSON**: 691?

**MR KOKO**: 691.

20 **CHAIRPERSON**: Okay.

**MR KOKO**: It refers to the Commercial Transactions Approval form. It says:

“The procurement practitioner arranges for the Commercial Transactions Approval form to be placed on the agenda of the Procurement



Committee or may present the transaction to the relevant dual or duplication for approval depending on the total approved during the time.

Requests must be addressed to the delegated approval authority that approved the original contract. Where the revised best estimate of the expenditure plus cumulative contingencies value stated in the delegated consent form...”

That is what is what the DCF stands for.

10           “...and/or total type exceeds the delegation of the authority of the original authority, the request must be submitted at the next higher level of authority.”

Chair, this good governance, so you needed a commercial transaction form, the commercial transaction form had to be approved by the procurement tender committee that approved the coal supply agreement of Optimum and that was the procurement tender committee of the board. It is not in place. I asked for it, I have written to your legal team, give me the commercial transaction form that was  
20 approved by the board tender committee of Eskom that gave authority to the person who signed the cooperation agreement. It was never given – it is not there. So the cooperation agreement is irregular, Chair.

Chair, I want to take you on the same bundle to MK50, it is in page – and this is the audit trail that you

need otherwise you wander in the wilderness. Page 781.

**CHAIRPERSON**: Yes, page 781, submission document.

**MR KOKO**: Yes.

**CHAIRPERSON**: Or does it start at 780.

**MR KOKO**: It starts in 780. Chair, it is the feedback of the document that served at the board tender committee on the 15 August 2015.

**CHAIRPERSON**: Okay and it is a submission, document.

**MR KOKO**: And it is a submission document, if you go to  
10 the signature page ...[intervenes]

**CHAIRPERSON**: And there is executive summary.

**MR KOKO**: Yes.

**CHAIRPERSON**: Yes, what page do you want me to go to?

**MR KOKO**: The signature page is page 784.

**CHAIRPERSON**: Well, I guess it is important to read what is paragraph 1 at page 780:

20                   “Mandate to conclude negotiations with Optimum  
                    Coal Mine for coal supply to Hendrina power  
                    station.”

Okay, that is what it is about.

**MR KOKO**: Yes.

**CHAIRPERSON**: Ja, okay, continue.

**MR KOKO**: Chair, I refer you to – if you go to page 781, paragraph 1, 2, 3, 4, 5. It says:

“Based on the risk associated with the abovementioned hardship notice the Primary Energy department sensitised the Eskom board tender committee about the said notice on 12 August 2014 and was mandated to enter into negotiations with Optimum to resolve prevalent issues in order to get assurance that Eskom could secure coal for Hendrina until and post 2012.”

Chair, here is Mr Bester and his team who says the first  
 10 time that we notified the procurement tender committee was on the 12 August 2014, three months after the cooperation ...[intervenes]

**CHAIRPERSON:** Is he the author this document?

**MR KOKO:** He is the author of this document.

**CHAIRPERSON:** Okay.

**MR KOKO:** Three months after the cooperation agreement was concluded.

**CHAIRPERSON:** When was the cooperation agreement?

**MR KOKO:** 23 May 2014.

20 **CHAIRPERSON:** Okay.

**MR KOKO:** Mr Seleka will take you to the bundle, I do n  
 to want to waste fine.

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

**MR KOKO:** So all that I am saying to you is that on paper it is common cause that the procurement tender committee

of Eskom did not authorise the cooperation agreement and the first time it came to know about it was the 12 August 2014.

Chair I will take you the document of the 12 August 2014 because the only time it went there was because of me but I want to take you to page 780, read 2.2, it says:

“Primary Energy division is mandated to negotiate and conclude the termination of the Optimum hardship claim in lieu of writing off the penalties that have been suspended against Optimum since 2012.”

**CHAIRPERSON:** PED is what?

**MR KOKO:** Primary Energy department.

**CHAIRPERSON:** PED is mandated to negotiate and conclude the termination of the Optimum hardship claim in lieu of writing off the penalties that have been suspended against Optimum since 2012. In other words, penalties had been suspended at that time and this paragraph says PED must conclude the termination of the hardship claim instead of writing off penalties.

**MR KOKO:** Yes.

**CHAIRPERSON:** Ja.

**MR KOKO:** And the first time I am telling you is that there was no authority suspending the penalties. So the team acted irregularly and unlawfully.

**CHAIRPERSON:** Ja.

**MR KOKO:** But secondly, at this point in time the penalties were – it was in March. If you go to the affidavit of CSH which I will take you to, the penalties were already R1.3 billion that were suspended.

**CHAIRPERSON:** And this is March 2015?

**MR KOKO:** This is March 2015.

**CHAIRPERSON:** Ja.

**MR KOKO:** The penalties was ...[intervenes]

10 **CHAIRPERSON:** Or April 2015 or thereabouts.

**MR KOKO:** Ja, but Chair the actual number of penalties was 1.9 billion.

**CHAIRPERSON:** As at when?

**MR KOKO:** As in April 2019.

**CHAIRPERSON:** 2019?

**MR KOKO:** Yes.

**CHAIRPERSON:** Okay.

**MR KOKO:** 2015.

**CHAIRPERSON:** 2015?

20 **MR KOKO:** Yes.

**CHAIRPERSON:** Ja.

**MR KOKO:** But, Chair, we are going to come to that because this is where you will see ...[intervenes]

**CHAIRPERSON:** I am sorry, before you proceed, Mr Koko, I was looking at the end of this document because you said

that Mr Bester was the author. I do not see his name.  
Where do you get that from that he is the author?

**MR KOKO:** Chair, please go to page 796.

**CHAIRPERSON:** There I see his name and signature. But  
is that not a separate document?

**MR KOKO:** It is the same set of documents, Chair.

**CHAIRPERSON:** Now you say it is the same set of  
documents?

**MR KOKO:** Yes, all these documents, the Eskom  
10 regulations requires of you to bring all of them together.

**CHAIRPERSON:** But who has signed at the end of the  
document we are looking at because it does not give the  
name, it just say Regional Executive Acting and there is a  
signature. Do you know who is signature when you say  
Executive Acting?

**MR KOKO:** Chair, which page are you talking to, which  
signature?

**CHAIRPERSON:** 784, which is ...[intervenes]

**MR KOKO:** The top one is Mr Vusi Mboweni.

20 **CHAIRPERSON:** The first one?

**MR KOKO:** The first one.

**CHAIRPERSON:** Ja.

**MR KOKO:** And the second one is Mr Eben Mabelane.

**CHAIRPERSON:** Yes.

**MR KOKO:** And if you look at the next page, on page 785,

at the top it says compiler.

**CHAIRPERSON:** At page 785?

**MR KOKO:** Yes.

**CHAIRPERSON:** Where does it say compiler?

**MR KOKO:** To the Chairman, Compiler.

**CHAIRPERSON:** Oh yes, Johan Bester.

**MR KOKO:** Johan Bester.

**CHAIRPERSON:** But that is a very different document.

**MR KOKO:** Chair, I agree with you but if you – the Eskom  
10 requirement is that this is a single board(?) document, all  
of these documents are compiled by Mr Bester.

**CHAIRPERSON:** Is this document starting at page 785 like  
an annexure to the one that we are dealing with?

**MR KOKO:** Correct, Chair, correct, Chair.

**CHAIRPERSON:** So there would be a submission  
document first which this document is.

**MR KOKO:** Correct, Chair.

**CHAIRPERSON:** And then there would be annexures to it.

**MR KOKO:** Correct.

20 **CHAIRPERSON:** But in the body of the submission  
document would that be something that tells us what  
documents are annexed so that we know that which  
documents are...

**MR KOKO:** Yes, Chair.

**CHAIRPERSON:** And we find that in the regard to the

documents that follow?

**MR KOKO:** Yes, Chair.

**CHAIRPERSON:** Where do we find it?

**MR KOKO:** Chair, what happens there and maybe I do not understand it is that the board submissions ...[intervenes]

**CHAIRPERSON:** Ja, which this one is.

**MR KOKO:** Is a tick box.

**CHAIRPERSON:** Ja.

**MR KOKO:** So there must – the secretariat will not accept  
10 the board submissions unless all these are together.

**CHAIRPERSON:** Ja. The documents are together.

**MR KOKO:** Yes.

**CHAIRPERSON:** Yes. No, no, I understand that, but I am ask whether in the submission document itself there would be any reference that tells what annexures are annexed. You know, in the affidavit.

**MR KOKO:** No, no, Chair. No, Chair.

**CHAIRPERSON:** You know in the affidavit that you say annexure so and so.

20 **MR KOKO:** I get your point, I get your point.

**CHAIRPERSON:** Yes.

**MR KOKO:** No.

**CHAIRPERSON:** Yes, you do not have that here.

**MR KOKO:** No, we do not.

**CHAIRPERSON:** Okay, alright. So in order to know what



– to know which documents were annexures to this submission document, where would we go?

**MR KOKO**: Chair, you do not need to worry because each document stands on its own.

**CHAIRPERSON**: Yes, but that they went together, that is what I am talking about.

**MR KOKO**: Yes.

**CHAIRPERSON**: That they went together, how do we know?

10 **MR KOKO**: The minutes of the board.

**CHAIRPERSON**: The minutes of the board will indicate.

**MR KOKO**: The minutes will indicate it and Mr Seleka has it, I can tell you that.

**CHAIRPERSON**: Ja. Okay, alright, that is fine.

**ADV SELEKA SC**: No, I do not have it, Chair, you will have to show me ...[intervenes]

**MR KOKO**: But I got it from you. You will have it ...[intervenes]

**CHAIRPERSON**: Okay, Mr Seleka, let us continue, we can  
20 check that later.

**MR KOKO**: Chair, I am very, very, very happy to show you because I have it.

**CHAIRPERSON**: No, no, no, that is fine, you can show me later.

**MR KOKO**: I have it, Mr Seleka.

**CHAIRPERSON:** You can show me later, let us just continue with the trail.

**MR KOKO:** So, Chair ...[intervenes]

**ADV SELEKA SC:** We are now at 1130, Chair, just to remind you.

**CHAIRPERSON:** Oh, okay, yes. Okay, we have done the 30 minutes, actually a little more than that but you have not finished, I will give you more time.

**MR KOKO:** Thank you, Chair.

10 **CHAIRPERSON:** Ja, but ten should be fine?

**MR KOKO:** I will stop at – in ten minutes.

**CHAIRPERSON:** Ja, okay, alright, let us continue.

**MR KOKO:** Go to 783.

**CHAIRPERSON:** 783?

**MR KOKO:** Yes. No, no, no – ja, 783.

**CHAIRPERSON:** Ja.

**MR KOKO:** Chair, paragraph 3.1.3.

**CHAIRPERSON:** 3.1.3, ja.

**MR KOKO:** Optimum ...[intervenes]

20 **CHAIRPERSON:** Optimum hardship and penalty costs.

**MR KOKO:** Yes.

“Optimum has not met required parameters in terms of the existing coal supply agreement and hence have outstanding penalties due to Eskom of 16 million at the end of January 2015.”

Chair, this is the ...[intervenes]

**CHAIRPERSON:** Where are they saying 16 million in July 2015?

**MR KOKO:** But Chairman, this is – now you will understand why I was intolerant to this team because the penalties are in the region of R2 billion. They are lying to the board, they are telling the board the penalties – first they are saying the penalties have been suspended from 2015 and there is no authority ...[intervenes]

10 **CHAIRPERSON:** But you say they suspended them without authority?

**MR KOKO:** They suspended them without authority.

**CHAIRPERSON:** Okay.

**MR KOKO:** And then they tell the board actually, the penalties that we suspended is not 2.1 billion, it is R16 million. These are the people we are dealing that your investigators are not picking up these things but they want to judge my behaviour.

20 Chair, because I have got ten minutes I want to take you back to the affidavit of – I think it was 14A that we started with Mr Seleka, of CDH. Chair, I can ...[intervenes]

**CHAIRPERSON:** Just hang on one second. With regard to the conduct of the Eskom personnel who were supposed to enforce penalties that you complained about.

**MR KOKO:** Yes.

**CHAIRPERSON:** What is the point again that you seek to make with regard to their conduct in suspending penalties, number one. And two, saying the penalties are 16 million when according to you they have gone a billion?

**MR KOKO:** Chair, I have opened a criminal case.

**CHAIRPERSON:** Ja.

**MR KOKO:** It is a criminal matter and I am saying to you – I am saying to the police these people are working with  
10 Glencore. It cannot happen one way.

**CHAIRPERSON:** Okay.

**MR KOKO:** This is a criminal matter. I have opened a criminal case, I have gone to the Public Protector.

**CHAIRPERSON:** Ja, okay.

**MR KOKO:** So – but I am ...[intervenes]

**CHAIRPERSON:** So that is the reason why you were mentioning it.

**MR KOKO:** Yes, yes.

**CHAIRPERSON:** Ja, okay.

20 **MR KOKO:** Yes, but all these things, Chair, informs my decisions at the end.

**CHAIRPERSON:** Ja.

**MR KOKO:** When we deal with these other issues.

**CHAIRPERSON:** Okay.

**MR KOKO:** But because of the time please take me to the

CDH affidavit, it is in 15A.

**ADV SELEKA SC:** Eskom...

**MR KOKO:** The one we started with.

**ADV SELEKA SC:** Eskom bundle 15(d).

**CHAIRPERSON:** I have said ten minutes, Mr Koko, but I do want you – I do not want you to complain that you have not dealt with issues.

**MR KOKO:** Chair, I will ...[intervenes]

**CHAIRPERSON:** So if I must add a little bit in order to  
10 make sure you have dealt with, I will add, I just want you to deal with the issues.

**MR KOKO:** Chair, I just want to tell you I am respectful, I do not want to waste your time but it is very important that I make the issues that I want to make.

**CHAIRPERSON:** Okay, no, that is fine.

**MR KOKO:** I respect your time.

**CHAIRPERSON:** No, that is fine.

**ADV BARRIE SC:** Yes, Chair, may I speak?

**CHAIRPERSON:** Ja.

20 **ADV BARRIE SC:** One can see the witness is already under time pressure and he is making mistakes as regards dates and references and so on so forth to which the evidence leader is contributing. The witness must have his say and he should stop feeling pressurised by time. He must do this properly because he now feels because of the

conduct of the evidence leader that oh, he must have to rush it and he should not rush it.

**CHAIRPERSON:** No, Mr Barrie, I think Mr Koko and I understand each other. I want him to feel that he has dealt with issues. I think in return he is saying I am quite happy to do that but I do not want to spend more time than is necessary. So the bottom line before me, Mr Koko, is that you must be able to deal with the issues you want to raise properly.

10 **MR KOKO:** Thank you, Chair, I will do that.

**ADV SELEKA SC:** Chair, sorry – Mr Koko, before you move on, I want clarity on the criminal case that you opened, would that be against Mr Vusi Mboweni and Edwin Mabelane who signed the document?

**MR KOKO:** I have listed eight names, Chair, and I have got it – it is in my car and I am happy to give it to Mr Seleka [indistinct – dropping voice]

**CHAIRPERSON:** No, that is fine but let us take the tea break now, that will give you time to just look at the issues  
20 you still want to cover.

**MR KOKO:** Can we finish the CDH matter?

**CHAIRPERSON:** CDH matter?

**MR KOKO:** Yes.

**CHAIRPERSON:** We are at twenty five to, we will continue with it after tea. But it gives you time to also look

at these are the issues I want to cover and then you can cover them. Okay, let us take the tea adjournment, we resume at ten to twelve. We adjourn.

**ADV SELEKA SC:** Thank you.

**INQUIRY ADJOURNS**

**INQUIRY RESUMES**

**MR KOKO:** ...up to the tune of R2billion ...[intervenes]

**CHAIRPERSON:** H'm.

**MR KOKO:** That Eskom was entitled to and we dealt with  
10 the – how the CDH lawyers ill-advised Eskom on the  
Clause 9.6 when the spreadsheet would work, that actually  
Eskom was entitled to the – and I am talking about the  
project team here because they were authorised to deduct  
penalties and they did not deduct penalties.

And Eskom as a whole did not take a decision to deduct penalties and the action by OCM not to go on arbitration but instead go put the business into business rescue was act of impunity...[intervene]

**CHAIRPERSON:** Business rescue.

20 **MR KOKO:** Business rescue, was act of impunity and I  
will also go to it and I will refer to it now because the first  
addendum of the coal supply agreement makes provision  
for Eskom to take over the mine. So - and one of the  
letters I wrote to Brian was invoked that clause to take  
over this mine.

**CHAIRPERSON:** That Eskom may take over the mine under what circumstances, generally speaking?

**MR KOKO:** So, for example, under conditions of hardship, Eskom can step over and say we are going to keep this mine, demanding the coal supply agreement makes provisions to that. We have taken legal advice to that Chair, I will refer you to that legal advice and the legal advice from the counsel says now that the mine is under business rescue Eskom can no longer exercise that  
10 provision in the coal supply agreement.

**CHAIRPERSON:** Okay.

**MR KOKO:** And my proposition to you is that Glencore chose to rely on business rescue rather than arbitration to make sure that Eskom does not step in and exercise the clause in the contract that says it is entitled to take over the contract, all that was an act of impunity and the ace up their sleeve was nothing else but their political connectivity Chair.

Chair can we go to paragraph 18, to Bundle 15C,  
20 page 1825.

**CHAIRPERSON:** 1825?

**MR KOKO:** Correct, Chair. Chair, the Board of Eskom that I worked under was very, very considerate to the plight of Optimum. They did not take the view that says we have got a coal supply agreement. We have got a hardship



clause that excludes hardship, you are in hardship it is none of your business - none of our business, go away.

The Board of Eskom did not take that line, the Board of Eskom was very, very considering. The Board of Eskom was alive to the fact that if Optimum goes under, we going to catch the few[? 3:34] and the document you have...[intervene]

**CHAIRPERSON:** But that attitude, which you say the Board did not take, I got the impression that that is the attitude that Mr Molefe took. Is that a mistake?

**MR KOKO:** It is a mistake, Chair and this is the mistake I am trying to correct.

**CHAIRPERSON:** Ja.

**MR KOKO:** It is a mistake that was first peddled by Mr Thuli Madonsela that everybody's peddling it here. The documents that is before you, the documentary evidence before you shows you that the Eskom Board bent extremely backwards to accommodate...[intervene]

**CHAIRPERSON:** No, no, I am not talking about the Board and I am not necessarily looking at what Ms Madonsela said or the documents I am just recalling my impression of Mr Brian Molefe's evidence and his attitude in regard to Optimum because he said, I think he said what you have said in so far as Optimum or Glencore's problem being one that is connected with the outside market, one.

Two, I think he made it clear that his position - at least that was my impression of him, that his position was we have an agreement with you, you now want us to increase the funds there is no justification for us to do that and we will stick to the agreement, that was my impression of what he said.

**MR KOKO:** Chair, I got to that position myself, after Glencore kicked us on the face, when we engaged them and the document before you now shows you how I, Mr  
10 Matshela Moses Koko bent backwards to accommodate them. And after they kicked me in the face, I showed them a finger.

**CHAIRPERSON:** Ja, okay page 1825.

**MR KOKO:** The document on page 1825 is the submission to the Board Tender Committee of 12 August 2014. You may recall that I took you through Bundle 15 where there Mr Bester said the Board was informed of the hardship clause on the 12<sup>th</sup> of August 2014. This is the time that the Board was informed Chair. If you go to the...[intervene]

20 **CHAIRPERSON:** And I see that you were a signatory to this document.

**MR KOKO:** Correct, Chair.

**CHAIRPERSON:** Ja.

**MR KOKO:** Correct, and when Mr Bester wrote to me for the first time around June the hardship position of

Glencore he did not tell me that he has already signed – that they have already signed the cooperation agreement. He just told me about the hardship, I said such a condition we should not be sleeping, we should be rushing to the Board because the consequences of this to Eskom is bad.

So we then put this document and you will see throughout this document, nothing - there is no reference to the cooperation agreement because I even did not know about a cooperation agreement. At that point my point was  
 10 what Mr Bester is telling me if I become part to it, if I say we have got a contract, we must comply. Is there way of...[intervene]

**CHAIRPERSON:** That would hurt Eskom.

**MR KOKO:** That would hurt us, that was my position.

**CHAIRPERSON:** Yes, so you decided to go to the Board.

**MR KOKO:** And then I decided to go to the Board to convince the Board to say, well, let us look for a middle ground. We know we are right, we know we can force our right but I do not think it will help us, more so that  
 20 Optimum at that point had already given Mr Bester a proposal on how to break the deadlock.

And Chair, if you go to page 826.

**CHAIRPERSON:** Yes.

**MR KOKO:** I am going to read it; it says OCM...[intervene]

**CHAIRPERSON:** Well it makes it easier if one can say what the purpose of the document is, paragraph 1:

“Title of a submission request for a mandate to negotiate but not conclude coal supply agreements for up to 24 years to ensure the security of coal supply for Hendrina Power Station.”

Okay, ja continue.

**MR KOKO:** So if you go to page 1826 Chair:

10 “OCM is currently claiming hardship, citing that Optimum Colliery has not been recovering its cost on the Eskom product over the past three years. Based on the current modus operandi OCM have proposed a price increase from the current R154 per ton after quality price adjustment this dropped R136 per ton, year to date May 2014 to R285 per ton for the remaining part of the period and R375 per ton plus profit margin post 2018 to 2023.”

I will stop there.

**CHAIRPERSON:** Yes.

20 **MR KOKO:** So Optimum says to Mr Bester we are in hardship, to get out of hardship we need a price increase from R154 per ton to R285 per ton. If you go to the bottom of the same page. I am going to read the last sentence to go to the next page he says:

“As the current coal qualities are not meeting

Hendrina specifications...[intervene]

**CHAIRPERSON:** I am sorry you said we go to the bottom of the page.

**MR KOKO:** The last sentence:

“As the current coal qualities are not meeting the Hendrina specification the primary energy department aims to negotiate but not conclude a real base of R296 per ton which equates to R14,28 per kilojoule based on the current higher CV’s of  
10 20.75 mega joules per kilogram as received”

AR means, as received, Chair.

“The aspirational base is R190 spectrum, which equates to R9,20 per gigajoule based on the CV’s of R20,75 per mega joule as received, which is also higher than the current CV of 28.38.”

Chair, here we were asking the Board, we said to the Board it is not whether we are right or wrong. We know we are right, we know the contract protect us but with the proposal from Optimum to increase the price from R154 per  
20 ton to R255, however, we also realise that there is quality issues, so let us actually give them R296 rather than R285 per ton.

So that was our real base and the aspirational base was R190 per ton. The Board approved this and there is minutes to that, so the Board said...[intervene]

**CHAIRPERSON:** Yes, and this is July 2015?

**MR KOKO:** July 2014, August 2014.

**CHAIRPERSON:** August 2014.

**MR KOKO:** Yes, so the Board says to us, okay, the current price that is allegedly causing hardship for Optimum is R154 per ton, we are giving you the authority to go and renegotiate between under R196 per ton to R296 per ton.

**CHAIRPERSON:** Yes.

10 **MR KOKO:** Chair, it was quite an exciting moment, because we know as a team that actually we only have to meet R285 per ton.

**CHAIRPERSON:** Yes, okay.

**MR KOKO:** Then we will have a – then we got a deal.

**CHAIRPERSON:** Ja, ja.

**MR KOKO:** So we were given the deal and the deal that we were given Chair, can I take you back to page 1825.

**CHAIRPERSON:** I am sorry, before you go there, first  
20 able to.

**MR KOKO:** Mr Barry...[intervene]

**CHAIRPERSON:** Oh, if it is not here, you can do it after.

**MR KOKO:** It is in the minutes, the minutes are here and the minutes are in Bundle 18.

**CHAIRPERSON:** 18?

**MR KOKO:** Yes.

**CHAIRPERSON:** Okay, Mr Barry can look for them and then later you can tell me. It is just that it is important because I think that it deals with an important issue, namely, what you are saying is at least your division and yourself you...[intervene]

**MR KOKO:** Oh, they are here, page 1...[intervene]

**CHAIRPERSON:** Mr Koko, hang on, you are saying that this reflects that - at least from your side, you were  
10 prepared that the price be increased, even if not to the amount that OCM wanted, but to try and meet them halfway. You were prepared to push that line, that is what I understand you to be saying.

**MR KOKO:** Most definitely, Chair.

**CHAIRPERSON:** Yes, okay. Where are the minutes I see you are excited that you have found them.

**MR KOKO:** Page 18...[intervene]

**ADV SELEKA SC:** It seems to be actually more than one that OCM had...[intervene]

20 **MR KOKO:** The point that I – it is more than...[intervene]

**ADV BARRY SC:** It is not half way it is more.

**MR KOKO:** We were giving them more.

**CHAIRPERSON:** No, no when I was saying halfway I did not mean exactly, and I was just saying less than what they wanted but it goes up nevertheless, less than what OCM

wanted.

**MR KOKO:** No, no Chair the Board says give them more.

**CHAIRPERSON:** No, no I am saying we are not in disagreement.

**MR KOKO:** Okay.

**CHAIRPERSON:** I am saying what you are pointing to seems to suggest that at least your attitude or your units or divisions attitude was that we should not insist on the current price because they are complaining.

10 **MR KOKO:** Yes.

**CHAIRPERSON:** We should increase it, even if we do not go up to what they want, that is what I am saying.

**MR KOKO:** Exactly, Chair.

**CHAIRPERSON:** Okay, alright, where are the minute?

**ADV SELEKA SC:** I thought it was different, Mr Koko. I thought they had proposed R285 but that you were prepared to give them R296.

**MR KOKO:** Yes, ja so that is...[intervene]

**CHAIRPERSON:** Oh, okay so that is different, ja.

20 **ADV SELEKA SC:** Yes.

**CHAIRPERSON:** Oh, you prepared to give them even more than what they wanted.

**CHAIRPERSON:** Yes.

**MR KOKO:** Exactly, Chair.

**CHAIRPERSON:** Oh, that is interesting.



**ADV SELEKA SC:** That is what I wanted to correct, Chair.

**CHAIRPERSON:** Oh, okay, alright. I thought at some stage, maybe it is a different time. I thought at some stage they went to 500 or something.

**MR KOKO:** No, I am coming to that, Chair.

**CHAIRPERSON:** You are coming to that, okay.

**MR KOKO:** And this is what I called kicking in the face.

**CHAIRPERSON:** Ja, okay, alright let us go to the minutes.

10 **MR KOKO:** So page 1830.

**CHAIRPERSON:** That is where I am.

**MR KOKO:** Those are the minutes.

**CHAIRPERSON:** And it is one, eight, three, zero of Eskom Bundle 15C.

**MR KOKO:** Yes.

**CHAIRPERSON:** Okay.

**MR KOKO:** And Chair, the minutes are...[intervene]

**CHAIRPERSON:** This is the Board Tender Committee meeting; this is the Board Tender Committee meeting?

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

**CHAIRPERSON:** Ja, okay.

**MR KOKO:** Chair, the...[intervene]

**CHAIRPERSON:** It is the meeting of 12 August 2014, ja.

**MR KOKO:** Chair, the minutes are in page 1841.

**CHAIRPERSON:** 1841, is that where we will find the

resolution?

**MR KOKO:** That is where the...[intervene]

**CHAIRPERSON:** That is where the issue was dealt with.

**MR KOKO:** Chair, I apologise 1843.

**CHAIRPERSON:** 1843?

**MR KOKO:** Yes.

**CHAIRPERSON:** Yes, I have got it.

**MR KOKO:** Chair, paragraph 7.5:

10                   “Request for mandate to negotiate and conclude  
                      coal supply agreements for up to 24 years to ensure  
                      the security of coal supply to Hendrina Power  
                      Station.”

**CHAIRPERSON:** Yes.

**MR KOKO:** And it was facilitated by Mr Bester.

**CHAIRPERSON:** Is that a discussion?

**MR KOKO:** Yes.

**CHAIRPERSON:**     Ja, okay, the item was tabled for  
approval, the terms which were included in the meeting  
pack. Alright, continue.

20 **MR KOKO:** Right, I am going to read the last sentence of  
the first paragraph, and I read it Chair because that is me  
saying - talking in the Board.

**CHAIRPERSON:** Ja.

**MR KOKO:** That statement is my statement in October  
2014.

**CHAIRPERSON:** Yes.

**MR KOKO:** And it tells you my statement...[intervene]

**CHAIRPERSON:** And you saying October now, I thought it was in August.

**MR KOKO:** In August 2014.

**CHAIRPERSON:** Ja.

**MR KOKO:** And that tells you my attitude...[intervene]

**CHAIRPERSON:** At the time, ja.

**MR KOKO:** Yes:

10            “It was submitted that historically Eskom was taken  
for a ride an adjustment was being done at this  
point.”

**CHAIRPERSON:** Oh, okay, now I see where you are  
reading:

“It was submitted, that historically Eskom was taken  
for a ride and the adjustment was being done at this  
point.”

That is what you say.

**MR KOKO:** That is what I said, that tells you my attitude.

20 **CHAIRPERSON:** Yes.

**MR KOKO:** It tells you that my attitude was not an  
overnight attitude but I was accommodating them because  
at this point I was saying but I have a coal agreement. You  
make millions in the export market. I did not benefit in  
your up sign. Now must take the downside of your

decisions, I will but I am unhappy but I am drawing the line.

**CHAIRPERSON:** Okay.

**MR KOKO:** “And the Board resolved with the primary image

division is mandated to negotiate with Optimum to ensure the security of supply for the Hendrina Power Station.”

And Chair the approval is granted for the primary energy to  
10 issue an open tender to secure coal supply posts 2018, post the end of the coal supply agreement and the most important one:

“The divisional executive PED is authorised here with the power to delegate further to take all necessary steps to give effect to the above including the signing of any agreements, concerns or other documentation necessary or related herewith.”

Now Chair, what the Board is saying here, it says if you get  
20 thee - if you manage to negotiate the price below R296 do not come back.

**CHAIRPERSON:** Ja, go ahead and sign.

**MR KOKO:** Sign.

**CHAIRPERSON:** Ja.

**MR KOKO:** Conclude the agreement.

**CHAIRPERSON:** Yes, well the last number one, under resolved that at page 1843 says:

“Primary energy reason is mandated to negotiate with Optimum Coal Mine to ensure security of supply for the life of Hendrina Power Station.”

That is one, two:

“Approval is granted for PED to issue an open market inquiry to secure coal supply to Hendrina for the period post 2018 taking into consideration the  
10 following.”

Now, two, what is two about, is it about getting other stakeholders who may assist to ensure that there is coal security?

**MR KOKO:** No, Chair two, is about meeting the requirements of the National Treasury.

**CHAIRPERSON:** Is that in relation to the issue of the price?

**MR KOKO:** No, two, says the contract ends in 2018.

**CHAIRPERSON:** Ja.

20 **MR KOKO:** So when the contract ends in 2018 there is no obligation on Eskom to extend the contract.

**CHAIRPERSON:** Yes, of course.

**MR KOKO:** So, we have to follow the process in Section 217 in the contract.

**CHAIRPERSON:** Ja, okay.

**MR KOKO:** They must tender and tender a competitive bid for Eskom to engage that and we quite frankly expected that they will tender the bid because they next door, they have got a conveyer another person will have to be far.

**CHAIRPERSON:** Yes.

**MR KOKO:** But we have to go through that process.

**CHAIRPERSON:** Okay, and then three, your authorised, PED is authorised, you were authorised as Mr Matshela Koko because you were the divisional executive, is that  
10 right, you were the divisional executive?

**MR KOKO:** No, no, Mr Bester was acting.

**CHAIRPERSON:** Oh, okay so he is the person who was authorised?

**MR KOKO:** Yes.

**CHAIRPERSON:** Okay:

“With the power to delegate further to take all the necessary steps to give effect to the above, the effect to the above includes one at page 843 namely, to negotiate with Optimum Coal to ensure  
20 security supply of supply for the life of Hendrina Power Station, including the signing of any agreements consents or other documents.”

So here the Board Tender Committee gave PED complete authority to fix this issue about the coal price.

**MR KOKO:** Exactly, Chair.

**CHAIRPERSON:** Ja, and the mandate that you were given as PED was enough to solve this problem because it went even above what OCM was asking for.

**MR KOKO:** Most certainty.

**CHAIRPERSON:** Yes, okay alright.

**MR KOKO:** Chair, now I am going to take you to Eskom 15, Bundle 15A, page 782, we have been to that bundle.

**CHAIRPERSON:** Ja, this is important, ja.

**MR KOKO:** Chair, all I am saying to you is once you go  
10 through the audit trail, there will be more important things.

**CHAIRPERSON:** Ja, what bundle must we go to now?

**MR KOKO:** Bundle 15A, page 782.

**CHAIRPERSON:** You see the importance of this part and this is - by this time, Mr Brian Molefe was there.

**MR KOKO:** No, he was not there.

**CHAIRPERSON:** Is this not 2015?

**MR KOKO:** No this is 2014 August.

**CHAIRPERSON:** Oh, okay, no, no, that is fine. I thought it was August 2015.

20 **MR KOKO:** Ja, but we will come to the role of Mr Molefe Chair, because I think he is the poor old man he's just been done hard.

**CHAIRPERSON:** He is not that old.

**MR KOKO:** Yes, his going to be angry with me, he is going to be angry with me.

**CHAIRPERSON:** Bundle 15, bundle what?

**MR KOKO:** Bundle 15A...[intervene]

**CHAIRPERSON:** Bundle 15, I think I have got B here. Do we not have 15A?

**MR KOKO:** Bundle - I am looking for MK15.

**CHAIRPERSON:** She says 15A stops at 500. I think she understands that you have given a page number that goes beyond that.

**MR KOKO:** I am looking for, I said Bundle 15.

10 **ADV BARRY SC:** Yes, it is correct the page number the right number 15, 782.

**MR KOKO:** 782.

**CHAIRPERSON:** Ja, she says...[intervene]

**MR KOKO:** Bundle 15, 782.

**CHAIRPERSON:** Mr Seleka, do we have such a bundle?

**ADV SELEKA SC:** Let me check 15D, Chair.

**ADV BARRY SC:** The document starts at page 780.

**CHAIRPERSON:** My registrar thinks it will be in B, but it should not be in B if you have it in A.

20 **MR KOKO:** No, Chair let us let us go with her.

**CHAIRPERSON:** But yours - all of us should have the same thing, what page?

**ADV SELEKA SC:** Yeah, 782 is in 15D.

**CHAIRPERSON:** Okay, I think the transcript then we will have to go with my pagination, 782 is a submission



document. Is it 782, is that the page that – no that starts at page 780, we have looked at that submission.

**MR KOKO:** Okay, so let us go to 780, Chair.

**CHAIRPERSON:** Yes.

**MR KOKO:** Let us go to 780.

**CHAIRPERSON:** I am there.

**MR KOKO:** 780, is the result of the negotiations with the team of Mr Bester. They are now coming back to the Board and they are saying to the Board Tender Committee on the 10 12<sup>th</sup> of August 2014 you have given us a mandate to go and renegotiate the hardship notice of Optimum. We have done that and we did not succeed.

**CHAIRPERSON:** How could they not succeed?

**MR KOKO:** That is my point, Chair you see, you are going to see – you are going to get to that point, now.

**CHAIRPERSON:** Because they were given such a wide mandate.

**MR KOKO:** You see, once we get through the documents we going to show that attitude. So let us read the 20 Resolution 2.1. Resolution 2.1 says:

“Primary energy division is mandated to conclude negotiations with Optimum mine to ensure security of supply for Hendrina Power Stations at R442 per ton for CV 23.5 dry basins from 1 April 2015 to 31 December 2018, to include this new coal supply

agreement the following value rights to be exercised by 31 December 2015.”

**CHAIRPERSON:** So they are asking the Board Tender Committee for a higher mandate.

**MR KOKO:** Exactly.

**CHAIRPERSON:** Close maybe, close to double the mandates.

**MR KOKO:** Correct, Chair.

**CHAIRPERSON:** Oh no, not really.

10 **MR KOKO:** No, I will take you to the cost implications.

**CHAIRPERSON:** Yes, okay, but where do we find them saying what the problem was with reaching agreement with OCM on the mandate that they have been given?

**MR KOKO:** Chair, the best you can get, and I happen to know what the issues are, but the best you can get is to go to page 782.

**CHAIRPERSON:** Ja.

**MR KOKO:** Page 782 says – no I leave this – there is a page where they - yes, please go to 787, page 787, Chair.

20 **CHAIRPERSON:** Yes.

**MR KOKO:** Chair, we have dealt with these documents and the bundles and the attachments, so this is an attachment, we have had this discussion before. So page 787, number two says:

“Approved mandate parameters and negotiation

results.”

So you will see that R296 on the left-hand side, approved mandate.

**CHAIRPERSON:** I am looking for it on this page, oh ja I see it, yes, mandate ja.

**MR KOKO:** That is the number you saw on the 12<sup>th</sup> of August 2014.

**CHAIRPERSON:** Yes.

**MR KOKO:** And look at the results.

10 **CHAIRPERSON:** Results achieved.

**MR KOKO:** Yes.

**CHAIRPERSON:** 442?

**MR KOKO:** Yes.

**CHAIRPERSON:** How was it possible?

**MR KOKO:** Exactly, Chair. Now remember, when we asked for a mandate we already had a proposal.

**CHAIRPERSON:** Yes, which was one...[intervene]

**MR KOKO:** 285.

**CHAIRPERSON:** 280 something.

20 **MR KOKO:** 285.

**CHAIRPERSON:** And then you were give the mandate of 296.

**MR KOKO:** We give them the mandate of 296.

**CHAIRPERSON:** Yes.

**MR KOKO:** Yes.

**CHAIRPERSON:** And they said, you reach the agreement, you do not have to come back.

**MR KOKO:** Yes.

**CHAIRPERSON:** So what happened, where is the explanation of what happened?

**MR KOKO:** So Chair, when I was on suspension here and when I came back, I was met with the hostility and the arrogance of Glencore, who are you, Mr Koko?

We are told Eskom has agreed you will always hear  
10 the Ms Thuli Madonsela made this document, this document that says Eskom had agreed until Brian Molefe came. So Chair, you can now go to Bundle 15C.

**CHAIRPERSON:** But before you do that, when PED went to the Board Tender Committee and said we know that contractually we are right and we can refuse to increase the price.

**MR KOKO:** Yes, that was me.

**CHAIRPERSON:** Ja, but we think it is not going to help us to adopt that attitude. We are asking the Board Tender  
20 Committee to give us a mandate to negotiate an increase.

You – OCM had put a proposal already.

**MR KOKO:** Yes.

**CHAIRPERSON:** All that needed – and that proposal was within the mandate that was given by the Tender Committee.

**MR KOKO:** Yes.

**CHAIRPERSON:** All that needed to be done is just to accept that proposal.

**MR KOKO:** Chair, now you are talking my language.

**CHAIRPERSON:** There was no need to negotiate because it was less than what the Board was prepared to pay.

**MR KOKO:** Chair, now you understand why I think Thuli Madonsela owes us the apology.

**CHAIRPERSON:** Ja, but if you can take me to where the  
10 explanation is...[intervene]

**MR KOKO:** Chair, that is all what you have in that bundle, that is all what you have.

**CHAIRPERSON:** There is no explanation?

**MR KOKO:** No, there is no explanation, all what they - all what they – the best that I can tell - is that the – I am an engineer so I tried to understand what they tried to do. So they call it the – at the face of it they tried to buy coal of the higher energy content for Hendrina. But that was still not the mandate of board. Just to – it does not matter what  
20 you think.

**CHAIRPERSON:** Ja you see it is – it is a very interesting – it is a very strange thing.

**MR KOKO:** Chair it is not...

**CHAIRPERSON:** You ...

**MR KOKO:** It is not strange.

**CHAIRPERSON:** You –

**MR KOKO:** The facts speak for itself.

**CHAIRPERSON:** No, look at it this way. In the context of for example a trade union. A trade union says we want you to increase our salaries or the salaries of our employees by 10% and then a division of the employer of the company goes to the board or whatever to say we want to resolve this issue. The board says go back you can negotiate even if it is more than 10% up to 20% but do not come back to us  
10 settle it if it is within that mandate. All that the employer delegation or negotiation team has when they come back is to say we accept your proposal of 10%. And then the whole thing is done. How does it go up like that now?

**MR KOKO:** Chair my family – my kids including my cat had been through a lifestyle audit. I am challenging you to get the people involved in legal negotiations to do the same.

**CHAIRPERSON:** Ja continue.

**MR KOKO:** That is the best I can say.

**CHAIRPERSON:** Hm.

20 **MR KOKO:** Chair and on the – on page – on that same page please go to page 50 – to page 796. Chair I meant it when I say my family and my cat went through the lifestyle audit and I challenge the people that was involved in legal  
00:02:14 to do the same.

**CHAIRPERSON:** Did you say 796?

**MR KOKO:** 796 yes.

**CHAIRPERSON:** Yes.

**MR KOKO:** I am going to read you the impact

“Furthermore the”

**CHAIRPERSON:** Let us talk first about what document that is.

**MR KOKO:** It is the same document we just looked at Chair.

**CHAIRPERSON:** Oh it is the last page of the same  
10 document.

**MR KOKO:** It is the same – it is the last document.

**CHAIRPERSON:** It is signed by Mr Johan Bester, General Manager Fuel Sourcing Primary Energy Division and Mr Vusi Mboweni Divisional Executive Primary Energy Division as well as Mr Edwin Mabelane Group Executive Acting Group Technology and Commercial. Yes.

**MR KOKO:** So it says in the middle of the page

20 “Furthermore they delivered cost of this alternative source when in all likelihood be higher than the price from Optimum – okay – as the mine delivers via 00:03:12 the Eskom assessment of the Optimum proposed costs indicate that if agreed to will cost Eskom 5.5 billion at 5.5 billion ton per ton for the remainder of the current cost supply

agreement.”

So the team is saying this proposal to increase the price will cost Eskom R5.5 billion extra.

**CHAIRPERSON:** Which proposal is it? Is it the 449?

**MR KOKO:** The 442.

**CHAIRPERSON:** 442 from OCM.

**MR KOKO:** From OCM.

**CHAIRPERSON:** Ja which is a new proposal.

**MR KOKO:** Yes.

10 **CHAIRPERSON:** After the mandate was given.

**MR KOKO:** Yes Chair.

**CHAIRPERSON:** To be...

**MR KOKO:** Chair when I was here I made to read the minutes of February 26 2015 deliberately because in those minutes the FD says we are not going to get a equity injection. We are not able to be able to borrow. The best we can do is to go for the MYPD3 reopener which we did and was declined.

**CHAIRPERSON:** Ja.

20 **MR KOKO:** So you cannot get money from the tariff – from the regulator. You cannot borrow more money. You cannot get a equity injection. Where are you going to get a R5.5. billion?

**CHAIRPERSON:** And what – was this known to the team that was..



**MR KOKO:** They have written it Chair.

**CHAIRPERSON:** I mean the points that you have just made were they alive to them? Were they aware of them?

**MR KOKO:** Of course they were.

**CHAIRPERSON:** They were aware of them.

**MR KOKO:** Of course they were.

**CHAIRPERSON:** Yes.

**MR KOKO:** They just think that the associates of Mr Ramaphosa are entitled to bully Eskom to extract R5.5 billion out of Eskom and nobody says anything about it and Mr – Ms Thuli Madonsela misses it. Chair how is it possible that Ms Thuli Madonsela needs this work that this proposal will cost Eskom R5.5 billion that Eskom does not have and the association – the associates of the President Ramaphosa are entitled to it. How is that possible?

**CHAIRPERSON:** Well all I am saying Mr Koko is that the Public Protector did not have as much time as this commission has had to look at these issues and you – you are raising some of the – some of the aspects you are raising have not been raised by any of the Eskom witnesses before. So – and of course as I understand it she did not have the – your input.

**MR KOKO:** And she had exactly – why would she not have my input when she passes a judgment that is against me? The rules of fairness expect of her to say you are educated I

am going to make a finding that is addressed to you what is your comment? Chair – Chair let us go to...

