COMMISSION OF INQUIRY INTO STATE CAPTURE

HELD AT

CITY OF JOHANNESBURG OLD COUNCIL CHAMBER

158 CIVIC BOULEVARD, BRAAMFONTEIN

10 JUNE 2021

DAY 408

Gauteng Transcribers

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DATE OF HEARING:	10 JUNE 2021
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PROCEEDINGS RESUME ON 10 JUNE 2021

CHAIRPERSON: Good morning Mr Seleka, good morning everybody.

ADV SELEKA SC: Morning Chairperson.

CHAIRPERSON: Are you ready?

ADV SELEKA SC: We are ready Chairperson.

CHAIRPERSON: Okay.

ADV SELEKA SC: Our witness today is Mr Clinton Ephron. He is – he is going to testify by way of a video link because he is out of the country and I think he will be ready to take either the oath or affirmation and then I will explain the purpose for his appearance.

CHAIRPERSON: Good morning Mr Ephron. Can you hear me?

MR EPHRON: Good morning Mr Chairman. Yes I can – loud and clear.

CHAIRPERSON: Thank you. Please Registrar administer the oath or affirmation.

REGISTRAR: Please state your full names for the record.

MR EPHRON: Clinton Martin Ephron.

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

MR EPHRON: No.

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

MR EPHRON: Yes 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.

MR EPHRON: So help me God.

CHAIRPERSON: Thank you. Yes Mr Seleka.

ADV SELEKA SC: Thank you Chairperson. Mr Ephron has been called to – to come back to testify before the commission. He has done so previously but he is called back as a result of allegations recently – or versions recently advanced before the commission particularly in regard to what took place prior to Glencore acquiring OCM – Optimum Mine and thereafter invoking the hardship clause which is found in the coal supply agreement between Eskom and Glen – OCM at the time.

There are certain versions of particularly Mr Koko and Mr Brian Molefe which we wish to put to Mr Clinton Ephron in order for him to clarify to the Chairperson the position in regard to Glencore and OCM at the time.

CHAIRPERSON: Yes okay.

ADV SELEKA SC: There is a file Chairperson which we will be using for Mr Ephron's statements which I believe he will now confirm under oath. The bundle is – or his – his statements are found in Exhibit U5A.

Mr Ephron on your side you would have been sent an electronic copy of this bundle. You confirm having it.

MR EPHRON: Yes I have it.

ADV SELEKA SC: Thank you.

MR EPHRON: I do – I have it.

ADV SELEKA SC: Okay. Your first statement is found on page 1 of that bundle.

MR EPHRON: Correct.

ADV SELEKA SC: And it runs up to page 28 – up to page 28.

MR EPHRON: Yes that is correct.

ADV SELEKA SC: That is correct. Above the name Clinton Martin Ephron there is a signature there – do you confirm that to be your signature?

MR EPHRON: I do.

ADV SELEKA SC: And I know you would have confirmed the contents of your statement in your first appearance – just to complete the picture you do confirm the correctness of the statement – the contents of your statement.

MR EPHRON: Yes I do.

ADV SELEKA SC: Chairperson if we could have this admitted as an Exhibit.

CHAIRPERSON: Well I do not know...

ADV SELEKA SC: Or that it is has been...

CHAIRPERSON: Whether we should do that.

ADV SELEKA SC: We should do that.

CHAIRPERSON: Because things were done in a certain way at the beginning.

ADV SELEKA SC: In the beginning okay.

CHAIRPERSON: You know the – the file was marked as an exhibit as opposed to ...

ADV SELEKA SC: I am sure.

CHAIRPERSON: The actual statements.

ADV SELEKA SC: Correct.

CHAIRPERSON: And maybe we should not cause any confusion.

ADV SELEKA SC: Yes.

CHAIRPERSON: But obviously the statement has been admitted and it is just that it was not marked as an Exhibit on its own.

ADV SELEKA SC: Yes.

CHAIRPERSON: So maybe we should just leave with the past the way it is.

ADV SELEKA SC: There is just two more of his statements.

CHAIRPERSON: Ja I think probably we just have to refer to them as the statement of such and such a date and statement of such and such a date.

ADV SELEKA SC: Okay. Ja.

CHAIRPERSON: You know we should not have had the file as an exhibit. We should have had the file as a Bundle.

ADV SELEKA SC: Correct.

CHAIRPERSON: And then the statements inside the file as exhibits.

ADV SELEKA SC: As exhibits.

CHAIRPERSON: Ja.

ADV SELEKA SC: Yes.

CHAIRPERSON: So – so the – the statements even if it might not have been expressly said they have been admitted. They – or maybe by implication it is just that they are not marked as exhibits. Ja. Okay.

ADV SELEKA SC: Thank you Chair.

CHAIRPERSON: Ja.

ADV SELEKA SC: Mr Ephron let us do the same with your last two statements – the second is found on page 322.

MR EPHRON: Yes that is correct except as you will note on the third statement we corrected something in the second statement.

ADV SELEKA SC: Correct. So the second statement starts on page 322 it ends on page 326.

MR EPHRON: Correct.

ADV SELEKA SC: The statement is dated 11 February 2021. You see that.

MR EPHRON: I do.

ADV SELEKA SC: And there is a signature there above the name Clinton Martin Ephron do you confirm that to be your

signature?

MR EPHRON: Yes I do.

ADV SELEKA SC: Do you also confirm the correctness of the contents of the statement?

MR EPHRON: Yes.

ADV SELEKA SC: Thank you.

MR EPHRON: Save as to the error that was made and it was corrected in statement 3.

ADV SELEKA SC: Okay talking of statement 3 that is found on page 327.

MR EPHRON: That is correct.

ADV SELEKA SC: The statement is dated 14 April 2021 – you see that?

MR EPHRON: I do.

ADV SELEKA SC: It is one page statement.

MR EPHRON: Correct.

ADV SELEKA SC: You confirm the signature there to be yours?

MR EPHRON: Yes I do.

ADV SELEKA SC: And you confirm the correctness of the contents of the statement.

MR EPHRON: Yes I do.

ADV SELEKA SC: Chair the statements will also be – or we beg that they be admitted as part of this Exhibit 5A Chairperson. Shall we proceed Chair? Shall we proceed

Chair?

CHAIRPERSON: I am sorry.

ADV SELEKA SC: Yes.

CHAIRPERSON: I had not seen this...

ADV SELEKA SC: Oh the two statements.

CHAIRPERSON: The state – statement at 327 on – I may have seen it or not – read it so I was just quickly having a look at it.

ADV SELEKA SC: Yes. Mr Ephron will explain it as well.

CHAIRPERSON: Hm. Okay I have just done so.

ADV SELEKA SC: Yes.

CHAIRPERSON: Okay there – so you have dealt with all three of them.

ADV SELEKA SC: Yes Chair thank you – yes.

CHAIRPERSON: Okay. Maybe I could just ask this question and maybe it is a question you are going to start with. Mr Ephron is there a particular reason why your statements were under oath – this was raised by both Mr Brian Molefe and Mr Koko who said that they were required to submit statements under oath and they submitted statements under oath that is affidavits but Mr Ephron kept on just sending statements that were not under oath. Was there a particular reason?

MR EPHRON: Mr Chairperson no there was no particular reason we were just asked to submit a statement.

CHAIRPERSON: Yes.

MR EPHRON: But I am happy to now confirm that they are – I am happy to now confirm that they are under oath.

CHAIRPERSON: Ja okay all right.

ADV SELEKA SC: Yes.

CHAIRPERSON: Mr Seleka.

ADV SELEKA SC: Thank you Chair. Mr Ephron just by way for the – a brief background in – on the facts before us there are three entities. There is Glencore, Optimum Coal Holdings and Optimum Coal Mine PTY LTD. Could you explain to us what your position was in relation to the three entities?

MR EPHRON: Well so I was – I was employed by Glencore South Africa and Glencore purchased approximately 67% of OCH and OCH in turn held 100% of the shares of OCM. So OCM was a wholly subsidiary of OCH and my position at OCH was I was a Director and effective CEO of OCH.

ADV SELEKA SC: Yes. And OCH was a South African based company.

MR EPHRON: Yes – as – yes that is correct. OCH South African based at the – initially listed and then unlisted.

ADV SELEKA SC: Yes.

MR EPHRON: Public and then private.

CHAIRPERSON: So you said you were effectively the CEO of OCH – you say effectively that suggests to me that you

may not have been appointed as such on paper but in terms of what you did practically you played the role of a CEO.

MR EPHRON: No.

CHAIRPERSON: Is that correct.

MR EPHRON: I was – I was appointed as CEO – I was – Mr Chairperson I will correct that. I was appointed as CEO.

CHAIRPERSON: So you were the CEO of OCH.

MR EPHRON: That is correct.

CHAIRPERSON: Ja. And at Glencore because you started by saying you were employed by Glencore – what was your position in Glencore?

MR EPHRON: So in Glencore I was the head of coal trading and coal operations in South Africa.

CHAIRPERSON: Okay.

MR EPHRON: And I was also a director on the local Glencore South African subsidiary.

CHAIRPERSON: Okay and in OCM did you have any a position or not?

MR EPHRON: Yes well effectively I would have been – and this is why I used the word effective previously is effectively I would have been the CEO of OCM as well being the CEO of OCH as the holding company.

CHAIRPERSON: Hm.

MR EPHRON: So all the companies that were underneath the umbrella of OCH which is Optimum Coal Holdings I was

– I was the CEO of all the companies.

CHAIRPERSON: You have – you have gone back to using effectively. Would my earlier question then be (talking over one another).

MR EPHRON: I use it – I use it effective because – because Mr Chairperson I am not 100% certain that for every underlying wholly owned subsidiary I was appointed as CEO.

CHAIRPERSON: Okay. Okay.

MR EPHRON: I would have to check that.

CHAIRPERSON: Okay.

MR EPHRON: So we could – we could certainly check that.