**CHAIRPERSON:** Okay.

**ADV SELEKA SC:** Chair may I ask..

**MR KOKO:** Now enter Mr Molefe Chair. Now enter Mr Molefe.

**CHAIRPERSON:** Hang on one second. Yes Mr Seleka.

**ADV SELEKA SC:** May I ask Mr Koko whether the allegations made against specific individuals are contained  
10 in any of his affidavits?

**CHAIRPERSON:** He is thinking.

**MR KOKO:** Chair my main affidavit deals with this. I go to town about how I was treated. I am not sure which ...

**CHAIRPERSON:** I think she is...

**ADV SELEKA SC:** No, no I am asking a different question Chair.

**CHAIRPERSON:** Ja.

**ADV SELEKA SC:** I know the issues he has done some – some addressing of them in his affidavit. I am asking  
20 whether to the extent that he 00:05:56 has he dealt with that in any of his affidavits?

**MR KOKO:** Who?

**ADV SELEKA SC:** To the extent that you blame certain individuals have you – have you dealt with that in any of our affidavits?

**CHAIRPERSON:** Well I think he has complained in – I do not know in the affidavit but previously he has complained that the Public Protector did not speak – did not give him an opportunity. Am I right Mr Koko?

**MR KOKO:** Correct.

**ADV SELEKA SC:** Chair not the Public Protector. I am talking – sorry Chair I am talking the people at Eskom.

**CHAIRPERSON:** Oh okay well you see you – the last people he mentioned was Mr Ramaphosa and the Public Protector.

10 So when you said people ...

**ADV SELEKA SC:** No.

**CHAIRPERSON:** I thought you were talking about.

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:** Those. Okay alright.

**ADV SELEKA SC:** I would include the President in this case.

**CHAIRPERSON:** Ja, ja the President ja.

20 **MR KOKO:** Chair I did not include them but I have opened a criminal case. I have said before and not only did I open a criminal case but I also went to the Public Protector.

**CHAIRPERSON:** But also you have not – in terms of the people if I understand Mr Seleka correctly to the extent that he is referring to the people that you said were supposed to enforce penalties you have not mentioned those people by name as far as I understand.

**MR KOKO:** No I have not Chair.

**CHAIRPERSON:** Ja.

**MR KOKO:** I have not here but in my case with the police and the Public Protector.

**CHAIRPERSON:** Oh obviously.

**MR KOKO:** I have done that.

**CHAIRPERSON:** Okay. Alright.

**MR KOKO:** Chair now enter Mr ...

**CHAIRPERSON:** Now you want to deal with the situation. So  
10 is what you are saying this that before – in 2014 you had adopted an approach with regard to OCM's proposal or demand or request for an increase that sought to try and dissolve that issue – you got the board tender committee to approve your approach and to give your division a wide mandate to increase the price actually even above if necessary what at that time was OCM's proposal.

**MR KOKO:** Correct.

**CHAIRPERSON:** But you say that instead of the team that was negotiating with OCM reaching agreement with OCM on  
20 their own proposal – on OCM's proposal at that time or even if it was more than their proposal but within the mandate that was given to them they came back to the board with a proposal from OCM that was 442.

**MR KOKO:** Correct.

**CHAIRPERSON:** Ja but now you are going to the stage

where Mr Brian Molefe enters the stage?

**MR KOKO:** Yes.

**CHAIRPERSON:** Okay alright.

**MR KOKO:** But before then there was a board meeting of the 15<sup>th</sup> of April 2015.

**CHAIRPERSON:** Ja.

**MR KOKO:** I do not want to take you to the documents I am going to waste time.

**CHAIRPERSON:** Ja.

10 **MR KOKO:** But the board of the BTC and the board had no authority to approve this proposal.

**CHAIRPERSON:** The 442 proposal.

**MR KOKO:** The 442.

**CHAIRPERSON:** Yes because there was no money.

**MR KOKO:** Because there was no money.

**CHAIRPERSON:** Ja.

**MR KOKO:** It was like – it would have broken the PFMA rules.

**CHAIRPERSON:** Yes.

20 **MR KOKO:** Now I have had a lot of merry-go-round why the board did not do this – why – it is simple.

**CHAIRPERSON:** Yes.

**MR KOKO:** The board cannot approve an unfunded expenditure.

**CHAIRPERSON:** Yes and that was the position.

**MR KOKO:** It was the position.

**CHAIRPERSON:** But the mandate that the board tender committee had given your division was fine.

**MR KOKO:** Yes.

**CHAIRPERSON:** Was within – was

**MR KOKO:** Yes Chair.

**CHAIRPERSON:** Was fine – ja.

**CHAIRPERSON:** Okay. Alright.

**MR KOKO:** But the 442 was unfunded and the board – BTC  
10 and the board could not approve an unfunded decision. I do  
not know why Mr Molefe went up and down and not tell you  
that. I do not know why Dr Ngubane did not tell you exactly  
that. This mandate is unfunded. The board cannot approve  
an unfunded proposal – Klaar. It had to send it back to the  
executive. There is one executive in Eskom. There is  
00:11:36 there are not two bulls in one kraal and the  
executive of that – the only bull in the kraal at the time was  
Mr Molefe. So he had to go and deal with it. But Chair I  
have asked you to go to page 1864.

20 **CHAIRPERSON:** What page again.

**ADV BARRIE SC:** Chair before that

**CHAIRPERSON:** I am sorry.

**ADV BARRIE SC:** In relation to the evidence leaders  
question whether these matters have been dealt with in prior  
affidavits. In fact they have in quite some detail in the

supplementary affidavit of Mr Koko which is in Bundle 15.

**CHAIRPERSON:** But he was not talking about details he was talking about the names of people.

**ADV BARRIE SC:** Yes but the names are there.

**CHAIRPERSON:** The names are there.

**ADV BARRIE SC:** The only fact that was not available at that time that the affidavit was deposed to but the allegation was still Mr Koko in these documents said that this Maharaj did not have authority.

10 **CHAIRPERSON:** Okay.

**ADV BARRIE SC:** But if you have regard to Bundle 15 it starts at page 1168 and from paragraph 118 and it extends through to paragraph 147.

**CHAIRPERSON:** Okay.

**ADV BARRIE SC:** So this is not new before the commission. It has been before the commission for a substantial period of time.

**CHAIRPERSON:** Okay.

**ADV BARRIE SC:** Since December.

20 **MR KOKO:** Chair it is correct that Mr Molefe was new to Eskom.

**CHAIRPERSON:** Yes.

**MR KOKO:** It is correct that Mr Molefe was not familiar with the operational detail of Eskom. At best we could say Mr Molefe is familiar with the PFMA because he has worked for

state owned companies and he was at National Treasury. So at best we can say he knew that you cannot take expenditure if you cannot fund. So – but the decision to cancel the cooperation agreement I do not think he was clued up enough to make that decision. He was not. I mean I have also listened to the narrative here but I am also disappointed with Mr Molefe for not dealing properly with this because he could – I blame myself for that because a lot of what Mr Molefe did Chair was because of me persuading him to do it  
 10 and one of the regrets I have is that Mr Molefe should just tell you that you know what talk to Mr Koko.

**CHAIRPERSON:** Ja.

**MR KOKO:** And Mr Singh should do the same. Mr Singh should say you know what talk to Mr Koko.

**CHAIRPERSON:** ja.

**MR KOKO:** He is the decision maker. He has been to the extent that we made these decisions.

**CHAIRPERSON:** Yes.

**MR KOKO:** He persuaded us to do that and we may have  
 20 not understood him. And all what I wanted to know when you sit alone and make this decision is that on the Tegeta transactions all of them without fail I am the man.

**CHAIRPERSON:** Yes.

**MR KOKO:** Not other people.

**CHAIRPERSON:** Okay.



**MR KOKO:** So Chair if I am taking you to page 907 –

**CHAIRPERSON:** I take – I take that to mean you take responsibility for all the decisions.

**MR KOKO:** Of course – quite – to the extent that I was in the office. Remember there was a ..

**CHAIRPERSON:** Ja.

**MR KOKO:** There was a time I was not.

**CHAIRPERSON:** You were not there.

**MR KOKO:** In the office but I can tell you now the one – the  
10 R1.6 pre-payment the R595 pre-payment, the penalties looked no further. Look at me.

**CHAIRPERSON:** Okay.

**MR KOKO:** None – Bundle 15(c).

**CHAIRPERSON:** That is c for you but we said b for us is it not?

**MR KOKO:** No, no this time it is right Chair.

**CHAIRPERSON:** Are we back – are we back to c?

**MR KOKO:** Yes please back to c.

**CHAIRPERSON:** Did you finish whatever point you wanted  
20 to make on that last page of that document by Bester, Mboweni and (talking over one another)

**MR KOKO:** Yes Chair the point I wanted to make to you is the Optimum proposal at 442 was going to cost Eskom R5.5 billion

**CHAIRPERSON:** Ja.

**MR KOKO:** And we could not fund it from the Equity injection, we could not fund it from the debt and we could not fund it from the Regulators.

**CHAIRPERSON:** So it was out of the question.

**MR KOKO:** So it was out of the question.

**CHAIRPERSON:** Okay.

**MR KOKO:** So it is not the reasons of state capture that 00:15:28 did not approve it.

**CHAIRPERSON:** it just – there was no money.

10 **MR KOKO:** There was just no money.

**CHAIRPERSON:** Ja.

**MR KOKO:** It is as simple as that.

**CHAIRPERSON:** Okay.

**MR KOKO:** Chair.

**CHAIRPERSON:** 15(c) what page?

**MR KOKO:** Page 1864.

**CHAIRPERSON:** 18?

**MR KOKO:** 64

**CHAIRPERSON:** 64.

20 **MR KOKO:** Chair there are two important advisory we received from CDH.

**CHAIRPERSON:** Ja.

**MR KOKO:** One is dated 17 March 2015 I was on suspension by then.

**CHAIRPERSON:** Okay before that let us identify what

document this is that you are referring me to?

**MR KOKO:** This is a document Mr Seleka's has referred to we start – this is where we started it is an affidavit of Rishaban Moodley of CDH.

**CHAIRPERSON:** Oh okay alright. 1864 I am there.

**MR KOKO:** Chair there are two important...

**CHAIRPERSON:** And what – what time frame are we at – that – okay this was deposed to in 2020 but the time frame we are looking at is 2015?

10 **MR KOKO:** Correct.

**CHAIRPERSON:** Okay.

**MR KOKO:** Chair there were two – there are two important legal advices we got from Eskom. One is date 17 March we will look at it now and the second one is dated 3 March both in 2015.

They are no different to the legal opinions provided by CDH in 2013 and 2014. So CDH has not given a different legal advises all along. It has been consistent all along. So I am going to take you to paragraph...

20 **CHAIRPERSON:** Has the question been the same?

**MR KOKO:** The question has been the same.

**CHAIRPERSON:** Okay.

**MR KOKO:** The question has been the same. Chair please go to paragraph 45 on the same page. I am going to try to read it Chair.

**CHAIRPERSON:** Ja.

**MR KOKO:** It is quite – it is very important that I read it because it deals with the issues Mr Seleka has been very passionate about.

**CHAIRPERSON:** Ja. 45.?

**MR KOKO:** 5.

**CHAIRPERSON:** 5 okay.

**MR KOKO:**

10           “Prior to the lapsing of the cooperation  
agreement CDH provided updated legal  
advice on the penalty claim and related risks  
on 17 March 2015 to Ayanda Nteta, Andrea  
Williams, Pam Pillay and other Eskom  
officials. We provide verbatim quotations  
from a portion thereof for context. We  
understand that the period for which the  
penalties specifically for sizing has not been  
imposed it is from 20 it is from March 2012.  
In order to protect Eskom’s accrued rights we  
20           propose that the following be done.

Eskom and Optimum immediately and prior to  
1 April 2015 agree that the running of  
prescription in respect of any payment  
reduction or penalty due to Eskom be stayed  
until such time a commercial resolution is

reached. Alternatively Eskom institute arbitration and/or action proceedings against Optimum for the sole purpose of staying running of prescriptions in respect of the potential claim it may have. The risk aspects to take note of an arbitration process only interrupts prescription for a year from the referral of proceedings. The CS”

And this is a very important part Chair.

10 “The CSA provides that all disputes between parties must be resolved by means of arbitration. Should summons be issued the claim could be jeopardised as Optimum could raise a 00:19:22 that the court does not have to jurisdiction to entertain such disputes. Should no agreement be reached relating to the staying of prescription or should Eskom not institute proceedings to stay prescriptions every month which lapses

20 means it forfeits losing approximately R50 million on average. This potential would have a PFMA implication for Eskom. It should however be noted that the enforcement of Eskom accrued rights by actions or arbitration is subject to the following. The

tification [?] of Clause 3.6 of the First Addendum as Eskom and Optimum is opposing interpretation relating the manner in which payment reduction should be calculated.

6.2 Eskom compliance with all contractual requirements in terms of the CSA and addenda Clause 9.6 and – of the CSA and 3.43 of the Second Addendum to inform  
 10 Optimum on a monthly basis of its failure to comply with the quality specification including such calculations of the penalty to be deducted from month invoice. The prescription of such proportion of the claim not stayed the prescription of such portions of the claim not stayed in time.”

Chair it speaks for itself. This is the advice from the Optimum says we have got issue of prescription and if Eskom does not institute proceedings arbitration Eskom  
 20 stands – intends to lose R50 million a month. Tell me which executive Chair will sit and fold his hands?

**CHAIRPERSON:** Put that point.

**MR KOKO:** CDH says that penalties that have not been claimed since 2012 March and they will prescribe unless Eskom acts.

**CHAIRPERSON:** Ja.

**MR KOKO:** And either institute summons or arbitration. And if it does not do that Eskom will forfeit R50 million a month.

**CHAIRPERSON:** Yes. Oh the point you are making is once there was this advice.

**MR KOKO:** Yes.

**CHAIRPERSON:** Action had to be taken.

**MR KOKO:** Exactly Chair.

**CHAIRPERSON:** Yes. To institute – to pursue the claim for  
10 penalties.

**MR KOKO:** Yes.

**CHAIRPERSON:** That is what that is the point you making.

**MR KOKO:** Yes.

**CHAIRPERSON:** And you are saying it was not because of anything else.

**MR KOKO:** Yes.

**CHAIRPERSON:** It was because this is what the advice said.

**MR KOKO:** Yes. And this is dated 17 March 2015. Brian  
20 Molefe was still at Transnet.

**CHAIRPERSON:** And – and he comes ...

**MR KOKO:** He comes into this.

**CHAIRPERSON:** For around 20<sup>th</sup> or 17<sup>th</sup> April.

**MR KOKO:** He comes in 20<sup>th</sup>.

**CHAIRPERSON:** He comes when it – when this advice has

already been given.

**MR KOKO**: Exactly.

**CHAIRPERSON**: Ja.

**MR KOKO**: Chair do not forget the advice of Optimum.

**CHAIRPERSON**: Yes.

**MR KOKO**: They refer to 9.6.

**CHAIRPERSON**: Yes.

**MR KOKO**: It says but you will have a difficulty in this claim because of 9.6 clause.

10 **CHAIRPERSON**: Ja.

**MR KOKO**: You see how they are misleading – how misleading it is?

**CHAIRPERSON**: But – but 9.6 says what?

**MR KOKO**: 9.6 says and they – the bottom of the page Chair Please check – page 86 they have written it..

**CHAIRPERSON**: Ja.

**MR KOKO**: It says:

“Eskom must notify Optimum in writing within  
15 days after each days.”

20 **CHAIRPERSON**: I am sorry – I am sorry. You are reading from where now? 1866?

**MR KOKO**: The foot note.

**CHAIRPERSON**: oh at the footnote.

**MR KOKO**: Yes.

**CHAIRPERSON**:



“Eskom must notify Optimum in writing within 15 days after each day’s delivery whether all coal supplied and driven Optimum to Eskom complied – comprised with the quality specifications.”

So at this stage the settlement agreement that you talked to me about two days ago had it happened?

**MR KOKO:** Yes.

**CHAIRPERSON:** Which – which dispensed.

10 **MR KOKO:** Yes.

**CHAIRPERSON:** On your understanding.

**MR KOKO:** Yes.

**CHAIRPERSON:** It dispensed with this need.

**MR KOKO:** Yes, yes.

**CHAIRPERSON:** Yes. So you are saying that at this stage this was wrong.

**MR KOKO:** Yes.

**CHAIRPERSON:** There was no need for this.

**MR KOKO:** Yes.

20 **CHAIRPERSON:** Because the settlement agreement had superseded this.

**MR KOKO:** Yes.

**CHAIRPERSON:** And it said the spreadsheet that is – that was – that would be exchanged every day would be enough. There would be – it would constitute compliance.

**MR KOKO:** Yes.

**CHAIRPERSON:** Okay alright.

**MR KOKO:** Chair I am taking you to 15 – page 911.

**CHAIRPERSON:** Page 911 of the same bundle.

**MR KOKO:** Of the same bundle.

**CHAIRPERSON:** Okay. And the same bundle is 15(c).

**MR KOKO:** Yes.

**CHAIRPERSON:** Eskom Bundle 15(c). Page 9?

**MR KOKO:** Now we are in 3 June.

10 **CHAIRPERSON:** Page 9?

**MR KOKO:** 9 – no, no page 1861 I apologise.

**CHAIRPERSON:** 1861.

**MR KOKO:** Yes. Paragraph – paragraph 45.9.

**CHAIRPERSON:** Yes start by identifying the document before you read.

**MR KOKO:** It is the same affidavit of Mr – of Mr Rishaban Moodley of CDH.

**CHAIRPERSON:** Ja okay.

**MR KOKO:** And now we are in June Chair.

20 **CHAIRPERSON:** That is June 2014 – 2015?

**MR KOKO:** June 2015.

**CHAIRPERSON:** Ja Mr Brian Molefe's at Eskom by this time.

**MR KOKO:** Mr Brian Molefe is at Eskom

**CHAIRPERSON:** Ja.

**MR KOKO:** But then – let me start at 45 – paragraph 45.7 it says:

“The duration.”

**CHAIRPERSON:** Hang on, hang on, hang on. Where I am there is no paragraph 45. You said we should go to 1861 is it not?

**MR KOKO:** No I apologise 1868.

**CHAIRPERSON:** 1868. Yes you want to start at 45.?

**MR KOKO:** 7.

10 **CHAIRPERSON:** Okay.

**MR KOKO:**

“The duration of the cooperation agreement was extended for a period until sometime May/June 25.”

**CHAIRPERSON:** 2015.

**MR KOKO:** 2015.

“In extending the negotiations OCM considered to stay the – to the staying of prescription in March 2015.”

20 **CHAIRPERSON:** Yes.

**MR KOKO:**

“Despite the extension of the period – of the period the attempt to conclude a new coal supply agreement under the 00:26:25 was not”

**CHAIRPERSON:** Proceeded with.

**MR KOKO:**

“Proceeded with.”

And the conclusion remember Chair there was no negotiations. We won 442. R442 per ton. We would only conclude this at R422 per ton. And Eskom could not do R442 per ton. That is the only reason why the coop – the...

**CHAIRPERSON:** No agreement could – was reached.

**MR KOKO:** The agree – could not be reached. It was not  
10 because of reasons of state capture, Mr Molefe at Eskom.  
Not at all.

**CHAIRPERSON:** There was no funding for (inaudible).

**MR KOKO:** There was no funding for it. The rest – the rest  
is noise, hearsay and politics of the ANC.

**CHAIRPERSON:** Right.

**MR KOKO:** And then on 3 June 2015

“CDH furnished Eskom with a memorandum  
of advice and enclosed a draft termination  
notice to be sent to Optimum. In essence  
20 CDH advised that Eskom should immediately  
proceed with the institution of the arbitration  
proceedings in respect of Eskom’s [?] rights.  
In light of prescription recommencing and  
Eskom people may obligation. In addition  
CDH advised Eskom to prepare for any

potential business rescue proceedings and short supply of stoppage of coal supply by Optimum. Pursuant to the aforesaid Eskom terminated the settlement process on 22 June 2015. In light of settlement process being terminated Optimum reinstatement that should proceedings.”

**CHAIRPERSON:** I mean the – I mean the settlement process there are they talking about the negotiations or  
10 what?

**MR KOKO:** They are talking about the negotiations.

**CHAIRPERSON:** Ja terminated the negotiations yes.

**MR KOKO:** Ja. Chair now let me take you to 45.13  
“The instructions to proceed with a letter of demand and the arbitration was based on the advice provided in order to preserve Eskom’s rights and again the backdrop that it was understood by Eskom that there remained several issues of concern which would need  
20 to be addressed and resolved during the 00:28:37 arbitration.”

Chair this in my point.

**CHAIRPERSON:** Yes.

**MR KOKO:** Mr Molefe did not know – was not familiar. He could not have known this. He had to be advised. And he

was advised. And I am not going take you to the letter that advised him because he it was formal letter that went to him.

**CHAIRPERSON**: From CDH.

**MR KOKO**: No from CDH to Eskom executives and from Eskom executives to Brian [?].

**CHAIRPERSON**: Ja okay.

**MR KOKO**: It says.

“Based on”

Maybe we should go there. Maybe we should go there.

10 **CHAIRPERSON**: Let us go there.

**MR KOKO**: Chair it is MMK15.

**ADV BARRIE SC**: Chair that should be in Bundle 15(a) at page 204.

**CHAIRPERSON**: Thank you. 204?

**ADV BARRIE SC**: As you please.

**CHAIRPERSON**: That is a summary record of discussion as to MMK-15. Ja, that is Bundle 15(a), page 204. But that is ...[intervenes]

**MR KOKO**: No, no, no Chair.

20 **CHAIRPERSON**: But that is 24 November ...[intervenes]

**MR KOKO**: No. Mr Barrie, MK-12?

**ADV BARRIE**: [No audible reply]

**MR KOKO**: MK-12.

**ADV BARRIE**: That is on page 194.

**CHAIRPERSON**: Okay. I am there. Page 194.

**MR KOKO:** Yes, 114(sic).

**CHAIRPERSON:** 194.

**MR KOKO:** 194.

**CHAIRPERSON:** Ja. That is a memo from A Mabelane, Inspector Group Executive, Commercial and Technology to Mr Brian Molefe, acting Chief Executive and Mr Vusi Mboweni is... Senior General Manager of Primary Energy Division and it is dated 8 July 2015. The subject is Letter of Demand for Optimum Coal Mine and Optimum Coal Holdings. And in paragraph 1 it says in terms of purposes, says:

“The aim of this memorandum is to notify the Chief Executive of the Letter of Demand which will be send to Optimum Coal Holdings in respect of the claim for penalties incurred...”

Yes, continue then, Mr Koko.

**MR KOKO:** Chair, you heard evidence from Ms Daniels that Mr Moodley and Mr Silanko briefed me and Mr Molefe about the prospects of the penalties and will get(?) it.

20 **CHAIRPERSON:** Ja.

**MR KOKO:** Now, this letter is signed by Mr Silanko. So he could not have told us that we are going to lose... [speaker no clear]

**CHAIRPERSON:** H'm, h'm.

**MR KOKO:** So, once again, the testimony of Ms Daniels

must just be taken for what it is.

**CHAIRPERSON:** H'm.

**MR KOKO:** I just want ...[intervenes]

**CHAIRPERSON:** Silanko was the head ...[intervenes]

**MR KOKO:** Was ...[intervenes]

**CHAIRPERSON:** ...of legal.

**MR KOKO:** He was... council.

[Parties intervening each other – unclear]

**CHAIRPERSON:** Ja, okay alright.

10 **MR KOKO:** And you see who compiled it. Mr Bester.

**CHAIRPERSON:** Mr Bester compiled it. It was supported by Mr Neo Silanko, General Manager of Legal and supported by Vusi Mboweni, Senior General Manager of Primary Energy Division and approved by Mr Edwin Mabelane, acting Group Executive, Technology and Group Commercial. That is on 10 July 2015. As well as by Mr Brian Molefe on the 15<sup>th</sup> of July 2015.

**MR KOKO:** Chair, what is interesting and I just – again, this is - I feel pity for Mr Molefe. That signature is not his.

20 **CHAIRPERSON:** Ja, it is his PP.

**MR KOKO:** Yes. He was not ...[intervenes]

**CHAIRPERSON:** But I assumed that he gave authorisation.

**MR KOKO:** He gave – he did. No, he did.

**CHAIRPERSON:** Ja.



**MR KOKO:** He did. So, Chair, if I can read you the financial implications.

“Eskom terminated the settlement discussions of – 22 June 2015 again on the advice of CBH ...[intervenes]

**CHAIRPERSON:** Ja.

**MR KOKO:** Which I agree with.

**CHAIRPERSON:** Ja.

10 **MR KOKO:** “In terms of reaching an undertaking between parties which by virtue of termination of the settlement discussion prescriptions recommends. In this instance, prescription recommends on 23 June 2015 in respect of any potential claim Eskom has against Optimum in respect of payment reduction, the recommendation)sic) of prescription from ...[intervenes]

**CHAIRPERSON:** The commencement.

20 **MR KOKO:** “The recommencements of prescription from 23 June 2015. That means, Eskom must immediately proceed with steps to preserve Eskom a crude(?) rights. Prescription would only stop – upon a matter being referred to arbitration. Hence the compressed time period of – thus referral contained in the attached

letter of demand...”

**CHAIRPERSON:** Yes.

**MR KOKO:** And remember, the last letter of demand was drafted by ...[intervenes]

**CHAIRPERSON:** Yes, but before. I am just moving back ...[indistinct]

**MR KOKO:** [coughing]

**CHAIRPERSON:** ...Eskom Holdings and Optimum, OCM and OCH. Do they not refer to as... Okay. Are party to a  
10 coal agreement with addenda – agrees – supply and deliver of coal to Eskom. Okay. A number of... This was unsuccessful and during 22 June 2015, Eskom issued a letter terminating this negotiation process. [Speaker not clear] Okay. No, that is fine. So you have read paragraph 6.

**MR KOKO:** Right. Chair, what then transpired is what is now popular. Then we have got business – then the business goes into – the company goes into business rescue.

20 **CHAIRPERSON:** So, now the Cooperation Agreement has been terminated?

**MR KOKO:** Yes.

**CHAIRPERSON:** CDH has advised that steps should be taken to claim the penalties?

**MR KOKO:** Yes.

**CHAIRPERSON:** Yes. Alright, continue.

**MR KOKO:** And then there is a letter of demand.

**CHAIRPERSON:** Yes.

**MR KOKO:** And on the – with the R 2.15 billion.

**CHAIRPERSON:** Yes, yes.

**MR KOKO:** And Chair, I have already told you that this R 2.15 million... [Speaker unclear]

**CHAIRPERSON:** H'm.

**MR KOKO:** They are documented in a spreadsheet that  
10 was relied on by mister... back to the R 2.15 [coughing – unclear]

**CHAIRPERSON:** Well, well, for the sake of completeness. Should you not refer to the letter, CDH letter and one – page 196 that seems to be the letter of demand?

**MR KOKO:** Yes, Chair. I have put my file away.

**CHAIRPERSON:** No, no you do not have to but I just want to say. I think what I see at page 196 is a letter of demand by CDH to Optimum Coal and the heading is:

20 “Demand for repayment in respect of coal which failed to comply with quality specification of the CSA during the period 1 March 2012 to 31 May 2015...”

**MR KOKO:** Yes.

**CHAIRPERSON:** Okay alright.

**MR KOKO:** Chair, in the same letter, I think it is

paragraph 6, it says to Optimum consider this as if you are unhappy. Consider this to go to arbitration.

**CHAIRPERSON:** I think it may be paragraph 5:

“Further, in the event that Optimum disputes the claim, an amount of – must provide us with the names of its preferred arbitrators within five business days of the noting of the dispute. Should you fail to reach agreement on a particular arbitrator within seven business days from the date of exchange of the names, arbitration’s request shall be made to the President of the Law Society to nominate an arbitrator...”

**MR KOKO:** Yes. Chair ...[intervenes]

**ADV BARRIE:** Chair, I note that there is a page missing, actually, in this letter. The second page is not here.

**CHAIRPERSON:** Oh, yes, I see it is page 183.

**ADV BARRIE:** I believe this letter is available elsewhere but we will look into it and ...[intervenes]

20 **CHAIRPERSON:** Ja, that is fine.

**ADV BARRIE:** ...that particular ...[intervenes]

**CHAIRPERSON:** Okay.

**MR KOKO:** So Chair ...[intervenes]

**CHAIRPERSON:** Ja.

**MR KOKO:** ...procedurally, Eskom’s framework

governance wise, we cannot be faltered at that – until at that stage. So ...[intervenes]

**CHAIRPERSON**: The point you [coughing – unclear] seeking to make for some time by reference to this documents is to say the institution in pursuit of the claims against OCM was based on, among other things, legal advice.

**MR KOKO**: Correct, Chair.

**CHAIRPERSON**: But also it was. We have reached that  
10 point of not agreeing a price increase because OCM insisted on the price of 442.

**MR KOKO**: Correct.

**CHAIRPERSON**: And had they not insisted on that price, we could have accommodated them because we have obtained the mandate from the BTC which actually went beyond the proposal they had made at that time.

**MR KOKO**: Correct.

**CHAIRPERSON**: Okay.

**MR KOKO**: Chair, the most unfortunate part. Then came  
20 August 20 letter.

**CHAIRPERSON**: H'm? And where do we find that?

**MR KOKO**: The August 20 letter.

**CHAIRPERSON**: Oh, is it – have you got it?

**MR KOKO**: I have it, Chair.

**CHAIRPERSON**: Ja.

**MR KOKO:** ...not having because this is a letter  
...[intervenes]

**CHAIRPERSON:** Ja, what date is it?

**MR KOKO:** It is...

**ADV BARRIE:** Is that the letter dated 20 August 2015?

**MR KOKO:** Yes, sir.

**ADV BARRIE:** Yes, that is in Bundle 15(c) at page 1904.

**MR KOKO:** Chair, this is the letter that – relationship.  
You asked me yesterday what – when I said, when did you  
10 – the relationship was broken and you said when? I said  
20 August 2015.

**CHAIRPERSON:** I am sorry. That page number, I do not  
have it on page ...[intervenes]

**MR KOKO:** 1904, bundle ...[intervenes]

**CHAIRPERSON:** Oh, 1904?

**MR KOKO:** [No audible reply]

**CHAIRPERSON:** I thought it was 904. Right, this letter,  
yes. Yes, I am there, Mr Koko.

**MR KOKO:** So this is a letter from Werksmans Attorneys  
20 representing the Business Rescue Practitioners.

**CHAIRPERSON:** Yes. And what is the date of that letter?

**MR KOKO:** 20 August 2015.

**CHAIRPERSON:** Yes, okay.

**MR KOKO:** And you will see it is for the attention Chief  
Officer, Generation.

**CHAIRPERSON:** Is this a response to the letter?

**MR KOKO:** No.

**CHAIRPERSON:** Not. To the demand, okay. Ja?

**MR KOKO:** Chair, this was pursuant to the meeting I had with them on the 17<sup>th</sup> of August 2017.

**CHAIRPERSON:** Business Rescue Practitioners?

**MR KOKO:** Yes.

**CHAIRPERSON:** Alright.

**MR KOKO:** And this is a letter terminating – suspending  
10 the coal supply...

**CHAIRPERSON:** Ja?

**MR KOKO:** I am going to read paragraph 4.

“You will, further, be aware from the notices in respect of Business Rescue proceedings, the hardship claimed initiated by Optimum in 2013 and your expensive engagement with OCM pursuant to the settlement agreement conducted in terms of the Cooperation Agreement between Eskom and OCM dated  
20 23 May 2014.

That the principle reasons for the recommencement of OCM’s Business Rescue proceedings is the financial distress in terms of the CSA has placed and continue to place on OCM.

The financial position of OCM was clearly communicated to Eskom on numerous occasions prior to the commencement of OCM Business Rescue proceedings in both written correspondence and formal meetings held between representative of OCM and Eskom.

10 This financial position has been exacerbated by Eskom's recent claim for historical claim and future penalties which if upheld with effectiveness(?) resulting in OCM supply coal to Eskom at... [Speaker unclear]

Chair, I want to take you to paragraph 7.

**CHAIRPERSON:** H'm?

**MR KOKO:** Yes.

"Notwithstanding the aforesaid – are amenable to supply coal to Eskom during the Business Rescue proceedings on terms which are sustainable for OCM.

20 Accordingly, OCM hereby offers to supply coal to Eskom to the terms set out in the agreement – this letter – interim agreement, which the – agreement is based on the principles negotiated between OCM and Eskom Negotiating Team - to the Cooperation Agreement.



The price included in the interim agreement represented the average cash cost of production of OCM.

The cost in the interim agreement are not materially different from the cost provided to Eskom as part of the Cooperation Agreement process and have only been adjusted to make account – to take account of the different time period during which the coal is to be supplied.

10 We record that pursuant to the Cooperation Agreement, Nedbank and Business Point Capital were appointed by Eskom to review the OCM cost in detail and they confirmed that OCM cost were agreed reflection of cost of money...”

Chair, we will go to the interim agreement but what the Business Rescue Practitioners were now – why – sent to us, we now are suspending the Cooperation Agreement and unless you give us the terms that we  
20 agreed – we negotiated in Addendum 4, called the...  
[Speaker unclear]

**CHAIRPERSON:** Is the price under the interim agreement that they will ...[intervenes]

**MR KOKO:** You are going to fall off your chair, Chair. Let us go to CPM-8.

**CHAIRPERSON:** And what page is that?

**MR KOKO:** No ...[intervenes]

**CHAIRPERSON:** Or is it a different bundle?

**MR KOKO:** Chair, the- where is the attachment to this letter, Mr Barrie.

**ADV SELEKA SC:** Well, CPM-8 is the next page.

**MR KOKO:** No, no I am looking ...[intervenes]

**CHAIRPERSON:** I see we have gotten ...[intervenes]

**MR KOKO:** ..the interim ...[intervenes]

10 **CHAIRPERSON:** ...one o'clock but I want to finish your –  
what you wanted to deal with so that after lunch  
...[intervenes]

**ADV BARRIE:** What is the date of the letter that you want to refer to Mr Koko?

**MR KOKO:** Chair... Mr Barrie, PMM-7 has got an attachment and that attachment, it is the interim agreement.

**CHAIRPERSON:** Maybe... I am just trying to see whether we should rather adjourn and then you can look it up  
20 during the lunch break.

**MR KOKO:** Mr Seleka, do you have mister ...[intervenes]

**ADV SELEKA SC:** Ja?

**MR KOKO:** ...affidavit because it is in the attachment. It is PMM-8. If you ...[intervenes]

**ADV SELEKA SC:** Oh. I – we have the affidavit without

the annexures.

**MR KOKO**: But if we take a break, I will find it, Chair.

**CHAIRPERSON**: Ja, okay alright. Would that be the last document you wanted to deal with?

**MR KOKO**: That would be the last document.

**CHAIRPERSON**: Okay.

**MR KOKO**: Because there is ...[intervenes]

**CHAIRPERSON**: No, it is fine.

**MR KOKO**: ...it just follows.

10 **CHAIRPERSON**: Okay, no, that is fine.

**MR KOKO**: It just follows. Then I will ...[intervenes]

**CHAIRPERSON**: ...then you ...[intervenes]

**MR KOKO**: ...exactly the document without referring to ...[intervenes]

**CHAIRPERSON**: Ja.

**MR KOKO**: After this, we get – after the agreement, we then get a letter which is – which skim's the cat, that says Optimum under Glencore will only supply coal to Hendrina until the end of December – ah, to the end of January.

20 **CHAIRPERSON**: H'm.

**MR KOKO**: Now I heard Mr Seleka saying to you that – but there was no crisis. There was an internal agreement in place that lasted until October 2016.

**CHAIRPERSON**: H'm.

**MR KOKO**: What Mr Seleka ...[intervenes]

**CHAIRPERSON:** [Indistinct]

**ADV SELEKA SC:** [Indistinct]

[Parties intervening each other – unclear]

**MR KOKO:** August 2016.

**ADV SELEKA SC:** July.

**CHAIRPERSON:** H'm.

**ADV SELEKA SC:** July.

**MR KOKO:** July 2016. That we see there.

**CHAIRPERSON:** H'm?

10 **MR KOKO:** What Mr Seleka is not telling you that the interim agreement in 2016 only existed because of the sale agreement of the 10 of December. The condition precedent of the sale agreement of 10 December 2015 was post-commencement funding, which I will take you to, when I answer the questions. Post-commencement funding by Tegeta. That Tegeta will fund the operations of Optimum from January 2016 to July 2016. That is the only reason why coal was guaranteed and it flowed to Hendrina.

**CHAIRPERSON:** Okay alright. Let us take the lunch  
20 adjournment. It is nearly ten past one. We will resume at ten past two. We adjourn.

**INQUIRY ADJOURNS**

**INQUIRY RESUMES**

**CHAIRPERSON:** Okay, let us continue. Did you find it, Mr Koko?

**MR KOKO:** Chair, I did and I thought when you come back would have made copies for you but unfortunately there is a problem with the back office.

**CHAIRPERSON:** Oh, okay.

**MR KOKO:** But I am going to proceed.

**CHAIRPERSON:** Proceed and read the relevant portion.

**MR KOKO:** And read the relevant portions and then ...[intervenes]

**CHAIRPERSON:** So it is another bundle that we have but  
10 the bundle is not here.

**MR KOKO:** Yes.

**ADV SELEKA SC:** Yes, his phase one bundle.

**CHAIRPERSON:** Okay, alright.

**MR KOKO:** So, Chair, it is ...[intervenes]

**CHAIRPERSON:** So just indicate again what document it is?

**MR KOKO:** It is annexure to Pierce Marsden affidavit and it is referenced PMM7 and in the attachment to PMM7 is the interim agreement that was proposed by the business  
20 rescue practitioners on 20 August 2015.

**CHAIRPERSON:** Okay.

**MR KOKO:** When they suspended the cooperation agreement and the answer I wanted from that doc ...[intervenes]

**CHAIRPERSON:** Oh, at that stage the cooperation

agreement had not been terminated yet.

**MR KOKO:** It had been terminated.

**CHAIRPERSON:** It had been terminated, it is just that you said suspended, that is right.

**MR KOKO:** No, no, no, no. The business practitioners – this is what I have come to understand from my legal adviser.

**CHAIRPERSON:** Ja, ja.

**MR KOKO:** That the business rescue practitioners has no  
10 authority to cancel the course of the agreement.

**CHAIRPERSON:** Ja, it gets suspended.

**MR KOKO:** They can suspend and they can approach the court to suspend it.

**CHAIRPERSON:** Yes but what I am saying is, that there was time – there is a time where the cooperation agreement was terminated, is it not?

**MR KOKO:** Chair, I apologise ...[intervenes]

**CHAIRPERSON:** You are confusing me?

**MR KOKO:** Yes, yes, the cooperation agreement was  
20 cancelled.

**CHAIRPERSON:** Before this part?

**MR KOKO:** Ja.

**CHAIRPERSON:** Yes.

**MR KOKO:** This the place went to the cancellation of the cooperation agreement.

**CHAIRPERSON:** Yes, okay.

**MR KOKO:** The cancellation of the cooperation agreement was followed by a letter of demand which triggered the board ...[intervenes]

**CHAIRPERSON:** The business rescue.

**MR KOKO:** The business rescue proceedings.

**CHAIRPERSON:** Ja, okay, ja.

**MR KOKO:** And one of the first things that business rescue practitioners did was to send a letter of August – I  
10 met them on the 17 August.

**CHAIRPERSON:** Yes.

**MR KOKO:** And they have discussions on the 17 August 2015, was that followed for money with the letter of August 20.

**CHAIRPERSON:** Ja, okay.

**MR KOKO:** And the question you then asked – I made you read the main letter which says we will not supply you, Eskom, with coal at a price that is less than the cost.

**CHAIRPERSON:** Yes.

20 **MR KOKO:** That is what they said and they said the cost had been reviewed by Nedbank and basis point capital. That is paragraph 7 of the letter that I have read earlier. Attached to that is an interim agreement and the interim agreement was for a 30 day period and the price for it, Chair, if I can just reference it properly, you will find the –

I know you make an issue about clause and sections so I am not sure if I can say...

**CHAIRPERSON:** Well, if you have got them right you can tell me so that I know where to ...[intervenes]

**MR KOKO:** So I would rather say paragraph 5.

**CHAIRPERSON:** That is fine, okay.

**MR KOKO:** Paragraph 5 of the interim agreement, the price is R22.32 per gigajoule and the CV is 23. And that makes the price that they say is their minimum they can  
10 supply to Eskom, R513 per ton. Now, Chair ...[intervenes]

**CHAIRPERSON:** That 513?

**MR KOKO:** ...13 per ton. Now, Chair, now you then understand the emotions that comes into this.

**CHAIRPERSON:** Yes, now this is what month in 2015 now?

**MR KOKO:** This is August ...[intervenes]

**CHAIRPERSON:** 2015.

**MR KOKO:** 2015.

**CHAIRPERSON:** After the 20<sup>th</sup>?

20 **MR KOKO:** This is the letter that came on the 20<sup>th</sup>.

**CHAIRPERSON:** On the 20<sup>th</sup>, ja.

**MR KOKO:** This is an attachment to the letter of the 20<sup>th</sup>.

**CHAIRPERSON:** Ja, this is the interim agreement, was an attachment to the letter of the 20 August 2015.

**MR KOKO:** Correct, Chair.



**CHAIRPERSON:** Now are you able to remember when it was in 2014 when you went to the BTC to obtain that mandate that we were talking about. Which month was this?

**MR KOKO:** 12 August 2014.

**CHAIRPERSON:** So this is 12 months later?

**MR KOKO:** 12 months later.

**CHAIRPERSON:** But the price in August 2014 their proposal was for ...[intervenes]

10 **MR KOKO:** 285.

**CHAIRPERSON:** 285 per ton.

**MR KOKO:** Correct.

**CHAIRPERSON:** And now 12 months later their proposal is 5...

**MR KOKO:** 513.

**CHAIRPERSON:** 513 per ton minimum.

**MR KOKO:** Yes.

**CHAIRPERSON:** Yes, okay.

**MR KOKO:** Yes. Now ...[intervenes]

20 **CHAIRPERSON:** Before that, before that, when was it when they were seeking 442?

**MR KOKO:** April 2015, 25 April 2015.

**CHAIRPERSON:** So August 2014, 285?

**MR KOKO:** Correct.

**CHAIRPERSON:** April 2015 ...[intervenes]

**MR KOKO:** No, April 2014.

**CHAIRPERSON:** Oh, April 2014 was 285?

**MR KOKO:** 285, yes.

**CHAIRPERSON:** Okay, that is when you went – you approach.

**MR KOKO:** The DC, correct.

**CHAIRPERSON:** The DC, okay. And then April 2015, 442?

**MR KOKO:** 442.

10 **CHAIRPERSON:** And then a few months later, August, it is 513?

**MR KOKO:** 513.

**CHAIRPERSON:** Okay, right. Continue?

**MR KOKO:** No, Chair, I did not like that, I considered that a blackmail because at all material times I was there so you can imagine – you cannot imagine, but the discussions between me and them was not pleasant and they say so in parliament ...[intervenes]

**CHAIRPERSON:** This is now on the 17 August?

20 **MR KOKO:** On the 17 August.

**CHAIRPERSON:** Ja, when you had an unpleasant discussion?

**MR KOKO:** Correct. And they say so and they are correct and, Chair, I must tell you, one of the gentlemen, Mr Steen, I did not interact with him, he was not – but the guy

that I interacted was Pierce Marsden, ordinarily a very pleasant competent guy and when it really gets heated he will cool down and say but Mr Koko, you will need to help me here, you know, he will ...[intervenes]

**CHAIRPERSON:** The meeting was quite heated?

**MR KOKO:** Yes.

**CHAIRPERSON:** Ja.

**MR KOKO:** And he will really ...[intervenes]

**CHAIRPERSON:** The pressure will go up.

10 **MR KOKO:** But he will – very decent gentleman, he will count up to ten, I think, take a deep breath and then come back again and we will never personalise each other and he says so in his affidavit that he did not think Mr Koko – the debate did go high, the temperature, but he did not think I was personal.

**CHAIRPERSON:** Okay.

**MR KOKO:** So I am glad he says so.

**CHAIRPERSON:** Ja, ja.

**MR KOKO:** Ja, And he says in his affidavit – and I have  
20 got a reference, he thought I was taking the best interest of Eskom and any other person would have done the same.

**CHAIRPERSON:** Okay.

**MR KOKO:** And I respect him for that, our agreement was very professional. Chair, that triggered a letter, an email to me on the Saturday. The first thing I did, Mr Seleka

asked, I want to Mr Silanko I said we need a legal opinion  
...[intervenes]

**CHAIRPERSON**: Hang on now, you say that triggered,  
that being the letter of 20?

**MR KOKO**: Yes, yes.

**CHAIRPERSON**: From the rescue practitioners?

**MR KOKO**: Yes, yes, yes.

**CHAIRPERSON**: Ja.

**MR KOKO**: He triggered from me to approach Mr Silanko.

10 **CHAIRPERSON**: Ja.

**MR KOKO**: I said, Mr Silanko, I need a legal opinion on  
...[intervenes]

**CHAIRPERSON**: But just complete your description of  
what your reaction was to this interim, this [inaudible –  
speaking simultaneously]

**MR KOKO**: Chair, it was a form(?) of betrayal, I felt that  
Optimum was extorting – behaved like extortionists and  
they were not negotiating and I will take you to the letter of  
the 24<sup>th</sup> now. They are simply saying let us – Mr Koko, we  
20 are going to interact with you in good faith but the CSA  
must be amended, the price must be 442, the penalties  
must be scrapped. If you do not entertain that...

**CHAIRPERSON**: No, but that time the price was higher  
now, not 442.

**MR KOKO**: But that time was 513.

**CHAIRPERSON:** Ja.

**MR KOKO:** If you do not do that we will put the business in liquidation. That was their aim. Give us 513, terminate the penalties, give us addendum four and if we do not do that, we will liquidate.

**CHAIRPERSON:** Was addendum 4 different from the interim agreement?

**MR KOKO:** Addendum 4 was the product of the cooperation agreement.

10 **CHAIRPERSON:** Okay.

**MR KOKO:** It was still in draft form.

**CHAIRPERSON:** And it was contemplating what price at that stage?

**MR KOKO:** 442.

**CHAIRPERSON:** 442, oh, okay. But of course in August, from August 20 they were now talking about 513.

**MR KOKO:** 513, correct, correct.

**CHAIRPERSON:** Okay.

20 **MR KOKO:** I then wrote a letter on a Saturday after briefing counsel to get us a senior opinion's counsel. (sic) And that letter, Chair, you will find it in bundle 18(b) page 1577.

**ADV SELEKA SC:** Sorry, we can make copies now, Mr Koko.

**CHAIRPERSON:** 18(b) what page?

**MR KOKO:** 1577.

**CHAIRPERSON:** This would now be the Saturday after the 20 August. No, I do not have it in (b) it must be in (c). I do not have that page under bundle 15.

**MR KOKO:** It is bundle 18, Chair, 18(b).

**CHAIRPERSON:** Oh, you said 15.

**MR KOKO:** I am sorry, 18(b) 1577. Chair, when people talk - you know, one of the things I do is it, you know, when it comes to these matters, I really sleep with a clear  
10 conscience having been through this process and one of the letters that makes me sleep with a clear conscience is what you will find in 1577, my interest at all material times was not to act in the interests of any other third parties but in the interest of Eskom and that was based on the fact that I have been in Eskom for years and I know what the contracts say. Some of them becomes Eskom way of life. You do not even know what you have them, you know but this is how Eskom works, you know, the Eskom way, we call it the Eskom way. So what you see in 1577 is what I  
20 knew was in the contract.

**CHAIRPERSON:** So you wrote this email to Mr Brian Molefe and you copied Mr Neo Silanko.

**MR KOKO:** Correct.

**CHAIRPERSON:** And you say:

“Subject: Memorandum from Counsel.”

Eskom write relating to Optimum business rescue. Do you want to read it into the record?

**MR KOKO:** Correct, Chair.

**CHAIRPERSON:** Ja.

**MR KOKO:** I say:

“Chief...”

I normally call Brian Legoa. So I say:

10 “Chief, I gave instructions to the lawyers to make applications for a court interdict and to also remove the appointed business rescue practitioners for Optimum Mine. I regret to tell you that we are not going to court as yet because of the advice provided by counsel. Counsel has provided us with legal options available to us. See the attached memorandum.”

And I go to it.

20 “As things stand, our degrees of freedom are very limited. The practitioners have given us a propose interim agreement that will increase the coal costs from R165 per ton to R513 per ton. They have given us until Monday to accept the terms and conditions of the proposed interim agreement, failing wish they will cancel the coal supply agreement with Eskom. The idea instead for us to acquire the mining rights from Optimum Mine and

appoint a contract miner to mine coal on our behalf.

The lawyers do not believe this is possible. I will call you to discuss our options.”

Chair, let us go to the memorandum and I will direct you specifically to – I think let us go to page – the memorandum ...[intervenes]

**CHAIRPERSON:** But even before you go there, your attitude based on what you testified two days ago, if I am not mistaken, would have been – it is not open to them to  
10 cancel ...[intervenes]

**MR KOKO:** Exactly, Chair, exactly.

**CHAIRPERSON:** Because the agreement between Eskom and Optimum Mine in regard to the coal, the CSA, does not allow that.

**MR KOKO:** Exactly, Chair.

**CHAIRPERSON:** If they aggrieved there is a route that is provided which would enable a new third party who is acceptable to both parties to decide whether they have good grounds or not to be aggrieved.

20 **MR KOKO:** Exactly, Chair.

**CHAIRPERSON:** Ja, okay, continue.

**MR KOKO:** And, Chair, I will not take you to the cooperation agreement but if Mr Seleka do that, I will show you something there that aggrieved me the most.

**CHAIRPERSON:** Ja.



**MR KOKO:** In the cooperation agreement we say Optimum has accrued the rights to cancel the contract. In the cooperation agreement. Where do they derive that?

**CHAIRPERSON:** Yes.

**MR KOKO:** I will not take you there but if you go into there you will find it.

**CHAIRPERSON:** Yes.

**MR KOKO:** The parties have accrued right including the rights ...[intervenes]

10 **CHAIRPERSON:** To cancel.

**MR KOKO:** To cancel the contract. There is no such.

**CHAIRPERSON:** But your concern there I guess is the fact that people on the Eskom side adopted that, have agreed to that approach.

**MR KOKO:** Exactly.

**CHAIRPERSON:** Ja.

**MR KOKO:** Exactly, Chair.

**CHAIRPERSON:** Okay, let us continue, the memorandum is there, page 1578.

20 **MR KOKO:** And that is a legal opinion from a senior counsel, if I can – it is Mr Seleka's colleague. If I can...

**CHAIRPERSON:** But it not him, hey?

**MR KOKO:** No, no, no, no. I know – I have got used to the lawyers calling each other colleagues, lawyers...

**CHAIRPERSON:** Ja, ja, ja.

**MR KOKO:** If it is not the right thing I will not use it.

Chair, if you go to page 1599.

**CHAIRPERSON:** Ja. 1599?

**MR KOKO:** Yes.

**CHAIRPERSON:** Yes.

**MR KOKO:** You will see the names of the counsel.

**CHAIRPERSON:** The counsel, ja.

**MR KOKO:** I cannot pronounce that.

**CHAIRPERSON:** Ja, I think it must be Luderitz SC.

10 **MR KOKO:** It is a difficult name for me.

**CHAIRPERSON:** Ja. You are on paragraph 7.1, starting from there?

**MR KOKO:** No, no, I want to read paragraph 6.1, Chair.

**CHAIRPERSON:** Yes.

**MR KOKO:** In paragraph 6.1 deals with the acquisition of the mining rights.

**CHAIRPERSON:** Ja.

20 **MR KOKO:** “The CSA affords Eskom the right to acquire the mining venture for CM on terms regulated by the coal supply agreement. The coal supply agreement has however been suspended and so too Eskom’s contractual rights to acquire the mine. In the event of the cancellation of the coal supply agreement Eskom will have no enforceable contractual right to acquire the mine.”

Now – and, Chair, this is my proposition to you, that the only reason – and Ivan Glasenberg in paragraph 31 of his contract directed that they go for business rescue practitioners because he says he understood it that they are able to suspend and cancel the contract, the coal supply agreement.

**CHAIRPERSON**: I am sorry, just repeat that?

**MR KOKO**: The only reason in Mr Ivan Glasenberg's affidavit that he says ...[intervenes]

10 **CHAIRPERSON**: Why they went for...

**MR KOKO**: Why they went for business rescue.

**CHAIRPERSON**: Ja.

**MR KOKO**: He says he understood that they can – they have the right to suspend and cancel the CSA.

**CHAIRPERSON**: The CSA, okay.

**MR KOKO**: That is what he says.

**CHAIRPERSON**: Yes.

**MR KOKO**: And the only reason I think he did that is because he knew that we would step in to exercise our  
20 right in terms of the coal supply agreement to take over the right.

**CHAIRPERSON**: Yes.

**MR KOKO**: But once he suspended we cannot and that is why I say in my email to Mr Molefe ...[intervenes]

**CHAIRPERSON**: We cannot.

**MR KOKO:** We cannot.

**CHAIRPERSON:** Ja.

**MR KOKO:** Based on the advice given by counsel. I am not one of those executives who do not take advice.

**CHAIRPERSON:** Ja.

**MR KOKO:** I said let us go to court but once I got ...[intervenes]

**CHAIRPERSON:** Legal advice.

**MR KOKO:** Legal advice I realise rushing to court...

10 **CHAIRPERSON:** Ja, ja. Well, on the face of it it makes sense. If entering business rescue suspends such agreements it makes sense to say well, you cannot thereafter and while the suspension is in place, purport to exercise rights that are in the agreement because even that right is suspended.

**MR KOKO:** Yes.

**CHAIRPERSON:** Ja, ja, ja.

**MR KOKO:** Yes, that is what I think, Chair.

**CHAIRPERSON:** Ja.

20 **MR KOKO:** What then happens is that we had no choice and I said in my email to Mr Molefe and I told him, Chair, we have no choice, our degrees of freedom are limited, we cannot go to court.

**CHAIRPERSON:** Ja.

**MR KOKO:** And we have to find a decent way to getting

back to Optimum.

**CHAIRPERSON:** Ja.

**MR KOKO:** Because the ...[intervenes]

**CHAIRPERSON:** They are in a corner now.

**MR KOKO:** They are in a corner, the belt is not running, so we have to reach out to Glencore, we have - this is the only way we had to do and Mr Molefe agreed with me. Chair, I do not know who initiated the meeting. Whether it is me – they say it is them, I think it is me, but it does not  
10 matter.

**CHAIRPERSON:** Ja.

**MR KOKO:** So eventually, I remember talking to the CEO of OCM.

**CHAIRPERSON:** Mr Ephron.

**MR KOKO:** Mr Ephron. We arranged a meeting on the 3 November.

**CHAIRPERSON:** Ja, for the 3 November.

**MR KOKO:** 3 September.

**CHAIRPERSON:** Ja.

20 **MR KOKO:** And in that 3 September it is me who said you know, this business rescue has upset me so much, we are not going to entertain him, our solution will come out of Glencore.

**CHAIRPERSON:** Oh, is that where you did not want to meet with the practitioners?

**MR KOKO:** Correct.

**CHAIRPERSON:** That was because this is what they have done.

**MR KOKO:** Correct.

**CHAIRPERSON:** Ja, okay, so you wanted to talk to ...[intervenes]

**MR KOKO:** Glencore.

**CHAIRPERSON:** Mr Ephron, ja.

**MR KOKO:** Mr Ephron, yes.

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

**MR KOKO:** Yes. Again the meeting was not nice, I did not talk, I do not talk when my boss is in the room, I only speak when spoken to.

**CHAIRPERSON:** Yes.

**MR KOKO:** But it was ...[intervenes]

**CHAIRPERSON:** So it was you, Mr Molefe from Eskom's side.

**MR KOKO:** It was me, Mr Brian Molefe. I think there were only three of us in that meeting.

20 **CHAIRPERSON:** Okay, from Eskom or...?

**MR KOKO:** No, no, no, from Eskom it was me and Mr Molefe.

**CHAIRPERSON:** Okay, okay.

**MR KOKO:** And then it was Mr Ephron.

**CHAIRPERSON:** Ja.

**MR KOKO:** Because we did not allow the business rescue to come in, I do not remember the fourth person in the meeting, I think it was ...[intervenes]

**CHAIRPERSON:** Ja, ja, but you provide the reasons why you did not want the business practitioners.

**MR KOKO:** Yes.

**CHAIRPERSON:** Because by putting – or rather – well, actually because they demanded ...[intervenes]

**MR KOKO:** 513.

10 **CHAIRPERSON:** But the people who put the company in business rescue were not the business practitioners, it was Ephron that you wanted to talk to.

**MR KOKO:** Yes, yes, yes.

**CHAIRPERSON:** Ja.

**MR KOKO:** And remember that when he did that he did not give me the privilege to talk to him.

**CHAIRPERSON:** Ja.

**MR KOKO:** He did not even pick up the call and say listen ...[intervenes]

20 **CHAIRPERSON:** Ja but what I am saying is, on reflection, the business rescue practitioners were not the people you were supposed to be upset with, it was Glencore, it was Ephron, the ones you wanted to meet.

**MR KOKO:** Chair, I told you that in the heated moments with the business rescue practitioners, we will all hug and

cry together.

**CHAIRPERSON:** Ja, ja.

**MR KOKO:** So I accept that.

**CHAIRPERSON:** Okay.

**MR KOKO:** And when Mr Seleka said yesterday it is not Glencore that cancelled that business rescue, I said yes and I put a [indistinct] with but I knew where he was getting to, he was making a distinction that the people in charge at the time was the business rescue practitioners  
10 but the people who put it there was – so I accept that.

**CHAIRPERSON:** Ja, ja. Okay, let us wrap up now because we ...[intervenes]

**MR KOKO:** So I am done, Chair.

**CHAIRPERSON:** You are done now.

**MR KOKO:** So the only thing that I will refer to is the – now we entered into an interim agreement ...[intervenes]

**CHAIRPERSON:** Now tell me for the sake of completeness the outcome of that meeting, the 3 September.

20 **MR KOKO:** So the interim agreement, the outcome of that meeting is recorded in a document called PMM8.

**CHAIRPERSON:** Yes.

**MR KOKO:** It is in bundle 15, PM8.

**CHAIRPERSON:** If we do not go there, if you remember what it is, that is fine.



**MR KOKO:** So all what it said is that they will supply Eskom with coal at original price of R154 per ton, they will do so for 60 days and that 60 days – and that was signed on the 22 September.

**CHAIRPERSON:** Ja.

**MR KOKO:** And it was effective from the 4 September until the 4 November.

**CHAIRPERSON:** Okay, that is fine.

**MR KOKO:** That was the ...[intervenes]

10 **CHAIRPERSON:** Okay, that is the outcome of that meeting.

**MR KOKO:** Ja. Chair, I am where Mr Seleka was.

**CHAIRPERSON:** Okay, alright.

**MR KOKO:** This is where I was and I could not answer him directly until we get ...[intervenes]

**CHAIRPERSON:** Without going back to...

**MR KOKO:** Without going to how we ended up.

**CHAIRPERSON:** How [inaudible – speaking simultaneously]

20 **MR KOKO:** Because now the question becomes, did we have an emergency or not? And how did – what was the scope of the cooperation agreement and then I was going to refer – now I can talk to it without referring to it.

**CHAIRPERSON:** Ja. Okay, not, that is fine. Mr Seleka. It has been quite a wait on your part but I do want to say

that I think that the issues that Mr Koko has dealt with appears to me to be legitimate issues to raise. They throw certain light on certain things. Ja, okay, let us continue.

**ADV SELEKA SC:** Yes. The document which Mr Koko wanted to refer the Chairperson to, copies of that have been made so ...[intervenes]

**CHAIRPERSON:** You want to put on record where it is to be found? The one that he was reading?

**ADV SELEKA SC:** Yes, which he said ...[intervenes]

10 **CHAIRPERSON:** The interim agreement?

**ADV SELEKA SC:** Sorry, Chair. Which he said it was an attachment to Mr Pierce Marsden's affidavit.

**CHAIRPERSON:** He said it is a letter and then in the interim agreement.

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:** Ja.

**MR KOKO:** Chair, there is a better place to place it because it is an attachment to the letter that is already on record.

20 **CHAIRPERSON:** But Mr Marsden's affidavit, if it is somewhere in the bundle that is fine.

**MR KOKO:** Oh yes. No, it is, Chair.

**ADV SELEKA SC:** Save to point out, Mr Koko, I think the calculation of R513 per ton you have calculated it yourself.

**MR KOKO:** Oh, ja, Chair. I did not calculate it, it is a

given. I just showed you how it got there.

**CHAIRPERSON:** Ja.

**MR KOKO:** So they way you do it, the price is there, R22.30, am I right?

**ADV SELEKA SC:** R22.30.

**MR KOKO:** Per kilojoule.

**ADV SELEKA SC:** Kilojoule.

**MR KOKO:** So if you convert to mass it is 513.

**ADV SELEKA SC:** Yes, so what I am saying to you is the  
10 calculation arriving at 513 is not in the document, you did  
it yourself.

**MR KOKO:** Ja, yes but what I am saying to you is, energy  
is mass and that is the...

**CHAIRPERSON:** Okay, no, that is fine. But let me sum  
up the points you have sought to make with regard to the  
trail that we have followed. As I understand it, it amounts  
to the following that you say, one – I am now linking it with  
part of what you said two days ago.

1. Any party that was aggrieved in terms of the CSA  
20 was not allowed to cancel the CSA, their remedy were  
those provided for in the CSA.

**MR KOKO:** Correct.

**CHAIRPERSON:** Which include in certain circumstances,  
arbitration.

**MR KOKO:** Correct.

**CHAIRPERSON:** As far as Eskom is concerned, when it comes to coal being supplied that did not meet the specifications it included rejecting the coal or prior to the settlement agreement, arbitration settlement agreement, giving notice to OCM within 15 days but after the settlement agreement, that was superseded by new arrangement and that new arrangement was that the spreadsheet that would be exchanged early would be regarded as compliance.

10 **MR KOKO:** Correct.

**CHAIRPERSON:** And that is one, two you are saying that OCM being aware of the availability of the arbitration route did take steps to pursue that route but did not pursue it to finality.

**MR KOKO:** Correct.

**CHAIRPERSON:** And you say the reason why, as far as you were concerned, they did not do that is because they knew they had no case.

**MR KOKO:** Correct.

20 **CHAIRPERSON:** They would lose arbitration.

**MR KOKO:** Correct.

**CHAIRPERSON:** And then you make the point that from your point of view – well you also say, those within Eskom, who were - whose duty it was to enforce penalties, suspended the enforcement of penalties without

authorisation.

**MR KOKO:** Correct, Chair.

**CHAIRPERSON:** And then you say when OCM complained about the price in 2014, you approached BTC, the Board Tender Committee and sought a mandate, which would accommodate or would enable you to agree to the proposal from OCM.

We - in terms of an increase on the price.

**MR KOKO:** Correct, Chair.

10 **CHAIRPERSON:** And actually even if they ask for a little more, you could still have agreed to give it.

**MR KOKO:** Correct.

**CHAIRPERSON:** But you say, those who were negotiating with that mandate was given and those who were negotiating with OCM which were under your team, I think, under your team, under your leadership.

**MR KOKO:** Correct.

**CHAIRPERSON:** You do not know what happened but later on, they came back and said OCM one at 442 as a  
20 price.

**MR KOKO:** Correct, Chair.

**CHAIRPERSON:** Ja, okay, alright a you sit there you do not know what difficulties if any, there were in pinning down OCM to the proposal that they had made earlier on.

**MR KOKO:** Correct, Chair.

**CHAIRPERSON:** And you say, thereafter OCM moved even from 442 to 513.

**MR KOKO:** Correct, Chair.

**CHAIRPERSON:** And, of course, once OCM was under business rescue, you were advised that Eskom could not take over the mine.

**MR KOKO:** Correct, Chair.

**CHAIRPERSON:** And that is what happened.

**MR KOKO:** Correct, Chair.

10 **CHAIRPERSON:** And you say the decisions that were taken to pursue the claim of penalties were because of advice, legal advice that was given to Eskom.

**MR KOKO:** Correct, Chair.

**CHAIRPERSON:** Okay, did I leave out anything?

**MR KOKO:** Yes, and that is because I did not tell you.

**CHAIRPERSON:** Ja, okay.

**MR KOKO:** So on the 20<sup>th</sup> of July 2015 when I came back from suspension, I confronted Mr Bester about the outcome, I said Bester you went with me to the BTC in  
20 2014. You showed me the proposal of OCM a policy - and Chair, by the way, I asked your legal team how they wanted to attach that proposal.

**CHAIRPERSON:** Ja, it would be good if we have it.

**MR KOKO:** I asked and I wrote to your legal team and I did not get it. You showed me this proposal, we debated.

We made a conclusion. We compromised, first between the two of us we reached a compromise before we go to the Board. Now I come back, you want 442, not a nice discussion he chose to resign. He felt uncomfortable, and he resigned instead of answering my questions.

**CHAIRPERSON:** So he did not explain what happened?

**MR KOKO:** He resigned. He writes in his affidavit; Mr Koko was asking too much, too many questions. Mr Koko was asking too many questions of details and asking too  
10 many documents.

**CHAIRPERSON:** But that is what you were asking you say.

**MR KOKO:** And that is what I was asking and he says it, he says I was asking for the report of Nedbank. This is responses – he was saying to me but this 442 was reviewed by...[intervene]

**CHAIRPERSON:** Nedbank.

**MR KOKO:** I said give me that Nedbank report.

**CHAIRPERSON:** Ja.

20 **MR KOKO:** Give it to me let me go and look at it myself.

**CHAIRPERSON:** And you never got it.

**MR KOKO:** Till today, I have never got it, I got it from the Commission. The basis point report, I never got it until today. I never, never got it.

**CHAIRPERSON:** Okay, alright. We will now make quite

some progress because we have covered what Mr Koko wish to deal with first before dealing with questions. So Mr Seleka.

**MR KOKO:** I apologise for disrupting you, sir, Mr Seleka.

**ADV SELEKA SC:** Yes, Chair can we go to Bundle EB15 Docket B.

**CHAIRPERSON:** Bundle?

**ADV SELEKA SC:** Eskom Bundle 15, Docket B.

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

10 **MR KOKO:** Correct, Chair.

**ADV SELEKA SC:** I am only going to touch on certain questions you were asking Mr Koko and see whether there are no explanations from him. One of them is where you were asking why the increase from - what is it? What was...[intervene]

**CHAIRPERSON:** 285, and then to 442.

**ADV SELEKA SC:** Yes, why could they not continue their agreement.

**CHAIRPERSON:** Yes.

20 **ADV SELEKA SC:** Yes, now Mr Koko let us go back to the document you were reading from, which is approval of a negotiated outcome. You referred to the Chairperson to page 786.

**CHAIRPERSON:** 786?

**ADV SELEKA SC:** 786.



**CHAIRPERSON:** Of Bundle 15B.

**ADV SELEKA SC:** Of Bundle 15B, so you read from there.

Let us go to 794, and I just want to ask for your comment on this because there are paragraphs there in 794, particularly the last three paragraphs. It says:

“PED engaged the services of independent corporate finance advisors, [Nedbank], capital and basis points to conduct the financial due diligence on Optimum’s cost mentioned above. The price offers for the coal that meets Hendrina’s highest CV specification is R442 per ton until 2018, which Optimum has indicated does not include a margin and this has been verified by the independent financial advisors. The price post 2018 is R475 per ton which excludes a margin of 20%. The conclusion from the independent corporate finance advisors was that based on mining and beneficiation costs for the coal quality specification and cash requirements that Hendrina agreed on the price of R442 per ton offered by Optimum, for a CV of 23.5 MJ/kilograms dry basis is cost reflective and they are in agreement with how the costs have been allocated to produce the coal for Eskom in comparison, PED approved mandate was to negotiate a real base of R296,30 per ton August

2014, money values for a CV of 22.8 MJ/KG on the dry basis.”

And then they conclude there in that paragraph. Was this not the reason for the change in the price or the proposed price?

**MR KOKO:** Chair, let us say that was the reason why is not within your mandate. You have got a mandate.

**ADV SELEKA SC:** Okay, if that is the answer that is fine.

**MR KOKO:** So, why go and act outside the mandate.

10 **CHAIRPERSON:** Ja.

**MR KOKO:** You came and said you have got a proposal from OCH of 296. We took that proposal to the Board on the basis of which we get given a mandate. If you stay within that mandate, the Board says do not come to us, just sign.

**CHAIRPERSON:** But also Mr Seleka is there a place where they explain what happened after they were given the mandate to - by the BTC, did they meet and they had discussions, and how did the proposal of 285 get not  
20 accepted.

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:** Is there a place where they explained that, as far as you have been...[intervene]

**MR KOKO:** No, Chair.

**ADV SELEKA SC:** Chair what I have been able to see

because this is evidence in phase one is that they engaged us they say here the services of independence corporate finance advisors, Nedbank capital on basis points to determine – to do financial due diligence.

**CHAIRPERSON:** What was – it was what one would expect is that if you are in negotiations with an outside party, you are a negotiation team or an entity as Eskom. There is a proposal given to you by the outside party. You go to your principals and say, please give us a mandate.  
 10 They give you a mandate, that is enough for you to cover that.

You do not go and do research, because you have got enough mandate. You do not go and even look for advice. You come back and say, okay, this is what we have offered, we have a mandate you either accept that, or if you still want to negotiate them down, you tried that but you would only go and do research after you have done something that deals with the proposal that was on the table.

20 So if there is not anywhere where that is explained then that is fine, but one would have liked to hear the journey from getting the mandate from the BTC to the time when Eskom, when OCM puts up a hire amount.

**MR KOKO:** Chair, you will not find it, it is not there.

**CHAIRPERSON:** H'm, ja.

**MR KOKO:** I can speculate...[intervene]

**CHAIRPERSON:** Did this 442 even come from OCM or did it come from the independent advisors?

**ADV SELEKA SC:** From my reading of the evidence Chair, Eskom itself engaged independent advisors.

**CHAIRPERSON:** Who came up with 442.

**ADV SELEKA SC:** To do a deal, ja after what they say is that due diligence that was conducted.

**CHAIRPERSON:** So but is that your understanding to?

10 **MR KOKO:** That is my understanding Chair.

**CHAIRPERSON:** So OCM is not the one who increased the price?

**MR KOKO:** I do not think they were acting alone, Chair. I do not think they were acting alone because let us suppose Chair and here is the reason why I am saying they were not acting alone. If it was an Eskom decision, why would it be a do or die for Optimum? Why would Optimum say if you do not give me 442 or 5.3 I am liquidating, why did they do that? Because Optimum to say listen 442 is your number  
20 our number is 285, we are happy with 285.

**CHAIRPERSON:** I think the people who were negotiating, have we got affidavits from them, we need to deal with this aspect.

**MR KOKO:** Chair, that is why I kept on telling you that you have got the wrong person sitting here because this

person sitting here has been targeted. The people who did this, one of them was sitting here and these issues have not been brought to him. Not only once, his got two affidavits already, not once in his affidavit do they say but respond to this. I make this point in my main affidavit not only once is he told but Mr Koko is making this point, can you respond to it.

**CHAIRPERSON:** Yes, you will give their names to the legal team.

10 **MR KOKO:** It is your favourite witness Mr Bester.

**CHAIRPERSON:** Why do you call him that.

**MR KOKO:** Because you have got favourite witnesses, Chair I know that.

**CHAIRPERSON:** There are no favourite witnesses.

**MR KOKO:** They get coached, they get protected when we make noise you go for the kill.

**CHAIRPERSON:** No, no Mr Koko you will give the names – you mentioned one person you gave...[intervene]

**MR KOKO:** That is Mr Bester.

20 **CHAIRPERSON:** Is he the only one that...[intervenes]

**MR KOKO:** That is Mr Bester.

**CHAIRPERSON:** Oh, okay.

**MR KOKO:** And he needs to be asked, why did you think that I do not deserve to get the copy of Nedbank Capital and basis point.

**CHAIRPERSON:** Ja, okay. I guess maybe the best is to get the transcript of Mr Koko's evidence today.

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

**CHAIRPERSON:** And to call upon him to depose to an affidavit and deal with the issues. That is whatever as maybe in any affidavit, it might not have been sent to you.

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:** Or Mr Koko.

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

10 **CHAIRPERSON:** Because maybe there is an explanation but on the face of this of it does sound strained but you have got an offer, you go and obtain a mandate from your principal, your principal gives you a wide mandate, which is enough for you to accept this offer.

But if Mr Koko is right, and if you understand his right, they go to outside advisors in circumstances where they have got an offer that they are mandated to accept and move on.

**MR KOKO:** Exactly, Chair.

20 **CHAIRPERSON:** So maybe they - I mean they might be able to explain, but I am just saying, that is what, that is part of what I am interested in.

**ADV BARRY SC:** Chair, if I may and this is simply to avoid that Mr Koko must come back at another occasion.

**CHAIRPERSON:** Ja.

**ADV BARRY SC:** But I do want to just draw your attention on page 793 of this bundle to the paragraph under the upper table.

**CHAIRPERSON:** 793?

**ADV BARRY SC:** 793, you will see, there is a little table at the top.

**CHAIRPERSON:** Ja.

**ADV BARRY SC:** And then there is a paragraph there.

**CHAIRPERSON:** Ja.

10 **ADV BARRY SC:** And that has to be dealt with – read in conjunction with page 795 paragraph 3.1.

**CHAIRPERSON:** Yes.

**ADV BARRY SC:** And the essential reason that is put out there but I do not – I am not a witness is that Optimum wanted to close the export mine.

**CHAIRPERSON:** Ja, okay, Mr Seleka you...[intervene]

**ADV BARRY SC:** But there was evidence there, that is no reason for a price increase.

**CHAIRPERSON:** Ja, Mr Seleka you will cover that, this  
20 part – let me this paragraph at page 793 reads:

“PED had intended to negotiate a real base of 296,30 per ton with Optimum based on the fact that the Eskom products should be cross subsidised by the export product and hence should be supplied at marginal cost or at a subsidised price which was

the original basis for allowing the mine to convert from being a cost plus mine only supplying Eskom to a dual product mine with more than 50% of its volume being sold to the export market. According to Optimum the price required to cover costs to break even to meet the current CSA qualities except for a one and sizing on the Eskom contract needs to increase significantly. Eskom's assessments of Optimums proposed costs indicate that if agreed to will cost Eskom R5.5billion at 5.5 MG per annum for the remainder of the CSA."

Is there something you want to explain in that paragraph Mr Koko?

**MR KOKO:** No Chair, that table is - and thanks Mr Barry, the table is quite nice table because that table says that first column is a price achieved and then the second column is the approved base, the 296 of particular importance Chair is the last column.

**CHAIRPERSON:** Approved aspirational base.

20 **MR KOKO:** Approved ja, the row – the column 22.8. So we went to the Board and we said to the Board, we have a proposal from Optimum for a 22.8 CV and that 22.8 CV will cost us 285. The Board said go and negotiate but we giving you 296.

**CHAIRPERSON:** To give you enough room.



**MR KOKO:** To give enough room.

**CHAIRPERSON:** Ja, just in case they change in the meantime.

**MR KOKO:** Exactly, the team came back and have negotiated a coal of 23.5 higher than what the Board approved at a price of 442. It only depends, I do not know why they did that.

**CHAIRPERSON:** Ja, okay, no, that is fine Mr Seleka.

**ADV SELEKA SC:** Thank you Chair...[intervene]

10 **MR KOKO:** And I do not know why they thought this is so important to destroy the operations on both sides.

**CHAIRPERSON:** Okay, Mr Koko let us allow Mr Seleka now.

**ADV SELEKA SC:** I know Mr Bester deals with this aspect of export in one of his affidavits Chair, but I just want to come back to the issues that arose.

**CHAIRPERSON:** Ja, okay.

**ADV SELEKA SC:** In regard to the price and I want to clarify this with Mr Koko so that we all are on the same  
20 page. Chair, please go back to Eskom 15C, 15C.

**MR KOKO:** I am there, Chair.

**ADV SELEKA SC:** On that page 1826, 1826, which is a submission document.

**CHAIRPERSON:** Yes, I have got it.

**ADV SELEKA SC:** Mr Koko, just for clarity again that

paragraph you read below the table, it says:

“OCM is currently claiming hardship, citing that Optimum colliery has not been recovering its costs on the Eskom product over the past three years. Based on the current modus operandi OCM had proposed the price increase from the current R154,40 after quality price adjustments this drops R130,36 per ton.”

YTD, what does that mean?

10 **MR KOKO:** Year to date.

**ADV SELEKA SC:** “Year to date, May 2014 to R285 per ton

“excluding escalations for the remaining contract periods, and R375 per ton in 2014 money values.”

And then they go on to say:

“Plus a profit margin post.”

Now, let us forget post 2018 to 2023 for now, how should we understand that R375 per ton in 2014 money values?

**MR KOKO:** The 375 will be the price at the end of 2018,  
20 Chair. So your contract ends in 2018 and the Optimum proposal was that between 2014 and 2018 the base price - remember I took you to the price and payment schedule it has got a base price. The base price becomes what 285 until the end of the contract and then the base price from 2018 becomes 375 until 2023.

**CHAIRPERSON:** So but why do they write in 2014?

**MR KOKO:** Because...intervene]

**CHAIRPERSON:** Oh in 2014 money value, oh okay.

**MR KOKO:** Yes, it is nominal rands.

**CHAIRPERSON:** No, no, I see so you are saying that 285 was to before 2014 to 2018 and then from 2018 to the end of the contract 2023.

**MR KOKO:** No, no 2014 to 2018 which is the end of the contract.

10 **CHAIRPERSON:** Oh, ja and anything beyond that would be 375.

**MR KOKO:** Anything beyond that would be 375.

**CHAIRPERSON:** Okay, that was their proposal.

**MR KOKO:** That was their proposal.

**CHAIRPERSON:** Okay.

**ADV SELEKA SC:** So just tell me whether my understanding of the way they wrote it here, if they say per ton year to date May 2014 to – well this drops R130 per ton year to date day, as you say May 2014 to R285 per ton  
20 excluding escalations for the remaining of the contract period and R375 per ton in 2014 more values and then they plus profit margin post 2018.

**MR KOKO:** And the profit margin is 20%.

**ADV SELEKA SC:** So the profit margin was 20%.

**MR KOKO:** So, on that 375 Chair, you will add 20%. So it

is 375 plus 20%.

**CHAIRPERSON:** And that 20% is of what?

**MR KOKO:** I beg your pardon?

**CHAIRPERSON:** Oh, 20% of 375.

**MR KOKO:** Of 375, yes.

**CHAIRPERSON:** Oh, okay.

**MR KOKO:** Yes, but that margin of 20%, did not apply on the 285.

**CHAIRPERSON:** Ja, okay. But what does this excluding  
10 escalations that appears after 285 per ton?

**MR KOKO:** Chair, is just too much detail that we should not have put there.

**CHAIRPERSON:** Ja, okay 285 was 285 for all intents and purposes.

**MR KOKO:** Yes, so the important numbers there is 285 and 375 plus 20%.

**CHAIRPERSON:** Ja, but the 375 was for after the contract had ended.

**MR KOKO:** Yes.

20 **CHAIRPERSON:** If there was a renewal or an extension.

**MR KOKO:** Correct, and their state of mind OCM when they did this proposal, was to seek to avoid an open tender process. I would have done the same, you always take the chance, if Eskom agrees you are in the money, if they do agree you have lost nothing.

**CHAIRPERSON:** Okay.

**ADV SELEKA SC:** Yes, Chair we will ascertain with Mr Bester.

**CHAIRPERSON:** Yes.

**ADV SELEKA SC:** What was going on there and...[intervene]

**CHAIRPERSON:** While you are looking for whatever.

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

**CHAIRPERSON:** Can we take a short adjournment just 10  
10 minutes?

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

**CHAIRPERSON:** We adjourn.

**INQUIRY ADJOURNS**

**INQUIRY RESUMES**

**CHAIRPERSON:** Okay let us continue.

**ADV SELEKA SC:** Thank you Chair. Chair I could quickly read from Mr Johan Bester's affidavit submitted in phase 1.

**CHAIRPERSON:** Yes.

**ADV SELEKA SC:** Where he addresses this meeting Mr  
20 Voges that he had with him on the first day of Mr Koko's return from suspension.

**CHAIRPERSON:** On the 20<sup>th</sup> of July.

**ADV SELEKA SC:** On the 20<sup>th</sup> of July.

**CHAIRPERSON:** Ja.

**ADV SELEKA SC:** For the record I will mention where the

affidavit is found.

**CHAIRPERSON:** Ja.

**ADV SELEKA SC:** It is Eskom Bundle 18(a) it is page 24.

He says:

10           “Mr Matshela Koko’s first day back at the  
office after his more than three month  
suspension was Monday 20 July 2015. He  
had me summoned to his office at 9H00 on  
that same morning. Mr Koko told me he  
wanted to brought up to speed with important  
transactions such as Eskom’s negotiations  
with Optimum (essentially Glencore as the  
main shareholder and funding partner of  
Optimum) as it related to the Optimum Coal  
Supply Agreement for Hendrina Power  
Station. He wanted all briefing notes and  
third party reports and recommendations. He  
also wanted the feasibility study report and  
other documentation relating to the New  
20       Largo project for the supply to Kusile Power  
Station.”

Paragraph 10.

“Prior to Mr Koko asking for the detailed  
Optimum and New Largo information I had for  
almost an hour fully appraised him of the

status on Optimum and New Largo. I recall that I explained to Mr Koko how important it was to keep the Optimum Mine from shutting down and that as a last resort if Eskom did not have the stomach to pay a sustainable price for the coal from Optimum in addition to Hendrina Power Station then Eskom should rather consider purchasing Optimum from Glencore to supply Arnot Power Station as we were running into supply problems from Exxaro Arnot Colliery. I explained to Mr Koko that Optimum Colliery was relatively near logistically and the coal qualities were also similar. I told him that once – one could apparently see the washing planted Exxaro's Arnot mine from the northern operations of the Optimum open car section. But then Mr Matshela Koko started asking a little too much detail and for documents that I thought was unusual for someone at his level of seniority. I asked myself where he would even get the time to read through the New Largo feasibility study."

Paragraph 11.

"I told Mr Koko that I was uncomfortable

continuing meeting with him and that he would have my resignation before 12H00 that day and I walked out. I did not wait for a reply. I dropped my resignation at his office at around 11H00.”

I thought I would read that Mr Koko I suppose you have seen his affidavit?

**MR KOKO:** I have Chair and Chair what the committee must know I was asking him for documents I was entitled for in my  
10 position. You know Chair somebody works for you. You are entitled to these documents he says but give me these documents let me read for myself.

**CHAIRPERSON:** Yes.

**MR KOKO:** And then he comes and he says ...

**CHAIRPERSON:** You are asking too much.

**MR KOKO:** You are asking too much. These are the white people that are not used to working for black people who ask for detail. Chauvinist white people who thinks that they can simply say – accept what I say. He is not used to working  
20 for a black person who is looking for details and if he is not happy he will go and read for himself. But besides I think he was covering up something. He was covering up something because it is the same person who brought the proposal of the 285 to me. It is the same person who motivated to me in Sep – in June/July 2014 which – and it happened August



2014 to the board who persuaded me and I believed in him. I believed in him and went with him and he led the presentation at the board and I supported him. What Mr Seleka has not read further is that he – he also says he was surprised that I refused that he leaves Eskom. He says so.

**CHAIRPERSON:** When he said he was going to resign.

**MR KOKO:** No, no when he resigned.

**CHAIRPERSON:** Ja.

**MR KOKO:** In his affidavit he also says he was surprised  
10 that it was me who tried to persuade him not to leave Eskom.

**CHAIRPERSON:** Yes, no but that is what I am saying that you mean that he says he was surprised.

**MR KOKO:** Yes.

**CHAIRPERSON:** When he talked about resigning or presented the letter of resignation that you were the one saying do not go.

**MR KOKO:** Yes. Even after the re – even after – even during he says even during – while he was serving notice.

**CHAIRPERSON:** Ja.

20 **MR KOKO:** It was me who went to him and say

**CHAIRPERSON:** You must not go.

**MR KOKO:** You must not go.

**CHAIRPERSON:** Yes.

**MR KOKO:** Because Chair I loved detail and I love engagement with people of detail.

**CHAIRPERSON:** yes.

**MR KOKO:** I am one – I am not one of the people who avoids intelligent people. I do not choose people who are..

**CHAIRPERSON:** Ja. You wanted to have all the information

**MR KOKO:** Exactly.

**CHAIRPERSON:** Okay.

**ADV SELEKA SC:** But he had something to hide. I can tell you now.

**CHAIRPERSON:** Mr Seleka.

10 **ADV SELEKA SC:** Thank you Chair. And Chair I will also just place on record ...

**CHAIRPERSON:** Did he end up leaving?

**MR KOKO:** He left against my will.

**CHAIRPERSON:** And what was the reason given for the resignation?

**MR KOKO:** That I am asking too much details.

**CHAIRPERSON:** Hm. Did he put that in the letter?

**MR KOKO:** No he did not.

**CHAIRPERSON:** Okay.

20 **MR KOKO:** He did tell me. He did not tell me. I said Mr Bester these documents – these documents are in the space I am delegated. I am entitled to them.

**CHAIRPERSON:** Ja.

**MR KOKO:** I should be instructing you.

**CHAIRPERSON:** Ja.

**MR KOKO:** And if you refuse to give them to you I should be dismissing you for that. It is a dismissible offence. These documents are in text. It is not the document of a division next door when I am not entitled to it. I am not encroaching I am not overreaching I am asking for documents that are rightfully belong to me. Except that I delegated you to deal with them.

**CHAIRPERSON:** Did you end up getting the documents after he had left (Inaudible)

10 **MR KOKO:** No I did no Chair.

**CHAIRPERSON:** They were not there.

**MR KOKO:** No well they were there.

**CHAIRPERSON:** Oh he was the only one who could give the reports.

**MR KOKO:** Yes I only got one of the reports that had been reports from the commission's investigators.

**CHAIRPERSON:** Ja.

**MR KOKO:** Three – five years later.

**CHAIRPERSON:** Ja but after – but after he refused if you  
20 really wanted the documents nothing prevented you from...

**MR KOKO:** Ja Chair quite obviously I – I did not follow them. I did – once he refused to give me and he left there was no need for those documents.

**CHAIRPERSON:** No but if there was a need before he refused that need should have persisted after he had refused

and actually that is all the more reason why you should have wanted to see them.

**MR KOKO:** Chair let me...

**CHAIRPERSON:** Why is he refusing?

**MR KOKO:** Let me tell why he – why he mentioned that report. First he did not think I would ask for it but secondly he did not want to explain himself to the change between 296 and 442. He did not want to explain himself.

**CHAIRPERSON:** Yes but my question is...

10 **MR KOKO:** But I got that explanation from the mines.

**CHAIRPERSON:** My question is you should have – that would have been all the more reason why you wanted – you would have wanted to see what he did not want you to see.

**MR KOKO:** No but I got the similar – I got the information I wanted from the mine.

**CHAIRPERSON:** Ja how long after?

**MR KOKO:** It did not take me long. It did not take me long.

**CHAIRPERSON:** So did you ultimately get – got – get all the information you had wanted from him.

20 **MR KOKO:** Yes.

**CHAIRPERSON:** But you got them from the mine

**MR KOKO:** Yes.

**CHAIRPERSON:** Okay. Mr Seleka.

**ADV SELEKA SC:** Yes. Thank you Chair. Then I am just really quickly touching on the certain portions that are

relevant to the evidence that came out. On the same Bundle 18(a) page 34

**CHAIRPERSON:** Maybe – maybe I would say this to – for your consideration Mr Seleka.

**ADV SELEKA SC:** Yes Chair.

**CHAIRPERSON:** To the extent that you might need somebody like Mr Bester.

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:** To deal with some of the issues or all the  
10 issues that Mr Koko has raised it may be that it might not help much to do it piece meal in the sense that you have not got everything but maybe could be follow up by way of written questions and answers we talked about. But that which you can do if you – if you prepare you can do now but I am just suspecting that you might need more information from Mr Bester. But I am quite happy to leave it to you.