CHAIRPERSON: Ja.

MR EPHRON: But there were a number of subsidiaries under OCH and I am – I am not entirely sure whether I was overseeing ...

CHAIRPERSON: Appointed yes.

MR EPHRON: Appointed CEO of each individual wholly owned subsidiary of OCH of which there were a number of.

CHAIRPERSON: Ja of course they were – our interest is more on Glencore, OCH and OCM. But you say in regard to OCM you are not sure whether you were appointed CEO but at a practical level you played the role of CEO, is that correct?

MR EPHRON: That is 100% correct.

CHAIRPERSON: Okay all right.

ADV SELEKA SC: Thank you Chair.

CHAIRPERSON: Mr Seleka.

ADV SELEKA SC: Mr Ephron are you able to see us here in the hearing venue.

MR EPHRON: I can see you both when you speaking yes.

ADV SELEKA SC: Okay. Thank you.

MR EPHRON: Thank you.

ADV SELEKA SC: So we have gone through your statement – the first statement in which you set out the details about how Glencore came to purchase or acquire OCM and the time period within which that transaction took place. So is it correct that this took place in the period between June 2011 and March 2012.

MR EPHRON: Yes.

ADV SELEKA SC: Just tell us – or just relay to the Chairperson the entity that Glencore was actually acquiring was it OCH or was it OCM or both of them.

MR EPHRON: Well the – it was OCH and to reiterate OCH owned 100% of the shares of OCM. So buying the shares of OCH you would effectively own the shares of OCM.

OCH was just a holding company with subsidiaries in it.

ADV SELEKA SC: Yes. In that period June 2011 to March 2012 were you the CEO I mean in its – sorry rather an

employee of Glencore?

MR EPHRON: Yes.

ADV SELEKA SC: And director in Glencore.

MR EPHRON: Yes Glencore's local subsidiary yes.

ADV SELEKA SC: So at the time of the acquisition – well you can tell the Chairperson whether or not this is correct. At the time of acquisition of OCH you became the CEO and director in OCH.

MR EPHRON: Yes.

ADV SELEKA SC: So from day – from the time of acquisition.

MR EPHRON: Yes once the deal was effective and closed then I got appointed as – as CEO.

ADV SELEKA SC: Okay.

MR EPHRON: And director.

ADV SELEKA SC: So the following aspect or facts will fall within your knowledge as to the reasons why Glencore did not do a due diligence when it acquired OCH.

MR EPHRON: Yes.

ADV SELEKA SC: Can you explain to the Chairperson what the reason was for Glencore not conducting a due diligence.

MR EPHRON: So Advocate Seleka if I may correct you. We did not not do a due diligence we did a reasonably extensive due diligence and I can point you to my paragraph 14 I am just going to see exactly where it is on my – on my

initial statement.

CHAIRPERSON: Okay it is paragraph – it is paragraph 14.

MR EPHRON: Find the page.

CHAIRPERSON: Of page 3. It is paragraph 14 of page 3 in this bundle where you kept talking about a comprehensive...

CHAIRPERSON: Correct.

CHAIRPERSON: Due diligence.

MR EPHRON: Correct. Correct so – so what I – just to give you some history here. We – we specifically mention that we did not do a comprehensive due diligence but it is worth noting the following.

OCH was a listed company and had listed one year prior to the commencement of the Glencore Group of Companies starting to acquire the shares in OCH which meant the following.

This is very important. In order to list on the Johannesburg Stock Exchange OCH at the time would have had to put out a pre-listing statement and they did so and it was a 300 page statement which included a recent competent person's report, a recent independent technical report and an independent competent person's report of the material assets of OCH by a company called SRK which is an independent company.

So all this information together with the information that Glencore had through its knowledge of the industry

would have allowed us to prepare a due diligence and to perform a due diligence which was sufficient under the circumstances and in associated – an associated with the risk that we were prepared to take and I will explain that a little bit later because I am sure that is a question that is going to be asked is why was it not done.

But the reason why and I will get there but for now you – one needs to understand that there was a significant amount of information that was available to us in order for us to run models and do a very good assessment of the value of this company.

ADV SELEKA SC: Ja were you – were you reading from somewhere – furnishing the details?

MR EPHRON: No I was not reading from – I was not reading.

CHAIRPERSON: Ja he was not reading ja.

MR EPHRON: From anywhere but – I was not reading I do recall the facts at the time that a – we used the word non-comprehensive because we could not go in and kick the tyres of every single vehicle or every single borehole in the ground but we had sufficient information in order to give us a very reasonable understanding of the company and its value thereto.

ADV SELEKA SC: Ja. I see that in that paragraph 14 of your first statement in – on page 3.

MR EPHRON: Huh-uh.

ADV SELEKA SC: You do say that Glencore was not able to undertake a comprehensive due diligence exercise in particular Glencore only had publicly available information regarding C – the CSA and it only knew the duration volume to be supplied and price per tonnage provided by the CSA. Glencore did not for example know how any price adjustment mechanisms in the CSA worked.

Well let us see whether you could answer this – this allegation that Glencore would have failed to do a comprehensive due diligence as you state in your – in your statement because Glencore had a connection with the current President Mr Ramaphosa and that Glencore intended to leverage his influence in order to negotiate a price increase with Eskom once the acquisition of OCH had taken place. What would be your comment to that?

MR EPHRON: I think that that allegation is preposterous and I – I cannot understand how and why someone would think such a thing.

The reason why we did not do a comprehensive due diligence is the following and I would like to point you to my second statement and we are going to have to go to page ...

ADV SELEKA SC: It is page 322 on the hard copy.

MR EPHRON: Thank – thank you very much. Page 322 and paragraph – paragraph 6. 323

ADV SELEKA SC: Yes on the – on the soft copy – thank you that is correct.

MR EPHRON: Correct. So let us just go back one step. Why did we not do a comprehensive due diligence. This is – this is not an uncommon strategy when procuring a company. One has to assess the risk.

CHAIRPERSON: I am sorry – I am sorry.

MR EPHRON: Associated with not doing a comprehensive...

CHAIRPERSON: I am sorry Mr Ephron you said 323 is there a particular paragraph that you want me to look at as you give evidence/

MR EPHRON: Paragraph 6.

CHAIRPERSON: Okay all right. Continue.

MR EPHRON: So there are two mechanisms in terms of buying a listed company – there are two ways in which one can do it.

One can approach the company directly and attempt to buy the shares from the company once they approach the end of their shareholders or you can approach the shareholders directly and through a series of private transactions obviously through the market you would be able to secure a certain amount of shareholding in the company.

So in – the reason why we did not approach OCH directly was because had we done so OCH would have had

to put out a public notice, a sense announcement that its share price could be affected as a result of a certain transaction.

So we – we said in order to ensure that the price remained competitive and we knew that there was potentially a competitive process out there – a number of prospective buyers were interested we elected to approach individual shareholders directly.

So as a result we could not enter into a non-disclosure agreement and go ahead with the company and kick every tyre we felt that we had sufficient information, sufficient knowledge about the company through our industry knowledge and in addition the pre-listing statement which I have previously mentioned which was 300 pages long gave a substantial amount of information around the company.

So we did not kick the tyres. We did not know every single asset within this company but we certainly had a pretty good understanding.

In going to your question Mr Seleka there is not an iota of evidence that points to the fact that Glencore in any way wanted to rely on a relationship with Mr Ramaphosa as our shareholder in order to change the contract price. It is ridiculous.

There is – we can show I am – you – the commission

has interviewed a number of Eskom directors, a number of Eskom employees past and present and nowhere has it ever come up that Mr Ramaphosa was involved in any discussion or negotiation around the CSA of OCM.

I go one step further. In paragraph 9 on page 324 I would like to please read it out.

CHAIRPERSON: Yes do.

MR EPHRON:

> "I never asked Mr Ramaphosa to intervene on behalf of OCH or OCM in any matters relating to Eskom or the CSA and to the best of my knowledge and recollection she never did so."

ADV SELEKA SC: Were you ...

MR EPHRON: So we strongly deny this allegation.

ADV SELEKA SC: Yes. Were you – were you personally involved and directly with Eskom in the – in regard to the Coal Supply Agreement?

MR EPHRON: Yes every step of the way.

ADV SELEKA SC: Ja. Now the acquisition was completed in March 2012 you say in your statement which you have now confirmed under oath and you do say that I think it is around July 2013 OCM decided to invoke the hardship clause. That is a little over a year later.

CHAIRPERSON: Maybe before you go that far Mr Seleka.

Mr Ephron is it in 2011 or early 2012 that OCH acquired OCM?

MR EPHRON: Mr Chairperson it was a series of transactions. So there were a number of transactions that we entered into.

CHAIRPERSON: Yes.

MR EPHRON: Between June 2011 and March 2012.

CHAIRPERSON: Yes. So the – the ...[word cut] at which you could say – it could be said that the acquisition of OCM by OCH was complete. Would it have been in March 2012, in your view?

MR EPHRON: So just to correct, Mr Chairman. It was not the acquisition of OCM of OCH. It was the acquisition by Glencore, LEC(?) Shell and its other shareholders that purchased – that finalised the purchases of OCH by March 2012. Correct.

CHAIRPERSON: Yes, but as I understood the position. I thought earlier on you said Glencore acquired OCH or is the position that OCH ...[intervenes]

MR EPHRON: Yes, that was ...[intervenes]

CHAIRPERSON: ...OCH already held 100% of shares in OCM before Glencore approached?

MR EPHRON: Yes.

CHAIRPERSON: Oh, okay, alright. So OCH ...[intervenes]

MR EPHRON: Yes, Mr Chairperson.

CHAIRPERSON: ...OCH was ...[intervenes]

MR EPHRON: Yes.

CHAIRPERSON: ...at all material times in control of OCM and then Glencore just ...[intervenes]

MR EPHRON: That is correct ...[intervenes]

CHAIRPERSON: ...the shares? Is that right?