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:** You can raise what you – what you want – you feel you are able to deal with.

20 **ADV SELEKA SC:** Yes, no I would simply put something to Mr Koko and he can maybe respond or...

**CHAIRPERSON:** That is fine.

**ADV SELEKA SC:** Or – is that alright Chair.

**MR KOKO:** That is fine.

**CHAIRPERSON:** That is fine.

**ADV SELEKA SC:** I seem to recall seeing this also in that submission Mr Koko which we read. He is saying particularly about now this price in paragraph 38 page 24 he says:

“PED appointed Nedbank and an independent technical consultant”

**CHAIRPERSON:** You are reading from what document now?

**ADV SELEKA SC:** 8 – Mr Bester’s affidavit.

**CHAIRPERSON:** Affidavit.

**ADV SELEKA SC:** Johan Bester.

10 **CHAIRPERSON:** The one you were reading from earlier.

**ADV SELEKA SC:** Correct Chair.

**CHAIRPERSON:** Okay.

**ADV SELEKA SC:** It is just a different paragraph.

**CHAIRPERSON:** Okay.

**ADV SELEKA SC:**

20 “PED appointed Nedbank and an independent technical consultant basis point to evaluate the cost structure of Optimum supply to Eskom. This is covered extensively in the affidavit and the annexures to my affidavit made to the SAPS SCO/DPCLS attached hereto. The analysis suggested that Optimum required R442 per ton just to break even and that it would be difficult for Eskom to procure coal from third party suppliers for

less than R300 to R350 per ton. And then it would cost Eskom in excess of R100 per ton to deliver the coal by truck to Hendrina Power Station.”

Paragraph 30 reads”

“Thus Eskom’s alternative would be at least R400 per ton however an analysis by commercial team and the PED technical and PEC transport teams and a team from Hendrina Power Station suggested that

10

1.The power stations coal stockyard is not big enough to safely accommodate approximately 400 trucks per day. The stockyard was designed to accommodate road deliveries for the entire power station burn.

20

2.There is an underpass that is en route to the stockyards that can only accommodate one truck at a time ie trucks that come past each other but need to wait for the underpass to be clear before being accessed from the opposite direction. Thus it would be a challenge to get 400 trucks in and out every day. I think it is approximately 400 trucks. We would struggle to procure the full

Hendrina Power Station burn of approximately 5million tons per annum. It is my view that a transaction/relationship/contract is only sustainable if both parties derive a benefit. It was clearly not sustainable if Optimum continued to lose R16 million to R100 million per month. It would eventually go into business rescue and file for bankruptcy and eventually the outcome would be no coal supply.”

So Mr Koko there I think those reasons are – were – are a reproduction of what was contained in that submission. You recall these reasons?

**MR KOKO:** Yes I do.

**ADV SELEKA SC:** You do. You have any comment or...?

**MR KOKO:** Yes I do.

**ADV SELEKA SC:** Insofar as these...

**MR KOKO:** Yes.

**ADV SELEKA SC:** He says it would be more expensive to secure coal.

**MR KOKO:** Yes I do.

**ADV SELEKA SC:** From third party suppliers.

**MR KOKO:** Yes I do. Chair you know one of the values of paying attention to detail and – and aim for nothing but excellence. I used to tell my team at work that we aim for



excellence. We will pay attention to detail. Absolute is not good enough. Is that you – you do not get fooled by such submissions. That is why some of us chose to be engineers and remained worker engineers when some of our colleagues shows to go into management. Chair let us go to Bundle 15 715. Bundle (a) 751.

**CHAIRPERSON:** Bundle 15(a).

**MR KOKO:** Ja it is MMK49.1 Mr Barrie.

**CHAIRPERSON:** 15(a)

10 **MR KOKO:** 7.

**CHAIRPERSON:** I have got c and e here.

**ADV SELEKA SC:** It is actually (b) Chair.

**CHAIRPERSON:** Mr – oh I have got this pagination of yours is causing problems. So we will find it in Bundle 15(b) what is the page number?

**ADV SELEKA SC:** 751.

**MR KOKO:** 751. So in 2015 in January I was presented with a submission by Mr Bester's team in – if you are there yet.

20 **CHAIRPERSON:** I am there.

**MR KOKO:** Yes. And

**CHAIRPERSON:** Is it the one starting at page 751?

**MR KOKO:** 751 correct.

**CHAIRPERSON:** Yes.

**MR KOKO:**

“And it was a feedback on the status of the board in the committee mandate obtained by the Primary Energy division which granted for purposes of assessing the coal requirements based on which – based on which a coal supply strategy to secure coal from Waterback in the Lephalale region would be implemented. This was the – this was aimed at adducing and identify short  
 10 falling in Mpumalanga region estimated 20 million – 20 to 40 million tons per annum from 2018.”

So here the BTC had directed Mr Bester’s team to do a study to take the coal from the Lephalale because it is – the Highveld region – the Highveld region coal is being disputed and the next region on coal is Lephalale. And the – so the board directed us to look at the feasibility of taking coal in Lephalale – mining it in Lephalale, putting – the rail and sending it to the Highveld. And this is the submission they  
 20 gave me and I interacted with the team and you will find if you go 761 – page 761

**ADV SELEKA SC:** Oh I see the documents...

**CHAIRPERSON:** It starts by saying that submission I see is signed by Mr Vusi Mboweni Divisional Executive acting Primary Energy and noted by you as Mr Matshela Koko

Group Executive Technology and Commercial on 10 February 2015. Right. We go to 9 – 761.

**MR KOKO:** Yes.

**CHAIRPERSON:** Yes.

**MR KOKO:** And you see who signed the document again?

**CHAIRPERSON:** Then there is a document that comes after that submission and seems to start at page 758 addressed to the Chairman of the EXCO – Eskom EXCO yes it is compiled by Phiwa Makhoba Fuel Sourcing. It is on feedback on the  
10 Waterback development program but it is signed at page 761 by Mr Johan Bester Fuel Sourcing and Mr Vusi Mboweni. Mr Bester signed on 19 January 2015 and Mr Mboweni on 22 January 2015. Yes Mr Koko you can then go to the part which you want to draw my attention to.

**MR KOKO:** Right. So on the document that was signed by Mr Bester the one that was prepared by Ms Phiwa. Please let us go to 768.

**CHAIRPERSON:** Yes.

**MR KOKO:** I am going to read to you the bottom paragraph  
20 into the – I am going to read in the record the one that start with relaxing.

**CHAIRPERSON:** Ja.

**MR KOKO:**

“Relaxing the Waterback commitment beyond  
2018 will ensure Eskom continues engaging

with the suppliers to progress their project to feasibility stages where they can be able to offer as a more accurate price indication of their product. It is also worth noting that Eskom recently secured a bulk sample coal from Exxaro to be tested at Majuba. This coal landed at Majuba Power Station at R530 per ton into the rail coal – into the rail.”

Now Chair what Mr Bester says is that we took coal from  
 10 Lephalale. We railed it to 530 kilometres to Majuba and it cost us R530 per ton. And then he wants me to pay the same amount for the conveyor next door. Chair you do not have to be smart to realise something is wrong.

**CHAIRPERSON:** So you say the price if you compare the two the price that he is talking about for the costs of conveyance of transporting coal does not make sense.

**MR KOKO:** You know what I told him they are taking you for a ride. That is what I told him. I said Mr Bester they are taking you for a ride. You telling me that you took coal from  
 20 – you mined coal in Lephalale you transported it 530 kilometres to Majuba. The distance between Hendrina and Optimum is not 20 kilometres. And you want me to pay the same price. You are taking me for a ride. Something you are not telling me. Let me read the document myself.

**CHAIRPERSON:** No is that when you asked for more

documents?

**MR KOKO:** Yes.

**CHAIRPERSON:** Ja.

**MR KOKO:** It is his documents. He thought this black guy does not read. This black guy is like other black executives who just oversee. Not me.

**ADV SELEKA SC:** Yes Mr Koko you are saying you told him about this.

**MR KOKO:** Of course I did.

10 **ADV SELEKA SC:** Hm.

**MR KOKO:** Of course I did.

**ADV SELEKA SC:** Of course you did.

**MR KOKO:** Yes.

**ADV SELEKA SC:** Okay. I know that it is not in your affidavit so we will ask him to deal with it. Then the next..

**MR KOKO:** Chair that is the only reason I have put this document in my affidavit. Because I knew the costing of coal price and affordability will come up. This is in my original affidavit. And he has my affidavit because he  
20 commented on it. So he has had sight of this.

**ADV SELEKA SC:** Yes Chair he certainly has Mr Koko's affidavit but Mr Koko's affidavit does not have this allegation. So that is what I am saying we will give to Mr Bester this one.

**CHAIRPERSON:** Okay.

**ADV SELEKA SC:** Then Chair I am moving on.

**CHAIRPERSON:** Ja.

**ADV SELEKA SC:** Eskom Bundle 15(c) page 1788 which is the second addendum to the coal supply agreement. And I am really just going to the paragraph without (inaudible)

**MR KOKO:** Mr Seleka please tell me.

**ADV SELEKA SC:** 15(c) page 1788.

**MR KOKO:** I am there Chair.

**ADV SELEKA SC:** Thank you. Just for the benefit of the  
10 Chairperson Mr Koko it might be necessary to read the first and the second addendum but let me start with the second on a very particular point. You read to the Chairperson paragraph 3.4.2.

**MR KOKO:** Correct.

**ADV SELEKA SC:** Which is the one about the spreadsheet.

**MR KOKO:** Correct.

**ADV SELEKA SC:** 3.4.2 is followed by 3.4.3.

**MR KOKO:** Correct.

**ADV SELEKA SC:** And it reads:

20 “Eskom will be entitled to offset any and all amounts due in respect of any penalties in respect of the quality of coal sold and delivered by Optimum Colliery to Eskom including without limitation in respect of the AI of AI.”

And just give us what AI stands for again?

**MR KOKO:** Abrasiveness Index.

**ADV SELEKA SC:** Abrasiveness Index thank you.

“Against the amount due to Optimum Colliery  
for and in respect of the purchase price of  
such coal.”

So Eskom is entitled to offset. Then it reads further to say:  
Shall I proceed Chair? Shall I proceed? It reads further to  
say:

10 “It being specifically recorded that Eskom will  
in writing advise Optimum Colliery monthly in  
arrears of the manner in which such  
penalties will have been calculated and  
Eskom will deliver to Optimum Colliery  
together with the details of such calculation  
the laboratory relevant results in respect of  
the coal in question in support of such  
calculation.”

Is there a reason why you did not read this paragraph?

20 **MR KOKO:** Chair

**ADV SELEKA SC:** I mean this clause.

**MR KOKO:** Chair if go into the transcript I was very, very  
clear to you. I read 4.2 and I referred to 4.3 and I said 4.3  
applies – it is a standalone clause and it tells you your –  
what you are entitled to and if you do this – the deduction a

month in arrears you tell the reason why. If you do not do it you do not forfeit your penalties. So the transcripts will again say it – I said it so I made a reference to 2.4.4 – 3.4.3.

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:** I certainly do recall that. I had a look at both.

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:** When you were giving evidence.

**ADV SELEKA SC:** Yes they – there are further sub-  
10 paragraphs ...

**MR KOKO:** Chair I must say.

**ADV SELEKA SC:** To..

**CHAIRPERSON:** I must also – I must ...

**ADV SELEKA SC:** Can I – finish.

**CHAIRPERSON:** Let Mr Seleka finish.

**ADV SELEKA SC:** Yes. They are further sub-paragraph 3.4  
quality of coal and you have 3.4.1.

**MR KOKO:** Yes.

**ADV SELEKA SC:** And 3.4.2, 3.4.3

20 **MR KOKO:** Yes.

**ADV SELEKA SC:** And my next question is do you know whether or not paragraph – Clause 3.4.3 was complied with by Eskom? Well it being specifically recorded that Eskom will in writing advise Optimum Colliery monthly in arrears of the manner in which such penalties will have been



calculated.

**MR KOKO:** Chair the answer is partial and I will – I am happy to refer you to a document. And if I am allowed I will do so.

**CHAIRPERSON:** Ja. Mr Seleka do you need him to refer to the documents?

**MR KOKO:** Eskom has complied with but not fully.

**CHAIRPERSON:** Just repeat that.

**MR KOKO:** Eskom has complied to it.

10 **CHAIRPERSON:** Ja.

**MR KOKO:** And not fully.

**ADV SELEKA SC:** Yes.

**MR KOKO:** And I am happy to show you a document.

**CHAIRPERSON:** Ja.

**MR KOKO:** I can talk to it or I can show you it.

**CHAIRPERSON:** Maybe you should do both.

**ADV SELEKA SC:** Maybe you should do them ...

**MR KOKO:** So let us go to the affidavit of Snehal Nagar.

**ADV SELEKA SC:** Yes.

20 **MR KOKO:** If I can be assisted where to find it. Chair, one of the things you will appreciate about my training is that I am an Engineer and engineers are trained to talk to engineering code. We are taught from university. If it is not in the design code or it is not in the rule book, you do not mention it. It does not exist.

**CHAIRPERSON:** Ja.

**MR KOKO:** And I tried to do that. If I cannot point to a document ...[intervenes]

**CHAIRPERSON:** You keep quiet.

**MR KOKO:** I keep quiet and I would appreciate the rest of your witnesses to do that.

**CHAIRPERSON:** [laughs] They are not engineers.

**MR KOKO:** It is common sense, though.

**ADV SELEKA SC:** The bundle is in Eskom – I mean, that  
10 affidavit is in Eskom Bundle 18(a), page 125.

**MR KOKO:** 18(a), 125.

**ADV SELEKA SC:** Chair, if I need to move ...[intervenes]

**MR KOKO:** 125?

**ADV SELEKA SC:** ...to something else, you – if you are satisfied with ...[intervenes]

**CHAIRPERSON:** No, no I am ...[intervenes]

**ADV SELEKA SC:** ...not satisfied ...[intervenes]

**CHAIRPERSON:** I am leaving it to you. You deal with whatever you feel needs to be dealt with.

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

**CHAIRPERSON:** Ja.

**ADV SELEKA SC:** Just to draw to your attention ...[intervenes]

**ADV SELEKA SC:** Ja.

**ADV SELEKA SC:** ...certain things who combines

...[intervenes]

**CHAIRPERSON**: Ja, 125?

**ADV SELEKA SC**: 125, yes.

**MR KOKO**: Yes. Chair, if you go to paragraph 7.4.

**CHAIRPERSON**: Paragraph?

**ADV SELEKA SC**: 7.4, page 132.

**CHAIRPERSON**: 122?

**MR KOKO**: 132.

**ADV SELEKA SC**: One, three, two.

10 **MR KOKO**: One, three, two.

**CHAIRPERSON**: One, three, two.

**MR KOKO**: Paragraph 132, it says:

“Based on the aforesaid calculations and our  
interpretation of the information provided  
...[intervenes]

**CHAIRPERSON**: Hang on, hang on. You are starting to  
read from whereabouts in paragraph ...[intervenes]

**MR KOKO**: Just – the last – the second last sentence of  
paragraph 7.4 on page 132.

20 **CHAIRPERSON**: It starts with based?

**MR KOKO**: Yes.

**CHAIRPERSON**: Oh, yes.

**MR KOKO**: Yes.

**CHAIRPERSON**: I can see, ja.

**MR KOKO**: Yes.

“Based on the aforesaid calculations and our interpretation of the information provided and the interpretation of the CSA, Eskom could impose a further penalty in the total amount of R 2.17 billion as summarised in the spreadsheet attached as SM...’

So, Chair, Eskom had a particular view of the interpretation of the CSA and based on that interpretation, the penalties is where the two point one four point five  
10 billion rands come from and if Optimum has a problem, we go to dispute and we will deal with that. But what I want to you to do is that, is to go to the next page which is 133.

**CHAIRPERSON:** Page 133?

**MR KOKO:** Yes, next to it.

**CHAIRPERSON:** Ja.

**MR KOKO:** Just... The next page, you will see is the penalties.

**CHAIRPERSON:** H’m? March 2012.

**MR KOKO:** Yes, starting from March 2012.

20 **CHAIRPERSON:** H’m?

**MR KOKO:** And – so if you go to – I hope you did not close that page, Mr Seleka, on Bundle 15 170, page 7718 and you asked if Eskom – do I know if Eskom complied to that.

**CHAIRPERSON:** Page 1788?

**MR KOKO**: Yes, and I said... [Speaker not clear]

**CHAIRPERSON**: Ja.

**MR KOKO**: So Eskom is entitled ...[intervenes]

**CHAIRPERSON**: But complete your point in relation to ...[intervenes]

**MR KOKO**: Ja. So Eskom has done the set-off.

**CHAIRPERSON**: H'm?

**MR KOKO**: So the – paragraph 3.4 point... Eskom will be titled to a set-off.

10 **CHAIRPERSON**: Ja, yes.

**MR KOKO**: Eskom has done the set-off.

**CHAIRPERSON**: Ja.

**MR KOKO**: And when you do the set-off ...[intervenes]

**CHAIRPERSON**: Ja.

**MR KOKO**: ...you then provide the reasons – areas.

**CHAIRPERSON**: H'm?

**MR KOKO**: And you see it is nicely done. YOU will see in paragraph – in page 133, the last paragraph. It says:

20 “From the table above, it appears that CV(?)  
as the sales and penalties were not applied  
before September 2013.

It also appears that the sales and penalties  
was not applied for the entire period..”

Right? And Chair, this is what I expected your  
investigators to investigate, but in any event ...[intervenes]

**ADV SELEKA SC:** Sorry, I missed that?

**CHAIRPERSON:** He says this is what he expected the Commission's Investigators to investigate.

**MR KOKO:** Ja.

**CHAIRPERSON:** H'm. He says ...[intervenes]

**MR KOKO:** If Eskom is entitled to the penalties of two point one and they are not paid, surely, it is a big issue. It should be big issue for me. It should be a big issue for the Commission. Why they did not go as not – why Eskom has  
10 not deducted penalties of two point one notice(?)? And when we – me and my team demanded them we were penalised and fired by the same President who was the Chairman of Optimum. And this were ...[intervenes]

**CHAIRPERSON:** But I just want to... What does page 133 represent for you? Is that the amount that remained after the set-off?

**MR KOKO:** No, it is the amount – it is the value of the set-off every month.

**CHAIRPERSON:** Oh, okay.

20 **MR KOKO:** 3.4.3 talks about monthly set-offs.

**CHAIRPERSON:** Are the last figures in those columns the total ...[intervenes]

**MR KOKO:** Set-offs.

**CHAIRPERSON:** ...in regard to of a set-off in each column?

**MR KOKO:** Yes.

**CHAIRPERSON:** Okay alright. So. And R 158 million is that the total of all the other columns?

**MR KOKO:** Yes.

**CHAIRPERSON:** Ja.

**MR KOKO:** So ...[intervenes]

**CHAIRPERSON:** It is just that ...[intervenes]

**MR KOKO:** So ...[intervenes]

**CHAIRPERSON:** ...say total or I think something has been  
10 – is no longer there.

**MR KOKO:** Ja.

**CHAIRPERSON:** Ja.

**MR KOKO:** So it is the total. Chair, ...[intervenes]

**CHAIRPERSON:** So 158, R 158.3 million is the totals of the columns of the set of – all the set-off amounts ...[intervenes]

**MR KOKO:** Correct.

**CHAIRPERSON:** ...in the months from 20 March 2012 to May 2014?

20 **MR KOKO:** Correct, Chair. So ...[intervenes]

**CHAIRPERSON:** Okay alright.

**MR KOKO:** So if I can be very pedantic?

**CHAIRPERSON:** And that comes from two comma something billion?

**MR KOKO:** Chair, if you go to the next part.

**CHAIRPERSON:** Ja.

**MR KOKO:** The next page 134.

**CHAIRPERSON:** H'm?

**MR KOKO:** The total value of the set-offs ...[intervenes]

**CHAIRPERSON:** H'm?

**MR KOKO:** ...is R 2 344 802 – no, two million three hundred and forty-four – two billion three hundred and forty-four million eight hundred and two thousand two hundred and twenty-one rands.

10 **CHAIRPERSON:** What does that amount represents?

**MR KOKO:** It is the total number – it is the total value of the set-offs... between 2012, March 2012 and May 2014.

**CHAIRPERSON:** But you just agreed when I asked whether the R 158 million was the total.

**MR KOKO:** Yes, I just want to answer you, Chair.

**CHAIRPERSON:** Yes.

**MR KOKO:** I just want to – the total value of the set-offs is this R 2.3 billion.

**CHAIRPERSON:** Ja.

20 **MR KOKO:** Right?

**CHAIRPERSON:** H'm?

**MR KOKO:** And of that R 2.3 billion only R 158 million was deducted.

**CHAIRPERSON:** Oh, okay, okay. Okay so – then your answer, I guess your answer to my question in relation to



the figure of R 158.3 million at page 133 should not have been that R 158.3 million was the total of the set-off. It should have been the total of the set-off is R 2.3 billion.

**MR KOKO**: Correct, Chair.

**CHAIRPERSON**: But R 158 million is all that was deducted?

**MR KOKO**: Correct, Chair.

**CHAIRPERSON**: Ja.

**MR KOKO**: And what was deducted – areas ...[intervenes]

10 **CHAIRPERSON**: Ja.

**MR KOKO**: Eskom would then do the coal qualities.

**CHAIRPERSON**: Ja.

**MR KOKO**: And the reason why.

**CHAIRPERSON**: Ja. Okay.

**MR KOKO**: It should have done that for all the R 2.3 billion. Eskom was privileged by Glencore and nobody wants to deal with that and I have a problem with that.

**CHAIRPERSON**: Ja, okay.

20 **ADV SELEKA SC**: Yes, thank you. Thank you, Chair. So, Mr Koko, your response to us raises a couple of things and we need to see how to deal with them. One, is that ...[intervenes]

**CHAIRPERSON**: I must say, Mr Seleka.

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

**CHAIRPERSON:** Keep an eye on what your plan was in the morning in terms of what you wanted to ask him.

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:** [laughs]

**ADV SELEKA SC:** I know that.

**CHAIRPERSON:** So... [laughs]

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:** But if you decide to deal with what has arisen from his evidence today in relation to what we were  
10 dealing with, that is fine.

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:** I am just saying. Do not forget what you ...[intervenes]

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:** ...planned to deal with.

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:** But it may well be that – time you could deal with that within ...[intervenes]

**ADV SELEKA SC:** Ja.

20 **CHAIRPERSON:** ...in terms of written questions and answers.

**ADV SELEKA SC:** Some of the penalties we can dispose of.

**CHAIRPERSON:** Ja.

**ADV SELEKA SC:** It is in the plan.

**CHAIRPERSON:** Ja.

**ADV SELEKA SC:** But let us deal with it whilst we are at it. Mr Koko, because we see from CDH's affidavit that they have referred to the period when the penalties were deducted and the period when the penalties were not deducted. And to the extent that you say deductions were affected, the point to Eskom not being able to calculate – to verify how the amount was arrived, which was duplicated, an amount of R 158 million. A little over  
10 R 158 million, which had been deducted from OCH... OCM.

But including in the two point one point seven – R 2.17 billion and it had to be taken out, ultimately. What do you say to that insofar as you are adamant that R 2.17 billion was due and payable when, in fact – and this is just the one component of it – there was a duplication of over R 158 million?

**MR KOKO:** Chair, let us get the facts right. Now we just have to be factual and talk to the facts and everything else will stand on its own. If you look at – if we are still on  
20 page...

**ADV SELEKA SC:** You can stay there because I will come to this – another paragraph of...

**MR KOKO:** Yes. But if you look at the page – Bundle 18, page 133.

**ADV SELEKA SC:** Page?

**CHAIRPERSON**: I am sorry.

**MR KOKO**: Bundle 18, page 133.

[Parties intervening each other – unclear]

**ADV SELEKA SC**: The same bundle?

**CHAIRPERSON**: [Indistinct]

**MR KOKO**: Same bundle, Chair. Same bundle.

**CHAIRPERSON**: Same bundle?

**MR KOKO**: Same bundle.

**CHAIRPERSON**: Okay.

10 **ADV SELEKA SC**: Same affidavit.

**CHAIRPERSON**: Okay, Mr Seleka, when Mr Koko has responded to the question that you have asked him. I want us to go back to that paragraph 3.4.3 that you said he had not read but let him answer your questions first.

**ADV SELEKA SC**: Yes.

**MR KOKO**: So, Chair, in page 133 it is a table and that table shows you the penalty – its evasiveness(?) index penalty. Right?

**CHAIRPERSON**: Okay. No, I thought I had the bundle  
20 that was required. So it is the 18(a) that I have just been given.

**ADV SELEKA SC**: Okay. Yes.

**CHAIRPERSON**: Is that the right bundle?

**ADV SELEKA SC**: That is the correct bundle.

**CHAIRPERSON**: And – I mean - affidavit. Page 125 and

page 126. Is that where I should be?

**MR KOKO**: Page 133, Chair.

**CHAIRPERSON**: 133?

**MR KOKO**: Yes, Chair.

**CHAIRPERSON**: Oh, that table. Ja, I have got it.

**MR KOKO**: Chair, the table on the first column at the top, it is Abrasiveness Index.

**CHAIRPERSON**: Ja, well, on mine it is not legible.

**MR KOKO**: It is not legible but I am just trying to lead  
10 you.

**CHAIRPERSON**: Ja, ja.

**MR KOKO**: It is ...[intervenes]

**CHAIRPERSON**: First column?

**MR KOKO**: First column is AI.

**CHAIRPERSON**: Ja, that is ...[intervenes]

**MR KOKO**: Abrasiveness Index.

**CHAIRPERSON**: Ja.

**MR KOKO**: And then the second one the ...[intervenes]

**CHAIRPERSON**: Hang on one second. Let me –  
20 Abrasiveness ...[intervenes]

**MR KOKO**: The second one ...[intervenes]

**CHAIRPERSON**: ...index. Second on?

**MR KOKO**: Is Calorific Value which is the heat content of coal.

**CHAIRPERSON**: What value?

**MR KOKO:** Calorific Value.

**CHAIRPERSON:** Calorific Value. Yes?

**MR KOKO:** That one is the ash content.

**CHAIRPERSON:** Ash?

**MR KOKO:** Content.

**CHAIRPERSON:** Ja?

**MR KOKO:** And the final one is the Fines.

**CHAIRPERSON:** Fines?

**MR KOKO:** Yes.

10 **CHAIRPERSON:** Okay.

**MR KOKO:** Okay total amount. The R 158 million – the last column, it is a summation of all their penalties.

**CHAIRPERSON:** Yes.

**MR KOKO:** The last column is Total.

**CHAIRPERSON:** Ja.

**MR KOKO:** Is the Abrasiveness Index plus the Calorific Value plus the Ash plus the Fines.

**CHAIRPERSON:** Yes. Okay.

20 **MR KOKO:** The Abrasiveness Index was dealt with in the settlement agreement that we have dealt with on April 12, 2011. You will remember the same document says barren ...[intervenes]

**CHAIRPERSON:** Ja.

**MR KOKO:** ...barren abrasiveness – the rest stays the same.

**CHAIRPERSON:** Yes.

**MR KOKO:** So the R 158 million that we – Mr Seleka is referring to includes the Abrasiveness Index which has no dispute(?) at all.

**CHAIRPERSON:** H'm?

**ADV SELEKA SC:** Yes but does that answer the question?  
EDH ...[intervenes]

**MR KOKO:** No, what I am saying to you, Mr Seleka ...[intervenes]

10 **ADV SELEKA SC:** Can I ...[intervenes]

**MR KOKO:** ...sharing(?) to R 158 million ...[intervenes]

**ADV SELEKA SC:** Let me finish.

**MR KOKO:** That is what I am simply telling you. You cannot refer to 158 because 158 ...[intervenes]

**CHAIRPERSON:** Hang on, hang on, Mr Koko ...[intervenes]

**MR KOKO:** ...index ...[intervenes]

**CHAIRPERSON:** Hang on, Mr Koko ...[intervenes]

**MR KOKO:** ...in dispute.

20 **CHAIRPERSON:** Hang on, hang on, Mr Koko.

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

**CHAIRPERSON:** Let us hear what Mr Seleka says.

**ADV SELEKA SC:** Yes. You see, the – Mr Moodley writes in his affidavit:

“On 8 March 2017...

And for the record, Chair, Eskom Bundle 14(d), page 927, paragraph 57.4.

“On 8 March 2017, Eskom Finance furnished us with various invoices for the period of March 2012 to February 2015 and advised us that they were unable to verify how the penalties for the penalised period in the amount of R 158 million had been calculated and/or what the formula for rationale for the calculation was...”

I am not saying that. I am reading from what they are saying and ...[intervenes]

**MR KOKO:** And Chair, I ...[intervenes]

**CHAIRPERSON:** Hang on, hang on, Mr Koko.

**ADV SELEKA SC:** Yes. And in the end result, Chair, it turns out that that amount was a double charge, was a duplication of what had already been deducted and it had to be taken out of ...[intervenes]

**MR KOKO:** Chair ...[intervenes]

20 **ADV SELEKA SC:** ...to be removed from the R 2.17 ...[intervenes]

**CHAIRPERSON:** Let him finish, Mr Koko.

**ADV SELEKA SC:** ...from the R 2.17 billion.

**CHAIRPERSON:** Yes, so ...[intervenes]

**ADV SELEKA SC:** So my question to Mr Koko is this.



**CHAIRPERSON:** Yes.

**ADV SELEKA SC:** If he was saying: We were entitled to R 2.17 billion. On what basis do you say so when there was this – just one aspect of that – being double charged of R 158 million?

**MR KOKO:** Chair.

**CHAIRPERSON:** Yes. Was that double charging, in the first place?

**MR KOKO:** I do not know.

10 **CHAIRPERSON:** You do not know?

**MR KOKO:** I do not know, Chair.

**CHAIRPERSON:** Okay alright.

**MR KOKO:** But surely, and this would be things that will be ventilated at the arbitrator. Optimum will come in and says you have double charged. The arbitrator says: I agree with you. On other issues, the arbitrator will say: I do not agree with you.

**CHAIRPERSON:** H'm, h'm.

20 **MR KOKO:** But this cannot be used as a reason why we should not go to arbitration.

**CHAIRPERSON:** H'm. Well, I thought Mr Seleka's question was not about going to arbitration but it was simple about whether you were right in what you said with regard to what 158 represents.

**MR KOKO:** No, no Chair ...[intervenes]

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

**MR KOKO:** ...the 158 represents, it is very clear.

**ADV SELEKA SC:** [Indistinct]...[intervenes]

[Parties intervening each other – unclear]

**MR KOKO:** It is very clear – was the person who was delegated to calculate it as calculated it and he is telling you ...[intervenes]

**CHAIRPERSON:** Yes.

**MR KOKO:** ...that on the basis of interpretation, this is  
10 the number.

**CHAIRPERSON:** Yes-no, but what I mean is. You have told me what you say R 158.3 million represents.

**MR KOKO:** Yes.

**CHAIRPERSON:** But I understand him to be saying, in effect, that cannot be the true picture because that is duplicated.

**MR KOKO:** No.

**ADV SELEKA SC:** No.

**CHAIRPERSON:** Okay.

20 **MR KOKO:** No, it was not ...[intervenes]

**ADV SELEKA SC:** No, no. Chair, you will remember this.

**CHAIRPERSON:** Ja?

**ADV SELEKA SC:** You will remember this. If you – well recount because that is the amount ...[intervenes]

**CHAIRPERSON:** Ja.

**ADV SELEKA SC:** ...Eskom gave to their lawyers, CDH of this ...[intervenes]

**CHAIRPERSON:** R 158 million.

**ADV SELEKA SC:** That is R 158 million.

**CHAIRPERSON:** As represented what?

**ADV SELEKA SC:** As representing part of the penalties – the penalties claim of R 2.17 billion.

**CHAIRPERSON:** Saying, in other words, we are entitled to claim this amount.

10 **ADV SELEKA SC:** Yes, correct.

**CHAIRPERSON:** Okay, okay.

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:** Okay.

**ADV SELEKA SC:** Now Mr Koko has said to you, many times: We were entitled to claim that amount of R 2.17 billion.

**CHAIRPERSON:** Yes?

**ADV SELEKA SC:** Yes. Now my question is. My question ...[intervenes]

20 **CHAIRPERSON:** But he says ...[intervenes]

**ADV SELEKA SC:** I am allowing you to process it, Chair.

**CHAIRPERSON:** Yes.

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:** As I understand him, he was saying – and this can be confusing – you are saying this amount of

R 158 million represents what had already been deducted.

**MR KOKO**: Exactly, Chair.

**CHAIRPERSON**: Yes.

**MR KOKO**: Exactly, Chair.

**CHAIRPERSON**: So if it had already been deducted, Eskom should not be pursuing ...[intervenes]

**MR KOKO**: A claim.

**CHAIRPERSON**: ...a claim against it.

**MR KOKO**: Exactly. And if it does, the arbitrator  
10 ...[intervenes]

**CHAIRPERSON**: That is wrong.

**MR KOKO**: You know.

**CHAIRPERSON**: Ja, okay.

**MR KOKO**: Yes.

**CHAIRPERSON**: Okay.

**ADV SELEKA SC**: Yes.

**CHAIRPERSON**: I think we are on the same page now.

**ADV SELEKA SC**: Ja, exact page.

**CHAIRPERSON**: Ja, ja.

20 **ADV SELEKA SC**: And the question is then. Why is he saying they were entitled to R 2.17 billion as a claim?

**MR KOKO**: Can I answer you, Chair?

**CHAIRPERSON**: Yes.

**ADV SELEKA SC**: When, in fact, the portion of it was this duplication.

**CHAIRPERSON:** Ja, then it is a question of whether  
R 158 million is included in the ...[intervenes]

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

**MR KOKO:** Chair ...[intervenes]

**CHAIRPERSON:** [Indistinct]...[intervenes]

**MR KOKO:** Chair, it is quite simple. The people who are  
delegated with the authority to calculate this claim have  
come to this Commission to testify that Eskom is entitled to  
two, one, seven.

10 **CHAIRPERSON:** H'm?

**MR KOKO:** And we are sitting with the same - with the  
affidavit in front of you, page 132. The person who is  
delegated says in this Commission Eskom could impose a  
further penalty in the total of two, one, seven as  
summarised in the spreadsheet, in the attached  
spreadsheet. So that is – what more can I say?

**CHAIRPERSON:** H'm, h'm. But basically, just to make  
sure that we are on – we understand one another. You are  
saying that is what they said, but you are saying, actually,  
20 insofar as they included this R 158.3 million ...[intervenes]

**MR KOKO:** They are wrong.

**CHAIRPERSON:** They were wrong?

**MR KOKO:** Yes.

**CHAIRPERSON:** Ja, okay.

**MR KOKO:** Yes.

**CHAIRPERSON**: Okay.

**MR KOKO**: But it is a different answer to say, were we entitled to two point one seven or not?

**CHAIRPERSON**: Yes, ja.

**MR KOKO**: We were entitled to it, we had already deducted it, and we cannot deduct it again.

**CHAIRPERSON**: Yes. No. I mean, I think, then you and Mr Seleka are on the same page because ...[intervenes]

**ADV BARRIE**: Chair?

10 **CHAIRPERSON**: Yes. Let me finish, Mr Barrie. If I misunderstand it, I just see it now. [laughs]

**ADV BARRIE**: Yes.

**CHAIRPERSON**: Because at least I think I understand what Mr Koko is saying. So to the extent that the amount of R 158.3 million represents an amount that had already been deducted by Eskom from the price of OCM for coal. Eskom was not entitled to include it in any claim that it would pursue. I think all three of us agreed on that. Now, before I come to you Mr Seleka to say: Okay what is the –  
20 what next after that understanding?

**ADV SELEKA SC**: Yes.

**CHAIRPERSON**: Let me hear from Mr Barrie, he wanted to say something?

**ADV BARRIE**: Yes, Chair. And it is question about whether Mr Koko and the Evidence Leader are on the same

page. What Mr Koko pointed out is that the R 158 million was the amount that was deducted. In other words, in that respect of that R 158 million, there would have been an obligation to, in terms of 3.4.3 of Addendum 3, to provide the calculation. But the real point is that...

He came to the conclusion that the real penalties that were payable was R 2.344 billion and that appears at the foot of page – and Mr Koko referred to that – of page 134. So on a recalculation, the real penalties payable  
 10 R 2.344 billion of that R 158 million was paid which leaves you with about R 2.15 billion or R 2.17 billion.

**CHAIRPERSON:** Oh, okay. So your understanding is that the amount of R 2.344 billion which appears at page 134 is incorrect if regard is had to the fact that R 158 million should be deducted from that?

**ADV BARRIE:** No, no that is not what - says.

**CHAIRPERSON:** Ja, he says ...[intervenes]

**ADV BARRIE:** He says he did the full calculation.

**CHAIRPERSON:** Ja.

20 **ADV BARRIE:** So that is, without taking into account, what was in fact ...[intervenes]

**CHAIRPERSON:** Yes, yes.

**ADV BARRIE:** That sum still has to be done.

**CHAIRPERSON:** Yes. Oh, okay.

**ADV BARRIE:** And we can do it here.

**CHAIRPERSON:** Okay, okay. So what ...[intervenes]

**ADV BARRIE:** I mean, that is what the developer says.  
That is how he spelt it out.

**CHAIRPERSON:** Ja, okay. But in the end, I think we are  
in agreement, therefore, that given that, Eskom would not  
be entitled to pursue a claim for R 2.344 billion.

**MR KOKO:** Correct, Chair.

**CHAIRPERSON:** It would have to deduct this  
R 158 million ...[intervenes]

10 **MR KOKO:** Correct, correct Chair.

**CHAIRPERSON:** Ja, okay alright.

**MR KOKO:** And if Eskom does that with the arbitrator, the  
arbitrator must just ...[intervenes]

**CHAIRPERSON:** Ja, ja, ja. Okay.

**ADV SELEKA SC:** Chair, may I just say something?

**CHAIRPERSON:** [laughs]

**ADV SELEKA SC:** Because I do not think it is  
proper...[intervenes]

**CHAIRPERSON:** Ja.

20 **ADV SELEKA SC:** ...that while a witness is testifying for  
counsel to try and explain the evidence before it.

**CHAIRPERSON:** Well, in this particular case  
...[intervenes]

**ADV SELEKA SC:** I am just commenting on that.

**CHAIRPERSON:** No, no, no. But in this particular case, I



think here is a question of understanding and I think it throws light.

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:** Under normal circumstances, no. But I think this is a question of understanding and ...[intervenes]

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:** ...I think it certainly has helped me.

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

**CHAIRPERSON:** Ja.

10 **ADV SELEKA SC:** Okay. Chair, it is inquisitorial(?) purposes(?) [Speaker unclear]

**CHAIRPERSON:** Ja.

**ADV SELEKA SC:** Chair has all the controls. Chair, what I – based on that understanding, Chair.

**CHAIRPERSON:** H'm?

**ADV SELEKA SC:** Then the impression - and I will it put it lighter – sought to be created – Mr Koko, then I am facing you, that you were entitled to R 2.17 billion as a penalty claim against Glencore for OCM, is incorrect.

20 **MR KOKO:** No, it is not.

**CHAIRPERSON:** No, just repeat that proposition, Mr Seleka.

**ADV SELEKA SC:** That the impression that he seeks to create that Eskom was entitled to pursue that claim of R 2.17 billion is incorrect.

**CHAIRPERSON:** Oh, okay.

**ADV SELEKA SC:** Because the claim would have had to be less by 158 point something million.

**CHAIRPERSON:** No, on that, I understand him to be saying ...[intervenes]

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

**CHAIRPERSON:** He says when you got - affidavit at the bottom of page 134.

**ADV SELEKA SC:** Yes.

10 **CHAIRPERSON:** You see ...[intervenes]

**ADV SELEKA SC:** Page?

**CHAIRPERSON:** Page 134.

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

**CHAIRPERSON:** You see that total of R 2.3 billion?

**ADV SELEKA SC:** I am there.

**CHAIRPERSON:** Ja, he is saying. If Eskom sought to claim this amount from OCM ...[intervenes]

**ADV SELEKA SC:** Yes.

20 **CHAIRPERSON:** ...it would have been wrong ...[intervenes]

**ADV SELEKA SC:** Exactly.

**CHAIRPERSON:** ...because before they could claim they needed to deduct the R 158.3 million.

**MR KOKO:** Thank you, Chair.

**CHAIRPERSON:** Then what you get out of that is

...[intervenes]

**MR KOKO**: Is two point one.

**CHAIRPERSON**: ...is what they were entitled to.

**MR KOKO**: Exactly, Chair.

**CHAIRPERSON**: That is what I understand him to be saying.

**ADV SELEKA SC**: Okay.

**MR KOKO**: And that is my wishes(?) to you Chair.

**CHAIRPERSON**: Yes.

10 **ADV SELEKA SC**: Let us assume that is the – what – says is the submission to you.

**CHAIRPERSON**: Ja, ja.

**ADV SELEKA SC**: But that is incorrect, Chair.

**CHAIRPERSON**: Ja.

**MR KOKO**: No, it is not.

**ADV SELEKA SC**: [laughs]

**CHAIRPERSON**: Okay, ja. Shall we deal it with it ...[intervenes]

**ADV SELEKA SC**: Yes because ...[intervenes]

20 **CHAIRPERSON**: What is wrong with that?

**ADV SELEKA SC**: What - show in his affidavit is that they did – and one has to read the paragraph before this table.

**CHAIRPERSON**: Ja.

**ADV SELEKA SC**: And what comes after that. Now, let us read this paragraph.

**CHAIRPERSON:** H'm?

**ADV SELEKA SC:** Because – and it emerges from Mr Moodley's affidavit that Eskom was battling to give the correct calculations of the amount.

**CHAIRPERSON:** H'm?

**ADV SELEKA SC:** His battling.

**CHAIRPERSON:** H'm?

**ADV SELEKA SC:** So he says then – let us read page 133 at the bottom of the page. He says"

10 "As indicated above, in 2015 the request to calculate the claim for the retrospective penalty which is commonly referred to as "the R 2.1 billion claim.

The following table reflects the differences between the penalty that was initially applied for per quality parameters and the revised penalty that would have been applied using the interpretation that was agreed with CDH in 2015.

20 The table below does not limit the total penalty to ton of delivered coal where the penalty amount exceeds the total invoice value. This is because the table is trying to illustrate the difference in penalty application per quality parameter for that which was originally applied when compared to that which should have been levied based on the revised

interpretation.”

And, Chair, you know, to emphasise that revised interpretation because you will see as he carries on in the next page:

“Therefore, the total penalty in the table below will appear to be greater under commonly referred to 2.1 billion penalty.”

So he has not said this is the claim which ...[intervenes]

**MR KOKO:** Chair, he has said so.

10 **CHAIRPERSON:** Hang on, Mr Koko, hang on, hang on.

**ADV SELEKA SC:** To the next page, Chair.

**CHAIRPERSON:** Ja.

**ADV SELEKA SC:** Page 135:

“In an attempt to understand the differences between the original calculation and the revised calculation we took a sample of four transactions.”

Now he is in the process of doing this and he is explaining to the Commission in his affidavit.

20 “The four grey shaded invoices in the table above were reviewed to determine the major differences in application of the original penalty and revised penalty calculations. The reasons for these major variances will need to be obtained from the applicable coal supply unit manager and coal supply manager presiding over this contract during the

period. The major reasons for the differences were found to be related to the following issues.”

And he gives the reasons for the differences and it might important:

“ Abrasive index..”

Which (a) the first bullet point.

“...from March 2012 till August 2013 was supplied at the base un-escalated, AI penalty price of addendum 2. The revised ...[intervenes]

10 **CHAIRPERSON**: Hang on, Mr Seleka.