MR EPHRON: Of OCH.

CHAIRPERSON: Of OCH.

MR EPHRON: That is correct.

CHAIRPERSON: Ja, okay. No, no. But the point in time when it could be said or rather let me say. What is the point in time when Glencore had acquired OCH, the shares in OCH?

MR EPHRON: I think you are referring to at what time Glencore and its partners had control of OCH?

CHAIRPERSON: Yes, that is what I am talking about. Ja, had control.

MR EPHRON: That would have been in and around March 2012.

CHAIRPERSON: Okay, alright. Do you know what Mr Ramaphosa's position was in that regard, whether in government or in the ruling party?

MR EPHRON: At that point in time, my recollection was that he was not involved in government.

CHAIRPERSON: Yes. And then in the party, was he already Deputy President or what?

MR EPHRON: He only... No, no. He only – my recollection and I really – I do not have exact dates but when Mr Ramaphosa divested his interest in all his money ventures, this one included, was in paragraph 13 of my first statement and that is on the 2nd of May 2014. So it would have come after that. Mr Ramaphosa would have become Deputy President only after that dates.

CHAIRPERSON: That is Deputy President of the country but what about Deputy President of the ...[intervenes]

MR EPHRON: [Indistinct]

CHAIRPERSON: What about the Deputy President of the party? Can you recall when he became that?

MR EPHRON: My recollection is that he was not involved at all in politics prior to his taking up of Deputy Presidency of the country but ...[intervenes]

CHAIRPERSON: Ja.

MR EPHRON: ...I am sure these facts would be able to easily verify that.

CHAIRPERSON: I think the information in the public domain would be that he was elected Deputy President of the party at the Mangaung Conference in December 2012. Mangaung Conference of the ruling party in 2012. I think that is my recollection, just from public domain. Does that

sound with you or you do not know?

MR EPHRON: I cannot – I really cannot confirm that.

CHAIRPERSON: Yes, yes.

MR EPHRON: But I just – I seem to recall that when Mr Ramaphosa was going to take up that position of Deputy President of the country, he divested himself of his mining and, in fact, all his business interests in South Africa. So that is what I seem to recall. I do not seem to recall anything else.

CHAIRPERSON: Ja, well, he would have become – he became Deputy President of the country after the 2014 elections.

MR EPHRON: Yes, yes.

CHAIRPERSON: So that might tie up with your statement in paragraph 13 of your statement.

MR EPHRON: Yes.

CHAIRPERSON: Mr Seleka?

ADV SELEKA SC: Yes.

CHAIRPERSON: Is my recollection about Mangaung correct?

ADV SELEKA SC: It is correct, Chair. The date from the President's own affidavit.

CHAIRPERSON: H'm?

ADV SELEKA SC: His election as – being elected as the Deputy President of the ANC is 18 December 2012.

CHAIRPERSON: Ja, okay, alright. Now, Mr Ephron, going back to the non-comprehensive due diligence exercise as I understand it that you say was undertaken by Glencore. You, obviously, did see the coal supply agreement that you would be taking over from – when you acquired OCH and OCM. Is that right?

MR EPHRON: Correct.

CHAIRPERSON: Yes. Now, I note that in paragraph 14 of your first statement, you say you did not, for example – or Glencore did not, for example, know how any price adjustment mechanisms in the coal supply agreement worked. Why did Glencore not find out how that those mechanisms worked? I would have thought that would be ...[indistinct]

MR EPHRON: Because ...[intervenes]

CHAIRPERSON: ...reasonable(?).

MR EPHRON: Yes, because we – because that information was not disclosed in any of the previous statements or publicly available information and therefore we could not have known that.

CHAIRPERSON: Now, did you say you did not approach, that is Glencore, did not approach OCH... OCM directly as a company but it approached shareholders privately? Is that correct?

MR EPHRON: Correct. That is correct.

CHAIRPERSON: Yes. And you say that was because if you approach the company directly, that would have triggered some notice that would have to be given and that would upset the share prices. Is that right?

MR EPHRON: That is correct.

CHAIRPERSON: Yes. So, but you did have sight of the coal supply agreement. Is that correct? You just did not know how the mechanisms worked?

MR EPHRON: No, that is incorrect.

CHAIRPERSON: You did not know?

MR EPHRON: No. So we only would have had – we did not have sight of the coal supply agreement.

CHAIRPERSON: Ja.

MR EPHRON: We would only have had sight of details in the competence person's(?) report of the coal supply agreement, such as, volume, duration and price.

CHAIRPERSON: Yes. Does that mean that that was just one agreement that you did not have sight have that you would, in effect, be taking over or is the position that you did not have sight of any agreements that you would be taking over when – after acquiring OCM?

MR EPHRON: We would not have had sight of any confidential agreements that OCH would have had. Only the main details of significant contracts and deals that OCH had.

CHAIRPERSON: Well, it sounds strange to me. I think you said it is normal to do things this way but it sounds strange to me because ...[intervenes]

MR EPHRON: No, I ...[intervenes]

CHAIRPERSON: Or did you not? Am I attributing ...[intervenes]

MR EPHRON: ...to say – no, I did not say it was normal. I just said it happens ...[intervenes]

CHAIRPERSON: Oh ...[intervenes]

MR EPHRON: ...that potential acquirers of the company do not go directly to a company. So let met just shed a little bit of light. If you go directly to a company ...[intervenes]

CHAIRPERSON: Yes, please do.

MR EPHRON: ...to the board, the board then may turn around and say, you know, why would we do a deal with one perspective buyer. Let us open this up to a tender process. Let us look at the entire market. Let us look at potentially the better value. So by going directly to a company, it is a strategy. If you can sign exclusivity with a company then maybe it is a good strategy to take but if you cannot, and we did not feel that we could, then it would have opened up a sort of a Pandora's box in terms of potential competition. So we felt that the strategy was more prudent to go directly to shareholders that own the

shares in OCH and affect transactions with those shareholders.

CHAIRPERSON: H'm.

MR EPHRON: We have done it before at Glencore. This is not the first time that we have done such a transaction.

CHAIRPERSON: Yes. Yes, okay. No, I understand. I was actually putting something to you that you had not said that is usual but you say – I think the line between what you said and what I was actually putting to you is quite fine. You say it does happen and say it is common, the approach to the shareholders as opposed to approaching the company. Okay, alright.

MR EPHRON: Correct.

CHAIRPERSON: Now, it – one of the reasons, certainly from my perspective, it was important that you be called back is that, certainly, when you gave evidence and maybe when other witnesses gave evidence, I had this feeling that OCM, Glencore, might have been treated rather harshly or unfairly or maybe too firmly by Eskom when you invoked the hardship clause.

And, of course, when Mr Brian Molefe came and gave evidence and you might have heard him or you might had the chance to either listen or watch or read his evidence. He referred to something that I said at some stage and I cannot remember whether it was when you

gave evidence or somebody else, when I questioned why Glencore had not done a due diligence but maybe with what you are saying now why did it not done a comprehensive due diligence because you say it did do a certain type of due diligence. It is not as if it did not do it all, you know.

Now, but when Mr Molefe gave evidence, he, in effect, said – not in so many words but he was sending a message that say, Glencore, OCM do not deserve any sympathy. To say the least, they put themselves into this position. They did not do a due diligence. Maybe we should say did not do a comprehensive due diligence.

They entered into – they took over a coal supply agreement that had this clause about price and they then complained that this price was bringing them hardship and they wanted Eskom to increase the price quite drastically. And he said: I refused because it was going to be unjustified for me to get Eskom to increase the price like this.

But he, his evidence, together with that of Mr Koko when the two, at least, are read together, also says but hang on. If Glencore, OCM felt that there was unfairness in us sticking to the price that was in the agreement, the agreement had a way for them to get a relief. The agreement said you can invoke the hardship clause, which

they did invoke, but it says you – if there is no agreement, you can go to arbitration. Take arbitration to its finality and if the arbitrator who would be a neutral person thinks that yes there has been harshness on you, relief would be granted.

And they were saying but at Glencore, OMC, although the invoked the hardship clause and although at some stage they took steps to pursue the arbitration route they never pursued up to its act. And Mr Koko: Chairperson, do you know why they did not do that? It is because they knew they had no case because the agreement – or I do not know – maybe referring to the settlement agreement that they referred to – defined what could – what was excluded from the hardship clause.

So he says they knew they did not have a case of any hardship. That is why they did not pursue the arbitration route to the end. So, in other words, saying to me: Chairperson, in effect, whatever sympathy or unfairness you may have felt for Glencore/OCM, when they – Mr Ephron gave evidence here and maybe whoever else gave evidence, was misplaced because they placed themselves in this situation and for the situation that they were complaining about, the coal supply agreement had an escape route. Escape route being to go to arbitration and then you could get relief. But they did not do their job.

Now they wanted Eskom to accept an increase, an unjustified increase if the way they put – I mean, certainly Mr Molefe put it. So, do you want to address that criticism or those ...[intervenes]

MR EPHRON: Yes. No, no I do, I do.

CHAIRPERSON: Ja.

MR EPHRON: I do. You have raised numerous points, Mr Chairperson.

CHAIRPERSON: Yes, ja.

MR EPHRON: So, I have to ...[intervenes]

CHAIRPERSON: ...them ...[intervenes]

MR EPHRON: ...raised a lot of points that ...[intervenes]

CHAIRPERSON: Okay.

MR EPHRON: ...would individually go to but ...[intervenes]

CHAIRPERSON: Yes.

MR EPHRON: ...I am happy to do so.

CHAIRPERSON: Okay, what I want you to do is. Deal with them to your satisfaction but Mr Seleka might raise individually raise some of them but deal with them the way you like to deal with them.

MR EPHRON: Okay. So, let me try and again give you my perspective in order to refute some of the allegations that have been made. You have to go back a step. The CSA contract between OCM and Eskom was entered into in

1993. It was a 25-year agreement. The people that entered into that contract envisaged that situations and circumstances will change over a period of 25-years.

And as such, they included a hardship provision. When Glencore came into the company in June or in March 2012, we started to understand more and more about the contracts. We, of course, identified that there was a hardship clause. Now, Eskom is a business and Glencore is a business. The contract had been running for 19-years.

The contracts specifically makes mention under the hardship provision, and I need to read this again because for some reason, people seem to forget the severity of the situation. I am referring to paragraph 12 of my second statement and that would be on page 324. Are you with me, Mr Chairperson?

CHAIRPERSON: I will get there just now. Yes, I am there.

MR EPHRON: So the CSA between Eskom and OCM included a hardship clause which specifically provided that ...[intervenes]

CHAIRPERSON: And that is from ...[intervenes]

MR EPHRON: ...from the contracts. Now – exactly. It is paragraph 12.

CHAIRPERSON: H'm.

MR EPHRON: Yes.

> "In entering into this agreement, the parties declare it to be their intention that this agreement shall operate between them with fairness and without undue hardship to any party..."

That is the prerequisite of the hardship clause in the CSA between OCM and Eskom. So on the back of that, we instituted hardship and we knew that it would be a long and tedious laborious legal process with Eskom. We understood that. It was then, in early 2014, and I am going to have to refer you – we are jumping to my first statement now, paragraph 20.

CHAIRPERSON: Ja.

MR EPHRON: And I going to get you to a page. Page 4.

CHAIRPERSON: Page 4?

MR EPHRON: Then go to page 4, paragraph 20.

CHAIRPERSON: H'm?

MR EPHRON: Please confirm that you are with me, Mr Chairperson?

CHAIRPERSON: Yes, I am. Thank you.

MR EPHRON: Okay. So approximately six months after the discussions and the hardship notice had been set, Eskom then approached OCM to suspend the hardship arbitration and to come up wit a proposal to ensure the viability and the longevity of the mine and at the same time

secure the much needed coal required for Hendrina Power Station. Why did Eskom do this?

In my opinion, is that Eskom realised that there was severe hardship being incurred by OCM but Eskom also realised that that contract would be coming to an end in December 2018 and under a cooperation agreement, which was signed in that paragraph on the 23rd of May 2014, we agreed that we would suspend the hardship in the hope that we could negotiate terms where the original idea, and it is not exactly written in these words in my statement, was that we would recover our costs for the period 2014 to 2018 and then we would expend the contracts with Eskom at advantageous prices to Eskom for the period 2010 to 2023 or 2024. So we would like to see it as a win-win.

At the same time, there were a number of penalties and a number of other things which we were hoping to incorporate with some resolve and settlement on that. So when we looked at this and we said: Can this work? When Eskom looked at it, they said maybe there would be some upfront payment in terms of paying a higher price in the interim to ensure the viability of the mine, they would in turn receive approximately 25 or 30 million tons to see them through to the end of the life of project of the Hendrina Power Station.

Of course, I am going to add, with the benefit of hindsight, it would have been an incredible deal for Eskom today. That is another issue. I am going to jump forward. When the new management came into Eskom and looked at the cooperation agreement, it was their decision, they decided, in their view that they could not pay a higher amount in the short term and they wanted to end this cooperation agreement.

They did not want to continue. They felt that they would take their chances in 2018 and it was their view that they did not have to continue. We felt that it was unfair. We felt that it was unreasonable. We explained it to them in the best possible term that we could. We had meetings. We sent letters.

We opened up the books of Optimum to show them the hardship. We showed them what was happening in the mine. Needless to say, we received a letter from Eskom, paragraph 36 of my first statement. It is page 9.

CHAIRPERSON: I have got it.

MR EPHRON: We received the letter on the 22nd of June where Eskom indicated that they no longer wish to participate in the settlement process and that the cooperation agreement, essentially, ended at that point in time. And I go on – we go on to say in paragraph 37:

"While Glencore and OCM understood that

> Mr Molefe was entitled to his position and how that position might benefit in the very short term, that Eskom would receive low coal prices, we felt that Mr Molefe's position did not necessarily appreciate the risk that Eskom face after 2012 where they would have no security of coal supply for the mine which was located very close to the Hendrina Power Station and therefore would be in a very weak negotiating position..."

That being said, that was Eskom's response. And that was sent on the 22nd of June 2015. I now refer you to paragraph 39. The very next day, Glencore re-invoke and reinstituted the hardship arbitration the very next day. At no stage was Glencore going to give up on the hardship. At no stage.

So the allegations that Glencore was not going to go down the hardship road. There is absolutely no doubt in anyone's mind, including the members, including the directorship of Eskom that Optimum was suffering severe hardship. Eskom made a decision. Eskom decided that this was not the road to go down. They did not want to an opportune(?) deal for Optimum. They only wanted to worry about the short term.

At the same time, there was a hardship provision,

having gone down the road of hardship of arbitration, could have gone either way. Of course, as arbitrations can always go either way but we felt we had a more than reasonable chance of succeeding in arbitration and that is the crux of the story.

CHAIRPERSON: H'm.

MR EPHRON: Mr Seleka, I am sure I have touched on a lot of points that you want to jump in on.

CHAIRPERSON: Yes, Mr Ephron. Mr Seleka is looking at me because I asked the question. [laughs] He is looking at me.

ADV SELEKA SC: ...want to. [laughs]

CHAIRPERSON: Well ...[intervenes]

MR EPHRON: It seems to me that you have become the evidence leader, Mr Chairperson. [laughs]

CHAIRPERSON: [laughs] Well, you might not be – you probably mean that well but there may be others who do not mean it well. [laughs]

MR EPHRON: I do. Of course.

CHAIRPERSON: So the first – but the first time ...[intervenes]

MR EPHRON: Of course.

CHAIRPERSON: ...you invoked the hardship clause, was it 2013 or was it – when was it?

MR EPHRON: Correct. It was July... The

13th of July 2013.

CHAIRPERSON: Yes. And the cooperation agreement was signed when?

MR EPHRON: It was signed in ...[intervenes]

CHAIRPERSON: Not necessarily the exact date, just ...[intervenes]

MR EPHRON: The 23rd of – I have got the exact date.

CHAIRPERSON: Ja.

MR EPHRON: The 23rd of May 2014.

CHAIRPERSON: Okay, alright. So it might be fair to say, there may have been around a year, close to a year or thereabout when the cooperation agreement was signed if you calculate from when you had invoked the hardship clause for the first time. Is that right?

MR EPHRON: Yes.

CHAIRPERSON: It might be less than a year but close to that. Ja. Okay, alright. Now you ...[intervenes]

MR EPHRON: Yes, and the arbitration proceedings were going ahead during that time. And I need to reiterate that Eskom approached OCM in early 2014. We only signed the cooperation agreement on the 23rd of May 2014 but early 2014, as per my paragraph 20, that is when Eskom approached OCM to suspend the hardship.

CHAIRPERSON: So are you saying that after the invocation of the hardship clause by OCM in 2013 the

process that would have led to arbitration continued while discussions or negotiations were going on between OCM and Eskom but before the arbitration could happen, the two parties concluded the cooperation agreement. Is that what you say?

MR EPHRON: Yes, after Eskom approached SCM, that is exactly what happened.

CHAIRPERSON: Yes and then the cooperation agreement suspended the hardship clause and then that went up to – is it 2015 when the cooperation agreement was cancelled?

MR EPHRON: Yes, 22 June 2015.

CHAIRPERSON: Yes and thereafter I think you said the following day you, OCM, re-invoked the hardship clause, is that right?

MR EPHRON: That is correct.

CHAIRPERSON: Yes and before Mr Seleka asks you the questions he is going to ask, can you indicate to me whether when OCM re-invoked the hardship clause after the cancellation of the cooperation agreement did that mean that continuation of the process that had been suspended when the cooperation agreement was signed or did it mean invoking the hardship clause from the beginning? In other words, starting the process afresh or is that something you cannot remember?

MR EPHRON: No, it – no, I can recall exactly, it was not

starting afresh. Everything that had been done already from July 2013, we had just continued.

CHAIRPERSON: Yes.

MR EPHRON: In fact we had set down dates for arbitration for a year hence which was the 16 to the 27 May 2016. So we were trying as much as we could to speed up the process. Of course, Eskom was trying as much as they could to slow down the process.

CHAIRPERSON: What then led to – why did the process not reach actual arbitration if it – in other words ...[intervenes]

MR EPHRON: Because the company went into business rescue.

CHAIRPERSON: Yes. And that, of course, ...[intervenes]

MR EPHRON: The company went into business rescue later that year.

CHAIRPERSON: Yes, is this later in 2015?

MR EPHRON: Correct.

CHAIRPERSON: Yes. The company going into business rescue was, as I recall, OCM/Glencore's decision, is that correct?

MR EPHRON: Well, it was all the shareholders.

CHAIRPERSON: All, the share – ja.

MR EPHRON: It was all the shareholders of OCH would have made that decision.

CHAIRPERSON: Yes but ...[intervenes]

MR EPHRON: Not just...

CHAIRPERSON: Ja, what I am highlighting is that it was not a situation where some third party, maybe of OCM, initiated that. That was not the situation.

MR EPHRON: Well, there were circumstances – the board decision – the board of OCH and OCM would have made the decision but it would have come as a result of circumstances within the company, so it was not from an outside party.

CHAIRPERSON: Yes. Mr Seleka?

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

CHAIRPERSON: I leave a lot of questions to you.

ADV SELEKA SC: No, no, that is fine, people must understand this is an inquisitorial investigation, Chair, so when you ask questions, you are not necessarily taking over from the evidence leaders, you are working with them. Mr Ephron, I am going to – let us see whether I am not disturbing that sequence but there is an issue here in regard to the hardship. The invocation of the hardship clause and the referral of the matter to arbitration, that the knowledge on your part – and I am putting a version to you from one of the witnesses, was that you could not prevail in the arbitration because of the reason why you invoked

the hardship clause which was the export market was down and you had closed your export market component of the mine.