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

**CHAIRPERSON**: I do not want us to spend too much time on this unless I know where it takes us in the end. Mr Koko says the correct claim would have been R2,3 billion minus the R158,3 million. Do you understand Mr Nagar to say something different and if so, what figure? And if we look at the difference between the figure that Mr Koko says and the figure that maybe Mr Nagar says, where does it take us, what difference does it make, in terms of what we  
20 are looking at?

**ADV SELEKA SC**: Yes, Chair, the ...[intervenes]

**CHAIRPERSON**: Because the – you remember that the correctness or otherwise of the claim is on its own neither here nor there. The whole question about the claim, as I understand it, is whether it was pursued for a certain

agenda.

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

**CHAIRPERSON:** And that agenda, if there is a difference of 1 million between Mr Nagar says was the correct amount and the amount that Mr Koko says, I am not sure if it would make a difference, but I just want us to keep an eye on where – on the issues.

**ADV SELEKA SC:** Yes. And, Chair, you come to that agenda, if I use that word, by seeing that there were  
 10 concerns raised by the amount or in respect of the amount which amount, as Mr Koko says, or which concerns were the same throughout but the adjustment only gets to be done must later when Glencore OCM is no longer in the picture. Chair, to accelerate it, Mr Sinhau(?) does not say 2.3 billion, look at page 139 and he will tell you what the potential claim was. Paragraph 7.8. 139, 7.8.

**CHAIRPERSON:** Ja.

**ADV SELEKA SC:** Because those tables are postulating to get to the right scenario of an amount. He says:

20 “On or around 13 March 2017 I was requested by Ms Daniels to sign a memo as finance support for the settlement of the penalty claim.”

Now that – the settle is at 577 million. He says:

“Upon review of the document there was no link in the memo to the potential total claim/value that was

due to Eskom.”

And there he gives you the potential claim. 1.1, if I round it off, R1.17 billion which ...[intervenes]

**CHAIRPERSON:** H’m?

**ADV SELEKA SC:** If I round it off, R1.17 billion which he repeats in ...[intervenes]

**CHAIRPERSON:** Where do you get 7?

**ADV SELEKA SC:** I round it off, Chair. It is 1.166.

**CHAIRPERSON:** Ja.

10 **ADV SELEKA SC:** He will repeat it again in paragraph ...[intervenes]

**CHAIRPERSON:** Well, it is 1,1 billion, is it not?

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

**CHAIRPERSON:** Ja.

**ADV SELEKA SC:** He will repeat it in paragraph 7.9.

**CHAIRPERSON:** Yes.

**ADV SELEKA SC:** And I read the last, last sentence there:

20 “I then signed as supported on 14 March 2017 in terms of ...[intervenes]

**CHAIRPERSON:** Well, I see before that he says:

“I was also uncomfortable...”:

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:**

“...to support the memo as I was not part of the



settlement negotiations and the memo did not refer to any of the calculations that we had performed.”

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:**

“On 13 March 2017 I sent an email to Ms Daniels attached as annexure SM 13 wherein I recommended a comment to be added to paragraph 1 under financial implications attached as annexure SN1 3A. The purpose of the comment was to provide context to the potential claim/value at hand and the potential value that was being given. The purpose was also to link the financial quantum in the document to the calculations that my team had performed. Ms Daniels replied to me on the following day being 14 March 2017 wherein she wanted clarity on the comment. She further indicated that she took Mr Singh through the document the previous day to finalise the matter on the same day, being 14 March 2017.”

**ADV SELEKA SC:** Then you will see in the next paragraph and Chair I will read the very last sentence.

**CHAIRPERSON:** Ja.

**ADV SELEKA SC:** Well, it may be important Chair will read the other ones because there he repeats this 158 million which was a duplication, already deducted, he says.

You see against:

“Already deducted for the period March 2012 to May 2015 and that the parties have set out the terms of the settlement agreement to be signed between the parties and make an order of the arbitration which I was requested to sign by Ms Daniels.”

But this is the one I wanted to bring to your attention:

10        “I then signed and supported on 14 March 2017 in terms of the calculations as described in the memo and to reflect the total amount of the claim of 1.17 billion.”

Now that is what he has referred to as the potential claim, so – and Chair, that is the one aspect of it, which...

**CHAIRPERSON:** So where does it take us, what is that?

**ADV SELEKA SC:** So the potential claim according to Ms Nihau (sic) is not what Mr Koko says it is.

**CHAIRPERSON:** Which is 2.1.

**ADV SELEKA SC:** No, 2.3 in that statement.

20        **CHAIRPERSON:** No, Mr Koko says from 2.3 billion you must deduct 158,3 million.

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:** So get to the correct claim.

**ADV SELEKA SC:** Yes?

**CHAIRPERSON:** That is what Mr Koko says.

**ADV SELEKA SC:** Yes, the 158 million but you

...[intervenes]

**CHAIRPERSON**: Ja, 158,3 million he says must be deducted from the R2,3 billion claim in order to arrive at the correct claim.

**ADV SELEKA SC**: Ja, well which claim is going to arrive at, Mr Koko?

**CHAIRPERSON**: 2.1. That is what he said. I did not do the calculations.

**ADV SELEKA SC**: No, it is not going to be 2.1.

10 **MR KOKO**: Chair, can I help you, Chair.

**CHAIRPERSON**: Yes.

**MR KOKO**: Otherwise you are going to sit here all night.

**CHAIRPERSON**: Yes.

**MR KOKO**: Because I do not even think Mr Seleka understands what he tries to make you understand. Let me do. Please go to bundle 15.

**CHAIRPERSON**: Ja.

**MR KOKO**: Bundle 15(a) page 138.

**CHAIRPERSON**: Is that (c) or (b)?

20 **MR KOKO**: (a).

**CHAIRPERSON**: (a)?

**MR KOKO**: Yes.

**CHAIRPERSON**: Just proceed, say what it says and then we will take it from there.

**MR KOKO**: Chair, I have given you a table in - it is my

main affidavit which I have been dying to talk to.

**CHAIRPERSON:** Yes.

**MR KOKO:** And it deal with the claim.

**CHAIRPERSON:** Ja.

**ADV SELEKA SC:** Page number?

**MR KOKO:** Page 138.

**CHAIRPERSON:** Ja, it is bundle 15(a) page 138. Yes.

**MR KOKO:** Chair, I am going to try to go through this quickly.

10 **CHAIRPERSON:** It starts at paragraph 490.

**MR KOKO:** 490, yes.

**CHAIRPERSON:** Yes, you say the heading:

“Value of Eskom’s penalty claim against  
OCM/Tegeta.”

**MR KOKO:** Yes.

**CHAIRPERSON:**

“Eskom’s R2,17 billion penalty claim was  
overstated.”

Ja, okay, continue.

20 **MR KOKO:**

“The fundamental point of difference between  
Eskom original penalty calculations and OCM  
calculations was a treatment of the size and  
parameter in the calculation of a penalty claim.”

Very important.

“How do we treat the sizing parameters in the calculations of the claim? I have summarised the difference in the table below.”

That has been confirmed by Mr Sinhau before the Commission. That is a number that Mr Seleka is talking about, the 1.17. And the point is, I am simply saying Mr Seleka is not putting that in proper context and I am trying to do that here and if Mr Seleka had read my affidavit he would have known that my position is not where he puts me  
10 in because is here.

**CHAIRPERSON:** Yes.

**MR KOKO:** So, if you go to the table, you will see I put ...[intervenes]

**CHAIRPERSON:** It says:

“Penalties deduced in the period March 2012 to May 2014 158,3 million.”

**MR KOKO:** Yes, but I make it two columns, I say penalties including sizing parameters, penalties including sizing and penalties excluding sizing.

20 **CHAIRPERSON:** Oh, okay, yes.

**MR KOKO:** I have got two columns.

**CHAIRPERSON:** Ja.

**MR KOKO:** Right.

**CHAIRPERSON:** Ja.

**MR KOKO:** So I am saying if you stay with the penalties

including sizing, the penalties in the period March 2012 I put it as:

“Penalties allegedly due but were not deducted between March 2012 and May 2014 is R1.4 billion including penalties.”

**CHAIRPERSON:** Yes.

**MR KOKO:** And it is 634 million excluding penalties.

**CHAIRPERSON:** Yes.

**MR KOKO:**

10 “Penalties due but were not deducted in the period June 2014 and May 2015 is 744 million versus 409 excluding penalties.”

You will see Mr Gert Opperman’s number is 720.

**CHAIRPERSON:** Ja.

**MR KOKO:** And then you will see I am saying the Eskom value of the penalty claim is 2.17 including penalties and ...[intervenes]

**CHAIRPERSON:** Including sizing.

**MR KOKO:** Including sizing.

20 **CHAIRPERSON:** Ja.

**MR KOKO:** and it is 1.2 excluding sizing and I put an asterisk there and say:

“In the Suzanne Daniels’ memo of 13 March”

Which Mr Seleka is referring to, that signed value is 1.17.

**CHAIRPERSON:** Ja.

**MR KOKO:** So you see whether we ...[intervenes]

**CHAIRPERSON:** That is where you stand, ja.

**MR KOKO:** Where the 1.17 raises what Mr Seleka is saying.

**CHAIRPERSON:** Ja.

**MR KOKO:** Right, so there is a proper context to that. It is simple, it is clear, do you include penalties?

**CHAIRPERSON:** Or do you exclude?

**MR KOKO:** Or do you exclude penalties.

10 **CHAIRPERSON:** Ja.

**MR KOKO:** If you exclude penalties the 2.17 becomes 1.17, it is as simple as that. Chair, I need to proceed.  
492:

“The Eskom finance in around March 2017  
recalculated the amount of the penalty claims  
...[intervenes]

**CHAIRPERSON:** Where are you reading from now?

**MR KOKO:** Paragraph 492.

**CHAIRPERSON:** 492, okay, ja.

20 “Eskom finance in around March 2017...”

Continue.

**MR KOKO:**

“...recalculated the amount of the penalties owing to  
Eskom to be 117 billion for March 2012 to May 2015  
and they stated that the basis of the calculation

could be verified but the interpretation is still in question. What was not in question at the time was that the penalties had been calculated to exclude the penalties relating to size in parameters.”

**CHAIRPERSON:** Now of course here you talk about penalties and penalties. The penalties, when you talk about excluding or including are the size in penalties.

**MR KOKO:** The size in parameters.

**CHAIRPERSON:** Because everything is penalties, ja.

10 **MR KOKO:** yes, yes, when you exclude the sizing then get to 1.17.

**CHAIRPERSON:** Yes.

**MR KOKO:** But, Chair, remember, there is no legitimate reason why you should exclude them.

**CHAIRPERSON:** Ja.

**MR KOKO:** There is no reason why they were excluded.

**CHAIRPERSON:** Ja.

**MR KOKO:** And this is what I am asking and begging your that your investigators should dig deeper into why the size  
20 in parameter were not – were excluded when the agreement ...[intervenes]

**CHAIRPERSON:** Includes them.

**MR KOKO:** Includes them.

**CHAIRPERSON:** Ja, okay.

**MR KOKO:** Chair, I need to conclude this because we are



on penalties now.

**CHAIRPERSON:** Ja.

**MR KOKO:** I am going to read maybe a bit further, paragraph 494, I am saying:

10           “The difficulty with the 1.17 billion that remained was that it included the 634 million of penalty claims that were allegedly due but were not deducted in March 2012 payments. The calculation of Eskom finance team were the effect that the penalty claims excluding sizing parameters in the period March 2012 were 792 million. Only one 158 million of that had been deducted.”

That is where the 158 comes from.

**CHAIRPERSON:** Ja.

**MR KOKO:** Chair, 494, the most important:

          “I could be given or find no cogent or valid reason why the penalty amount of 634 million was not deducted from the payment during the March ’12 and March ’14.”

20   I still cannot find a reason why.

**CHAIRPERSON:** Would that be the – would that be because of the suspension that you talked about?

**MR KOKO:** That is what they talked about, they say it was suspended.

**CHAIRPERSON:** Yes, ja.

**MR KOKO:** Yes.

**CHAIRPERSON:** Ja, so that if that suspension happened, this is the amount that was not deducted because of that.

**MR KOKO:** Yes, yes, excluding sizing parameters.

**CHAIRPERSON:** Sizing penalties were deducted.

**MR KOKO:** No, no, no, what I am saying, if you exclude sizing parameters the number is 634 million.

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

**MR KOKO:** If you including the sizing parameters to be  
10 1.4 billion.

**CHAIRPERSON:** Ja. Okay, alright.

**MR KOKO:** So when they say they suspended, they had no authority to suspend the penalties.

**CHAIRPERSON:** Ja.

**MR KOKO:** Chair, I just want to finish this. Paragraph  
496:

20 “Ms Daniels was running the arbitration proceedings regarding the OCM penalties in which Tegeta had become the respondent. I requested Ms Daniels and Mr Vusi Mboweni to try to find the necessary supporting documents in terms of which Eskom would establish its penalty claim of 634 million excluding sizing parameter for the period March 2012. CDH had in paragraph 1.6 of the MMK55...”

Which is a legal opinion, I have it open, I will take you to

it.

“...state that Eskom had no such document. I wanted to be assured in particular that Eskom had notified OCM of its failure to comply with the coal parties’ specifications of the calculations of the penalties or payments in the period March 2012/2016. This is a requirement of clause 9.6 of the contract...”

And that you will find in the MMK55, I will take you to and I  
10 write in paragraph 4.8 verbatim what 7 4.8 verbatim what 7  
9.6 say, Chair.

So wall what I am saying to you, on the basis of the advice given to me, we will find it in MK55, it is bundle 15. It is in 15(b), page 873.

**CHAIRPERSON:** Why do I have two 15(a)s, Mr Seleka?

**ADV SELEKA SC:** Chair, I would not ...[intervenes]

**CHAIRPERSON:** Oh, no, I am sorry, the one 18(a), not 15, ja. Okay, you want us to go to 15(a)?

**MR KOKO:** 15(a) page 873.

20 **CHAIRPERSON:** Okay.

**MR KOKO:** Yes. I sincerely apologise, Chair, 15(b).

**CHAIRPERSON:** 15(b)?

**MR KOKO:** 15(b) page 873.

**CHAIRPERSON:** I think you must take the 18 as well.  
15(b) what page?

**MR KOKO:** 873.

**CHAIRPERSON:** Yes.

**MR KOKO:** Chair, it is a memorandum from CDH directed to Ms Suzanne Daniels, it is dated 10 March 2017:

“Subject: Consideration for purpose of settlement discussions with Optimum Coal Mine.”

Chair, I refer you to paragraph 1.3.

“The issues of concern relating to the claim has always been, amongst others, the following.”

10 And this issues have – if you read the CDH legal advice, you will find the same issues in 2013, same issues in 2014, same 2015, they actually cut the paragraph. They even cut the footnote, cut and paste the footnote.

“Eskom compliance with all the contractual requirements in terms of the CSA and addenda. Process 9.6 and 3.4.3 of the first addendum to inform OCM on monthly basis of the failure to comply with the quality specification including such calculations of the penalty to be deducted from the  
20 month’s invoices.”

So you will see we have dealt with this before. You will see even the footnote is a cut and paste. So this memo was simply telling me that Mr Koko, you have not complied 3.4.3 of the first addendum and they did not mention anything about 3.4.2 of the first addendum and you did not

comply with 9.6 so you – and there no documentations and you have got difficulty in your claim and when you do that, Chair, and my paragraph on 15(a) 141, you will see I quote 9.6 verbatim and then I come to the figure of 577. Now 577, Chair, if you go back to page 198 on the same bundle, 15(a) and – Chair, that paragraph 490 becomes very important and that table...

**CHAIRPERSON:** Your affidavit, I think she has opened the CDH letter. 490, okay, I have got it, page 138.

10 **MR KOKO:** Right. So that table I tried to summarise in simple ways. So now I said to him) you have not deducted penalties since 2014. So I am going to be consistent with that so then I am going to be dealing with column B, it is the column on the right hand side, penalties without sizing.

**CHAIRPERSON:** Ja, excluding sizing parameters.

**MR KOKO:** Yes, right. And that is 1.17 Mr Seleka was talking about. So now I am saying penalties allegedly due but not ...[intervenes]

**CHAIRPERSON:** Sorry, you say 1.7?

20 **MR KOKO:** Chair, I have it as 1.2.

**CHAIRPERSON:** 1.2 that is what is in the table, ja.

**MR KOKO:** I have it as 1.2.

**CHAIRPERSON:** Ja.

**MR KOKO:** But you will see my footnote.

**CHAIRPERSON:** Yes.

**MR KOKO:** This is my calculations, Chair.

**CHAIRPERSON:** Ja.

**MR KOKO:** So they have the 1.17 and I could not find a reason of difference between my 1.2 and my 1.7.

**CHAIRPERSON:** Yes.

**MR KOKO:** But I did not want to be tied up to 1.7, Chair, cannot explain, so that is why I put the same numbers there. So if you say the penalties due were not deducted in March 2012 to 2013 is that 624 million excluding sizing  
10 and that is a value that is affected by clause 9.6 of the contract. So that is the value at risk that we could not motivate for. So I am going to put that to zero, I am going to assume I am going to lose that because of 9.6. The number that we are then left with, it is 577, that is where we settled on. That is how I signed off on the 577 million. I had no agenda, I was driven by the document before you – before me that I am sharing with you.

**CHAIRPERSON:** Mr Seleka?

**ADV SELEKA SC:** Thank you, Chair. That, Chair, has to  
20 be looked at against the memorandum provided by CDH which, Chair, we traversed during the evidence of Ms Suzanne Daniels because they do refer to those clauses including 3.4.3, not 2, but 3 which the Chair wanted to go back to in that agreement and that is the clause that deals with the monthly calculation of the amounts that you

notified.

**CHAIRPERSON:** Yes well maybe let us talk about what I wanted to raise namely what was the point you had in mind when you said Mr Koko had not read that part of the paragraph that is highlighted or that paragraph.

**ADV SELEKA SC:** Ja, I did not recall him reading it.

**CHAIRPERSON:** Yes, no.

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:** But what I was saying is what was the  
10 point about it, what was the significance of the paragraph, of the clause as you saw it.

**ADV SELEKA SC:** Yes. No, thank you, Chair, because it is exactly where we are now. Which is Eskom needed to comply still with that in order to provide OCM with how they will calculate the penalties and the information as set out in that clause on a monthly basis. It says monthly in arrears, so the end of the month after the coal is supplied. So that still retained the obligation on the part of Eskom to that exercise because what ...[intervenes]

20 **CHAIRPERSON:** And what was the effect of not doing that exercise?

**ADV SELEKA SC:** That is then what you see here in CDH's opinion to Eskom.

**CHAIRPERSON:** Which is?

**ADV SELEKA SC:** Which is that:

“Eskom’s compliance with all the contractual requirements in terms of the CSA and addenda and then they refer to clause 9.6 of the CSA and 3.4.3 of the second addendum to inform Optimum on a monthly basis of its failure to comply with the quality specification including such calculation of the penalty to be deduced on a monthly basis.”

They say:

10            “It is one of the factors to be noted that the enforcement of Eskom’s accrued rights by action or arbitration is subject.”

Now what ultimately happens Chair ...[intervenes]

**CHAIRPERSON:** I am sorry, what do they say is the effect of Eskom not doing this monthly?

**MR KOKO:** Exactly ...[intervenes]

**ADV SELEKA SC:** The advice they gave Eskom – the – well not the advice, the concern they raised with Eskom which is the concern the BTC also raised with those who came to BTC ...[intervenes]

20    **CHAIRPERSON:** H’m.

**ADV SELEKA SC:** Is that in Eskom failing to do that Eskom, or the executive seems to have waved the enforce – the entitlement to enforce...[intervene]

**MR KOKO:** But they are wrong.

**ADV SELEKA SC:** Whatever...[intervene]



**CHAIRPERSON:** Hang on Mr Koko.

**MR KOKO:** That line is wrong.

**CHAIRPERSON:** No, no hang on Mr Koko.

**ADV SELEKA SC:** Yeah, I am telling what to receive from the person that Eskom seems to have waived the entitlement to enforce those penalties.

**CHAIRPERSON:** Yes.

**ADV SELEKA SC:** They raised those concerns, Chairs.

**CHAIRPERSON:** So, to the extent that Eskom had waived  
10 what the claims for those penalties, failure to comply with those monthly - to advise Optimum coal colliery monthly in arrears of the manner in which such penalties would have been calculated. Were they saying that that failure, failure to do that amounted to a waiver of what?

**ADV SELEKA SC:** It seems to have been a waiver of Eskom's - either the entitlement or the intention to enforce those.

**CHAIRPERSON:** Well, how do they put it, do you have it there in your opinion, I am not sure where it is?

20 **ADV SELEKA SC:** The waiver issue was a concern of the BTC.

**CHAIRPERSON:** Ja, but the lawyers what do they say?

**ADV SELEKA SC:** The CDA says, and I am on the second opinion. It says:

“It should however, be noted that the enforcement

of Eskom's accrued rights are action arbitration is subject to the following.

One:

"Rectification of Clause 3.6 of the first addendum as Eskom and Optimum has opposing interpretations relating to the manner in which payment reduction should be calculated."

Two:

10 "Eskom's compliance with all the contractual requirements in terms of the CSA and addendum."

And I have read this one, Clause 9.6 of the CSA and 3.4.4 of the second addendum:

"To inform Optimum on a monthly basis of its failure to comply with the quality specification including such calculation of the penalty to be deducted from the monthly invoice."

And then three is the prescription of such portions of the plane, not state in time, but they raised this concerns, Chair. Ultimately...[intervene]

20 **CHAIRPERSON:** Whether do they advise their lawyers, they are being paid for this opinion, what was their legal advice of what it means what the effect is?

**ADV SELEKA SC:** Yes, the ultimate advice is in the fifth opinion, which Mr Koko was reading, in their advice and acting on Eskom's information received from Eskom is that

the amount that was claimed - that was not claimed for should be abandoned. That is what ultimately happened, then there was amounts regarding sizing specifications.

**CHAIRPERSON:** But let us, let us just stop there.

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:** That - what does that contribute to in the investigation of this because I understood the issue of the claim to be, to say Eskom was as against Glencore, Eskom was strict in its approach in demanding this high amount, 10 because there was a certain agenda namely to pressurise OCM to agree to sale to Tegeta. But when Glencore got out of the PHR and it was Tegeta the attitude changed on the part of Eskom and it as no longer so strict because Tegeta they had, it is part of whatever of the agenda. They did not want to enforce the whole claim against Tegeta that is why they settled on a very low amount compared to the amount they were pursuing against Tegeta.

**ADV SELEKA SC:** Yes, I have looked at it slightly differently Chair, on the first leg. On the first leg the way - 20 because I have tried to keep it to the facts is that despite the concerns raised by CDH, Eskom forced our heads to seek to enforce the 2.17billion against OCM.

Now, what is the reason? We can then speculate the ulterior motives I know that is what the Parliamentary Portfolio Committee has made a finding on, which is what

the Chairperson is saying to force OCM out. But I think what I have tried to restrict myself to is the evidence before the Chairperson, which is, here are the opinions that were given from 2013. They raised this concerns, why did you still forge ahead with the 2.17billion and only capitulate when you are now squaring off with Tegeta.

**CHAIRPERSON:** But you see, they could have forged ahead without an agenda, they could have forged ahead because maybe they do not agree with their lawyers, or  
10 they were taking their chances. So it becomes important to know whether we are looking at the issue of whether they were acting in pursuit of some agenda or whether it may have just been differences of approaches or differences of opinions or not agreeing with lawyers without an agenda.

**ADV SELEKA SC:** Yes, but if the Chair is done.

**CHAIRPERSON:** Ja.

**ADV SELEKA SC:** Chair, there is no evidence from any of the witnesses, that they did not agree with the lawyers.

**CHAIRPERSON:** That they did not?

20 **ADV SELEKA SC:** That they did not agree with the lawyers.

**CHAIRPERSON:** Yes.

**ADV SELEKA SC:** In fact, the lawyers were raising concerns saying give me information. You give me information so that I can verify the merits of your claim.

**CHAIRPERSON:** Yes.

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:** But then those who have come before, what have they said about - if they agreed with the lawyers concerns, what did they say?

**ADV SELEKA SC:** Well, we know from the evidence of Ms Daniels that this concerns, according to well, I led her, I do not know about those who were here in phase one that these – in her affidavit, that these concerns were raised  
10 with Mr Anoj Singh, Mr Brian Molefe. I think she also mentions Mr Koko...[intervene]

**CHAIRPERSON:** But remember, you are supposed to know that evidence in phase one is one of...[intervene]

**ADV SELEKA SC:** I think I am going drop dead Chair before, the amount of information is so staggering.

**ADV SELEKA SC:** No, but you remember, I said to you even if you come after other people, you need to know what happened before because you cannot divorce it from what you are dealing with.

20 **ADV SELEKA SC:** Yes, so her evidence is that they were shown this concerns but they did not heed the concerns.

**CHAIRPERSON:** Ja, but if they do not heed the concerns, provided there is no agenda. How does it get into what we are looking at?

**ADV SELEKA SC:** Well, the agenda is what you infer,

Chair.

**CHAIRPERSON:** Yes, no, but what I am saying is why do we – why must we bother to look to inquire into why they did not follow their lawyer's advice for our purposes.

**ADV SELEKA SC:** Yes, yeah I want to put it to Mr – because I am not I am not finish, I want to put it to Mr Koko let me hear what he has to say because that has not been put to him, Chair.

**CHAIRPERSON:** But before you put it to him I want to  
10 know whether we should spend time on it, that is my - whether we should spend time on it.

**ADV SELEKA SC:** Alright, let me say to the Chairperson, Chair...[intervene]

**CHAIRPERSON:** Let me say you see, on my understanding or as far as this Tegeta, OCM issues are concerned. If it was simply a commercial transaction between parties involved in business and whatever I am not interested in why Eskom personal did not agree with their lawyers, if it remains at that, it is none of the  
20 Commission's business.

But if there is an allegation, as I understand it - I understand there to be that Eskom in effect was assisting Tegeta to acquire OCM and using the penalty, the claim for penalties to try and put pressure on OCM/Glencore and make it difficult for them to continue operating so that they

would then sell to Tegeta, then I am interested.

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:** So when it comes to this issue then I am saying simply because the relevant people at Eskom might not have done what their lawyers said that on its own is neither here nor there for me unless it links up with the allegation that Eskom or Eskom personal where assist being in effect, Tegeta.

**ADV SELEKA SC:** Yes.

10 **CHAIRPERSON:** Otherwise, they can disagree with their lawyers as much as they want I am not interested but if that disagreement is not a genuine one, but it is because it is part of an agenda, then I am interested.

**ADV SELEKA SC:** Yes, Chair because that you only come to that conclusion if you add the second leg.

**CHAIRPERSON:** Yes.

**ADV SELEKA SC:** Which is what I want to canvass then with Mr Koko in the second leg is exactly when Tegeta comes into the picture.

20 **CHAIRPERSON:** Yes.

**ADV SELEKA SC:** This is - how do you then treat Tegeta differently from OCM? So that is what I want to put to Mr Koko and he well, as I say put – ask Mr Koko about and he can explain himself to the Chairperson, because we have not heard his explanation on that because the inference

arises only from second leg of it.

**CHAIRPERSON:** But there could be inconsistent treatment that is not connected to an agenda. There could be an inconsistent treatment, so the inconsistency could be connected with an agenda but it could also not be, it might not also be. So - but we are at 5 o'clock now.

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:** We - there is an evening session. I want to see whether Mr Pretorius is here. Oh, ja he is here, so  
10 we have to stop.

**MR KOKO:** Chair, I have not been asked to comment and I have got one-minute comment on what Mr Seleka has been saying, because after this we going to be told that we must write our responses.

**CHAIRPERSON:** Ja.

**MR KOKO:** Chair, I want to refer you back to Ms - I want to say to you, Eskom acted on advice from the very same CDH to terminate the cooperation agreement and the letter of demand was drafted by CDH, you saw that and the  
20 calculations was confirmed by CDH.

Chair if I can quote Rashavin[?] Moodley's affidavit he says in paragraph 45.5.6 on his advice on the 17<sup>th</sup> of March 2015:

"Should no agreement be reached between Eskom and OCM to stain prescription or Eskom not



institute proceedings every month it would forfeit R15million.”

So that is the motive, that is a motive but Chair I want also...[intervene]

**CHAIRPERSON:** Ja, but you referred to that part earlier as well.

**MR KOKO:** Yes, so Eskom stood to forfeit according to the advice of CDH R15million a month, if we did not terminate the cooperation agreement, institute arbitration  
10 proceedings and issue a letter of demand. But Chair on the 16<sup>th</sup> of March 2021, day 361 Ms Daniels was testified on this topic and she said to you, you asked and she says, Ms Daniels says on page 11:

“Mr Chairman, the issues were there from the beginning in terms of the basis of calculations of the claim. You will see from the opinion submitted attached on to Mr Moodley’s affidavit from CDH, that in 2015, there were already issues before the issuing of the summons, before the mention of the  
20 claim. I think even Mr Bester testified that there was - he was sceptical as to the amount. He raised the risks with Mr Molefe and they were ignored. I was not, there is some grammar issues there. I was not involved in the matter at that time, I recall being called into one meeting with myself, Mr Bester,

Advocate Tulanka[?] who was the head of legal at the time. Mr Moodley and we - they did explain, the three of them explained to Mr Molefe and Mr Koko, that, you know, these were the issues and notwithstanding that explanation from the three people involved in the matter, they were either meant to go ahead with the institution of the claim."

Mr Seleka then asked;

"Can you recall exactly when was that?"

10 Ms Daniels answers:

"The meeting was in 2015, I think it would have been around early 2015 because there was a meeting scheduled for Glencore around - about the same time."

Now Chair, I showed you a memorandum of Mr Tulanka[?] it is addendum 12, where Mr Tulanka[?] actually authorises contrary to Ms Daniels. When you asked Ms Daniels in December, and I looked for it but I could not find it but I know you asked her. You said to Ms Daniels, but Ms  
20 Daniels you knew of the opinions of CDH, why did you in December 2013 go and ask for another one, when you had it already?

She could not answer you, but what I want to tell you again, is that on the time that she says I was briefed by Mr Tulanka[?] I was on suspension. So I could not have

been briefed. So Mr Seleka cannot lie on her history of very quickness.

**CHAIRPERSON:** No, is not his favourite words. Mr Seleka do you want to say something otherwise, we will adjourn and then I think questions will have to be done in writing and then answers given.

**ADV SELEKA SC:** Yeah, well, I just wanted to correct the date of Ms Daniels request for an opinion. I think that was in 2015.

10 **MR KOKO:** 2015, December Chair.

**ADV SELEKA SC:** Yes, not '13.

**MR KOKO:** But when you asked her in 2015 December why did you...[intervene]

**CHAIRPERSON:** Hang on, Mr Koko, hang on, yes.

**ADV SELEKA SC:** Yeah, Chair that is what I wanted to correct, something else but I think the documents will speak for themselves.

**CHAIRPERSON:** Okay, alright. We are going to in terms of the way forward or as previously agreed, I think  
20 whatever questions we had for Mr Koko we will put them in writing, that will be sent to his legal team and then Mr Koko will then respond to those by way of an affidavit.

That is one, two also in terms of what we have agreed another affidavit may be submitted by Mr Koko's legal team, where they will clarify whatever issues Mr

Barry may have wish to clarify in re-examination, that is in order, Mr Barry?

**ADV BARRY SC:** As you please, Chairman that affidavit will to some extent be simply a repetition of the supplementary affidavit in many respects, but adding to it facts that have come out in these proceedings, and that have now come to the fore that we were not aware of at the time that that affidavit was presented.

So the point that I am simply making is there is  
10 going to be some repetition, but it will make logical sense in respect of being by way of reply to what has been raised in the questioning of Mr Koko.

**CHAIRPERSON:** Okay, alright. Let us fix some deadlines by when can you let them have your questions?

**ADV SELEKA SC:** Yes, and I wanted to explain to the Chairperson, because I know that Mr Koko has dealt with the issues in his affidavits. The questions that were arising were in relation to put in the version mainly of other witnesses, which he has sought to address in his affidavit.  
20 So I will have to look at his affidavit and see whether is he dealing with everything yeah – so it is not your key accounts from my side to send him questions when I know the themes are already addressed in his affidavit.

**CHAIRPERSON:** Okay, so how much time would you, need to.

**ADV SELEKA SC:** Chair, I am...[intervene]

**CHAIRPERSON:** Well, in terms of what you wanted to ask him today I guess, did you exhaust that?

**ADV SELEKA SC:** Well, the submissions 1.6billion it is not questions that he did not address in his affidavit.

**CHAIRPERSON:** Okay. So in terms of what you wanted him to deal with, he has dealt with.

**ADV SELEKA SC:** In his affidavit.

**CHAIRPERSON:** In his affidavit?

10 **ADV SELEKA SC:** Yes.

**CHAIRPERSON:** And in oral evidence?

**ADV SELEKA SC:** Not yet, we did not get to that.

**CHAIRPERSON:** But obviously, he stands by his affidavit.

**ADV SELEKA SC:** Yes, so as that should be the position.

**CHAIRPERSON:** Yes. Well, if there is something because he does not have to repeat everything that is in the affidavits, some of the things are non-controversial. So, whatever questions you want to ask would relate to what? Putting versions from other people because if those other  
20 people have put up affidavits, he would have been given those affidavits and he would have responded.

**ADV SELEKA SC:** Indeed.

**CHAIRPERSON:** So why would you need to?

**ADV SELEKA SC:** I mean, the type of questions, Chair we would ask which you would not find in his affidavit that

one we address, the reason for engaging the DMR particularly Mr Duo Repella in the emails, his explanation of the submission to the Board. I know his dealt with it in the affidavit the Board has a different view, I mean, one would have wanted to know from him.

**CHAIRPERSON:** Can we say you have until Wednesday, next week, that gives you eight days.

**ADV SELEKA SC:** It notionally gives me a – you know how I am strictly involved in other matters.

10 **CHAIRPERSON:** Ja, but I do not want them to be late with their response, you see because we are running out of time. So let me give you up to the end of the day on Wednesday to let them have it, if there is a serious problem you can request an extension but I really want - would like you to deal with that because remember, Mr Koko was here for the 10<sup>th</sup> day so he has been around.

So there should not be a lot that has not been canvassed and then, Mr Barry, can I then say you file your response, Mr Koko's affidavit on or before the 10<sup>th</sup> of June.

20 Is that is fine?

**ADV BARRY SC:** Yes, that should be fine, can we then assume Mr Chairman that Mr Koko does not have to appear here again? Because what needs to be avoided is this thing and then he testifies, then they go back to the same witnesses, because I just want to point out I intend to

retire at the end of 2023.

**CHAIRPERSON:** No, he will not appear, he will not come back to give oral evidence.

**ADV BARRY SC:** So very well, and then there is a further aspect about the procedure going on because while sitting here, I have heard of the Evidence Leaders say that they are going to argue this that and the other and then there is the issue in terms of the rules that if we want to put in a written submission you have to give us consent.

10 **CHAIRPERSON:** Yes, no, you may start working if you have not yet started already on written submissions.

**ADV BARRY SC:** Are we going to see the submissions that are going to be made to you by the Evidence Leaders?

**CHAIRPERSON:** Well, if they are going to make written submissions, there is no reason why you should not see them but I would not want you to wait for them. So what I would like is that you give us what your own submissions are, if and when there's become available, they should be made available and if necessary, you can supplement.

20 **ADV BARRY SC:** But from the perspective of the rules you give us leave to make submissions in writing.

**CHAIRPERSON:** Yes, yes, I am.

**ADV BARRY SC:** Because have that is the requirement.

**CHAIRPERSON:** I am, ja. So I would like to have that by 20 June, can you do that?

**ADV BARRY SC:** That makes it a bit difficult, but we will try our best.

**CHAIRPERSON:** You will try your best, thanks.

**ADV BARRY SC:** But it depends on how things obviously develop for you, in terms of when you have to bring these proceedings, the live proceedings to an end. Thank you, though, we will do our best to serve, sir.

**CHAIRPERSON:** Okay, alright, Mr Seleka you want to say something?

10 **ADV SELEKA SC:** Yeah, something unrelated is the – and I should have reminded the Chairperson about the application to cross examine Mr Koko.

**CHAIRPERSON:** Oh, yes the application, I completely forgot about that, that is the only part Mr Barry that I had forgotten. I must decide Eskom's application so if Mr Koko is to come back, it would only be if I granted that application, but it would not be out of the Commission's decision to say that the Commission wants him back.

**ADV BARRY SC:** Very well.

20 **CHAIRPERSON:** I am going to try and look at that application and make a decision in the next day or two.

**ADV BARRY SC:** Thank you, sir.

**CHAIRPERSON:** Ja, you are done Mr Seleka?

**ADV SELEKA SC:** I am done, Chair.

**CHAIRPERSON:** Thank you very much, Mr Koko, thank



you, Mr Barry and your instructing attorney. Thank you, Mr Seleka and your junior investigators, we will now adjourn the day session and then now we will resume after 15 minutes with the evening session.

We adjourn.

**INQUIRY ADJOURNS**

**INQUIRY RESUMES**

**CHAIRPERSON:** Good evening Mr Pretorius, good evening everybody.

10 **ADV PRETORIUS SC:** Evening Chair.

**CHAIRPERSON:** Good evening Mr Mahlobo.

**MR MAHLOBO:** Evening, evening Deputy Chief Justice and Dada Zondo.

**CHAIRPERSON:** Thank you. Yes.

**ADV PRETORIUS SC:** Chair before we begin with Mr Mahlobo Dorothy when she gave evidence placed on record three documents. The third was not admitted as an Exhibit so may I ask you to admit the transcript of her interview with the SSA investigators as YY12.3 it is at page 522.1 and  
20 following of SSA2(a).

**CHAIRPERSON:** What page of Bundle 2(a).

**ADV PRETORIUS SC:** 522.1

**CHAIRPERSON:** 522.1. This is her interview with?

**ADV PRETORIUS SC:** Yes.

**CHAIRPERSON:** With whom?

**ADV PRETORIUS SC:** With the SSA internal investigators.

**CHAIRPERSON:** Okay. It starts from 522.2 actually.

**ADV PRETORIUS SC:** 2.

**CHAIRPERSON:** Up to where? Is it up to the end – no it not up to the end. Well if you go.

**ADV PRETORIUS SC:** 5. – 522.98.

**CHAIRPERSON:** Oh okay. And that would be admitted as Exhibit?

**ADV PRETORIUS SC:** YY12.3.

10 **CHAIRPERSON:** The transcript of the interview between Dorothy and the SSA Investigators.

**ADV PRETORIUS SC:** Internal Investigators.

**CHAIRPERSON:** Internal Investigators which starts at page 533.2 and goes up to 522.98 will be admitted as Exhibit YY12.3.

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

**CHAIRPERSON:** Okay. Please administer the oath or affirmation.

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

20 **MR MAHLOBO:** My name is Mbangiseni David Mahlobo.

**CHAIRPERSON:** Oh okay I think start afresh because your mic was not working.

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

**MR MAHLOBO:** It is Mbangiseni David Mahlobo.

**REGISTRAR:** Do you have any objection to taking the

prescribed oath?

**MR MAHLOBO**: No objections.

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

**MR MAHLOBO**: I do.

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

10 **MR MAHLOBO**: So help me God.

**CHAIRPERSON**: Thank you. Okay.

**ADV PRETORIUS SC**: Thank you.

**CHAIRPERSON**: Thank you.

**ADV PRETORIUS SC**: Mr Mahlobo the purpose of your evidence this evening is to respond to evidence that has been led or will be led before the commission in relation to two issues.

20 Firstly is allegations concerning your involvement in the operational activities of the SSA and the second is allegations concerning deliveries of cash to you in relation to the operations of the SSA.

So if I may go to the first topic and invite you to look at the affidavit of Mr Y which appears in Bundle SSA02(a).

**CHAIRPERSON**: I guess Mr Mahlobo is represented by the same legal team as previously?

**ADV PRETORIUS SC:** Yes I understand so Chair.

**CHAIRPERSON:** Just to have that on record. Is that correct?

**ADV ADONIS:** Good evening Chair.

**CHAIRPERSON:** Good evening.

**ADV ADONIS:** That is correct Lehlohonolo Peter Adonis still representing.

**CHAIRPERSON:** Thank you.

**ADV ADONIS:** The witness. Thank you.

10 **CHAIRPERSON:** Thank you.

**ADV PRETORIUS SC:** If you go to Bundle 2(a) at page 101. And I would like to refer you to paragraphs 6.33 and 6.34. This is the affidavit of Mr Y. And if you go – he deals there with Operation Lock which involved a safe house and protection in regard to Mr Eugene De Kock. In paragraph 6.34 he says:

20                   “The reason for the Chief Directorate Special Operations assuming responsibility for Mr De Kock who was coded as Mr Lock apparently arose from concerns about his continued links to right wing groupings.”

We need not deal with that allegation but the next one is important.

                  “Minister Mahlobo was reported to have had close personal involvement with this

operation. Indeed Frank informed the investigation team that tensions arose between Ambassador Dlomo and Minister Mahlobo as a result of the Minister's continued access to Mr De Kock."

Do you have any comment?

**MR MAHLOBO:** Well thank you very much Chair DCJ Baba [?] and Mr Pretorius. The last time we interacted before I make this comment Chair.

10 I had made an appeal before and I am going to make it. There is something that I said we should – be careful to – not to do it wittingly or unwittingly.

The law does not allow anybody especially when it comes to issues of intelligence or counter intelligence. When it comes to covert operation that you can disclose any of a person. And whether you look at your National Strategic Intelligence Act – whether the Oversight Act is very clear. I will have preferred those who were assisting Mr Pretorius to declassify information Chair.

20 That they should not have used the name of the person that is being used here. But I do not want to get into – into those details. But I want to put it on record because it is illegal and the – later on if I am requested to – to give you specifics in law the law has not been changed. It has not been changed because even this commission itself it can

discuss any other matter or policy, irregularities but immediately you start to name people that were involved in operation is a big no.

And as I said when we were asked by the ANC and President to come here some of the blind spots I must raise them and I would prefer that going forward you can refer maybe to the project name because the name does not necessarily mean what it is written there it is a 00:10:02.

But if you are going to call people's names (speaking  
10 in vernacular) problem I will have a difficulty. But on the matter that is been raised on 6.34 I have responded even before here. The Minister has never been involved in operations. Inasmuch as in South Africa there is no law that precludes executive authorities Chair to deal with certain issues.

In this specific matter the answer it is a big no. There are some of the projects we know I will not get into their details I will never do that. There were certain instances where there were problems. And when there are  
20 problems, problems get to be raised to the Minister or they get to be raised to the President or they are raised by members of Joint Standing Committee on Intelligence.

The Ministries office only came in to assist where there was a problem but it never ran its operations. That is the answer I will give. But if someone Baba [?] started to

create an impression if you run an operation you are like a project manager we are full time running that.

This thing of people coming here and create an impression that someone was running this on a daily basis it is a big no. But on this one Mr Pretorius the answer is no but I know of this operation there were challenges and the office of the Ministry had to come in and do an intervention monitor that the disputes that were existed between the project manager and the asset I will not call their names and  
10 the asset they were resolved because there were big issues. They were even in the media. And to do monitoring and to do support by the office of the executive it is not illegal. That is my responsibility. But to say we ran the operation it is not true.

**ADV PRETORIUS SC:** Well the allegation is not that you ran the operation Mr Mahlobo the allegation is that you were reported to have had close personal involvement with this operation. Do I understand problems arose in the execution of this operation and you – and your office did become  
20 involved in sorting out those problems? Is that correct?

**MR MAHLOBO:** I think I need to help to Mr Pretorius so that we will not spend the whole day about things that we must avoid when you want me to help the commission.

**CHAIRPERSON:** What have you got there Mr Mahlobo?

**MR MAHLOBO:** Baba?

**CHAIRPERSON:** What have you got there?

**MR MAHLOBO:** No, no, no I just want to assist him because I do not want to – to get this thing to be long winded. I will make a reference Chair to the Intelligence Oversight Act 40 of 1994. You will go to Section 4 and it talks about access to intelligence information and documentation. And it says that when you handle information with security you must send that information within security guidelines. It also say that notwithstanding we shall not be obliged to disclose to  
10 the committee or any other committee the three things I said to you the name or identity of any person or body engaged in intelligence or counter intelligence activities.

ii. Any intelligence information or document in a form which could reveal the identity of any source of such intelligence information or document if that intelligence information or document was provided to such service under the express or implied assurance of confidentiality.

The third point any intelligence or counter intelligence method and they underline the word Baba Zondo method  
20 employed by the service of such disclosure would reveal or lead to the revelation of the name or the identity of any person or body engage intelligence or counter intelligence activities or the activities of the source of any intelligence information or document.

I want to put this thing of law on record then come to



this matter that as far as being discussing operations I am now allowed to do it but in this case I am assisting because Mr Pretorius when he started an allegation is being made – two allegations he said today he wants to deal with.

One allegation Minister for his office involved running operations. That is the theme for today. And then the second theme is us spending monies.

I have responded to 6.34 the answer we never handled this operation but there was an incident where there  
10 were problems and the office of the Ministry came in.

I am not going to talk about the issues of people fighting they saying this and this the law does not actually allow me to do that. But to help the commission for me it is suffice that we never ran this operation but for your record these are one of the intelligence operations that had challenges.

When there were challenges where the – an oversight responsibility to resolve them and how we did it the methodology I cannot discuss it here Bab Zondo.

20 But as I was saying I am not going to be saying whether I had tension with Mr Dlomo or not even speculations no. My answer we never ran this thing and there were challenges. My office came in and it is sufficient that we came in to be able to assist the project manager to resolve challenges.

**ADV PRETORIUS SC:** But that is precisely the question I put to you. Capable of a yes or no answer not at all covered by the provisions of the Intelligence Act.

**MR MAHLOBO:** Bab Zondo to assist this process if Mr Pretorius is going to have an attitude I can give one back.

**CHAIRPERSON:** No, no, no

**MR MAHLOBO:** He cannot speak to me like a child Bab [?].

**CHAIRPERSON:** No, no let us

**MR MAHLOBO:** I cannot allow it.

10 **CHAIRPERSON:** Let us carry on. Nobody wants to be in breach of the law but where the law is not going to be breached, it is important that answers be given to legitimate questions.

**MR MAHLOBO:** Well Bab [?] I agree.

**CHAIRPERSON:** Ja. Ja. Let us carry on on that basis.

**MR MAHLOBO:** But – but uncriticised.

**CHAIRPERSON:** Ja no, no.

**MR MAHLOBO:** Bab [?] I know intelligence.

**CHAIRPERSON:** Ja.

20 **MR MAHLOBO:** I am trained.

**CHAIRPERSON:** Yes. Okay let us – let us not...

**ADV PRETORIUS SC:** Let me put it – let me put one fact on record.

**CHAIRPERSON:** Ja.

**ADV PRETORIUS SC:** The evidence that has been given to

date including the evidence and pursuant to that operation Lock issues has been cleared with the SSA, has been declassified and we have clarity on what we can and we cannot put before you Chair and we have acted in accordance with that. So Mr Mahlobo you can rest assured that we are putting questions to you in accordance with evidence that has been cleared. Either expressly by the acting DG of the SSA or by way of reference to declassified documents. So I am going to give that assurance but I would  
10 like to make comment.

**MR MAHLOBO:** (Speaking over Mr Pretorius.)

**ADV PRETORIUS SC:** I would like to move on from there.

**MR MAHLOBO:** But I want to come in on the...

**CHAIRPERSON:** No let us finish first. Let him finish first. Mr Pretorius finish.

**ADV PRETORIUS SC:** The question that I put to you before your answer now to the Chair was a straightforward question. It was simply were – did you have a personal involvement with the operation and I understand your answer  
20 to be yes and you gave some explanation for it. That is sufficient for our purposes.

**MR MAHLOBO:** That is not my answer.

**CHAIRPERSON:** Okay alright.

**MR MAHLOBO:** You are putting an answer to me.

**CHAIRPERSON:** Okay you wanted to say something earlier.

**MR MAHLOBO**: Chairperson. I want to say something.

**CHAIRPERSON**: Ja.

**MR MAHLOBO**: You see Bab Zondo it is very unfortunate that matters of intelligence must come here but if there is criminality it must dealt here. Matters of intelligence are not discussed in this way. But let me help because there are certain things that Mr Pretorius might think he is putting them on record they are correct which they are not correct.

You know the last time I sat here I cooperated and  
10 assisted. There was one documents remaining. That document had transcript from Project Veza and I said I am not going to deal with this document. And ultimately where the law bear without were concluded probably I was misunderstood and never understood why I said I cannot deal with it.

One of the thing that I must very grateful to your office is that this appearance today very clear I was sent documentation on time. There was an indication what are the issues we are going to deal with. I am happy with that.  
20 And they indicated here because I could see we can go all over. They indicated there are only four witnesses that I must respond to.

In as much as Bab Zondo I had a reservation to do – to come here and respond to people who have not spoken. But I cooperated and I will do it.

But let me just help without taking too much of your time but it is an important matter. You know the issues of classification and declassification. One of the things some of these documents are here now. They have been sent to me and to my lawyers and if I am not disciplined, I will have leaked them.

Guess what? One of the thing that when you declassify you are not allowed by law in handling information or documentation to reveal the names of people. To reveal  
10 the methodology and to reveal certain things. You will see Bab Zondo here in the transcript itself even in some of the people's affidavits they have actually broken the doctrine in law of disclosing people's names and methodology.

This name that was mentioned at the beginning by my learned friend here Mr Pretorius was not supposed to happen. And I will show you even when we go along I am shocked that those who were responsible to do the declassification I thought maybe it is an omission but I could see that there is a commission.

20 One day here because someone wants to give a particular narrative the name that is being mentioned under Project Lock is mentioned by name. The law says you cannot. Then another person who says more or less a similar characteristics that intelligence once worked with him. No, no he is given a code name. What I am trying to

do is that in as much as you want answers I will give answers to the best of my ability. But I will disagree that the assurances that were given by SSA are correct.

One you do not even – I have not even been furnished let me use this word with the declassification certificate. Whoever declassified there are certain conditions you put a certificate. I have not been issued. The transcript that was supposed to deal with here today similarly they have names of people. Some they have chosen  
 10 deliberately not to put them. Guess what? They are here. They have been disclosed. What will happen as an advice is that in as much as they have given assurance that they have declassified information they have still made certain mistakes here. And I will want us when we handle this thing as my 00:24:09 leaders we avoid as far as possible getting into names, the methodology but ask difficult questions I am fine with that.

**ADV PRETORIUS SC:** Thank you.

**MR MAHLOBO:** And then – but bear with me Bab Zondo if I  
 20 answer the manner I answer it is because the answer is mine. For an example the point that Mr Pretorius was saying I had a personal involvement. We must not twist words. Here the allegation made to me I ran operations. What does it mean running operations? And the answer that I am saying put it on record it is a no.

But in this instance I am saying on record ...

**CHAIRPERSON:** Well in paragraph 634.

**MR MAHLOBO:** Ja.

**CHAIRPERSON:** The allegation was that you had a close personal involvement with the operation. I think that is what Mr Pretorius sought to establish whether you – what your comment is on that.

**MR MAHLOBO:** No the answer is no Bab Zondo.

**CHAIRPERSON:** Okay.

10 **MR MAHLOBO:** You see let us not use semantics. I know English. The allegation that are made by all these people that came here because I am responding to allegation even in the Rule 3.3 Notices. You ran operations.

**CHAIRPERSON:** Ja, no, no that might be maybe the overall ...

**MR MAHLOBO:** And you could see here it is being used s clarity which is English personal involvement. Then the next question what is the frequency of personal involvement?

**CHAIRPERSON:** Yes. Okay look let us – I mean we are all  
20 agreed that nobody wants to – the law to be breached number 1. Mr Pretorius has made the point that the legal team took the trouble to make sure that the SSA could check whether information would be disclosed that should not be disclosed. They might not have done their job properly as you see it from their side as well they have sought to try and

make sure that ...

**MR MAHLOBO**: They have not done a good job.

**CHAIRPERSON**: As far as possible the – the law is adhered to. But let us proceed and make progress.

**ADV PRETORIUS SC**: Thank you. Mr Mahlobo the question I have is not a difficult one. There may be difficult questions later but you have kindly agreed to answer those questions. What Mr Y said in his affidavit these are not our words they are the words of Mr Y.

10           “Minister Mahlobo was reported to have had  
              close personal involvement with this  
              operation.”

Now if I may conclude. Is that correct not correct? It has got nothing to do with running the operation it talks about an involvement that you had.

**MR MAHLOBO**: You know what Chairperson who is Mr Y? Mr Y is a person who is making an allegation here who was in Project Veza. He is not the person who dealt with me. How does he come and make this allegation and why should

20 I be entertaining that?

2. These people of Project Veza here Bab Tiyane [?] they told you Project Veza is incomplete. They told you that they got hearsays – they do not have evidence. They are still investigating. To let the responding to Mr Y who is actually not actually saying that I have a personal involvement as a



fact here and spend that time doing that.

**CHAIRPERSON:** But I thought you already said no that is not (talking over one another).

**MR MAHLOBO:** No but I am asking the kind of how questions are being asked because everybody who is making an allegation be that I had a direct contact with Mr Y Mr Y is putting this as a fact. Should the commission Bab Zondo be actually be attending to speculation?

**CHAIRPERSON:** No, no

10 **MR MAHLOBO:** Because I have given the answer.

**CHAIRPERSON:** No, no you see because you were Minister of State Security you know that environment more than we know it. The people – some of the people who have deposed to affidavits know that environment quite well I would imagine. Now if anybody has information that may be relevant to our investigation it is important that they give it to the commission before the – so that the commission can look at that information before the commission completes its work. Now it may be that they are involved in an  
20 investigation that has not been completed but that investigation might take much longer than the time – the time of the commission. If the information is relevant to the Terms of Reference of the commission and they think it is – it could help the commission it is legitimate for them to put it but it is important that you be given a chance to say but Y

never dealt with me so this is not the true position.

**MR MAHLOBO**: But let us - let us do this, so they tell  
...[intervenes]

**CHAIRPERSON**: Ja.

**MR MAHLOBO**: and have a smooth running.

**CHAIRPERSON**: H'm.

**MR MAHLOBO**: Who was Y? Y is the guy who never  
came to testify here. He was in the Project Team. He has  
comes here. He speaks about information about what  
10 other people said. Let us make an example because I can  
read.

“The reason for the CBSO assuming  
responsibility for Mr Something...

I will not call a name.

“...who was coded(?) as Lot(?), apparently  
rose from concern about his concerned(?) links  
to right-wing groupings.

Minister Mahlobo was reported to have a close  
personal involved with the operation.

20 Indeed, Frank informed the Investigation Team  
that terms and arose between Ambassador so  
and so and Minister Mahlobo as a result of  
Minister Mahlobo continued access to  
Mr De Kok...”

Those two sentences are not the same at all.

Why should we pay those team(?)? They are not the same. It does not talk about involvement. The person who is a third person who is actually going to come and testify tomorrow, has not made this allegation of my personal involvement. This person is talking about tension.

And then this kind of a funny(?) investigator makes that conclusion to become and actually speculate when there is no evidence. I will not waste the Commission's time and I will not be back(?) to that. I have  
 10 given the answer. We never ran this operation and only the time when there were challenges, the minister's office as part of oversight to deal with those disputes. That is all.

**CHAIRPERSON:** Mr Pretorius.

**ADV PRETORIUS SC:** So do I understand your answer correctly that yes the minister's office did get involved in order to sort out certain problems that arose in execution of the project?

**MR MAHLOBO:** That is the answer.

20 **ADV PRETORIUS SC:** And ...[intervenes]

**MR MAHLOBO:** Regarding this funny(?) feeling(?), Chair, of people who came here, they want us to speculate, follow each other, he said this, he said that. I will not do it.

**CHAIRPERSON:** Mr Pretorius.

**ADV PRETORIUS SC:** Let us on then to another

allegation which appears at page 106 of the same bundle.

There the allegation made by ...[intervenes]

**MR MAHLOBO**: Page?

**CHAIRPERSON**: 106.

**ADV PRETORIUS SC**: Yes, 106.

**MR MAHLOBO**: But this paragraph?

**ADV PRETORIUS SC**: Paragraph 6.48.

**MR MAHLOBO**: Okay. So I can see. I am there, Mr Pretorius. I can see.

10 **ADV PRETORIUS SC**: Yes. Now this deals with these allegations in this paragraph, deals with Project Tin Roof which related to an investigation into the alleged poisoning of the former President Zuma. The allegation is:

“Project Tin Roof was established in December 2014 at the insistence of Minister Mahlobo...”

I will pause there. Do you have any response to that allegation?

**MR MAHLOBO**: The allegation is false. If someone says  
20 insistence, Chair, what does it mean? It means you instructed people. There is no instruction that I gave. And if there was an instruction, the law is clear even if there financial implications but the answer, there was no insistence from me.

**ADV PRETORIUS SC**: Alright. The allegation continues

to the following effect that:

“Minister Mahlobo had Mahan Thuli removed  
from ...[intervenes]

**MR MAHLOBO**: Point of order, Chair. You have made a mistake, Advocate Pretorius. You cannot mention people's names.

**ADV PRETORIUS SC**: But... Oh.

**MR MAHLOBO**: No, no, no ...[intervenes]

**ADV PRETORIUS SC**: Please allow me to ask my  
10 question.

**MR MAHLOBO**: No, no, no.

**ADV PRETORIUS SC**: The Chair will stop me. This has been the subject matter of extensive evidence. It is also in the public domain.

**CHAIRPERSON**: Hang on, Mr Mahlobo. From what you have said and from what was said when the SSA investigation – evidence started here. In terms of name, I understood that the names could not be disclosed are those of people who are operatives within SSA. I hope I  
20 am using the right term. Who are ...[intervenes]

**ADV PRETORIUS SC**: Operatives or members.

**CHAIRPERSON**: That is what I understood to be the position and I was told that those names of such people would be replaced with pseudonym names and only those who were not – who do not fall within that category.

**MR MAHLOBO:** You see, Chair. The problem you have with Mr Pretorius. It is not your area of specialisation. And intelligence, like you know, there is no dispute that intelligence has been politicised as far as '95 until today. They will come here to do certain things, to portray certain people. I am saying to you.

There is a second head of judiciary in this country. Even people who are targets, you do not disclose their names. That is why I read the law(?). I am not  
10 opening... I might be – like, the last time I told you I am a scientist but I got trained on this thing. I worked on it for more than three years.

Let me tell you. This thing of disclosing this name even if the name has been in the public domain, but who are not allowed by law to actually do the wrong thing that others have done. I have a discomfort. You know now that disclosing names of people what kind of a risk you put to them.

Do you appreciate that they do even have  
20 families and enemies? This Commission cannot make the same error on the basis ...[intervenes]

**CHAIRPERSON:** Well ...[intervenes]

**MR MAHLOBO:** ...on the basis because that is why even when I gave the testimony in the beginning, I am quoting law.

**CHAIRPERSON:** Ja.

**MR MAHLOBO:** The very law ...[intervenes]

**CHAIRPERSON:** Let us go to the law. Let us go to the law. Insofar as it may say anything other than the categories of people that we understood were – should not be disclosed. Are you looking at it? Or if you have the section, Mr Mahlobo, you can mention the section.

**MR MAHLOBO:** I gave – no, see, Chair. When you are reading this thing, I gave you an example of intelligence  
10 oversight at 40 of 1994. I quoted for you Section 4 that access to intelligence information and documents. And I have read that part.

**CHAIRPERSON:** Ja.

**MR MAHLOBO:** But do not read that part only. Also read the National Strategy Intelligence Act 39 of 1994. And understand when you read it, even in the deformations in the act, what is counterintelligence, what is this thing called covert, covert intelligence because those issues of secrets. I am just saying let us just be careful because  
20 they view a one-sided approach.

**CHAIRPERSON:** No, no ...[intervenes]

**MR MAHLOBO:** We are not going to go and get another(?) opinion this afternoon. But if [speaking vernacular] because it is worth it because – discomfort.

**CHAIRPERSON:** But did you know whether the provision

that covers somebody who is not an official of SSA or somebody who is not an operative, have you – do you recall what provision it is so that we can look at it?

**ADV PRETORIUS SC:** Chair, the ...[intervenes]

**CHAIRPERSON:** Mr Pretorius, did you find anything?

**ADV PRETORIUS SC:** If I may just say? Section 4, which I understand is the section that Mr Mahlobo referred to, talks to about access to intelligence information and documents on the part of the JSCI. It is referred to the  
10 committee shell and deals with the circumstances under which the committee is entitled to documentation.

**CHAIRPERSON:** Ja, ja.

**ADV PRETORIUS SC:** It does not deal with the issue that you have raised about the names of operatives being subject to non-disclosure provisions.

**CHAIRPERSON:** H'm.

**ADV PRETORIUS SC:** Mahan Thuli is not a person covered by the legislation. It is quite simple.

**CHAIRPERSON:** H'm, h'm.

20 **MR MAHLOBO:** You see, Chair. I am dealing with ...[intervenes]

**ADV PRETORIUS SC:** And the fact, Chair, there are public statements made to the media by Mr Mahlobo concerning this issue.

**CHAIRPERSON:** H'm.



**MR MAHLOBO**: Chairperson, you know what?

**CHAIRPERSON**: H'm?

**MR MAHLOBO**: I do not want to be difficult. This pervasion of Mr Pretorius. I am saying to you, with confidence, is wrong and the advice – those who gave the advice from State Security, they know they are wrong.

**CHAIRPERSON**: H'm.

**MR MAHLOBO**: Number two ...[intervenes]

**ADV PRETORIUS SC**: Chair ...[intervenes]

10 **MR MAHLOBO**: Number two, Chair.

**CHAIRPERSON**: H'm?

**MR MAHLOBO**: Mr Pretorius must not throw statements and say Mr Mahlobo made statements in the public domain with the name that he is referring to. Every time I was asked about this matter, I will answer this matter, I have always refused to comment. But I am going to help you. I am going to answer it.

But I am going to answer it when you throw the name of a person and I sit here and I say I am okay. I took  
20 an oath. I took an oath. If you avoid(?) the name, I am going to answer. You can – because if - you cannot let someone decided to put their in public it makes it right.

**CHAIRPERSON**: H'm. Well, let us – let me check with your legal team. Do you know of any provision that prohibits the disclosure of a name other of somebody who

is not an operative or an official of SSA? If you do know tell me so we can look at that because certainly from the Commission's Legal Team and the Investigators, a lot of trouble has been taken to make sure that nothing that is done here is in breach of the law and some of the documents have been – declassification was sought to ensure that there was no problem and the acting DG, as I understand it, was involved in rearing some of the information or documents. Yes?

10 **ADV PRETORIUS SC:** Chair, can we cut this short?

**CHAIRPERSON:** Ja.

**ADV PRETORIUS SC:** The names involved are known by reference to evidence properly given already before the Commission.

**CHAIRPERSON:** Ja.

**ADV PRETORIUS SC:** I really do not think much can be gained by Mr Mahlobo becoming involved in an argument as to the provisions of the act.

**CHAIRPERSON:** Ja-no, that is fine. But let me hear what  
20 his – whether his legal representative has anything to say on this issue? Have you got anything to say?

**COUNSEL:** Yes, Chair. Although you have put me on the spot, obviously, a battle that I did not want to enter into.

**CHAIRPERSON:** Ja.

**COUNSEL:** There are a bit of legislations.

**CHAIRPERSON:** Ja.

**COUNSEL:** Chair, we have said them extensively in our affidavit.

**CHAIRPERSON:** Ja.

**COUNSEL:** Oh, and from the top of my head.

**CHAIRPERSON:** Ja.

**COUNSEL:** Other than what my client is really eluding to.

**CHAIRPERSON:** Ja.

**COUNSEL:** But I think I will take queue [No audible reply]

10 **CHAIRPERSON:** Ja.

**COUNSEL:** ...from what the Evidence Leader is saying, Chair.

**CHAIRPERSON:** Ja.

**COUNSEL:** Because it does not really change the price of cheese in China.

**CHAIRPERSON:** H'm.

**COUNSEL:** Just debating. It is just going to prolong us, otherwise. But Chair, I take note and we will address it in our closing for you.

20 **CHAIRPERSON:** Ja.

**COUNSEL:** The relevant provisions and our understanding of it.

**CHAIRPERSON:** Okay alright.

**COUNSEL:** Thank you.

**ADV PRETORIUS SC:** Let me put the question, Chair, in a

way that does not ...[intervenes]

**CHAIRPERSON:** Ja.

**ADV PRETORIUS SC:** ...raise the argument.

**CHAIRPERSON:** Okay.

**ADV PRETORIUS SC:** In relation to the alleged poisoning of former President Zuma, there was a suspect, okay? Did you have any involvement, Mr Mahlobo, in the removal of that suspect from Nkandla and the provision to that suspect of protection and maintenance?

10 **MR MAHLOBO:** That takes us forward, Mr Pretorius. Thanks for understanding my discomfort. I know this Intelligence Law. Firstly, I want to put it on record Chair that I never removed the suspect and it is incomprehensible that you can actually go [speaking vernacular] and remove someone's wife. I never issued that instruction but I ...[intervenes]

**ADV PRETORIUS SC:** ...in English what you have said in isiZulu.

**MR MAHLOBO:** My isiZulu [speaking vernacular]

20 **CHAIRPERSON:** [laughs] But Mr Pretorius needs the translation.

**MR MAHLOBO:** I will gather the words.

**CHAIRPERSON:** H'm?

**MR MAHLOBO:** I am saying Chair, I know that there was a suspect on a serious matter of National Security where

the Head of State was allegedly poisoned and in as much as you are dealing with Mr Y here, we are having other people who are making statements there because I do not want to be going this way, this way.

The answer here, Chair, is that, firstly there are certain things that I must deal with because it has been a matter I have always avoided to speak to. In as much Mr Pretorius, you can think I am quoted(?) there. The quotation is always no comment but today I can see you  
10 want a comment.

**ADV PRETORIUS SC:** Well, I ...[intervenes]

**MR MAHLOBO:** No, no, no let me answer. Today you want a comment. I am giving you my comment for the first time. Firstly, there is someone who has written an affidavit here that I refute, who creates an impression including this Project Versa report which Mr Y is speaking on what he hears. One, this operation was not an operation only for State Security. It was the Security Cluster Operation.

Because we must put these things on record so  
20 that people do not create impressions because they twist things. I know how operatives work. For your record, it was the Security Cluster Operations. The police and Intelligence were involved. The reason why they get involved because someone would ask: Is it – why do you get involved in family matters?

Any matter where foreign agencies are being alleged to be involved to any head of state, it is a National Security matter. And the – that is why it is on public record, Chair, that ultimately this matter in as much as I am not supposed to go into detail but because it is the same like the judges.

These matters of national interest, I will use discretion but be guided that I do not break the law. This matter, ultimately, we all know now, that a case was  
 10 opened but then there was a decline for prosecution. So that we can disabuse people who come here and create an impression that Intelligence just walk out. That is one.

Then minister's involvement. Minister Melwa(?) gave an instruction for the suspect to be removed. I have never given that but the operators who ran the operation, they ran the operation. Even if I had to give an instruction, Chair. How will I give an instruction to remove someone's wife? Where do you get that capacity? [speaking vernacular] It does matter.

20 And you want to create an impression, there is this young man called the minister has the capacity to come to your home and take your wife. The answer is yes. And let us not play to the gallery. Then the issue that is also on this point of an instruction to use monies. Any instruction to use money, Mr Pretorius, by the executive

authority if it is a directive must be in writing.

If I insist that you must carry that instruction that has financial implications and it is going to cause an unauthorised expenditure, that office has to write to me and say to me now that you have given this instruction, please note that this instruction has the following implications.

Then if I insist to proceed, you will write to National Treasury and the Auditor-General of South Africa.

10 This story that an instruction was given, including to say do these monies, it is a no. But I do know that a covert operation was run with respect to an allegation about the poisoning of a former president.

And there was no way Intelligence Services, if they have got information, they should not have run this thing. You know now when you are sitting(?)... Other countries' President has died. What happened to those countries? Because this is what we are dealing with... Why do you get involved in family matters? Why do you do  
20 this?

Probably, we should be able to lay the matter to rest. I am commenting for the first time. And I am also dealing with the same issue that has been raised by Myriam(?). Because these people who are dealing with Y, but Y is talking about things that gets told by other people.

And I am here to deal with Myriam. I was not going to come and deal with Y but when I deal with Y, I will deal with these people who gave me the summons to deal with because I do not want to be going back there because I know each allegation. I know what in each annexure is there. Thank you.

**CHAIRPERSON**: Right. If we may, Mr Mahlobo, deal with the delivery or the allegations regarding the delivery of cash separately?

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

**ADV PRETORIUS SC**: No, separately. I am not asking any questions about that now. If we could just concentrate, please, on the issue of Project Tin Roof. As I understand it, you say that that project was not established at your insistence?

**MR MAHLOBO**: That is correct.

**ADV PRETORIUS SC**: Alright.

**MR MAHLOBO**: You were saying something about cash. What was the issue of the cash?

20 **CHAIRPERSON**: He was saying ...[intervenes]

**ADV PRETORIUS SC**: No, I will say later. That will come later.

**MR MAHLOBO**: [No audible reply]

**CHAIRPERSON**: H'm.

**ADV PRETORIUS SC**: If I may just move on then, please,



to paragraph 6.5.2?

**MR MAHLOBO**: [No audible reply]

**ADV PRETORIUS SC**: 6.5.2 on page 107.

**MR MAHLOBO**: I am there.

**ADV PRETORIUS SC**: Pseudonym name is used there but the affidavit reads:

10                    “In 2015, pseudonym, a former SSA member  
                         was recruited by Minister Mahlobo to mitigate  
                         and resolve The Fees Must Fall Protest which  
                         had erupted across universities in South  
                         Africa...”

Do you have any comment on that allegation?

**MR MAHLOBO**: Well, Chairperson, you see one of the things that makes me uncomfortable. Some of the things you admit them here as evidence. You know when someone says you recruited someone, does not actually give you the details, does not give me the documentation to be responding to that.

20                    You know, this government, one of the biggest  
                         problems are about state capture, were these issues about recruitment. Where is Mahlobo saying here that I actually recruited someone? This is a document that I approved and signed?

**CHAIRPERSON**: But Mr Mahlobo, we will make better progress if what is being put to you as having been said by

a particular witness is untrue. You say no that is not true.

**MR MAHLOBO**: No, you are correct, Chair, we will do.

**CHAIRPERSON**: We will make progress.

**MR MAHLOBO**: But at the very same time it is wrong that everybody can come and say things and do not actually link you and then I must be answering this thing, yes, no, yes, no. The answer is no, Chair.

**CHAIRPERSON**: Ja, okay.

**MR MAHLOBO**: But I am saying to you. Is one of the  
10 things that this Commission gets criticism for.

**CHAIRPERSON**: H'm?

**MR MAHLOBO**: Anybody can come, you drop someone's name, you do not put any ounce of evidence. We must follow that thing. No.

**CHAIRPERSON**: Ja. Let us continue.

**ADV PRETORIUS SC**: Well, his evidence is contained in a lengthy affidavit and as confirmed by another witness and it was a product of an investigation conducted internally in the SSA. But simply, Mr Mahlobo, if I may put to you the  
20 allegation? Did you recruit a former SSA member to mitigate and resolve The Fees Must Fall Protests?

**MR MAHLOBO**: Let me respond in two ways. There is no evidence you have. I have read the affidavits. Recruitment you advertise. You interview people. You actually sign documents. There is no document that says I

have done that. And the – I do not want people to actually have a situation where you say you have evidence. You can you have an allegation but there is no evidence. The documents that you have given to me, there are no documents that ...[intervenes]

**CHAIRPERSON**: Yes but ...[intervenes]

**MR MAHLOBO**: ...minister signed.

**CHAIRPERSON**: But Mr Mahlobo, you are saying recruit means what you have said. I do not know that necessarily  
10 because if – depending on the situation, you can recruit somebody into a particular, you know, group of people without any documents. So when it says recruit, you might say recruit in this context would involved paperwork that there are situations where somebody can be recruited without paperwork. So ...[intervenes]

**MR MAHLOBO**: Chairperson ...[intervenes]

**CHAIRPERSON**: So I am simply saying. I do not think it is enough to say when it is said. Somebody says you recruited so and so, to say: Well, I should not answer it  
20 unless he can put up documents ...[intervenes]

**MR MAHLOBO**: It is not ...[intervenes]

**CHAIRPERSON**: ...because this is an inquiry. So somebody can say something and you say: Do you know it? And you say whatever and we ask somebody else. We try and get more information.

**MR MAHLOBO:** You, see [speaking vernacular].

**CHAIRPERSON:** H'm?

**MR MAHLOBO:** I am responding to Mr Pretorius. He says he has evidence. I know the word evidence what it means.

**CHAIRPERSON:** H'm?

**MR MAHLOBO:** It means – you start to say: I have read these affidavits. I have read all these annexures.

**CHAIRPERSON:** Well, may to the extent that he may have said there is evidence, he might mean and he may be  
10 meaning simply an affidavit because an affidavit is under oath. You know, that is evidence. If you want – if you talk about proof, documentary proof that might be something else but once something is under oath but – that is evidence but whether you want proof to support that, that is something else.

**MR MAHLOBO:** But evidence, Chair, you will agree ...[intervenes]

**CHAIRPERSON:** Ja.

**MR MAHLOBO:** ...they have adjudicated on many matters  
20 in our land(?)

**CHAIRPERSON:** H'm.

**MR MAHLOBO:** You do not put a speculation. If you say something has happened, even if an affidavit ...[intervenes]

**CHAIRPERSON:** No, if you have personal knowledge of it, that is evidence. If I say Mr Mahlobo was at the

Commission on Wednesday evening and I saw him, I do not have to go and check whether he signed when he came in. I saw you, you see?

**MR MAHLOBO**: We differ, Chair, on that one.

[laughs]

**MR MAHLOBO**: Let us agree to differ.

**CHAIRPERSON**: Ja.

**MR MAHLOBO**: *Here I am recruited my niece's(?) government.* [Speaker is unclear]

10 **CHAIRPERSON**: But that is what I am saying, to say if you talk about – if you say recruitment in this context would include paperwork, that is different.

**MR MAHLOBO**: This person, Chair. You know, this thing, if certain people come here – I do listen to the Commission when I find time.

**CHAIRPERSON**: H', h'm.

**MR MAHLOBO**: And very interestingly what people come and say here when it is convenient and sometimes I must comment you, sometimes you put to say a bit – but really,  
20 really how, where and how. But sometimes you guys leave them. Here, this person was an employee. If an employee is being recruited by the minister, there will be paperwork.

And the – what I am disputing that there is a paperwork of this recruitment of this person for this memo that bears my authorisation. That is what recruitment

means because this is a state. I am not recruiting what you would call it – let me use this word.

I am not recruiting an operative for a spy because if it is for a covert operation, there are also rules around the OD's, which is the Operational Directives, I approve. How to do them. If we are going to be use the – but not within what is prescribed in law ...[intervenes]

**CHAIRPERSON:** Well ...[intervenes]

**MR MAHLOBO:** ...we will have a disagreement.

10 **CHAIRPERSON:** Yes. Did you ask – let us leave out recruit, did you ask, instruct or advise from SSA member to mitigate and resolve the Fees must Fall protest?

**MR MAHLOBO:** I never did an instruction but there was a covert operation, as you remember in terms of the National Intelligence as emailed. Remember the situation at the time. I checked my affidavit because my affidavit must just also not be ignored as if I have responded to some of these issues but there is no instruction given here.

**CHAIRPERSON:** Okay.

20 **ADV PRETORIUS SC:** Alright. Did you have any involvement in the Fees Must Fall project?

**MR MAHLOBO:** What do you mean?

**ADV PRETORIUS SC:** Did you direct – firstly, did you recruit whether formally or informally whether through process or in the absence of process anyone to act as part

of the project in relation to the Fees Must Fall protests?

**MR MAHLOBO:** Your records, Mr Pretorius, will tell you I was not a project manager, I was not running this project.

**ADV PRETORIUS SC:** No, I did not ask that.

**MR MAHLOBO:** No, no, no, this is my answer I am giving you.

**ADV PRETORIUS SC:** Right, I am listening.

**MR MAHLOBO:** That is my answer.

**ADV PRETORIUS SC:** So your answer is that you were not  
10 project manager?

**MR MAHLOBO:** I am saying you have evidence, I am not a project manager, I never ran this thing.

**ADV PRETORIUS SC:** Yes. But, with respect, Mr Mahlobo, that is not an answer to the question, so let us try and move on, the question did you ...[intervenes]

**MR MAHLOBO:** Well, if you do not like my answer ...[intervenes]

**ADV PRETORIUS SC:** No, no, let me finish please.

**CHAIRPERSON:** Hang on, Mr Mahlobo, let Mr...

20 **ADV PRETORIUS SC:** Did you have any involvement whatsoever in the operation of the Fees Must Fall project?

**MR MAHLOBO:** I have said to you no.

**ADV PRETORIUS SC:** That at least - we have clarity. I may move on then, Chair. Chair, I want to put two things on record, if I may?

**CHAIRPERSON:** Let me hear first what he says.

**UNKNOWN COUNSEL:** Okay. Chair, I was going to seek an indulgence from my colleague and yourself, it will take about five minutes, I need to confer something with my client.

**CHAIRPERSON:** Oh, a break.

**UNKNOWN COUNSEL:** Which might also assist the Commission in how we run effectively and efficiently.

**CHAIRPERSON:** Okay, Mr Pretorius?

10 **ADV PRETORIUS SC:** May I just put two things on record quickly just for process reasons, Chair.

**CHAIRPERSON:** Ja.

**ADV PRETORIUS SC:** We have checked with the investigators that express permission was given by the SSA to mention the name of De Kock. That is the first one.

**CHAIRPERSON:** Ja.

**ADV PRETORIUS SC:** The second is that the relevant section I think my learned friend may have been referring to, I am not sure, is in the Intelligence Services Act, not  
20 the Oversight Act, not the Intelligence Services Oversight Act but the Intelligence Services Act, that Section 10.4 reads:

“The Director General must as far as is reasonably practical take steps to ensure that:

(a) National Security Intelligence, intelligence



collection methods, sources of information and the identity of members of the agency are protected from unauthorised disclosure.”

That is the section.

**CHAIRPERSON:** Okay, alright. Let us take a ten minutes adjournment ...[intervenes]

**MR MAHLOBO:** Chairman, before you take the break, that is not the section I was referring to, please put it on record. I have my notes here, I know what I ...[intervenes]

10 **CHAIRPERSON:** I think he was referring to your lawyer, this is learned friend.

**MR MAHLOBO:** No, no, no.

**CHAIRPERSON:** Ja?

**MR MAHLOBO:** He is saying the section because I have all these sections here.

**CHAIRPERSON:** You say you were referring to another section.

**MR MAHLOBO:** And these sections, you do not read them in isolation.

20 **CHAIRPERSON:** Ja. No, that is fine, ja.

**MR MAHLOBO:** But I am not here to give a lecture how they work. During our tea time let me find that we do that.

**CHAIRPERSON:** Let us take a ten minutes adjournment as requested by your counsel.

**UNKNOWN COUNSEL:** Thank you, Chair.

**CHAIRPERSON:** We adjourn.

**INQUIRY ADJOURNS**

**INQUIRY RESUMES**

**CHAIRPERSON:** Okay, let us continue.

**ADV PRETORIUS SC:** Thank you, Chair. For the sake of completeness, I did mention earlier that the section placed on record by Mr Mahlobo as Section 4 of the Intelligence Services Oversight Act deals expressly with what the parliamentary committee is entitled to and not entitled to, it  
10 does not deal with the issue germane to this evidence.

If I may then go on, Mr Mahlobo, and refer to page 111 of the same bundle at paragraph 7.1 and 7.2. Certain general observations are made there by Mr Y and if I may just put them to you. They read as follows:

“In May 2014 Mr David Mahlobo was appointed as the Minister of State Security. In the period that followed the office of the DG became involved in covert operations purported to be the “President’s Project” allegedly pursuant to a directive from  
20 Minister Mahlobo.”

Do you have any comment on that? Is that a correct allegation or an incorrect allegation?

**MR MAHLOBO:** What was the allegation?

**ADV PRETORIUS SC:** The allegation is that the office of the DG became involved in covert operations purported to

be the “President’s Project” allegedly pursuant to a directive from Minister Mahlobo, is that correct or it incorrect?

**MR MAHLOBO:** There is no directive from Mr Mahlobo.

**ADV PRETORIUS SC:** Right. Then the second paragraph reads:

10 “During his tenure as Minister of State Security, Mr Mahlobo became directly in operational matters. He instructed and approved the utilisation of retained...”

Well, let us deal with the first question first. That is a general question and you have dealt with it at your last session of evidence and I am not going to go back there, but it is the second part of that paragraph that I would like to put to you. It reads:

“He instructed and approved the utilisation of retained earnings to fund CDSO projects including projects he was personally involved in.”

20 Now let us break that up to make it easier, Mr Mahlobo. Did you ever instruct and approve the utilisation of retained earnings to fund CDSO projects?

**MR MAHLOBO:** Well, Chair, to assist. This evidence was led before, if you recall the last appearance on the 9<sup>th</sup> and even on the 9<sup>th</sup> the documents you read yourself, there is

no document that say I have given instruction. The only issues that you have in your documents is budget adjustment that you actually saw that you have led evidence before.

**ADV PRETORIUS SC:** Mr Mahlobo, the question is not whether there is written evidence confirming the allegation, the question is whether the allegation is correct or not, did you ever instruct or approve the utilisation of retained earnings to fund CDSO projects?

10 **MR MAHLOBO:** Chairperson, I have answer this question before and the answer remains no.

**ADV PRETORIUS SC:** Okay.

**MR MAHLOBO:** And it should not only be a no because if we lead this evidence, let us not create as if these matters we have not gone before them. You saw where only the Minister signed on an appropriation of budget in terms of the law.

**ADV PRETORIUS SC:** Let us move on to another – and we may come back to that issue in a little more detail  
20 under another head but let us move on, if we may, to another document and you will find that in SSA bundle 2B at page 1164.

**MR MAHLOBO:** Where are we going? Page?

**CHAIRPERSON:** Bundle ...[intervenes]

**ADV PRETORIUS SC:** SSA 2(b) Chair.

**CHAIRPERSON:** Ja, 2(b) and page?

**ADV PRETORIUS SC:** 1164.

**CHAIRPERSON:** Under what? Bundle 2(b)?

**ADV PRETORIUS SC:** YY17. This is the affidavit Sonto Gladys Kudjoe.

**MR MAHLOBO:** On page?

**ADV PRETORIUS SC:** And I want to take you to page 1164 please. And the allegations made by her relevant to the question that I wish to put to you are contained in  
10 paragraph 58 to 61 and I will read them paragraph by paragraph and you can then say whether the allegations are correct or not. Paragraph 58 reads:

“It is imperative that not only was there a sabotage or defiance by the Chief Financial Officer pertaining to the control measures that I had put in place but I experienced direct interference from my political head who had oversight authority on SAA. In this regards the then Minister would instruct the Chief Financial Officer directly in the process bypassing  
20 me.”

The question that I would like to put ot you, Mr Mahlobo, is during your tenure as minister, did you ever give direct instructions to the Chief Financial Officer and ...[intervenes]

**MR MAHLOBO:** The answer is no.

**ADV PRETORIUS SC:** Sorry?

**CHAIRPERSON:** The answer is no.

**ADV PRETORIUS SC:** Oh, I did not hear that, I am sorry.

**CHAIRPERSON:** Ja, there was some noise that happened while he was giving the answer but he said the answer is no.

**ADV PRETORIUS SC:** Right. Then in paragraph 59 the allegation is made as follows:

10           “The former minister would seeks funds from the  
Chief Financial Officer claiming to be running his  
operations. This would be under the guise of  
special operations.”

Did you ever seek funds from the CFO for any operations  
whether they were your operations or not?

**MR MAHLOBO:** The answer is no, Chair.

**ADV PRETORIUS SC:** Right.

**MR MAHLOBO:** There is a process on how funds must be  
run there and if you seek funds.

20           **ADV PRETORIUS SC:** The allegation continues in relation  
to the point that you have just raised:

“I must now pause to mention that these operations  
would not be in respect of projects that had been  
approved and funded in terms of the measures set  
out in the standard operation on procedures. In a  
nutshell, this was undermining my authority and

sabotaging the steps I had put in place to ensure compliance with internal governance leading to complete breakdown of working relations with the former minister.”

Now we can break those allegations up but I would understand from your former answer that it would not be necessary to do so, are those allegations correct or not?

**MR MAHLOBO:** Remember, I have answered the first one, that the rest becomes moot.

10 **ADV PRETORIUS SC:** Yes but I take it you confirm that they are incorrect?

**MR MAHLOBO:** Ja.

**ADV PRETORIUS SC:** Right. Paragraph 60 says:

“As I have already alluded to in paragraph 28 above I must emphasise that the interference by the executive authority on:”

And it reads on:

20 “The operations of SSA was in direct conflict with key policy issues pertaining to division of and responsibility as could be found at paragraph 5.1 of the PFMA. Clearly the former minister acted outside his mandate as the executive authority.”

I take it that comment is superfluous in relation to questions I ask you because you say that never happened.

**MR MAHLOBO:** Yes.

**ADV PRETORIUS SC:** Right. Paragraph 61:

“The issue of accountability for covert operations was a problem and how decisions were taken to allocate resources to different structures were sometimes compromised. Many members owed SSA a lot of money and there were consequences for their unaccountability hence the review of OD04, remuneration of agents and contracts and OD09, covert operations to tighten accountability.”

10 There is no direct allegation against you there so I am going to move on.

**MR MAHLOBO:** No, I want to comment.

**ADV PRETORIUS SC:** If you wish, yes.

**MR MAHLOBO:** Through you, Chair. If you read in my affidavit, I will not be able to refer now, that when I came to SSA there were challenges, nobody can dispute that, but whose responsibility to discipline members below senior management? It is the responsibility of the accounting office. Thank you, Chair.

20 **CHAIRPERSON:** Mr Pretorius?

**ADV PRETORIUS SC:** If I may ask you to comment on the allegation in paragraph 69, which appears at page 1167.

**MR MAHLOBO:** On page 69?

**ADV PRETORIUS SC:** Paragraph 69, page 1167.

**MR MAHLOBO:** Well, I would not comment, Chair,



because as we led the evidence before, we indicated in terms of what the operational directives, the one that the Minister approved, says how projects are conceptualised and how projects are approved. I will not confirm because this is not in my ambit to approve or not to approve. If that person says so, they will give you supporting information or documents whether they are approved or not, it is not in ...[intervenes]

**ADV PRETORIUS SC:** May I ask the question that I  
 10 intended to ask? The question I would like to ask you arising out of what is said in paragraph 69 is do you agree with the proposition that accessing retained earnings for current expenditure was contrary to Treasury regulation prescripts and the SSA's commitments to Treasury? Is that a correct statement?

**MR MAHLOBO:** Can you repeat it again?

**ADV PRETORIUS SC:** The allegation – well, not the allegations, the statement is made in paragraph 69 as follows and I am going to read it:  
 20 “Accessing retained earnings for current expenditure was contrary to Treasury regulation prescripts and our...”

And I presume that means SSA.

“...commitments to Treasury.”

Is that a correct statement?

**MR MAHLOBO:** Well, I have not seen any document to say how was it in violation of those but when you led my evidence the last time you had those documents about retained earnings and the submission that were made by those officials were made to the approving authority and the approving authority in this case, like you saw my signature there, was me. But if a person is the one that is making the recommendation to you and come and say later on the retained earnings were – there was a deviation.

10 Remember, the retained earnings, the retained earnings are specifically dealt with in terms of Security Services Special Account Act, Act 81 of 1969. Later on there was amendment, Act 41 of – it should be 1994 or 1992, that number might be right or wrong, and the secret services or intelligence services are allowed, Chair, that if you have money credit remaining it gets to be approved by the executing authority appointed by the Minister of Finance and the evidence you led on that day demonstrated that process was followed unless here what is being referred to,  
20 there is a contrary documentary evidence that I do not have it in my possession.