The agreement specifically says in clause 27 that export – the downturn in the export market is not the reason to invoke the hardship clause. Now I want you to comment on that because if that was the reason, the allegation is that you then knew that you would not succeed in the hardship arbitration and that is why you did not pursue it. Yes?

MR EPHRON: That is not the reason. The reason why the hardship was invoked was because the price escalation mechanism in the contract was not reflective of the current situation with respect to mining costs and to be fair to the people that entered into this contract in 1993, there is no way that they could have envisaged that the price escalation clause could encapsulate all the necessary increases or all the increases they had incurred in mining from 2008 and onwards and even before. And, as such, every year in real terms the price that the mine was receiving was getting less and less as a result of the price escalation adjustment not being reflective of mining inflation.

So what then happened was that the mine, as a standalone mine, or as a fact, or with export product was

losing money. So it was losing money on the basis of that fact that this escalation clause was not representative and for every time that would need supplied, the mine was losing a significant amount of money.

CHAIRPERSON: What do you say ...[intervenes]

MR EPHRON: I hope I am answering you.

CHAIRPERSON: Yes, okay, I thought you had not finished.

MR EPHRON: Well, I hope I am...

CHAIRPERSON: Yes, I thought you had not finished but I think you have, ja.

MR EPHRON: No, no, no, I am...

CHAIRPERSON: What do you say to ...[intervenes]

MR EPHRON: No, I am done.

CHAIRPERSON: What do you say to the proposition that whatever difficult situation OCM/Glencore found itself during this time was to a very large extent a consequence of the choice that OCM/Glencore or Glencore had made when it acquired control of OCH and OCM not to get to know – not to see this contract, CSA contract, and not to study it carefully and see how it would work for Glencore OCM and what potential challenges it would pose and what Glencore would put in place to deal with those challenges? What do you say to that proposition, to say when you ...[intervenes]

MR EPHRON: Mr Chairperson, Mr Chairperson ...[intervenes]

CHAIRPERSON: Hang on, let me finish, let me finish. In other words, what do you say to the proposition that you should not complain or OCM/Glencore should not complain when it met with such challenges as you have told me about because that is what is going to happen if you acquire a company without ensuring that you see what contracts it has that will be binding on you and whether it will have challenges and how you will meet those challenges when they do arise? This is a situation where Glencore was the author of its own misery. What do you say to that proposition?

MR EPHRON: Mr Chairperson, you are correct, you are one hundred percent correct, there was a risk associated with entering into agreement to buy shares in OCH without performing a comprehensive due diligence.

There was a limited due diligence and I have explained that extensively. Of course we did not know the extent of the losses that were being potentially incurred by Optimum but the key matter here- and this is what people are forgetting, is Glencore only complained in terms of the way in which Eskom approached this matter.

We looked at the contract, we saw that there was a hardship clause and we invoked hardship under the rights

of the contract because we – the people that entered in this contract envisaged that there would be problems with this contract, so all we did was we stepped in and said how can we try and ameliorate the risk or ameliorate the financial difficulty the shareholders of Optimum were experiencing at that point in time using a contractual basis to do so. That contractual basis was a hardship clause.

Now, if Eskom felt that that was not what they wanted to do or not the road that they want to go down or they felt that it was unfair that we invoked that, well, that was sitting in the contract so that was a mechanism that we decided after the fact to use to reduce the amount of financial hardship we were incurring.

At the same time, we put a proposal to Eskom that said let us extend the contract, let us try and make it into a win-win but we need to do something because right now we are funding this entire operation which ordinarily should be in liquidation but we are not because we want to try and continue and ensure that the mine supplies coal to Eskom. So we are not denying any of those facts. We are business people, we came in to look at the mine, we looked at the mine and we saw that there was a mechanism that allowed us, because we were incurring undue hardship, there was a mechanism that allowed us to look at the contract and try and see if there was a way in which we could reduce the

hardship for the mine. That is all we did.

CHAIRPERSON: Well ...[intervenes]

MR EPHRON: Now, there is another issue regarding whether there was *male fides* or whether there was – whether we can complain or not complain, we are not here to complain. We are not here to complain, if Eskom's – if that was Eskom's decision, that was their choice. That was what we had to live with. We reinstituted the hardship clause, we had reinstituted – we had dates set for hardship and we were going to continue down that road, that was the intention.

CHAIRPERSON: Yes, of course all of this arises, at least in part because Mr Brian Molefe says in effect, if not expressly, that he or his management after he came to Eskom is portrayed as having been harsh or unduly harsh in his approach to Glencore, Eskom, in regard to the issue of increasing the price as requested or proposed by Glencore. It said that prior to his arrival at Eskom in April 2015 the management of Eskom had had discussions with Glencore/OCM, they had reached an cooperation agreement in terms of which – and which I think you said when you gave evidence previously, in terms of which all these structures within - management structures within Eskom who had anything to do with the cooperation agreement and with the – I think price you were proposing,

they seemed to be amenable or they were agreeable until Mr Molefe came and when he came, all of that changed. So he is saying I am not denying that I took a firm stand against increasing the coal price and I will not apologise for that position that I took.

He says I took that position in the interest of Eskom. There was no way Eskom could afford that increase and he says actually that proposal was unjustified and it is unfair that decisions that I made or decisions that my team made should be viewed as decisions that were aimed at unduly being harsh on Glencore/OCM because maybe we were wanting to assist another party, we wanted to put OCM or Glencore in a difficult position to facilitate some other transaction.

He says that is not the case, he says I looked at all of this, I looked at the agreement and I looked at Eskom's financial situation and I did what I believed was right in terms of protecting the interests of Eskom. You might wish to say something, I am just saying that is the context in which some of these issues arise. You might wish to say something about this.

MR EPHRON: Yes, sure. So, Mr Chairman, I mean that is Mr Molefe's view and he is entitled to have that but I think you have heard a substantial amount of testimony from other board members and other people within Eskom that

the approach that was taking was unreasonable.

But there is no reason for me to say or to try and get to understand whether Mr Molefe feels he was right or wrong, that was his opinion. I think in hindsight we can see exactly what has happened to the mine.

The truth of the matter is that Mr Molefe had come in and within a few days he had already decided that he was not going to go ahead with this agreement, in any form.

The cooperation agreement had even been extended to a fourth addendum of the agreement. In fact most of the terms had already been agreed in terms of the extension of the CSA until 2023 and that is in my first statement paragraph 27.

So if Mr – at the end of the day I cannot make any deduction of what Mr Molefe felt or what the internal bureaucracy of Eskom felt but we said fine, if that was your position then that is what we would have to live with.

CHAIRPERSON: Okay. Mr Seleka?

ADV SELEKA SC: Thank you, Chair. To the extent, Mr Ephron, that you recommenced the hardship arbitration you say the next day after the termination of the settlement process. You got dates in your statement, 16 to 27 May 2016 which is nearly a year later. Could you not get earlier dates for that arbitration?

MR EPHRON: Mr Chairperson, there was just – I mean, there was – we could not even get a meeting with Eskom never mind a date. I mean, we were lucky to take whatever we could get.

Remember that between the 23 June 2015 and May 2016 there would have to be discovery, there would have to be a whole lot of witness statements, so I mean we got those dates and we locked them in, there was not a question of getting an arbitration hearing sooner than the 16th to the 27th.

I can assure you we did everything in our power to try and get that date sooner and Eskom were doing everything in their power to get the date later.

ADV SELEKA SC: You earlier responded to the Chairperson's question why did you not pursue the arbitration to its ultimate end? Your response was that you – OCM went into business rescue.

MR EPHRON: Correct.

ADV SELEKA SC: Now what do you say to both Mr Molefe and Mr Koko who say well, business rescue was simply used as a mechanism for you to – and I mean OCM, for OCM not to comply with the agreement which OCM knew it could not terminate. So neither party could cancel the CSA and for OCM to avoid complying with the CSA, it then decided to go into business rescue. So it is stratagem, in

other words, business rescue proceedings.

MR EPHRON: So I am not sure what agreement Mr Molefe or Mr Koko read but I do not know of any agreement that allow you to exit.

So I do not know, the accusation that we realised that we could not exit the agreement, we then went into business rescue.

Business rescue was instituted by the board of OCM and OCH as a result of circumstances that led up to the business rescue being declared on the 31 July.

But if you allow me, after the hardship provision had been invoked and after we had a received a letter from Eskom that indicated that there would be no cooperation agreement and that there would be no fourth addendum to the CSA, we then received a letter on the 16 July, just a month later, 16 July 2015. I would like to point you to paragraph 42 of my initial statement, page 10. Sorry, page 10, sorry.

CHAIRPERSON: I have got it.

MR EPHRON: OCM received a letter from Cliffe Dekker Hofmeyr representing Eskom demanding payment of alleged penalties in an aggregate amount of R2 billion and that was for previous sizing and quality issues. These were the sizing and quality issues that we were continually discussing with Eskom over the past three years in order to

come up with some sort of amenable solution.

The key thing was not the penalty. The penalty we knew was not based on anything reasonable and I think that there has been some evidence that within Eskom that many people within Eskom felt that that – the penalty of 2 billion and the request for an immediate payment otherwise summons will be issued, was completely unreasonable within Eskom. So that we have gleaned from other evidence and other testimony that is given to the Commission.

But that was not the issue, the issue that put us into business rescue was the fact that continual penalties would be applied against the contract against any deliveries which was approximately 3 to 350 000 tons a month that was being supplied by OCM at the time, that Eskom would no longer be paying for that coal.

Now we had gone down a long road of explaining and we had experts and predictions and reserve indications and all details regarding the qualities of the coal and the qualities of the sizing.

That being said, it was virtually impossible for OCM to supply exactly as per the contract. It was still a very, very high quality coal but by the imposition of the penalties and the mechanism in the contract allowed for set-off which meant that if we were supposed to get R150 a ton,

Eskom would pay us nothing for the coal, essentially R1 a ton.

I would like to point you to paragraph 47 which is on page 12.

CHAIRPERSON: Yes, I have got it.

MR EPHRON: Further *male fides* as far as I am concerned that was imposed on OCM. Eskom withheld payment, for no reason, of approximately R92 million which was for coal that had been delivered for the previous two months, so we ...[intervenes]

CHAIRPERSON: I am sorry, are you reading from ...[intervenes]

MR EPHRON: We have got this letter ...[intervenes].

CHAIRPERSON: Sorry, sorry, Mr Ephron.

MR EPHRON: I am reading from – so in paragraph 47.

CHAIRPERSON: Ja? I am looking for ...[intervenes]

MR EPHRON: I can read it for you but basically what it says is that for the month of July and the month of August 2015, Eskom did not pay for the coal.

CHAIRPERSON: Hang on, hang on.

MR EPHRON: Coal delivered.

CHAIRPERSON: Hang on, you were referring to 90 – I think was it 92 million or something and I was trying to look at 47 and I could not see it.

MR EPHRON: Yes, so 58 million for July.

CHAIRPERSON: Ja.

MR EPHRON: And 34 million for August.

CHAIRPERSON: Okay, alright, continue?

MR EPHRON: So we then knew – we knew what was happening within Eskom, Eskom was just trying to put the maximum amount of pressure on Optimum.

They sent a letter for the penalties of R2.1 billion which we knew was frivolous. They then purported to not pay Optimum for the coal that was being supplied, nothing. Never mind the hardship, but they would no longer pay for the coal. They withheld the money.

So the directors of Optimum at that point in time in order not to trade recklessly and speaking to shareholders were left with no choice but to place the business into business rescue in the hope that the business rescue practitioners could come in and maybe they could salvage something from a disastrous situation that we were facing. That is why we did not continue with the hardship claim, Mr Chairperson.

CHAIRPERSON: I am sorry, if you sum that up, would it be that because of the introduction of the element of the R2 billion penalty claim you felt that that changed the situation and OCM/Glencore would not be able to deal with that except through business rescue?

MR EPHRON: Correct, we were faced with – we were up

against the ropes. They knew we have hardship, they had done full financial due diligence on the company, they knew exactly what was happening, they knew that the hardship arbitration was going to continue, they still elected to hit the company with 2.1 billion of penalties, which they knew the company could not afford and, in addition to that, the way which we understood it, was that Eskom would not then be paying for any of the coal that was being supplied.

So we were left with very little choice, Mr Chairperson. Very little choice. As directors we were really up against the wall.

CHAIRPERSON: But ...[intervenes]

MR EPHRON: There was – we still held up hope, we still came in and gave post-commencement funding or post business rescue funding in the hope that something could be salvaged by the business rescue practitioners.

CHAIRPERSON: I take it that OCM/Glencore when this demand for the payment of R2 million was made – R2 billion was made, OCM would have looked at the merits or the demerits of that claim and taken legal advice where necessary as well and would have formed a view about the merits or demerits of such a claim and I would imagine that if they took the view that there was no merit in a claim for R2 billion, maybe it was R1 billion, substantially less or not

valid at all, that they would not feel pressure to do anything, they would say well, take us to arbitration for that penalty – for that claim or take us to court, we will defend that – we are not shaken by that claim. Am I right in thinking along those lines?

MR EPHRON: So there is that. It is a little bit more complicated.

CHAIRPERSON: Yes.

MR EPHRON: Because there are two aspects here. The first aspect is, we had been in discussions with Eskom to attempt to try and reduce minimally some of the penalty provisions in the contract because as demand grew over the previous 20 years, the coal was further and further away from the plants and there was further and further degradation of the material and it was virtually impossible for Optimum to meet the exact quality specifications.

I say this not with a pinch of salt but the qualities were very, very close to what needed to be supplied under the contract but because of the very harsh penalties that were included in the contract and were already under negotiation between OCM and Optimum that there was reasonable chance that we would not have to pay such a penalty.

But, of course, it is another legal obstacle that the mind would have to face and there would be possibility that

some of it would have to be paid. We do not know, but there would be. At the same time there is a mechanism in the CSA that allows OCM to approach Eskom, explain to Eskom and Eskom had brought their experts onto the mine for over the last three years and they had agreed – I mean the Eskom technical people had agreed that what Optimum or OCM was saying with respect to the qualities of the material was correct, and that they could not meet the harsh specification that was included in the 25-year-old contract.

So yes one instance we could defend it, it would be a long story and it would be defendable and we felt that maybe there was some to be paid, certainly not R2billion.

The bigger issue Mr Chairperson was that while we are waiting for that to happen, while we waiting for the hardship to happen, we mining 350,000 tons a month of coal, already losing a R100million a month but now we are going to lose R200million a month because Eskom it is not paying us for the coal.

So you could say it is easy decision but when you when you are faced with such severe hardship within a particular company, there comes a point in time that you reach out to business rescue practitioners in the hope that maybe they can come up with something more suitable than you, maybe it was a personality clash between OCM

and Eskom and maybe another face, another person would be able to get a better deal.

I mean, I am sure that there are deals in the industry being done as we speak around these kind of transactions, I would not be surprised.

CHAIRPERSON: Maybe we should – thank you Mr Ephron, maybe let us take the tea break now and then we will continue after the break. Let us resume at quarter to, its twenty-five – no, no not twenty-five to its twenty-seven, twenty-eight minutes to twelve, lets resume at quarter to twelve. We adjourn.

INQUIRY ADJOURNS

INQUIRY RESUMES

CHAIRPERSON: Okay, let us continue, Mr Seleka.

ADV SELEKA SC: Thank you, Chair. Mr Ephron if I understand you correctly, you are saying OCM did have the option to exit the coal supply agreement?

MR EPHRON: No, not at all.

ADV SELEKA SC: So it did not have the option to exit the coal supply agreement or to terminate it?

MR EPHRON: No, it did not have that option.

ADV SELEKA SC: Okay, well, because...[intervene]

MR EPHRON: Sorry, did I not - what – did I not indicate that there was no option to exit. I mean, what I mentioned earlier was that I do not know of any agreements that allow

you just to exit, if you want to exit, maybe there are.

CHAIRPERSON: Well you – no, the normal thing is that different agreements have different or make different provisions, but it is quite normal for an agreement speaking in general, I am not talking about a coal supply agreement, necessarily, to make provision - particularly if it is a long term relationship, to make provision for any of the parties to exit by simply giving a certain amount of notice, a reasonable notice that now they want to get out of this contractual relationship.

And in addition, the normal thing, and the - what I am talking about is a situation where they do not need to blame the other party for anything, they just say, we want to exit for our own reasons. No, we are not saying you are in breach or anything and then, obviously, there would be also clauses to the effect that if the one party is in breach of the agreement or contracts, the other party, the innocent party, is free to exit the contract by terminating the contract, if the breach is serious one.

That is the norm, that is what is normal, you know. That happens with a contract of employment, having been CEO you would know, if you have a fixed term contract with a particular employee, that he or she is employed for X number of years usually the only way you can - either the employee or yourself can exit that contract is if the other

party is in breach, but not just because you no longer want to because there is a reason why both parties want a fixed term arrangement.

But if it is a contract that is of an indefinite nature, usually you can exit by giving notice but as I understand it, what Mr Koko was saying in regard to the CSA was because of how long it is, the duration of the contract, and because of the importance of coal to Eskom there was no provision for just exiting, you know, just because anybody wanted to exit from it.

Obviously, that brought about certainty to all, to both parties but also he was saying the agreement acknowledged that there could be situations where there would be hardship on the part of I cannot remember either side or the supplier and that is why a special provision was made for the hardship clause because it was understood that you cannot have a situation where the one party feels that there is hardship but they are forced to just continue without any route to relief and it was accepted that where the one party feels that there is hardship on it that has come about in relation to the contracts, then it could invoke the hardship clause and that would have the potential of leading to relief that would remove the hardship if they were successful in arbitration.

So, but I had also understood you to be suggesting

that there was a way of exiting but I think now that you have clarified, you were saying you do not know of situations where you can just exit, I understood you to be saying something different but you have clarified that your understanding was that OCM/Glencore could not just exit the CSA and that is your - that is the understanding you had.

ADV SELEKA SC: Can you explain that?

MR EPHRON: Correct, Mr Chair, if I can add...[intervene]

CHAIRPERSON: Yes.

MR EPHRON: If I can add Mr Chair in my experience with Eskom over many, many years, I have never seen a contract that allowed one party to exit, of course under the second example that you gave of breach, of course, it is a different story and that goes into a whole other set of legalities.

CHAIRPERSON: Ja.

MR EPHRON: But terms of unilateral terms of the unilateral ending of a contract, I have never seen that, I have never seen that at Eskom, ever.

CHAIRPERSON: Ja, okay, no, that is fine, Mr Seleka.

MR EPHRON: And there is no reasonable way of any - there is no way any reasonable person would just – can deduce that someone who has been in the industry for many years would ever suggest that there would be such a

contract between Eskom and a supplier, it does not make any sense.

CHAIRPERSON: No, no, I certainly understand completely, why there is no such option having heard the evidence of Mr Koko and Mr Brian Molefe and now your own position, I have a complete understanding why there would be no option in the contract to unilaterally get out of the contracts.

ADV SELEKA SC: Yes, so...[intervene]

MR EPHRON: Yes, but, sorry, just to - not to harp but the allegation that one, that I or we assumed that there would be such an option is preposterous and it is bizarre, anyway.

CHAIRPERSON: Ja, no - well, one, I do not think that either Mr Brian Molefe or Mr Koko said you would have thought that there was such an option. What we have said, is that both Mr Seleka and I thought that you had just said earlier that there was such an option. That is why he asked you the question, so – but you have clarified now, but I do not want you to get the impression that it is witnesses who said that.