**ADV PRETORIUS SC:** Alright. I am not sure that I understood the answer to the question. Do I understand you to be saying that the statement as set out and as put to you is subject to a qualification and that permission may

be granted to used retained earnings for operational expenditure?

**MR MAHLOBO:** Permission is - actually how to use retained earnings, or let me use these right words, how to use retained earnings is legislated and if there is any deviation from that legislation, whoever says so, will give that contrary view, but in my possession and the document we dealt with, remember we had a long discussion about those retained earnings.

10 **ADV PRETORIUS SC:** Well, the question is a simple one, as I understand it. Is it correct to say that accessing retained earnings for current expenditure is contrary to Treasury regulations prescripts, is that correct or incorrect. It is not my statement, as I am saying, Chair.

**ADV PRETORIUS SC:** No but it is a correct statement? That is what I am putting. You know – you appear to know in detail what the regulatory provisions are and the simple question that I put to you is this statement:

20 “Accessing retained earnings for current expenditure was contrary to Treasury regulation prescripts.”

Is it or is it not?

**MR MAHLOBO:** Well, let us do this, Chair, to help each other, because I have always – if you try to fragment this thing, here we have two statements, one statement is

talking about projects that have not been approved, that is one.

Number two, in the same paragraph of the project, someone throws a statement and say that accessing retained earnings for current expenditure was contrary, I will not comment on something that I do not have here. The only thing that I have seen that we discuss here, there were two requests to utilise retained earnings and those requests were explicit in their own writings to say what was  
 10 it all about and we went through here, those ones were approved by the approving authority, which is the minister.

**CHAIRPERSON:** So the question that Mr Pretorius was asking seeks only what you know. If you know the statement to be correct to say as far as I know it is correct ...[intervenes]

**MR MAHLOBO:** This one, Chair ...[intervenes]

**CHAIRPERSON:** If you do not know, you say I do not know.

**MR MAHLOBO:** This one is not my statement  
 20 ...[intervenes]

**CHAIRPERSON:** No, no, it is not your statement.

**MR MAHLOBO:** I do not know who [indistinct].

**CHAIRPERSON:** No, Mr Pretorius is taking a statement from the affidavit and seeks to simply establish whether in terms of your own knowledge what this person is saying is

correct or not, you can say I do not know whether it is correct or not, you can say I do know that it is correct or I do know that is not correct.

**MR MAHLOBO:** I am saying, Chair, this statement is not explicit to say what they are talking about, I will not know but the only thing I am saying on record are the two retained earnings that you led on the 9 April here. But in this context I do not know what the person means and the person will be better placed what does it mean to say it is

10 contrary to...

**ADV PRETORIUS SC:** I think ...[intervenes]

**CHAIRPERSON:** Mr Pretorius, I went ahead of you, which paragraph are you on about this?

**MR MAHLOBO:** On 69.

**CHAIRPERSON:** On 69.

**ADV PRETORIUS SC:** Paragraph 69 on page 1167.

**CHAIRPERSON:** Okay, I see:

20 “Accessing retained earnings for current expenditure was contrary to Treasury regulation prescripts.”

What is vague about that, Mr Mahlobo?

**MR MAHLOBO:** But, Chair, I do not know what a person is saying, which regulations and how is it contrary.

**CHAIRPERSON:** Well, remember, it seeks – no, no, no, Mr Mahlobo, it seeks to establish your own knowledge.

You either do not know or you know. All that the person is saying is:

“Accessing retained earnings for current expenditure was contrary to Treasury regulation prescripts.”

If there is no Treasury regulation prescript that you know that is against accessing retained earnings you say I do not know any such prescripts. So I cannot say it is true, I cannot say it is not true.

10 **MR MAHLOBO:** I am saying, Chair, I do not know about this incident the person is referring to.

**CHAIRPERSON:** No, no, Mr Pretorius is not asking about an incident, Mr Mahlobo, he is putting a proposition to you. You either you know it or you do not know it. You either know that Treasury regulation prescripts prohibit accessing retains earnings for current expenditure or you do not know whether they do or they do not. It is a simple thing.

**MR MAHLOBO:** Chairperson ...[intervenes]

**CHAIRPERSON:** You do not have to say in terms of  
20 Section what, in terms of regulation what.

**MR MAHLOBO:** But, Chair, Treasury regulations are law.

**CHAIRPERSON:** Yes.

**MR MAHLOBO:** And the answer you want, it cannot be outside the law, Chair.

**CHAIRPERSON:** But I want your knowledge, what is your

knowledge of what the position is. Do you know that these prescripts prohibit accessing retained earnings for current expenditure or do you not know whether they prohibit it or allow it?

**MR MAHLOBO:** Chairperson, I am saying to you – maybe I am not clearer, Treasury regulations, there are many of them and I am saying to you what I know about retained earnings are governed by the Special Secret Services Account Act and ...[intervenes]

10 **MR MAHLOBO:** Treasury prescripts.

**MR MAHLOBO:** No, if you are going to say Treasury prescripts, Chair, there are many of them, there are many ...[intervenes]

**CHAIRPERSON:** No, Mr Mahlobo, no, Mr Mahlobo. There may be many, the question is whether of those many is there one that you know to be prohibiting this? It does not matter that there are many.

**MR MAHLOBO:** I do not know this one, Chair, I have said so many times, I have said no and ...[intervenes]

20 **CHAIRPERSON:** You do not know.

**MR MAHLOBO:** I have said I do not know.

**CHAIRPERSON:** Okay, alright. Mr Pretorius.

**ADV PRETORIUS SC:** Yes can we move on please, Mr Mahlobo to page 1171 of the same bundle at paragraph 84?

**CHAIRPERSON:** What is the page, Mr Pretorius?

**ADV PRETORIUS SC:** 1171. If I may read the allegation to you, Mr Mahlobo. It reads:

“As per the instructions of the former minister contrary to commitments that were made to Treasury and advice to the then minister not to use these funds for current expenditure or consumption, in 2015 the former minister in cahoots with the CFO...”

10 That is the witness's word, not mine.

“...directed access to the retained earnings of R130 million of which R90 million was allocated to fund CDSO operational projects.”

I am sorry, Chair, I am told that we need five minutes for a technical adjournment.

**CHAIRPERSON:** Oh, okay.

**ADV PRETORIUS SC:** Or an adjournment to deal with technical issues.

**CHAIRPERSON:** Okay, alright. Let us take a short  
20 adjournment to allow the technicians to attend to the technical problem. We adjourn.

**INQUIRY ADJOURNS**

**INQUIRY RESUMES**

**CHAIRPERSON:** Okay, let us continue.

**ADV PRETORIUS SC:** Thank you Chair. Mr Mahlobo we



are at paragraph 84 on page 1171 of SSA2B, and I am going to start to read it again if I may:

“As per the instructions of the former Minister contrary to commitments that were made to Treasury and advice to the then Minister not to use these funds for current expenditure or consumption in 2015 the former Minister in cahoots with the CFO directed access to the retained earnings of R130million of which R90million was allocated to  
 10 fund the Chief Director of Special Operational – Operations, Operational Projects and to clear the CDSO budget overruns and R20million for Foreign Intelligence. Subsequently the Minister also asked for R20million for his project which he requested to be included in the CDSO budget. As an accounting officer I did not know a clue about the Minister’s Project which required funding.”

Now there is several allegations in that, and perhaps we should break them up. Is it correct, that you gave  
 20 instructions, Mr Mahlobo to access retained earnings in the amount of R130million?

**MR MAHLOBO:** No such instruction.

**ADV PRETORIUS SC:** Did you ever allow anybody else to access retained earnings of R130million?

**CHAIRPERSON:** 150 or 130 Mr Pretorius?

**ADV PRETORIUS SC:** 130, yes Chair sorry.

**CHAIRPERSON:** 130, ja.

**MR MAHLOBO:** Chairperson, this person because we are not appearing here for the first time. This is the same person who actually wrote to the Minister and actually recommended for this budget adjustment and it is very puzzling what is being said here and you have it on your file.

**ADV PRETORIUS SC:** So are you saying that Ambassador  
10 Kudjoe in fact wrote to you, in your capacity as Minister asking that the retained earnings be accessed in that amount of R130 million, is that – do I understand you correctly?

**MR MAHLOBO:** The returned earnings that I was asked to approve for various reasons because programs were either others were not performing, the others are overspending. We dealt with the matter here. The person who advised and recommended to the Minister and in those documents if I recall them well there was not even a reservation  
20 written by her that it should not be done. Then surprisingly, this paragraph 84 say something else contrary to what is on record.

**ADV PRETORIUS SC:** We will raise that...[intervene]

**CHAIRPERSON:** I am sorry, Mr Pretorius. Are you directing your answer to the specific figures that are

mentioned here or are you talking in general?

**MR MAHLOBO:** I am talking both.

**CHAIRPERSON:** Both, okay.

**ADV PRETORIUS SC:** Did you give your approval in accordance with the recommendation?

**MR MAHLOBO:** The recommendation for the budget adjustment that we dealt with, on the 9<sup>th</sup> of April I did approve it and in terms of the legislation that I have given you before, because budget adjustment are allowed by that  
10 legislation and I will not be bothering you with those details but it is clearly there in the submission because that - those two submissions you saw are clearly indicating with what empowers a Minister to consider and what empowers the Minister for approval.

**ADV PRETORIUS SC:** And do I understand you to have agreed to that the amount involved in your approval was indeed the amount of a R130million?

**MR MAHLOBO:** Yes, the record indicates that the recommendation I actually approved for R180million.

20 **ADV PRETORIUS SC:** Right, and of that amount, is it correct that R90million was allocated to fund CDSO operational projects?

**MR MAHLOBO:** I do not have a recollection on how it was spread about but I know about the total figure.

**ADV PRETORIUS SC:** Yes, the further statement is made,

that subsequently the Minister also asked for R20million for his projects, which he requested to be included in the CTSO budget. Is that a correct or incorrect statement?

**MR MAHLOBO:** That is an incorrect statement.

**ADV PRETORIUS SC:** Did you ever ask for any amount for any projects that could be termed your project?

**MR MAHLOBO:** The answer is no.

**ADV PRETORIUS SC:** Then if we make our on please to a new affidavit, YY5 which appears at page 164 of SSA  
10 Bundle 2A this is the affidavit of Darryl.

**MR MAHLOBO:** It is under undercover what?

**ADV PRETORIUS SC:** Page 164, oh you want the number I will give it to you in a moment.

**MR MAHLOBO:** I want the undercover?

**ADV PRETORIUS SC:** I will give it to you in a moment. It is YY5.

**CHAIRPERSON:** You want the undercover Mr Mahlobo?

**MR MAHLOBO:** Is it what?

**CHAIRPERSON:** You said you want the undercover.

20 **ADV PRETORIUS SC:** Okay, we have permission to review.

**MR MAHLOBO:** Okay, thank you Chair. You were saying page?

**ADV PRETORIUS SC:** Page 59 sorry, page 164. This is the affidavit of Darryl and his referring to Project

Academia.

**CHAIRPERSON:** I am sorry Mr Pretorius I thought you said Y so the pagination in this bundle is not as straightforward as the other one. What is the page number?

**ADV PRETORIUS SC:** It is 8164 black numbers Chair and YY is the cover sheet under which the statement is.

**CHAIRPERSON:** Oh, YY5, okay.

**ADV PRETORIUS SC:** YY5, is the blue marker.

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

**ADV PRETORIUS SC:** Yes, we spoke earlier about the project that related to the fees must fall protests and that was Project Academia. I think we are on the same page there at least. What is said in paragraph 59 is the following:

“During my seven months’ tenure at SSA Project Academia was established. I did not initiate the project myself, however, but was acting on the instructions of Mr Dlomo and Minister Mahlobo.”

20 Is that a correct statement? Well, let us deal with the first sentence first:

“During my seven-month tenure at SSA Project Academia was established.”

We need not deal with that, I think it is well known that it was, the statement that I wish to put to you is that of

Darryl which he says:

“I did not initiate the project myself, however, but was acting on the instructions of Mr Dlomo and Minister Mahlobo.”

In so far as you are concerned, is that a correct statement?

**MR MAHLOBO:** It is an incorrect statement, Chair.

**ADV PRETORIUS SC:** He goes on to say in paragraph 60:

10       “The rationale behind Project Academia related to the hash tag fees must fall campaign affecting various Universities at the time. It was felt that the situation of unrest and the role of the student representative councils in stirring up protest had to be neutralised. Given pseudonym University connections he was identified as having potential to neutralise disruptions on student campuses arising from the hash tag fees must fall campaign. I realised that he had been sent for training in a foreign country to prepare him for his work.”

20   In another statement, it was alleged that you recruited that person, you have denied that, but we need not go any further in that regard. I would like to go to another affidavit, please, that is at page 260 of SSA Bundle 2A which is the same bundle. We can go to page 260, please. This is an affidavit of Mr **Lloyd Mahlangu**, who was

instrumental in placing certain information before the Special Investigation Unit. If one goes back to page 257.

**MR MAHLOBO:** We are no longer on 260?

**ADV PRETORIUS SC:** I am sorry?

**MR MAHLOBO:** You are not saying you are at 260.

**ADV PRETORIUS SC:** Yeah, I am going to go there in a moment I just wanted to introduce the affidavit. At page 257. He said, he says:

10            “I the undersigned, **Lloyd Mahlangu** in my capacity as director, domestic branch of the State Security Agency, state under oath.”

He says in paragraph two:

“This affidavit is deposed to in terms of Chapter 2 and Section 34, one of the prevention and combating of corrupt activities Act 12 of 2004 and in terms of Treasury regulation, 12.5.1 issued in terms of the Public Finance Management Act, 1 of 1999.”

In other words, it is an affidavit presented to the Special  
20 Investigation Unit, as I understand it and if I can then go back to page 260, paragraph 14.3. It reads as follows, and again, these are general statements but they are followed more particular statements, but I am going to read them all:

“Mr Mahlobo, the former Minister of State Security

is implicated in directly initiating and participating in intelligence operations in breach of constitutional and legal prescripts.”

Let us just stop there for a moment. Is it correct to say that you were involved in initiating directly and participating in intelligence operations in breach of well - at all?

**MR MAHLOBO:** This guy is lying.

**ADV PRETORIUS SC:** Alright.

10 **MR MAHLOBO:** And Chair, as we have spoken before, there is a process governing, initiating and approving of projects and those policies are there.

**ADV PRETORIUS SC:** Right, well, I think what he is saying, in fact I know what he is saying is that, his not talking about projects initiated in accordance with legal prescripts his talking about projects that were initiated in breach of legal prescripts. Does that affect your answer?

**MR MAHLOBO:** No, Chair, Mr Pretorius, let us help you. I am reading his statement, he say:

20 “I am implicated directly at initiating and participating.”

That is the first statement and remember when you introduced and I am saying his lying under oath and to initiate there is a clear policies that I approved myself and I have made reference in my affidavit. And then the



second part, he says:

“It is in breach of the Constitution and legal prescript.”

There is no Constitutional and legal prescript that were breached.

**MR MAHLOBO:** Mr Pretorius?

**ADV PRETORIUS SC:** I am just pausing a moment Chair to see whether I need to put anything further because it is dealt with by other witnesses more directly. I am going to  
10 move on to the affidavit of...[intervene]

**MR MAHLOBO:** Can I just check, why are you jumping this one of money where he lies under oath the boy still coming back here?

**ADV PRETORIUS SC:** I am not coming back; I am not asking because I choose to do so.

**MR MAHLOBO:** Okay.

**ADV PRETORIUS SC:** The reason Mr Mahlobo is that those allegations form part of a report that he has made having sourced other information, and we have that  
20 information which I can put to you directly. I do not have to rely on his say so of what he was reported to him.

**MR MAHLOBO:** No, but...[intervene]

**ADV PRETORIUS SC:** I really do not have to give you an explanation.

**MR MAHLOBO:** No, no it is fine I will wait, I am just

looking at something interesting where someone put it as a fact but proceed, I will follow you.

**ADV PRETORIUS SC:** So I would rather put to you a more original statement rather than a report Mr Mahlobo. If we may go on then to another affidavit, and that is in YY7 at page 310 of the same Bundle 2A. You have dealt already in your evidence with much of what where this witness...[intervene]

**MR MAHLOBO:** We dealt with this witness before.

10 **ADV PRETORIUS SC:** Yes, we have. So I am not going to repeat anything except to ask for clarification in respect of one issue Mr Mahlobo. If you go to page 310 paragraph 52 and over the page, the following paragraphs, these paragraphs deal with matters that were put to you at the last hearing and that is the creation of the project which involves the creation of a Union to rival the Association of Mineworkers and Construction Union, AMCU.

What would like to ask is whether there was ever a meeting at your home, which was attended by yourself and  
20 certain other people in which you directed that the project had run into trouble.

A certain person who was deployed to run the project in conjunction with another now feared for his life and you gave an instruction according to this allegation, to arrange for funds to be paid for the protection of a

particular person. Did you ever do that?

**MR MAHLOBO:** Well, I need to confirm that like we said before, this is one of the projects Chair, that I call them, intelligence fail. That ran into problems and at least we dealt with this issue where people were saying I created a Union when your documents indicated the Union, when it is originally had been made before.

But there was an incident where a particular person referred in that document, had an incident of being  
10 involved - there was an issue where this person had a security threat that was even reported to the police and this person has always been in terms of this initiative was an asset of the organisation.

And when there were security problems, I did engage with the department to say let them look at it this particular matter but I never gave them any instruction, because the office of the Minister as always - if people, they have problems they come and ordinarily myself, or my staff, will be able to find the mechanism to support those  
20 who are handling the project itself.

To be able to find each other, I will not recall the question of the meeting but I will recall the question that this person indeed had an incident and I engaged with the management to engage with this person how to support this person.

**ADV PRETORIUS SC:** Right, yes, well, there is not much difference between what you say Mr Mahlobo and the statement:

“Minister Mahlobo required me to arrange funds to be paid to this person for him to see to his protection.”

Is that incorrect or correct, just for clarity?

**MR MAHLOBO:** To say I said they must arrange for funds, it is a big no, but to attend to the security situation of this  
10 asset I actually engaged with management to say let them handle the matter but to give them an instruction that had financial implication I never did.

**ADV PRETORIUS SC:** Okay, if we could then deal with a different affidavit please, Bundle 2B at page 905 this is the affidavit...[intervene]

**MR MAHLOBO:** And just before you go there, and remember on I am on record Chairperson that this witness without any fear or favour of contradiction I have put it on record, this is that pack I have put it on record, do you  
20 remember that day on the issues of Judge?

**CHAIRPERSON:** Is that the one who have just come from – is that the one whose affidavit we were dealing with just now?

**MR MAHLOBO:** Yes, and I want to keep it on record that this is one of the biggest peddlers, peddlers are not are

not only outside, but also peddlers they can be also inside in the Intelligence Services.

**ADV PRETORIUS SC:** Sorry, who is the peddler?

**MR MAHLOBO:** This witness we are dealing with; remember I have put it on record.

**CHAIRPERSON:** His referring to the witness whose affidavit we were dealing with just now.

**MR MAHLOBO:** You said, Bundle 2B, now?

**CHAIRPERSON:** Mr Pretorius, is it 2B?

10 **ADV PRETORIUS SC:** I hear that Chair, is that Steven?

**MR MAHLOBO:** Yes, I did put it on record on the line.

**ADV PRETORIUS SC:** What is a peddler in the jargon used by us security operations?

**MR MAHLOBO:** You know, someone who is a peddler, peddlers they work in this way. Some may walk in, some they exist and they read, I can read you too. They give you information, in their information that you have there is an element of truth and lies and if you do not have the ability to do analysis and evaluation, you can actually  
20 make a decision on the basis of an information that is untrue.

And is not easy, sometimes it is one of the difficult things when you are handling intelligence brief. Is it really true, did it happen? And some of the decisions get to be made on intelligence, remember how they actually attacked

Iraq the other country will not mention because of relationship on the basis of peddling false intelligence.

And it is not an easy thing to pick it up but you can actually be able to do it when you do trend analysis.

**CHAIRPERSON:** Is the purpose of including some truths to

make you to give it some credence?

**MR MAHLOBO:** Ja, you do, but say it is the very thin line and it is always one of the challenges. You can go on the  
10 basis of an intelligence information and you give it to a principal, the President to make a decision and to find that you were given [speaking in vernacular].

**CHAIRPERSON:** Ja, fake news, fake information.

**MR MAHLOBO:** Ja, that is the right one.

**CHAIRPERSON:** Ja, okay alright.

**MR MAHLOBO:** But there is fakeness, there is also the truth in between there, and decisions have to be made. This is where we talk about some of those things, but there are many of them.

20 **ADV PRETORIUS SC:** Right, so as I understand it that a peddler is someone who deliberately falsifies intelligence information and passes it on for use, is that right?

**MR MAHLOBO:** Yes, remember this in this particular case I gave you two examples where certain people will have been accused as working for another foreign intelligence

services.

Remember also I had to deal with the question where Judges are just wrongly accused, and it is very difficult to be Judges these days and where I even gave a strong warning that when people want to do it, let them not do it under my name, but these are the things and they will create it and it will look so legit.

**ADV PRETORIUS SC:** The peddling of false information under the guise of intelligence can lead to serious  
10 consequences, I presume.

**MR MAHLOBO:** It has led to countries to war, it has actually made certain decisions, wrong decisions being made. There is evidence not only - we do have our own intelligence failures, too, we must never create an impression that Mr Pretorius that we do not have our own - but there are many examples.

**ADV PRETORIUS SC:** So it would seem obvious that that would be a most serious breach of an intelligence member's duties and in fact, an offense.

20 **MR MAHLOBO:** Well it is and the reality is that we do have them all over and South Africa is not an exception.

**ADV PRETORIUS SC:** When did you come to know that Steven was a peddler, that peddled information?

**MR MAHLOBO:** I gave you two examples.

**ADV PRETORIUS SC:** When did you come to know of

that?

**MR MAHLOBO:** During my tenure as a Minister.

**ADV PRETORIUS SC:** Steven is still a member of the SSA?

**MR MAHLOBO:** Ja, and he - let us make an example. I say to you, there was a time when I was made to say certain prominent people are spies and I said to you here, I even left the agency. When we said let us open up a case because to work for another country, let us say you are a  
10 Judge whether a President or a Minister but we are being handled somewhere else.

You cannot do it; the law does not allow you to do it. Even today those people of this project is one of those. Then he also comes here, like I said the other day about the issues of those two Judges that he cannot even recall and I told you Chair that I knew because remember, in intelligence news, they walk, they come and knock at your door.

And I know that how hard certain people are trying  
20 to actually undermine the judiciary, for one reason or the other to say this one, [speaking in vernacular], and without an ounce, they will never stop doing it. Now, [speaking in vernacular].

**CHAIRPERSON:** So you just said they would say this one, meaning a Judge has been bribed, has been paid, given



money.

**MR MAHLOBO:** It is not always being bribed, [speaking in vernacular], his being influenced.

**CHAIRPERSON:** H'm.

**MR MAHLOBO:** Ten things that would actually undermine the responsibility that you have been given for a particular office. Sometimes unknowingly and they happen all the time.

**ADV PRETORIUS SC:** When you learnt that Stephen was a  
10 pedlar what action did you take?

**MR MAHLOBO:** One of the things that I have always asked – remember the matter was being handled by the police – the one that I am saying to you.

**ADV PRETORIUS SC:** Did you report to the police that he had pedalled false information.

**MR MAHLOBO:** No, no Chair wait Mr Pretorius. I am saying the incident I am talking about that I know it was pedalled because over time and time and again this person who had produced this thing I said the matter must be  
20 reported to the police – a case was opened and every time – remember intelligence we cannot arrest people. We can investigate then work in conjunction with the police. Now the police they want this information – they want this information until I left the police could not get this information – this evidence. And now I am appearing here

again I see now this person is accusing two people as judges paid. That on oath this same person says hey I do not know these people I have checked them. The other person says no, no these are the judges. And at the very same time our 00:01:36 of our democracy the other leg which is the judiciary. There is a cloud hanging people saying hey, hey this thing about judiciary and these people will continue to say so.

**CHAIRPERSON:** What is the information that the police  
10 were asking for which they could not get until you left?

**MR MAHLOBO:** It is an intelligence information Chair.

**CHAIRPERSON:** Oh it is intelligence information.

**MR MAHLOBO:** To prove that what you say that indeed these people are working this. This is the same person who actually falsified even an intelligence card of another agent overseas and say this is a proof that this person is a member of this intelligence agency.

**ADV PRETORIUS SC:** What I want to put to you is something different. Mr Mahlobo while you were Minister  
20 you became aware of the fact that a member of the SSA was guilty of peddling false information. A most serious matter that warranted reporting to the police as I understand it. Why was he still employed? Why was disciplinary action not taken against him? Or was disciplinary action taken against him?

**MR MAHLOBO:** Chair I am saying this matter of the allegations that were made about certain prominent people was handled by the police and the police the agents are supposed to give them until I left Chair. But I know that the former DG actually did some investigation on this person. I do not know the outcome of that investigation.

**ADV PRETORIUS SC:** But Mr Mahlobo as Minister with oversight responsibility you become aware of someone who peddles information that is so serious it was warrants a  
10 police investigation do you in your oversight capacity not see it as your duty to ensure that the person is held to account? And was he held to account?

**MR MAHLOBO:** Chairperson.

**ADV PRETORIUS SC:** He is still a member of the SSA

**MR MAHLOBO:** Chairperson Mr Pretorius my answer is simple. I said these serious allegations were investigated and the police got involved. They needed information from this person and I have said to you they waited and waited and waited until I was changed as a Minister. But I know  
20 now that the former DG around the capacity of this person did an investigation and I do not have content of the report about that particular investigation.

**ADV PRETORIUS SC:** Well the point I am making to you Mr Mahlobo is not whether criminal investigations were warranted or not we can investigate that. The point I am

making to you that if what you say it true it would seem to follow as night follows day that you in your oversight capacity would have taken steps to ensure that internal discipline was conducted.

**MR MAHLOBO:** But Mr Pretorius do not miss the point. My point is simple. This person is working in the police. To prove these things that he has manufactured that these people are spies.

**CHAIRPERSON:** No, no you may be misunderstanding  
 10 maybe in part Mr Mahlobo. The part about the police might be a criminal investigation – might be one aspect. I think Mr Pretorius is more interested in the other part which would be within the control and power of the organisation disciplinary process. Now you have said that the former DG did some investigation and – but you do not know what the outcome is but I think that is what Mr Pretorius is really interested in to say as somebody who was attached with the responsibility of oversight you ought to have taken whatever steps needed to be taken to make sure that internally this  
 20 person was held to account. I think that is what he is talking about.

**MR MAHLOBO:** Chairperson we hear each other. Mr Pretorius I do not want to say what he is implying. I understand. I am saying to you Chair this person we continuously urge them to cooperate with the police, give

them this information so that the police can indeed prove that these prominent South Africans are spies. And I am saying to you until I left that had not happened. I will not have acted when I have left because I am not in the employ and the other issue was that why is this person still there when the person does not have capacity? I know that there was an investigation about the capacity of this person and I do not know the outcome because I was – I was 00:06:52.

**ADV PRETORIUS SC:** Well you see we have put this matter  
 10 or Mr – Stephen has responded to the investigators in relation to your statement given previously that he is a peddler. He denies it I must put it to you. But if there were – it seems entirely probable that if people knew or suspected he was a peddler there would have been investigations. You confirm that internally there was an investigation. He is still a member of the SSA. One can only assume that the investigations did not produce the outcome that you claim to be true.

**MR MAHLOBO:** We – you – we – you cannot assume Mr  
 20 Pretorius. Assuming is one of the things that I have always been very careful to speculate with.

**ADV PRETORIUS SC:** Not in this case.

**MR MAHLOBO:** No, no Mr Pretorius.

**ADV PRETORIUS SC:** You assuming that he is a peddler.

**MR MAHLOBO:** No, no, no. I – you know what I

understand what you are trying to say. I am saying to you we are given here something else. I am not – I am saying to you there is a fact this person ran this operation. This person produced a card and the police so that they can act on these prominent individuals that are bringing the country into disrepute in terms of espionage I left this person unable to do that. Even today those...

**CHAIRPERSON:** Did you say unable to produce information that would prove his report to.

10 **MR MAHLOBO:** Yes to report so that the police can deal with espionage.

**CHAIRPERSON:** Yes.

**MR MAHLOBO:** Because espionage is a serious matter. I left before that thing could be done. Even today.

**CHAIRPERSON:** So in other words based on what you understood to be the position he should have been dismissed?

**MR MAHLOBO:** Well ...

**CHAIRPERSON:** If or on your approach to say the police  
20 asked for proof he had no proof.

**MR MAHLOBO:** He had not given the proof, action should have been taken and what I am saying to you is that I know the former DG of Intelligence did and actually an investigation about the fitness of this officer.

**CHAIRPERSON:** And of course – and of course once you –

once you say action should have been taken it would seem to me that for somebody who is guilty of something as serious as that the only action should be dismissing him because that person can cause wars – can cause the country to ..

**MR MAHLOBO:** Where there to dismissal would be an outcome of the process Bab Zondo.

**CHAIRPERSON:** No I ..

**MR MAHLOBO:** But I understand the gravity even today.

10 **CHAIRPERSON:** The gravity.

**MR MAHLOBO:** Even today state security have never concluded that matter and say these prominent people are not spies. And it had been left hanging. And this is a serious matter. It is the very same issue here in this affidavit where someone claimed that the two judges have been bought. And the same team that came here Baba it says to you they have no evidence that there are these two judges that were being bought. And it is a matter that those that are running intelligence our – they should look at it.

20 **CHAIRPERSON:** Mr Pretorius.

**ADV PRETORIUS SC:** Well let me just approach it from a different angle Mr Mahlobo if I may. You say the police could not find proof.

**MR MAHLOBO:** He could not give the police evidence.

**ADV PRETORIUS SC:** So in other words the evidence that

was required to substantiate the allegation was absent.

**MR MAHLOBO:** He never gave them.

**ADV PRETORIUS SC:** Was absent. Do you say that you know that that evidence existed. Why did you not give it to them?

**CHAIRPERSON:** No I think Mr Mahlobo is saying Mr Pretorius he – he implies that he does not know whether it exists or not but what he does know is that the police asked for it and he – this person did not give it to them.

10 **ADV PRETORIUS SC:** Yes. No but the point I am making.

**CHAIRPERSON:** Ja.

**ADV PRETORIUS SC:** Is that Mr Mahlobo you come to the commission and you make it clear and definite statement in the absence of the evidence.

**MR MAHLOBO:** Oh.

**ADV PRETORIUS SC:** Let me finish. In the absence of the evidence that he is – Stephen is a peddler. That is not the standard that you apply to other aspects of your evidence. As I understand the standard you apply if there is now  
20 written proof or no external corroborating evidence the charge cannot stand.

**MR MAHLOBO:** No Chairperson Mr Pretorius must help the commission. If he chooses to become a legal representative of Stephen it is okay. Because I have given you two examples that are actually even of public



knowledge and I know the intelligence brief that actually even purported from him that this card actually belongs to one of these prominent people. I am not actually going to come here and lie.

**CHAIRPERSON:** No, no but

**MR MAHLOBO:** And if now he wants to represent him as he is taking that line I am out of it Chair.

**CHAIRPERSON:** No, no he has to be fair to you. He has to be fair to the witness who implicates you as well. He needs  
10 to be fair to both so that is why he – he has put to him what you said about him that is why he said he has responded.

**ADV PRETORIUS SC:** Yes.

**CHAIRPERSON:** Because he wants to make sure that all sides are heard.

**ADV PRETORIUS SC:** Anyway the evidence is on record and we can read it and consider it. I would like to move to another affidavit please and that is at page 905 and 906 of Bundle 2(b).

**MR MAHLOBO:** It is under cover. The undercover they  
20 help Mr Pretorius to arrive quickly. You want us..

**CHAIRPERSON:** You like undercover Mr Mahlobo.

**ADV PRETORIUS SC:** It takes me time to get to the cover.

**MR MAHLOBO:** Why? Thank you. You need to help me Mr Pretorius.

**CHAIRPERSON:** Ja he will help you just now.

**ADV PRETORIUS SC:** YY16.

**MR MAHLOBO:** I am there.

**ADV PRETORIUS SC:** If you go to page 905 please. This is an extract from an interview that Frank held with Veza investigators and I want to refer you please to the first paragraph on page 905. And what was being discussed here was Operation Lock. The third line – I will read from the third line onwards.

10            “So when that happened Ma’am that is how  
the Ministry took over the project. It went  
out of my hand. I know nothing about it.  
The person was paid from the Minister’s  
office. I would draw the money under Ops  
Lock, deliver the money to them at the  
Ministry. They would sign for it either  
Vukani or Jay they are both pseudonyms he  
would sign for the money. They would go  
and deliver and bring back the certificate.  
They would take the money and I would take  
20            the certificate. I would settle like that.  
There was another project for example Ops  
Justice. There was money being drawn.  
That money started at R1.3 million up until  
R21.8 million. I used to draw that money.”

In essence what Frank is saying is that money was

delivered to your offices under the rubric of Project Lock, is that correct?

**MR MAHLOBO:** Chairperson can I address you? Before I respond here one of the reservation I have is that I do not want to deal with these transcripts. These transcript they do not even have the certificate of a transcriber. Number 2 even the last time when I refused to engage on that small document it is because I was being given transcript of Project Veza.

10        1. They had no cover to say who is the author for this thing. And if there was a transcript certificate it will have been better.

2. If the transcript certificate those who do transcript like they do even for the commission they know the obligation that the law places on the accuracy of that information. That is point number 1.

And I have read these – a number of these ones – these transcripts and they are incomplete and I have written notes for myself and I said to legal team I am prepared to deal  
20 with any matter as long as that matter is under oath. There is an affidavit. Whether a person has testified – whether the person has not testified. But if it is under oath I will entertain it. I happen also to know that my legal team had a discussion with your offices about an affidavit that I am prepared to respond to by Frank. Not a transcript an

affidavit where he puts these things under oath because an oath is a serious matter. That is what I am prepared to do. Because even this transcript and the affidavit that you sent of Frank of February 2021 I cannot recall the date what is in the transcript and what is in the oath are slightly different. Well I have learnt – I have learnt that last week when you sent me – you send us these notices who is appearing. Frank was supposed to have appeared last week and I know now that Frank only deposited a signed affidavit last week.

10 And so that we do not bring your commission into disrepute as a matter of courtesy my legal team advise the team about this particular matter. But if you want to deal with this matter that is referred there I will request that please Frank affidavit and I am going to respond to it.

**ADV PRETORIUS SC:** I am afraid those decisions as to whether you should answer a question or not are for the Chair to make not you with respect.

**MR MAHLOBO:** But order Chair I was making a request to you not to Mr Pretorius. I am telling you – you know I have  
20 been participating here under constraints but because I respect you despite some of the challenges. That is why I told you that from time to time when I have a discomfort I will raise it and I am raising it to you. If you feel my discomfort is unwarranted you will say so.

**CHAIRPERSON:** Mr Pretorius.

**ADV PRETORIUS SC:** Chair I am asking a factual question.

**CHAIRPERSON:** Ja.

**ADV PRETORIUS SC:** It devises out of evidence before you.

**CHAIRPERSON:** Let us go back to...

**ADV PRETORIUS SC:** There will be testimony from Frank in regard to this. I am simply asking the question prompted by evidence before you of whatever quality whether monies for Project Lock were delivered to the office of the Minister.

10 **CHAIRPERSON:** That was the question?

**ADV PRETORIUS SC:** That is the question.

**CHAIRPERSON:** Okay. That seems to be a general question that should – you can answer Mr Mahlobo.

**MR MAHLOBO:** You see Chair why I am speaking the manner I speak. I am not oblivious of the other documents where this matter is raised and the context are different.

**CHAIRPERSON:** Well I am not sure that I know which other documents.

**MR MAHLOBO:** No, no I do have the affidavit.

20 **CHAIRPERSON:** Ja.

**MR MAHLOBO:** That was sent.

**CHAIRPERSON:** Ja.

**MR MAHLOBO:** Where the so called Project Lock is being spoken about. And the context. For an example here this statement does not say the money was given to the

Minister. What should I say because it is not given to me.  
Should I account for the two people?

**CHAIRPERSON:** So – so I guess that in that event if it does not say to the Minister then if it says it was given to the office if you know that it was given to the office you say yes. Or if you do not know whether it was given to anybody in your office then you do not know.

**MR MAHLOBO:** You know Chairperson that is why when you pigeonhole someone you want me to direct me to – this  
10 matter there is an affidavit to it. It give the context before you rush to the allegation whether monies were given to the two people that they are saying here. And I want to talk to that context.

**CHAIRPERSON:** Which affidavit Mr Pretorius is that.

**ADV PRETORIUS SC:** I am not sure whether we are going back to another issue which we will – which we have already dealt with which I do not intend to go back to it except (talking over one another).

**MR MAHLOBO:** There is an affidavit of February.

20 **ADV PRETORIUS SC:** The question Chair is...

**CHAIRPERSON:** Okay let us – you say it is an affidavit of February.

**MR MAHLOBO:** It has been sent to me.

**CHAIRPERSON:** Ja.

**MR MAHLOBO:** That in your summons you sent there is

this transcript, there is an affidavit.

**CHAIRPERSON:** (inaudible)

**MR MAHLOBO:** And I am – pardon Chair.

**CHAIRPERSON:** By February.

**MR MAHLOBO:** Ja February 2021.

**CHAIRPERSON:** Oh the month of February.

**MR MAHLOBO:** Yes.

**CHAIRPERSON:** During the month of February.

**MR MAHLOBO:** Yes.

10 **CHAIRPERSON:** I thought – I thought February was the  
pseudo name.

**MR MAHLOBO:** No, no. You see Chair last time I was not  
trying to be disrespectful but I want to say to you in trying  
to help the commission I know what game is being played  
by those who are doing Project Veza. They want to actually  
pigeon us to a particular narrative. We will not run away  
from answering questions. But their narrative cannot be my  
narrative. And if this commission does not want to give an  
opportunity to clarify this – for an example there is an  
20 affidavit by Frank and the affidavit by Frank and the other  
affidavits that people are saying here what is the main  
allegation – why am I sitting here?

One of the allegations is that the Minister one is  
involved in operations. Now they are saying the Ministry.  
My officials are involved in operation. That the first part

which is against the law. Then the second part it says the Ministry and the Minister received monies. And how do you want us to help the commission if we follow only one route because I want to answer that question because now they are talking about their Ministry. Then I will come to this matter of whether these officials they received money or not.

**CHAIRPERSON:** You – what you can do Mr Mahlobo is you can give an answer to the question but provide the context  
10 that you wish to provide if you say there is a context to my answer. And then you provide the context.

**MR MAHLOBO:** Well Chair let me give you the answer. You helped me by guiding me.

**CHAIRPERSON:** Ja.

**MR MAHLOBO:** That particular way.

**CHAIRPERSON:** Ja.

**ADV PRETORIUS SC:** But perhaps for the sake of clarity if I may to mean. I should clarify what I said.

**CHAIRPERSON:** Okay.

20 **ADV PRETORIUS SC:** I am not even going to clarify what I said I should repeat what I said. Was money paid to the Minister's office in relation to the execution of Project Lock? That is the question. The Minister's office. Not the Minister the Minister's office.

**MR MAHLOBO:** Chairperson like you guided me I am going



to respond the manner you have put it yourself. Because I am not comfortable with that route.

1. I want to put it on record the Minister's office never ran projects.
2. My office got involved where there were challenges between the Project Managers and the people they were managing where there were either matters of trust deficit or there were disputes or there were non-payments. My office got involved to ensure that those  
10 issues are being resolved and they had to monitor and report whether those issues are resolved.

That is what I want to put it on record. Whether during assisting on Project Lock they received money or not received money I do not know. But I must be able to actually ensure that my officers they do not get to be accused the way other people come here and accuse us without evidence like they admitted themselves.

Office of the Minister never ran projects. The only instances where they got involved is when there were  
20 challenges. Like a number of project it will be Lock, it will be this issue that you are referring to of the so called union and others. I know that they were helping to solve problems. But they never ran those operations. How they supported those who want to resolve problems they can discuss for themselves. But whether they were given

money or not money I am not aware.

**CHAIRPERSON:** Mr Pretorius.

**ADV PRETORIUS SC:** Right that deals with that issue. If I could just go to page 1011 of the same bundle please.

**CHAIRPERSON:** Yes I am also there Mr Pretorius.

**ADV PRETORIUS SC:** If I may just read to you from an interview transcript that was supplied to the investigators by the SSA where Frank was interviewed by Mr Mfamadi [?] as part of the high level review panel proceedings. I am going  
10 to read from the top of page 1011. It reads:

“And then Project Justice it arose outside  
inside Project Indistinct it was an operation.  
The one that I referred to earlier when I said  
it intended to have an understanding who sit  
were within the justice fraternity.”

I am reading exactly as it appears on the page.

“Specifically issue that pertain the judges because there was this feeling with the... these judges are being... handed by Foreign Intelligent

20 Services. So my understanding of the Project Justice was there.

**Unknown Female:** Was it not intended to influence decisions of judges?

**Mr Frank:** At a point I can say it was because I know for ...[indistinct] Even within Project

Justice we are paying a lot of money a month and these monies were said to be paid to a certain set of judges that were w-h-e-l-e, working on high profile cases and so forth, and so forth.

An Unknown Female: Yes.

10        Mr Frank: But I was not directly involved. I only know because I used to draw money for Masanda who gave direct to their office of the Minister because that project was being handled direct from that office of the Minister, Mr Mfumadi. It is fine...”

Now what I would like to ask you about is, not the existence of the project, necessarily, but whether money for Project Justice was ever delivered to the office of the Minister? That is your office.

20        **MR MAHLOBO**: Well, Mr Pretorius we should not run from certain of these things. We have dealt with this matter before and here. We should repeat these things because we can also perpetuate things ourselves. A meeting. You will find time, whenever you interact with Frank, I would have received a notice that my people must be here. Tomorrow we are looking at him.

And I just wanted to put something for you to note as a Chair. Just look at the statement where it says:

What was the issue of Project Justice about? And the affidavit that Frank has deposed. That, actually, confirms that whatever that Project Justice was, it was not about buying judges.

And I want to put it on record here because you would have heard lies and continue to actually when the judiciary is under attack, we continue to actually create that impression. And I still repeat my statement. During my tenure I have not issued an instruction that judges must  
10 actually be paid or bribed.

And worse. Even if - let us say, it was done which there is no evidence even to say that because we never did. Why would government lose cases? But it will be interesting. But let me come to the question. I am not aware that monies was given to my office because even this – what do you call this thing?

This transcript is not even specifying. This one is talking about my office. I do not know who in the office but it is not me here.

20 **ADV PRETORIUS SC:** Is it possible that monies for Project Justice were then given to your office?

**MR MAHLOBO:** Chairperson, I do not want to speculate. This thing, it does not say who. You cannot just leave money in the office. There are people. And this is what I was telling you about the incompleteness of some of these

transcripts. Let alone about some of the questions people ask where you do not, actually, follow certain serious matters. You just leave them hanging. I do not want to discuss issues of ...[intervenes]

**CHAIRPERSON:** Yes. Or do you not know?

**MR MAHLOBO:** I do not even want to discuss the issues of the quality of the transcript and the investigation of this.

**CHAIRPERSON:** H'm.

**MR MAHLOBO:** But few days ago, the Minister was on TV,  
 10 saying that she is going to conduct a foreign sec(?) investigation because this what – this thing called Project Veza is helping nobody in terms of getting to specifics. This is one of the example, Chair. Like, I say, in my case, the answer, as I am saying, I do not know this.

**CHAIRPERSON:** Ja but I think you have given the answer.

**MR MAHLOBO:** Ja.

**CHAIRPERSON:** You do not know whether money was given to your office or not.

**MR MAHLOBO:** For this specific case.

20 **CHAIRPERSON:** But you say it was not given to you?