MR EPHRON: Okay, okay all clear.

ADV SELEKA SC: Yeah, Mr Ephron the - well, the allegation is actually different, now that you say you could not, or there was no option to exit let us see how you

answer this question, because I asked you earlier was that because of that knowledge you used business rescue as a mechanism to avoid complying with the agreement?

MR EPHRON: Mr Seleka, I think I answered that, in my answer to the Chairperson, in that business rescue was the final straw on the camel's back in terms of the severe hardship that OCM was under at that point in time. It had been - it had gone through an extensive process with Eskom from hardship, to cooperation agreements, to addendum, to discussing the penalties, to extending the contract. There was a significant history and it was the catalyst of the penalties and the going forward of the non-payment of coal deliveries, we put the business in business rescue because our shareholders were no longer willing to fund the business on a monthly basis.

It was not - it is just we got to a point of, in some respects no return and there was hope that during a business rescue proceedings, and that is why there is such a thing is that a business rescue must rescue the company, and we gave the business rescue practitioners all the means that they would have required in order to hopefully come up with something.

ADV SELEKA SC: So your answer to that allegation is yes, you used it as a mechanism to not comply with the agreement?

MR EPHRON: No, my answer to that is no - my answer to that is no, we did not use it as a mechanism. We used business rescue because the company was in financial distress.

CHAIRPERSON: Well, let me ask this question, Mr Ephron and maybe I must just say to you, because not everybody knows, in my earlier life, I was a lawyer in practice and I represented a lot of trade unions and did a lot of labour work. So I became familiar with bargaining between trade unions and employers and negotiations for all types of things, including wages and struggles for recognition agreements and so on, in the 80's and 90's. Between a trade union and an employer there is a lot of bargaining, because each one is trying to advance its own interests and in a mature relationship, neither would be trying to destroy the other because they need the other or at least they think they have to live with other.

But in trying to advance their own respective interests or promote their interest, they can cause a lot of inconvenience for the other. Each one can cause a lot of inconvenience sometimes cause some suffering and some hardship. As a result, when a trade union calls its members out on strike, and they go for weeks or months without wages, that some suffering, but the employer can also lock them out.

So, there can be a lot of suffering and the employer will may go through suffering when there is no production because the workers are out on strike and each one blames the other, you know, but within that, there is a lot of room where various things are allowed to be done by both parties to the other and they will accuse each other of being unfair and so on but sometimes or most of the time, one should leave the whole thing to them and that is a way in which they will push each other to an agreement to compromise.

Now, when one looks at the discussions and negotiations between Eskom and OCM and Glencore here, including the use of the business rescue option, whatever the reason may have been, if the agreement did not preclude Glencore/OCM from invoking the business rescue process, it can be argued that there was nothing wrong with OCM/Glencore invoking the business rescue process, if it believed that the circumstances required it to do so, okay.

But if the parties did not want a supplier who is involved in a coal agreement such as this, to voluntarily resort to a business rescue process maybe they would have put that in the agreement or maybe they would have said before you can do that the following steps should be taken. Maybe they would have said, well, it should be a

situation where it is a third party who puts you into business rescue situation.

I am not sure I am just opening my mind to a lot of possibilities. Is there any reason why when I look at all of this, the allegations that have been made by OCM/Glencore against Eskom, particularly after Mr Brian Molefe's arrival, as well as when I look at the allegations that are made by Eskom, particularly during Mr Brian Molefe's tern, tenure against Glencore/OCM?

Is there any reason why I should not approach this on the basis that this was a commercial transaction where each party was entitled, within certain parameters, to use whatever tactics to bring pressure on the other, to see things their way or to compromise and reach agreement without attributing any mala fide to either party? Is there any reason why I should not approach it the matter in that way?

MR EPHRON: Mr Chairperson you know I cannot deduce what you should be thinking or the way in which you should understand this but - and just to be clear, we are not making allegations of mala fide because we do not know mala fide. We only putting facts on the table and it is for you to come to the conclusion of whether there was or there was not.

But there are a lot of facts, and there is a lot of

information at your disposal as to what was happening with this mine and why so much pressure was being put on this mine. When you say you had a lot of experience with unions, we also had a lot of experience with unions over the years but I always knew that fairness would prevail. Even though many of our workers went out on strike, I always knew that in the end, we would both be reasonable and come to the party.

If there is an allegation to be made, we do not believe in reasonableness in terms of OCM and Eskom because why put so much distress on a company, when you know that the company is under distress, why, for what purpose? There was a solution, there was a reason, there are currently deals being done in the industry at the moment that allows for such solutions. So why could a solution not be done in 2015? So, I cannot...[intervene]

CHAIRPERSON: You cannot assist much, ja.

MR EPHRON: ...guide you in terms of how you want to – of how you should think this through but I can only I can only give you our version of the facts and where we stand and what we experienced at the time in the most honest and open way that we can do it.

CHAIRPERSON: Yes, okay, Mr Seleka.

ADV SELEKA SC: But on that question, Mr Ephron the executives we have mentioned Mr Brian Molefe, Mr Koko

and I think one member of the Board, Dr Ngubane did say something to the effect that Glencore was seeking to capture Eskom, you were strong arming them into increasing the coal price and that is the reason why there was some resistance on their part.

CHAIRPERSON: And I think the increase was said to have been, is it close to 100%?

ADV SELEKA SC: Yeah, it more than that, it was...[intervene]

CHAIRPERSON: Ja, so part of the – of what was said by Mr Brian Molefe, Mr Koko and Dr Ngubane is look at the increase that Glencore wanted us to agree to, look at the amount. How could we agree to such an amount if we were really to act, and be seen to be acting in the interests of Eskom. You want to deal with that?

MR EPHRON: Sure, Mr Chairperson they have their view on the price increase, the price increase in fact the final price increase that we gave was, I think R300 a ton, which was, yes, 100% more. It was all in relation to the costs of the mine. The costs were evaluated on an open basis with Eskom's experts to see exactly what was happening.

The allegation of State Capture is so preposterous, that it is very difficult to try and come up - to try and even mentioned it because all Glencore did was come in, they saw a contract that was an amount that was under distress.

They saw long term contract, they saw a hardship invocation clause, they saw a clause that could relieve some of the pain, which was envisaged in the contract in 1993 and all they intended to do was invoke a contractual provision in a contract.

If that is State Capture, then I need - then I certainly do not understand State Capture. What was in my mind, how does one, who are we capturing in this instance, in terms of asking for a price increase and I want to reiterate this, because it seems to be lost all the time. There was a win, win scenario in extending the contract by an additional 30 odd million or 25 odd million tons which would see out the life of the Hendrina Power Station.

So there was a win, win scenario, it was not just a one sided discussion. Now, these kind of discussions, Mr Chairman, are happening every day between Eskom and other industry players as we speak. Why is it okay today and was not okay in 2015 was it State Capture in 2015 and not today? So I do not understand the allegation and I strongly deny it.

CHAIRPERSON: What do you say to somebody who says to you, listening to all of this evidence, it seems that if OCM or if Glencore had done a proper, maybe I should not say proper, a comprehensive due diligence, before taking over OCH and OCM and had seen this contract and had

done their homework properly they would have realised that in due course, they would have a problem because of this price and would have stayed away from OCM.

But because they did not do their homework properly they did not know before taking over OCH and OCM that there was this contract, you did say that you did not know, you had not had sight of this contract. You did not know about - you did not know the terms of this contract. You did not know that the price adjustment mechanism was one that you would later find not to be, I think you say in your statement not to be helpful or whatever, it would not help in this situation.

That is why you found yourself in this situation because you did not do the kind of homework that should have been done. What do you say to that?

MR EPHRON: Firstly, Mr Chairman, anyone even if Glencore had not bought this mine, whoever had taken on this - the current management would have declared hardship, the current management would have gone into business rescue, anything could have happened.

So it is difficult to go back in time and say, had we done this we would have done that, I do not think anyone is necessarily to blame in that instance we are - what we did was we came in, there was a risk of the contract, as you quite correctly pointed out and all we did was when we

came in, we used the contractual terms of the contract to try and reduce the hardship of the mine, that was our intention.

Our intention was not to come in and change the price or close the mine that does not make any sense. All our intention was to come in and continue with the contract, there was no reason why we were not going to continue with the contract. When we saw that there was undue hardship and when we saw that there was a hardship clause, we invoked the hardship.

I do not think that that is unreasonable in terms of any counterparty in any contract wanting to do in a 25-year agreement. So you can blame Glencore for not doing a full due diligence, but at the same time, how do you blame Glencore for invoking a provision in a contract that allows a particular party not to endure hardship? If - let me put it to you like this, Mr Chairman, let us assume that there was no Eskom contract and the mine was enduring hardship. What would happen is the mine would close down. There is no such thing as you cannot - the company cannot go into business rescue or liquidation.

The company does not make money that can happen in the situation not having an Eskom contract. We really, really pushed as hard as we could to try and come up with a solution on a win, win basis to ensure that the

mine could continue and that the power station could continue.

CHAIRPERSON: Ja.

MR EPHRON: I need to go back and reiterate, if you look with hindsight, look at the mine today, look at the power station there is nothing there.

CHAIRPERSON: You see...[intervene]

MR EPHRON: So I hate using hindsight but it is what it is but we came in, we knew there was a risk. When I say we knew there was a risk, we knew there was a risk in not doing a full due diligence. Glencore has purchased mines before without doing such an intrinsic due diligence but that was one of the things that we had to accept.

When we came in and we saw that there was a hardship provision we invoked it and all we did was try and protect the rights of ourselves and our fellow shareholders.

CHAIRPERSON: Well, one, at this stage I do not have - I have not taken a view, necessarily to the effect that Glencore/OCM was wrong to invoke the business rescue process and it may well be that it is not for me to say it was right or wrong. Certainly, there seems to be nobody who says it was in breach of the agreement to Glencore/OCM to invoke the business rescue route and as I understand it, the agreement did not preclude Glencore from doing so.