**MR MAHLOBO:** Ja.

**ADV PRETORIUS SC:** Yes. I may just explain to you, to allay your concerns, Mr Mahlobo. Ultimately, all the evidence will be considered by the Chair and he will, at the end of the day, weigh up the quality of the evidence and

come to a decision as to what he can find and not find. That is the normal process. You are participating in that process by answering matters that are already before him. And I trust you will continue to answer questions that are put to you.

**MR MAHLOBO:** No. Let us help you. I have full confidence in the Deputy Chief Justice and he has my full respect but in a democracy, when I see games being played, like by these investigators, there is no way I am  
 10 going to help you Chair to pinpoint certain things You know, names of people are being tarnished. We must not runaway from accountability but you throw names of people after they have said everything about people.

Sidney was sitting here. Jafta was sitting here. They told you this is what we hear. And if I was not having confidence in you, I was not going to participate. If the President and the ANC side, I respect the three organisations. The judiciary. And we are very fortunate that they choice a person of your calibre(?). I respect my  
 20 President, His Excellence Cyril Ramaphosa in the ANC.

I am part of the Top Decision. But if certain things are being done here and you will see this queried, I will have to make the remark because the law allows me to do. While I would not shy away.

**CHAIRPERSON:** Ja.

**MR MAHLOBO:** But when I see certain things, I would raise them.

**CHAIRPERSON:** Ja.

**MR MAHLOBO:** And I have full confidence that as a second in command of the judiciary, you will do your best to be able to help the country looking at everybody who came here, who played games, who did what.

**CHAIRPERSON:** Ja.

**MR MAHLOBO:** It is going to be very big work.

10 **CHAIRPERSON:** [laughs]

**MR MAHLOBO:** And – but you have our full support.

**CHAIRPERSON:** [laughs]

**MR MAHLOBO:** And we wish you well on that exercise, Chair.

**CHAIRPERSON:** Ja. Mr Pretorius.

**ADV PRETORIUS SC:** Alright. I would like to move on then to page 1146.1 of the same bundle and this is the affidavit of Frank submitted to the Commission.

**MR MAHLOBO:** One, one...?

20 **ADV PRETORIUS SC:** One, one, four, six. It is right at the end of the tab number 16.

**MR MAHLOBO:** Oh.

**CHAIRPERSON:** I have got it.

**ADV PRETORIUS SC:** Yes. Can we go to paragraph ...[intervenes]

**COUNSEL:** I am sorry to interrupt with my – Pretorius.

**CHAIRPERSON:** H'm?

**COUNSEL:** Chair, you will recall, as I have appeared last time, that I also represent in this matter ...[intervenes]

**CHAIRPERSON:** H'm?

**COUNSEL:** ...the witness called Frank.

**CHAIRPERSON:** H'm.

**COUNSEL:** And I think during the testimony of my client now, who is the witness, he has tried to indicate that we  
10 have got about two documents purporting to be an affidavit. So I did not have the index to the paginations and I am privy to two documents that are presenting themselves as affidavit. If my colleague can just guide me? I can see my colleague, Nozawa(?), normally engage with from the Legal Team is trying to whisper something to me.

**CHAIRPERSON:** Oh. [laughs]

**COUNSEL:** Just to check because there will be an issue raised specifically on that particular affidavit. Hence I am  
20 asking this.

**CHAIRPERSON:** Okay. Mr Pretorius.

**ADV PRETORIUS SC:** ...[intervenes]

**CHAIRPERSON:** Well ...[intervenes]

**ADV PRETORIUS SC:** Chair, I am ...[intervenes]

**CHAIRPERSON:** ...it is one dated 16 February 2021, is it



not?

**ADV PRETORIUS SC:** [No audible reply]

**CHAIRPERSON:** It is one that was deposed to  
...[intervenes]

**ADV PRETORIUS SC:** Yes.

**CHAIRPERSON:** ...on the 16<sup>th</sup> ...[intervenes]

**CHAIRPERSON:** Okay. So that appears from page  
1146.34.

**CHAIRPERSON:** H'm? Will that help you?

10 **COUNSEL:** May I quickly just run next...[intervenes]

**CHAIRPERSON:** Ja, ja.

**COUNSEL:** ...to my...

**CHAIRPERSON:** Okay.

**COUNSEL:** Chair, it seems like we disempowered my  
colleague. So she will not be able to assist me because  
apparently she had to give her copy to you.

**CHAIRPERSON:** Oh. [laughs]

**COUNSEL:** [laughs]

**CHAIRPERSON:** I see. Ja, Mr Pretorius ...[intervenes]

20 **COUNSEL:** But on that note, Chair. Can I just ask  
...[intervenes]

**CHAIRPERSON:** Ja?

**COUNSEL:** ..for five minutes so that we do not get to  
interrupt my learned colleague.

**CHAIRPERSON:** Ja.

**COUNSEL:** But otherwise – because I had the discussion before on this point.

**CHAIRPERSON:** Ja.

**COUNSEL:** And though I did not get an assurance but there was some engagement on it.

**CHAIRPERSON:** H'm. Okay let us adjourn for five minutes. We adjourn.

**COUNSEL:** Thank you, Chair.

**INQUIRY ADJOURNS**

10 **INQUIRY RESUMES**

**CHAIRPERSON:** Let us continue.

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

**CHAIRPERSON:** But maybe I can indicate that if we come to half past nine if you are done that is fine but if you are not done then there is always room to put questions in writing which can be responded to by way of an affidavit. That is something that we can look at as well.

**ADV PRETORIUS SC:** Right.

**CHAIRPERSON:** Okay, alright.

20 **ADV PRETORIUS SC:** Could I take you please, Mr Mahlobo, to page 1146.14? This is the affidavit, attested affidavit of Frank. Chair, I must point out that we will call Frank tomorrow to get him to speak to this but my instructions are that this is in fact his affidavit although these pages are not initialled.

**MR MAHLOBO:** I am there, Chair.

**MR ANISI:** I am here, Chair, I can confirm that it is his affidavit because I have got an instruction.

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

**ADV PRETORIUS SC:** Yes, of course, Mr Anisi acts for both Mr Mahlobo and Frank.

**CHAIRPERSON:** Ja, okay, okay.

**ADV PRETORIUS SC:** Thank you. Paragraph 61.1 deals with Operation Justice. It says:

10           “Operation Justice was designed to investigate...”

**MR ANISI:** Just a second, Mr Pretorius, you said 1146.1?

**CHAIRPERSON:** 1146.14, that is the page.

**ADV PRETORIUS SC:** .14.

**MR ANISI:** Okay, I am there.

**ADV PRETORIUS SC:** Paragraph 61.1 reads and perhaps before I read from this affidavit I should just mention that there is in existence a draft affidavit of Frank that may become relevant in tomorrow’s evidence but for the moment I am going to put the signed affidavit to

20 ...[intervenes]

**MR MAHLOBO:** We are on 61.1.

**ADV PRETORIUS SC:** If I may read it, Mr Mahlobo.

“Operation Justice was designed to investigate, confirm or refute the involvement of judges in destabilising the state and also that some judges

were being handled or cooperated with foreign intelligence services and discrediting the office of the President of the Republic. The operation was allocated an amount of 1.3 million initially and later million on a monthly basis for the purpose of the operation. Such funds were dispensed to the office of the then Minister of State Security Mahlobo.”

The question I wish to put to you is whether or not the last sentence is correct or not, whether you know whether it is correct or not. That is the sentence when reads:

“Such funds were dispensed to the office of the then Minister of State Security Mahlobo.”

**MR MAHLOBO:** The last sentence, Chair, as I said earlier on, I am not aware but as I have explained before the role of the ministry around when there are challenges, ja. Thank you.

**ADV PRETORIUS SC:** Were there any such challenges in relation to Operation Justice which might have justified your office dispensing those project monies?

**MR MAHLOBO:** Well, I do not want to speculate, Chair, it has been long time I left this space but as a matter of principle, as I said, my office never an projects but where there were challenges from time to time they will come in but in this specific case I will not have actually an idea

really to say whether there was or not.

**ADV PRETORIUS SC:** Paragraph 61.2 reads:

“Operation Lock was designed to monitor, evaluate and provide logistical support to the subject after he was released on parole into the care of the State Security. This operation was also making financial payments to the value of R200 000 monthly which, at a later stage, was reduced to R30 000 monthly. (Not sure of the period in question). The dispensing of these funds was through the office of the minister.”

Again, the last sentence.

**MR MAHLOBO:** Well, the last sentence, as I am saying, I am not aware. But what I am aware, this one specifically I am aware, like we spoke earlier on, there were challenges and my office had to come closer to help them but whether they disbursed monies of them or not, I am not aware.

**ADV PRETORIUS SC:** Paragraph 61.3 reads:

“Operation Seskona was born out of a consultative meeting that took place in the Ministry. Present was the then Minister Mahlobo, the then Deputy Minister, Deputy Director General, Mr Dlomo, SSA CFO, SSA Budget Control Manager. CDSO Acting General Manager, CDSO Head Finance Assets, myself...”

That is Frank.

“...and other ministry staff.:

Is that a correct statement?

**MR MAHLOBO:** Well, this one, Chairperson, I cannot recall this meeting but if it was a meeting of this high level delegation probably we need to be assisted probably if to confirm or not to confirm with the minutes because I know that normally my ministry staff, when we call management meetings or certain meetings, they will keep records. But,  
10 as I said sometime back, Mr Pretorius and Chair, remember I struggled to get even a single document from the agency. I was only privileged to participate through some of the documents they chose to give but those ones that I requested, you remember when we were to put a lot of letters amongst ourselves about documents, but this one, I will not be able to recall whether it took place or not and if indeed it took place there should be records for it.

**ADV PRETORIUS SC:** Right. Perhaps the next sentence would assist in triggering your memory: It reads:

20 “The operation was designed to launch investigative operations, monitoring and penetration into the civil society movement that was responsible in the destabilising and causing disorder in the City of Cape Town in the name of protest against lack of service delivery.”

Do you know anything about that project?

**MR MAHLOBO:** Well, this project, Chairperson, I will be very guarded because, you know, you have the beginning of a sentence and someone creates an impression of this entity as if the only time this entity that we had to look at it is because during that time and this entity, if even if you can check their records, was registered long, long before I even became a minister there. But I do recall that I got intelligence brief about a number of organisations that  
 10 were involved either in violent protests or causing destabilisation and this entity, Mr Pretorius, is one of the entities I will get intelligence brief but the sentence to say it was designed to do what, what, what, remember, who conceptualises projects, Chair, and our projects, they get to be approved is not at my level but the Intelligence brief, as a principle, I should receive the intelligence brief if they are meant for me but in this instance I did receive intelligence brief.

**ADV PRETORIUS SC:** Right. If we may go over the page  
 20 please to 1146.16, paragraph 61.5, it reads:

“In addition, an operation code name Commitment was undertaken by the Chief Directorate Special Operations. I have no recollection of the intended purpose. However, I remember that the funds allocated were to the value of R2.5 million on a

monthly basis and were dispensed to the office of the Minister and/or at times was given to my colleague, Luyanda or Shadow.”

Both pseudonyms.

“The operation had the approval of the Minister D Mahlobo and Mr Dlomo.”

Did you know of the operation code named Commitment?

**MR MAHLOBO:** I did receive the intelligence brief on this one but to say I approved the project, ministers never  
10 approve projects in terms of our policies.

**ADV PRETORIUS SC:** And you did not approve the project, I take it?

**MR MAHLOBO:** No. But the intelligence brief I did receive.

**ADV PRETORIUS SC:**

“The allegation is also made that funds to the value of R2.5 million on a monthly basis were dispensed to the office of the Minister or at times took another route.”

20 **MR MAHLOBO:** Well, he is not specific here, I will not be aware whether it was dispenses and dispensed to who in my office.

**ADV PRETORIUS SC:** Is it possible for monies to be dispensed to your office or through your office without you knowing?



**MR MAHLOBO:** What do you mean?

**ADV PRETORIUS SC:** Well, your office, the Ministry of State Security, I take it operates under your command and under your supervision and authority and the question is, is it possible for monies for State Security projects to be dispensed to your office or through your office without you knowing it?

**MR MAHLOBO:** Remember, it depends what do you mean. You cannot have a situation where if the money is not  
10 deposited to you – given to you, you must then account, you will have to start to ask those things like when you are in an evidence to say by who, when, where I was. And if we get into those kind of things and remember how monies get to be handled, there is a clear mechanism because one of the things that even if there is a view we must accept evidence from project [indistinct], which is not scientific, in an intelligence and in government there is a tracking system, anybody who request, who deliver and approve, there is a document management system. Even when I  
20 receive my intelligence briefs I will sign for them that I have received an intelligence brief, you do not just go around and handle certain things, if you do that, you are breaking the law and it is going to make it very difficult for you even how to account.

And immediately – then that is one part. Then there

is a second part. Then there is a method, you know, there is a method of how cash must be delivered to an asset and this thing is called a DLB, a dead letter box where when you operate, you do not leave it a – you know, in the olden times when people were still - some people were honest, I can drop your parcel there and you must be able to pick it a particular point, at that point without any contract. How they handled monies and the methodologies is not my business because I never handled money and in this

10 instance, Mr Pretorius, it will be unfair to say if someone brings money to the office, if the money is not brought to me, I cannot account for that, Chair. And whilst ...[intervenes]

**CHAIRPERSON:** Is it possible that large sums of money – now when I say large, you know, R1 million might not be large to you, Mr Mahlobo, is it possible that large amounts of money could be given to your office for legitimate use in terms of business of your office and you would not know that your office received large amounts of money because I

20 can take it if it was illegitimate, maybe there is a possibility somebody could hide it from being seen by other people but if it is legitimate, do you think it would be easy for somebody in your office to receive large sums of money for legitimate use without knowing?

**MR MAHLOBO:** You know, Bab Zondo, there is

somewhere - because unfortunately Mr Pretorius has not been kind to also to refer to my own statement, there is somewhere in my affidavit – and I have been out of intelligence for some time, there is a – you know, let me start with how you say it is possible if it is for legitimate. You see, the problem that the people of project where they are missing a point. You know, if you want to get these guys to account, if you can just give me a minute or two without wasting time, to come to a conclusion – to come to  
10 a conclusion whether something is legal or not legal. Firstly, I will have asked a question which is – fortunately, I have an experience of being a former accounting officer myself, is to say but this project of yours, where did you get the authority? What is the basis in law? And if that basis in law does not fit in terms of the National Security structures(?) or the NIE you can say this is an illegal counter-intelligence or it is intelligence operation.

Number two, I will ask the next question, who is the project manager, did you get the project to be approved  
20 and what are the resources? Which is an important step whether approval is there before you can say legitimate or not legitimate.

Then there always something which is a witness in intelligence, Chair. You know, there is something called source index. Source index is a database. When we are

going to be a source the categories are not the same how much we are going to earn and they vary. If they say I am handling a President, because you can handle a President, I am handling a judge, I am handling just someone there depending also on the risk profile, the money that must be paid is not the same. Then on the basis of that the issue is to say whether the amounts of money for this kind of an operative, is it commensurate? You know, if you were a professional service provider or a consultant, there are  
 10 rates. Even honourable Pretorius is sitting here, SCs, you are not the same, there is a junior, there is a senior one, there are rates. Did you pay the actual commensurate rate? Those are the things they should have looked.

Then there is an issue, just to conclude, Bab Zondo, to your question, then the method on how monies get to be handled, as long as you come back and account, it is a matter of a method you do not disclose but the issue that you must ask, was there value for money? Was there value for money because if, for example, to run an  
 20 operation it has a timeframe and a duration, at the end of the day the risk that I was trying to neutralise or the operation that I was trying to do certain things, it is still there, it means money is being wasted. But here, as you were asking, it is possible.

**CHAIRPERSON:** Yes, it is possible.

**MR MAHLOBO:** It is possible.

**CHAIRPERSON:** If it is legitimate.

**MR MAHLOBO:** If it is legitimate, it is an approved project and then there is an accountability because at the end of the day there must be returns.

**CHAIRPERSON:** But are you saying it is not possible for your office to receive legitimate funds to be used legitimately without you knowing because there will – it is not possible, you would always know because there would  
10 be records or you say ...[intervenes]

**MR MAHLOBO:** No, no, no, Chair, it is different. You see, one of the things even when they report in the media is not to understand how budget works. If I am going to know that monies are going this way, they must belong to my vote item. You know, even in Chief Justice office you know that. Then there are items. That the money is not in my budget, how will I know because those are handled where the budget is.

**CHAIRPERSON:** Ja. But I guess if it is legitimate money  
20 it can only come from your budget, I would imagine.

**MR MAHLOBO:** No, no, no, if let us say ...[intervenes]

**CHAIRPERSON:** If it is legitimate.

**MR MAHLOBO:** No, no, no, it does not have to be legitimate in terms of my office. I am saying if my office has actually done a procurement or procured a service, it

must come from my line budget. But if someone is making a claim an allegation like Frank, that he has given someone from my office, he should be able to explain to you who did he give it to and why did you give to this persona and whether this person ultimately accounted for the monies or he should be able to answer the question, if you are asking to become your post office, did that money arrive there? What were your systems to do that? Those are some of the things but I am not here to look at the

10 capabilities of those who were doing the investigation, they were looking for something else and if you wanted to direct them but in terms of how an organisation ...[intervenes]

**CHAIRPERSON:** Okay.

**MR MAHLOBO:** Whether it has collapsed or not collapsed, there will be systems.

**CHAIRPERSON:** Okay. No, that is fine. Mr Pretorius?

**ADV PRETORIUS SC:** Mr Mahlobo, I am really trying my hardest to understand what your evidence is and let me stress that Frank will come and he will give his evidence,

20 he will be asked questions about his interactions with the Commission's investigators and legal team. So you can rest assured I will do that tomorrow. For the moment I just want to ask you, can your office legitimately be used as a conduit for funds for operational projects of the SSA?

**MR MAHLOBO:** Well, I will not agree that you use the

word conduit because that is something else.

**ADV PRETORIUS SC:** No, I am asking you that question, so on the assumption that I mean what I say by the use of the word conduit, I would be grateful if you would answer the question.

**CHAIRPERSON:** In other words, would it be permissible? Was it permissible for somebody to use your office as a conduit for sending money to somebody?

**MR MAHLOBO:** Well, it depends, Bab Zondo Buthi, what  
10 was the context? Why will someone be asked? Then they will be able to explain those that got involved. I will not be able to speculate.

**ADV PRETORIUS SC:** So it is possible then in certain circumstances, I understand your answer, it is not an absolute no, it is not possible for the office of the ministry to be used to receive and dispense operational funds of the SSA?

**MR MAHLOBO:** Well, as I am saying, Chair, I will not speculate because I do not know the circumstances.

20 **ADV PRETORIUS SC:** I am not asked you to speculate.

**CHAIRPERSON:** But what he saying is that he understands you to be saying you cannot say the office of the Minister could never be used like that, you are saying it could depend on circumstances.

**MR MAHLOBO:** [speaking in the vernacular].

**CHAIRPERSON:** Yes.

**MR MAHLOBO:** They way you are putting it, if it is not twisted, the way put it is the correct version.

**CHAIRPERSON:** Ja. Okay, alright.

**MR MAHLOBO:** Because remember words they have a very powerful meaning, Bab Zondo and when I – words – we are not on the same 23.33 I should be able to raise my ...[intervenes]

**CHAIRPERSON:** No, that is fine.

10 **MR MAHLOBO:** But where assist [speaking in the vernacular] facilitator, I am happy with the way you explain it.

**CHAIRPERSON:** Okay.

**ADV PRETORIUS SC:** Mr Mahlobo, do you know the purpose of Operation Commitment?

**MR MAHLOBO:** Well, I will not even recall but what I know that in all operations, depending who is the recipient of the information, you will only get what we call it – an Intelligence brief and here, sitting now, without  
20 documentation – remember, I was not given documentation by SSA, I do not even know who was the approving authority, whether it was approved or not approved.

**ADV PRETORIUS SC:** Well, do you know the purpose of Operation Commitment, yes or no?

**MR MAHLOBO:** I am saying the purpose will be on the



conception document.

**ADV PRETORIUS SC:** Do you know it?

**MR MAHLOBO:** Chair, I have given you the answer, Mr Pretorius.

**ADV PRETORIUS SC:** I do not recall the answer.

**MR MAHLOBO:** No, no, no, I am saying to you without document I will not know.

**ADV PRETORIUS SC:** So you do not know?

**MR MAHLOBO:** No, I am saying without document. Do  
10 not change my answer.

**CHAIRPERSON:** Okay, maybe let us put it this way. While you were Minister, during your term, is it possible that you knew the purpose at that time but right now you would need to be reminded, you would need documents to remember or what is the position?

**MR MAHLOBO:** You see, Chair, how intelligence work, as long as the counter-intelligence information, the project manager will know but if it is a matter related to national security like they do and if the report is for me, I will get  
20 an intelligence brief and I want to confirm that I did receive brief. The intelligence brief will then tell you – they will tell you that these are the following things that are happening and these are the decision that the government must make either at my level or at any other level but intelligence brief, I did receive intelligence briefs.

**CHAIRPERSON:** In relation to this particular project?

**MR MAHLOBO:** Yes.

**CHAIRPERSON:** Yes. But in terms of what its purpose was, do you recall that at stage you knew what that ...[intervenes]

**MR MAHLOBO:** No. No.

**CHAIRPERSON:** You do not recall.

**MR MAHLOBO:** Yes.

**CHAIRPERSON:** Okay. Mr Pretorius?

10 **ADV PRETORIUS SC:** Would the Intelligence brief have stipulated the purpose of the project?

**MR MAHLOBO:** What is an intelligence brief? The intelligence brief ...[intervenes]

**ADV PRETORIUS SC:** Mr Mahlobo, we are really stuck for time and that is [inaudible – speaking simultaneously]

**MR MAHLOBO:** No, no, no, I am helping you, Mr Pretorius, because remember this thing is also beamed(?) somewhere else. If here you are going to create impression when already our integrity around dealing with  
20 intelligence in public they are corrected, it is a problem. You know an intelligence brief is an information, it does not tell you about the sources, it does not tell you about the methodology they use, it does not actually tell you about the issues about finances, the Intelligence brief tell you about the risk, how, what is the rate of that particular

risk and it will also be in a position to tell you what action has been taken, whether that particular action has worked or the decision that you need to make and you know how an intelligence brief, when you have got it. After receiving an intelligence brief you see it depending on the level of classification and you sign for receiving some of those. Then, from there, because that document is only for your eyes only then intelligence brief get to be destroyed. That is how it works because they can actually even land on  
10 wrong hands.

**CHAIRPERSON:** But Mr Pretorius' question is whether ordinarily such a brief would tell you the purpose of the project.

**MR MAHLOBO:** That is why I took this [indistinct], Chair, to explain what is an Intelligence brief.

**CHAIRPERSON:** Yes.

**MR MAHLOBO:** So that someone listening there must know what is an intelligence brief. It does not contain the elements they should contain.

20 **CHAIRPERSON:** It does not tell you about the purpose of the project.

**MR MAHLOBO:** No, it does not.

**CHAIRPERSON:** Okay.

**ADV PRETORIUS SC:** There has been evidence before the Chair as I recall on more than one occasion that the

purpose of the Operation Commitment was to pay sums of money in millions of rand to the former President. Did you know about that?

**MR MAHLOBO:** I do not know about that. Those who say so, they would probably know but I do not know about that.

**ADV PRETORIUS SC:** So do I understand your evidence in relation to Project Commitment to be the following, you do not know whether money was dispensed to your office in relation to Project Commitment?

10 **MR MAHLOBO:** I have responded to that, Chair.

**ADV PRETORIUS SC:** Am I correct, is my summary correct?

**CHAIRPERSON:** The Chair summarised it correctly, I agreed with the Chairs summary.

**ADV PRETORIUS SC:** You are not prepared to answer the question.

**MR MAHLOBO:** No, no, the Chair helped ...[intervenes]

**ADV PRETORIUS SC:** I am just asking you, Mr Mahlobo, are you prepared to answer the question that I have just  
20 put to you?

**MR MAHLOBO:** I have answered it, Chair.

**CHAIRPERSON:** There was a question which I put it in my way and he said it provided accurately what he wanted to convey.

**ADV PRETORIUS SC:** I will read the record, Chair. The

second issue is that you do not know of the evidence being correct or incorrect as to the purpose of Project Commitment, namely payment of monies of the former President.

**MR MAHLOBO:** I have responded as correct.

**ADV PRETORIUS SC:** There is further evidence by Frank that I am going ask, Chair, that fall into the category of written questions because I want to deal with another topic.

10 **CHAIRPERSON:** Yes, okay, that is fine.

**ADV PRETORIUS SC:** Verbally. He does say in his affidavit though, Mr Mahlobo that he delivered under the head Project Mabuya certain monies to “a relevant recipient” and ...[intervenes]

**MR MAHLOBO:** Which page are we at now?

**ADV PRETORIUS SC:** Page 1146.25

**MR MAHLOBO:** I am on a different page now.

**ADV PRETORIUS SC:** You see where it says.

20 “I was requested to collect and deliver money, R2.5million. I took it to the relevant recipient, and they signed for it.”

I will ask him tomorrow who that is, I just wanted to alert you if you had any comment.

**MR MAHLOBO:** Well, I am having a problem here ...[intervenes]

**ADV PRETORIUS SC:** He also talks of other deliveries of money in relation to Project Mabuyo project commitment, or operation commitment, and I am going to ask him detail of that and I'm offering you an opportunity to comment if ...[indistinct -dropped voice] that's at page 1146.27.

**MR MAHLOBO:** I lost the pages.

**CHAIRPERSON:** Well, if ...[intervenes].

**ADV PRETORIUS SC:** I'll ask different questions, Chair...[intervenes].

10 **CHAIRPERSON:** It's not alleged that it was given to him...[intervenes].

**MR MAHLOBO:** Well, if it's not to me, I will not know.

**CHAIRPERSON:** Yes.

**ADV PRETORIUS SC:** Well, the trouble is, Frank may identify the recipient, so I don't know yet...[intervenes].

**CHAIRPERSON:** No, I understand that but I'm saying if, as things stand, you don't understand that allegation to be that money was given to him, he can't contribute anything.

**ADV PRETORIUS SC:** Well – I'll deal with it tomorrow  
20 under another question Chair, I don't want to argue the point now...[intervenes] but I've given him a chance to comment, that's all I'm saying. I want to deal with the second topic, very briefly, Mr Mahlobo. As I understand your evidence, the last time around, you were quite and unequivocal that you personally never received monies

from SSA for operational purposes.

**MR MAHLOBO:** Its correct, Chair.

**ADV PRETORIUS SC:** There is some evidence, however, from witnesses who say the opposite.

**MR MAHLOBO:** I have seen it.

**ADV PRETORIUS SC:** And what I want to put to you, some of it will be put to you in writing but I what I want to put to you is, the evidence of Dorothy which you're probably aware of.

10 **MR MAHLOBO:** We dealt with it last time, I remember her affidavit that there was some issues about clarity. We dealt with Dorothy and I gave you my responses about her.

**ADV PRETORIUS SC:** Well, she says firstly, that she handed money to you personally, although there is a qualification and that was an amount of R1.5million to your residence in Cape Town. As I understand it, you deny that?

**MR MAHLOBO:** Yes, I deny it.

**ADV PRETORIUS SC:** She also says that...[intervenes].

20 **CHAIRPERSON:** I'm sorry Mr Pretorius is that a reference to the first time when he said, she said, she did not...[intervenes].

**ADV PRETORIUS SC:** Yes, the qualification is that it was in...[intervenes].

**CHAIRPERSON:** In a bag, she didn't know whether there

was money inside ...[intervenes].

**ADV PRETORIUS SC:** She understood it to contain R1.5million but never actually observed the money.

**CHAIRPERSON:** Ja.

**MR MAHLOBO:** Yes, the answer is, I rebut it.

**CHAIRPERSON:** So, maybe – would she have delivered a bag to your residence in Cape Town which didn't have money but had something else?

**MR MAHLOBO:** Well, Chair, you heard the evidence, and  
10 I was very pleased, the manner you handled the issue and I've been reading Dorothy – there are a number of affidavits here but that incident of Cape Town, I don't know it.

**CHAIRPERSON:** You?

**MR MAHLOBO:** Don't know it.

**CHAIRPERSON:** Ja okay.

**ADV PRETORIUS SC:** In summary and because of the intricacies of time Mr Mahlobo, I'm going to put to you, the evidence in summary. Dorothy says on three occasions  
20 she withdrew from the SSA R4.51million. She then counted it at the cashier, put it into bags, signed for it. She then says, she took it to your house in Pretoria, your residence, took the money out in your presence, in your study, counted it and then left. I take it you deny that...[indistinct – dropped voice]?



**MR MAHLOBO:** I deny it and very interesting I just want you, Chair, to point one matter. My answer it's a no but something very funny here. There are – probably Mr Pretorius when you do your own assessment which has been something which has been trying me. There are two affidavits, on affidavit the person claims to be given R4.5million over a period of six months in my house. Then the next time the affidavit says, no, no, no its only three times and – which is not true, as I've said. Then  
10 there's something funny, well I thought baba you'd ask that question. How do you count R4.5million, you know, do you have a machine to do this, how long did it take, well I know it's implicit to that but it sounded very interesting but without wasting your time, Mr Pretorius, it's a no but those were some of my interesting observations when you're doing your job?

**ADV PRETORIUS SC:** Fine, we've dealt with Frank's affidavit and to the extent necessary we will put questions to you in writing. I believed that you want to take five  
20 minutes to make a closing statement but if I may I just want to put one more summary question. There have been, either in evidence put to you or in evidence that will be put to you in the form of questions for your answer on affidavit, nine witnesses – well ten witnesses really that have given evidence to the effect that you have played a role in

operations that you have actively involved yourselves in operations of the SSA, just summarising all the evidence. Why would they give false evidence?

**MR MAHLOBO:** Well, you know, Chairperson, one of the things that is not actually – well I don't know because I'm not a lawyer to use the word, evidence, but when all they sat here those who sat here, they told you it's a matter of hearsay. There's a matter that has been raised, Mr Pretorius, that maybe I must deal with, that at no point, I  
10 did an Executive overreach. Even if you were to do an Executive overreach, well this is...[indistinct] operations and if it was in an ordinary issue of procuring services which is a serious matter where an Executive get's involved in procurement, which I've not done so but Ministers, we have a very clear – an interest, how is the department operating and when you have a clear interest on how the department is operating and ultimately, I have an oversight responsibility to report in terms of the law. In the Intelligence Services there are challenges, and I don't  
20 want to deny that they come from far. There are challenges when you come closer and check about whether people are using monies properly or not monies properly when you are actually getting complaints and you started to sit on people's heads that these matters must be dealt with, there are a number of these lapses. There are those

people that will not want you to get involved in dealing with those issues, but the law requires to do so.

There is always something funny because all of them, they're using the word, "involved" in operations or using the word all. You know, it's impossible, as a project manager, I'm not a project manager that thing requires a daily basis. You'll look at one affidavit, you might not have dealt with the ...[indistinct] of Miriam where Miriam on the matter, she was claiming that I was running the project myself. In her own affidavit Chair, she says she will only  
 10 communicate with me once or twice in a month, is it being operational. Only saying in the affidavit, I only presented to the Minister a PowerPoint presentation about this operation, only twice, is it being operational and I'm also on record Chair. Where oversight you need to be hands on to see and there's no law that precludes you. Only law that you can't do Executive overreach, I can't appoint my family members there or my friends without a due process and I must declare my interest. I can't involve in  
 20 procurement, which is the things I've not done.

**ADV PRETORIUS SC:** The question, if I may return to it, Mr Mahlobo is, why would up to ten witnesses either directly or indirectly seek to claim falsely that you involved yourself in the operational matters of the SSA, is there any reason why ten witnesses would do it?

**MR MAHLOBO:** No as I was saying, Intelligence is politicised and you have seen yourself here, nobody can deny it. They get to be having views about who must do who, they even have a view who must be a Minister or not a Minister. I even know because I'm not here to – I'm here to help the Commission, one of the things that I have avoided to do, is to implicate people. I know that people – they even went to former President to say he must remove me. You know, for an example, Pretorius you'll have a  
10 situation where people will say to you, which is a well-known issue. Mr Mahlobo is a henchman for Mr Zuma.

**ADV PRETORIUS SC:** For?

**MR MAHLOBO:** Former President, why will a President, if he had intentions even to get the conference in Nasrec to be warned change a very good henchman like Mahlobo on the eve of the conference. I was re-shuffled to Energy on the 16<sup>th</sup> of October two months before the elections and Intelligence operators, they will come here, they will give you some truth and they will also give you some, certain  
20 lies, and it's one of the biggest issues, that's why we must support President Ramaphosa, including yourself to read Intelligence of the systematic ...[indistinct]. One, around issues of politicisation that comes far beyond, when Intelligence was conceived that even continues today. You can even see today there's still tensions and at the end of

the day, I'm not immune from those particular issues but I did on the best of my ability, that was – I'm not saying I was the best thing to happen in Intelligence, I tried, mishaps happened along the way, we tried to put those – people who would be able to judge us over time to say, did we do that but all of them who came here, Mr Pretorius, they could not demonstrate even the ...[indistinct] report, even the high level review report, they all came and sat here, this is what we're being told, this is what we are  
 10 being told but when we said, give us evidence, give us evidence, nobody gave them evidence.

**ADV PRETORIUS SC:** Well, lets just deal with that issue, very briefly if I may. The fact that there is no documentation to your satisfaction to support a particular averment, the fact that someone says, I went personally to the Minister's office and gave R4.5million – R4.51million to the Minister, the fact that there's no supporting documentation that satisfies you or report or other official documentation, does not render that evidence false.

20 **MR MAHLOBO:** Well, you know...[intervenes].

**ADV PRETORIUS SC:** It's evidence, it's the most direct form of evidence.

**MR MAHLOBO:** No, you know Mr Pretorius, I'm not a lawyer, I've never studied law, but I've operated at the highest level, even in administration. Evidence that is

admissible is not a hearsay, it will answer when, where, how and so forth but this Commission is not about that but immediately you start to venture into that where people they are saying here on record, I can't recall this, I can't recall this, this is what people, they were saying to you but despite those reservations about ...[indistinct], I said, you know what, I will help this Commission because it's our own creation. Even there is certain constraints I've seen but I'll help but let's not – even if you can go to the Court  
10 of law, and you go and say these things, you know how courts work but I don't want to get into the juggle of debating that.

**CHAIRPERSON:** Okay, I think, maybe if I could just put it this way. I think Mr Pretorius is suggesting that even if – even if there is no documentary proof or evidence to support what they say, your answer is, they are all not telling the truth. So, he's question is, if they are all not telling the truth, it means they are falsely and deliberately giving false evidence against you. So, his question is, why  
20 would so many people all target you to give false evidence against you. He wants you to get a chance to deal with that issue.

**MR MAHLOBO:** Chairperson, you are putting it nicely, probably I don't know why you are understanding the way you put it. Chairperson have we ever bothered and asked

the question about some of these lapses. Why will someone at a level of a General Manager not follow certain systematic things that happen, why would that person do, knowingly so. That's one issue that I want to leave for your own assessment. Number two, only two people, only two people here, remember I'm accused, not by ten people, someone is accusing me in terms of a report. Remember the other people that we are dealing with it's not people that they have dealt with me. Therefore, don't say it's ten  
10 but at the very same time Intelligence has a big component I'm not going to tell you the strength of numbers. If, out of the Intelligence Services only these numbers are coming and say this, when you look – I do maths, I do stats and if you look at it in terms of the weight, what does it mean? I'm saying to you, whether is it me or any other Minister that will fall because of the toxic environment that is there, only perpetrated by few, depending on the dynamics that are happening in the country in the political life of the country, you will have problems. Not – most Ministers that  
20 have gone there, they all raise issues, and you ask yourselves, what's happening even today they are still raising issues and if they raise issues, if you do diagnostic, what are we dealing with? Are we dealing with very lousy Ministers, very corrupt Ministers, the answer is no, there are fundamental problems there that's why when

the Presidency say, I'm repurposing this thing, including the report that you'll put, you'll be able to start to lay a foundation, going forward, on how to deal with this?

**ADV PRETORIUS SC:** Well, do I understand you to be conceding or saying that there are problems that need to be corrected?

**MR MAHLOBO:** Well, I'm on record, I said Intelligence Services, like any Government Departments their problems are inherent.

10 **ADV PRETORIUS SC:** I'd just like to...[intervenes].

**MR MAHLOBO:** Even during my time they were there.

**ADV PRETORIUS SC:** I'd just like to wrap this up very briefly, if I may. Seven witnesses have given direct or indirect evidence with delivery of cash for operational projects to you personally or to your offices. I want to then – that's just by way of summary. To the extent that these people are operatives why would they come to give false evidence, put their jobs at risk, their employment at risk, expose themselves to civil outcomes or consequences or  
20 even criminal outcomes and consequences by giving false evidence. I want to put it to you, it's, in my view, inconceivable that they would do so.

**MR MAHLOBO:** Well, in an ordinary world it's inconceivable but in an Intelligence world it can happen and I should not be able to speculate – you know, one of



the things that I've always avoided when I'm here, I don't want to speculate about people's motives but I'm clear, I know the environment I worked in and I know the characters and what the issues they were doing but at the very same time, I must be on record, in Intelligence there will always be robbed elements and there, there are good men and women who do their job diligently but there are also politicians there who are actually politicking and politics is politics here.

10 **ADV PRETORIUS SC:** I also want to put it to you, finally , that either their evidence is simply coincidence, or they've conspired together to give false evidence before they came, either of those are improbable.

**MR MAHLOBO:** Well, yourself, you have said here, I told you that this Intelligence Services are not immune from the politics of the ANC. I made an example here, that there are people both in the Intelligence Services and in the movement even everywhere who think that some of us are just underhand. The former President just appointed  
20 people who know nothing, and we're just being used. I was not used, I'm conscious, I'm a professional, I ran Government Baba Zondo, I ran departments where I got clean audits as an Accounting Officer, I know administration and I know politics. I will not break the law wittingly or unwittingly I know but at the very same time,

this process tells you about the kind of capacity we have at the state, the kind of certain people that give them the highest responsibility where they come and do certain funny things and they want to find scapegoats, I know the law and as I was even saying, because everybody who came here, it was about President Zuma this, President Zuma this and this youngsters is hired, I even asked a simple question to you Chair. Why will this President change a trusted confidant if he wanted to capture the ANC

10 Nasrec. Someone he thought, no, he's so pliable that he can do that. Have we ever thought, you know these things Baba Zondo we must also be careful that this Commission must never be seen to be unwittingly playing to the games of politics that are happening outside? You know there was an incident, Chairman Zondo, where the country – the media said I'm being deployed to become the Minister of Energy to conclude a nuclear deal. Your Commission, baba Zondo, I got subpoenaed by your Commission earlier on where someone came and made soe funny insinuating

20 statement in passing without saying that I signed a nuclear deal. I got a subpoena here, when I asked for documents to prepare, that subpoena was withdrawn, it said, it was sent to me erroneously. I had not signed any nuclear deal, but the country knows that I signed a nuclear deal, I was the Minister of Energy only for four months. I only

finalised the integrated resource plan for this country, I was also able to finalise that we have an energy summit where we look at how energy should do that.

Even it was funny where NGO took me to court, they say to court that I've signed a nuclear deal. When we're at the doors of the court they said let them produce evidence they say, no, no, no, they look at me, they think I'm going to do it. This very same thing this Commission did where people come, make allegations without  
 10 substance and you get to be called here. I was called, your records will show it but I'm not holding it against this and I'm saying it's a very delicate balance that this Commission must do so that even when we come to use this platform for things other than what we are trying to do to cleanse ourselves of the issues of malfeasance and corruption, that we must fight but at the very same time we use other particular platforms to deal with other people.

**ADV PRETORIUS SC:** In fairness to you I must put one last question, two last questions and I'm going to put it  
 20 very carefully, so bear with me. If it were to be argues...[intervenes].

**CHAIRPERSON:** We've gone past quarter to ten.

**ADV PRETORIUS SC:** I know but in fairness I must put this.

**CHAIRPERSON:** Ja.

**ADV PRETORIUS SC:** If it were to be argues or suggested that you had every motive to deny the allegations that have been put in evidence to you because you wanted to protect yourself from criminal sanctions, what would your answer be?

**MR MAHLOBO:** That's not true, that's not true, you know, as I was saying you are an inquisitorial Commission, but the reality is that if anyone wants to open a case, let him do that but at the very same time, why should I actually  
10 say certain things have happened when they've not happened when people can't even recall, why should I be forced to say that ...[indistinct].

**ADV PRETORIUS SC:** The other point I'd like to make for your comment is that it appears that you have very strong views about the need for secrecy in operational matters, is that not a possible reason for denying involvement in operational matters?

**MR MAHLOBO:** You know, it's not that I have strong views, just know that Intelligence in South Africa is highly  
20 regulated that's why I took the trouble to demonstrate to you where people come and create an impression that people, they do as they please. This is highly regulated and the issues of secrecy and in terms of the doctrine of Intelligence, Intelligence is a trade craft, it works in a particular way. It's not my view, it's what I was

implementing in law. You know if I was sticking to secrecy, I was going to come here and become funny when you ask me any operational matter, I would have refused to answer. The only thing I've refused to do is when you started to disclose names and identities of people, but I've been very cooperating here, helping you to deal with matters that, ordinarily, I should not. I would have, even refused, if I never respected you and the ANC and President to come and discuss Intelligence matters in public because they're  
 10 not discussed in public. When at the very same time I participated in a high level review panel, but I've always been prepared to come and account, that's what I've done.

**CHAIRPERSON:** I think we must stop now Mr Pretorius.

**ADV PRETORIUS SC:** Yes, Chair Mr Mahlobo did indicate that he would like a minute or two, I think I've reduced it from five minutes to a minute or two.

**CHAIRPERSON:** Is here anything you want...[intervenes].

**ADV PRETORIUS SC:** ...to make some closing remarks.

**CHAIRPERSON:** If there is I hope it's one or two minutes.

20 **MR MAHLOBO:** No, no, no Chair, it's just to convey my sincere thanks to you for allowing me the opportunity to come here and respond to a number of baseless allegations and being very fair. You've been fair with your team, I must also try to thank Mr Pretorius, I know it was not personal, we might differ on certain issues and – but it

was all in the spirit of getting information. At the very same time we need to wish you well Bab Zondo, it is not an easy situation, and we hope that when you conclude this work [speaking in vernacular]. We will look at the report when it comes at a particular point and then we will see because all of us we are trying an effort to help our country, but whatever we have done here and people that will come please let us handle the matters of national security with the sensitivity it deserves, and remember

10 whatever we are doing here we are being watched and our relationship with other people in the world is very important, but I hope I never gave you trouble, because I came here in spite of some of the administrative barriers, the [speaking in vernacular] I must thank my legal team there, Comrade Adonias and Comrade Ayanda despite that I was not even given money to have lawyers to be paid for documents I have subjected myself here as my President has expected me to do, and the ANC, we will have to be able jointly to find a way to support how to strengthen our

20 institution, including Intelligence Services, we will always be available to make an input, but at the very same time I am very cognisant, I don't want to rule from the grave, I have done my part, I have served my country to the best of my ability.

If there were mistakes along the way I will take

responsibility, but where people accuse me falsely I will not agree, [speaking in vernacular].

**CHAIRPERSON:** No thank you, thank you for availing yourself Mr Mahlobo. We appreciate it and as indicated if there are any further questions that Mr Pretorius would have liked to put but time did not permit he will send questions to your legal team and would ask you to respond to them by way of an affidavit, but thank you very much for availing yourself, thank you to your legal team for their  
10 cooperation, thank you Mr Pretorius and your team, thank you to the investigators, thank you to the technicians and to the staff, I thank all of you for your perseverance for us to sit until this time, and for your cooperation, thank you very much.

**MR MAHLOBO:** Thank you Chair.

**CHAIRPERSON:** We adjourn.

**MR MAHLOBO:** And I still need to thank Mr Pretorius, thank you.

**CHAIRPERSON:** [laughing] thank you.

20 **REGISTRAR:** All rise.

**INQUIRY ADJOURNS TO 20 MAY 2021**