I have mentioned this and I think you have responded but I just say it again for the sake of completeness. Within the context of this matter the Eskom senior executives, Brian Molefe and Mr Koko as I understand them are simply saying, we must not be blamed for our decisions not to agree to OCM and Glencore's demand or request or proposal for an increase in the coal price, because of the hardship that Glencore says they were going through because the hardship and that situation was a consequence maybe in whole or maybe in part for – that flowed from their decision – their election to take over OCM and OCH without having done proper due diligence because if they had done that proper due diligence either they would have known that there was a reasonable likelihood or possibility of challenges because of this price and maybe they would not be able to use the hardship clause to get the relief they want and they would have stayed away or negotiated something that would have avoided this situation.

So the country and the world must not blame us for the decisions we took and for the approach we took. That I think is in part at least what they are saying and I am putting in my own words but I think you have responded but in case you want to add anything I – I give you a chance.

MR EPHRON: Yes I would agree with your analogy. They had their view for whatever reason that they did not want to

agree to an increase in the price and they – they felt that they needed to protect Eskom. I think what needs to happen is you need to – you need to look at the sequence of events post business rescue. And you need to look at the full picture.

CHAIRPERSON: Yes thank you.

MR EPHRON: In order to make an – a conclusion.

CHAIRPERSON: Yes.

MR EPHRON: This is – this is chapter 1.

CHAIRPERSON: Ja. Ja.

ADV SELEKA SC: Ja.

MR EPHRON: There is a continuation of the story.

CHAIRPERSON: Yes. No thank you.

MR EPHRON: But it is not – it is not for me – it is not for me to – it is not for me to – to go through that. You have substantial evidence in front of you.

CHAIRPERSON: Ja. No, no that is fine.

MR EPHRON: This is just where we got to. This was in our view this was a transaction not a very good one but it was a transaction in the ordinary course of business.

CHAIRPERSON: Yes. Thank you. I just wanted to make sure that you have had a chance to deal head on with what I understand them to be saying. Mr Seleka continue.

ADV SELEKA SC: Thank you.

MR EPHRON: Absolutely.

ADV SELEKA SC: Thank you. Mr Ephron you have mentioned repeatedly that the parties needed to deal with each other fairly. Do you think you were not treated fairly as Glencore OCM?

MR EPHRON: Everyone – everyone can have their due Advocate Seleka You know I do not think it was reasonable in the way in which Eskom dealt with us but you know that – that was their due that was the way that they felt – that they should – should deal with the matter.

ADV SELEKA SC: Ja.

MR EPHRON: I think in hindsight in has proven to be wrong but that being said I – you know it was what it was. We – we dealt with it as best as we could with – I can assure you with the utmost bona fide's at all times.

ADV SELEKA SC: Yes. Look we have specifically in looking at the state capture features of the transaction or whatever we are investigating and I want to ask you the question whether do you think there was an ulterior motive in the way in which Glencore OCM was treated by Eskom – the new executive at Eskom? Whether then or now...

MR EPHRON: I cannot answer that.

ADV SELEKA SC: You cannot answer.

MR EPHRON: I cannot answer that Advocate Seleka I can only – I can only hope that – that you guys have sufficient evidence in order to be able to do that but it is not my

position to answer that.

ADV SELEKA SC: Well let us – okay let us look at what happens and maybe you can tell the Chairperson what seems to be a turnaround in Glencore's decision from the 3rd of September 2015 when you were called to a meeting to meet with Mr Koko and Mr Brian Molefe. Do you recall that?

MR EPHRON: Where are you looking? Can you refer me to a paragraph?

ADV SELEKA SC: Paragraph 50 of your statement – page...

MR EPHRON: 50?

ADV SELEKA SC: Yes page 13 – 13.

MR EPHRON: Okay. What is your question?

ADV SELEKA SC: Ja well I want you to explain to the Chairperson what is happening from this date onwards because there seems to be a turnaround or a turning point in Glencore's decision regarding OCM and we see this in this meeting of the 3rd of September 2015 where you are at Eskom.

There would also be a meeting on the 24th of November 2015 and what you ultimately convey to Eskom as Glencore's decision to taking OCM out of business rescue. Are these events and you can go into the details of – of these meetings for the Chairperson's information? Do

they signify a turning point in Glencore OCM's position or not?

MR EPHRON: No I think – I think what you have highlighted Advocate Seleka is – is that at all times post the business rescue declaration Glencore was funding the company to continue to produce coal and to – to sustain itself.

We were hopeful at this point it was under the – under the leadership and under the – or the curatorship or the business rescue practitioners were in control so they were dealing with most of these issues.

But the hope was that – that somehow a deal could be ironed out between the business rescue practitioners and – and Eskom. In fact there are various overtures by the business rescue practitioners towards Eskom in order to try and see if there is a way forward.

The meeting of the – I think it was – I am trying to find that final date. A lot of – there were a lot of circumstances and there were a lot of facts between the time of the – Glencore's decision to take it out of business rescue in – when did you say was – 24th of November.

ADV SELEKA SC: Yes.

MR EPHRON: That is all – that is all – no not 24th of November – sorry I cannot seem to find where – where you mention..

ADV SELEKA SC: The 3rd of September.

MR EPHRON: I am trying to find the – yes so it is jumping – is it September? Yes because it was jumping around quite significantly and there are a lot of facts that – in between so I want to try and respond to the second meeting that you indicated. Can you direct me to a paragraph please?

ADV SELEKA SC: Oh the 24th in paragraph 72. I think – let us see –

MR EPHRON: No that was a meeting with the DMR.

ADV SELEKA SC: Yes, no it 72, 73 start on page 18, page 19.

MR EPHRON: Yes so that – that all deals with the Oakbay offer and that Oakbay were undergoing a due diligence and Oakbay were looking at the mine and we – the business rescue practitioners and a representative of Glencore met – I was not at that meeting on the 24th of November but there was a meeting there that – that – that the business rescue practitioners were taking up with Eskom with regards to Oakbay.

ADV SELEKA SC: Mr Ephron which paragraph are you at?

MR EPHRON: 73.

ADV SELEKA SC: It says at – paragraph 73 reads:

> "A meeting was called with Eskom on 24 November 2015 in order to update them

regarding the discussions with Oakbay."

Is that the one?

MR EPHRON: That is the exact one.

ADV SELEKA SC: Yes in that meeting a number of things were discussed but the one other thing which I thought you would deal with for the purposes of the – of informing the Chairperson where Mr Blankfield advised the meeting that Oakbay was conducting a due diligence and that funding has been secured for OCM for the duration of Oakbay's due diligence period.

MR EPHRON: Yes.

ADV SELEKA SC: Can I – let me – let me paint a picture to you so that you can understand what I am trying to ask you.

MR EPHRON: Sure.

ADV SELEKA SC: So we have looked at a phase which you say in chapter 1 and now we – OCM is in business rescue but decisions after it has gone into business rescue particularly from September 2015 there is a decision to continue supplying coal to Eskom. And with that there was a decision from – by Glencore to fund OCM and ultimately to take it out of business rescue.

That decision was communicated in this meeting of the 24th of November 2015 and you also speak about communicating it on the 29th of November 2015 and then there is also a meeting on the 1st of December 2015 where

you are at Eskom and you again communicate a decision of Glencore to fund OCM and take it out of business rescue.

You recall that.

MR EPHRON: Right. Yes so now you have the timing slightly wrong. So the 24th of November that was not the meeting to indicate to Eskom that we are taking it out of business rescue. The 24th of November 2015 meeting was specifically with Oakbay, the business rescue practitioners, Eskom and Mr Blankfield as a representative of Glencore at the time and it was all about Oakbay's indicated desire to purchase OCM. It was not about taking it out of business rescue – the idea was that if OCM – if Oakbay was successful in buying OCM then it would be taken out of business rescue.

When I – when you speak about funding – funding was in place from the time of business rescue. I need to reiterate that if funding was not in place after business rescue then immediately the mine would be in liquidation.

So funding was in place from the moment business rescue started all the way through until effectively Oakbay took control of the mine which was sometime early in 2016.

So this first meeting is – is – has got nothing to do with – with Glencore wanting to take it out of business rescue.

On the 29th of November however, which is now

paragraph 89 that is a different story. By that time which is a few days, later a lot of things were moving in between. I would like to maybe read it to you.

ADV SELEKA SC: Yes.

CHAIRPERSON: Ja do so.

MR EPHRON: It is – I do not – I have just got to call up the page number but I think you have got paragraph 89 in front of you.

ADV SELEKA SC: It is page 22.

MR EPHRON: Page 22 apologies.

> "On the 29th of November 2015 after Glencore OCH had declined the third Oakbay offer and had received Section 54 Notices the Glencore team held a telephonic conference to consider its options regarding OCM which at that stage consisted of letting the BRP's put the mine into liquidation i.e. by withdrawing the funding being provided by Glencore of committing to provide further funding to keep the mine operational so that the BRP's could take it out of business rescue."

And I am reading further paragraph 90.

> "Glencore's decision was in part informed by its analysis of the Optimum business which

indicated that the additional cost of continuing to fund and operate OCM over its remaining 00:15:11 mine – mine life compared to the third Oakbay half of approximately R1.1 billion which included a number of risk and uncertain assumptions would have resulted in that amount increasing. However.."

And 91.

"Despite the high cost of continuing to fund OCM Glencore decided that the collateral damage of putting OCM into liquidation for example the impact on the mine's employees and Glencore's other businesses would have been too great. We therefore decided to provide further funding commitments to allow the BRP's to terminate the business rescue proceedings following which OCM would have continued operating the mine in the ordinary course business."

So there was a whole lot of stuff that happened before that that got us to the point where we said okay this is – we have really got no choice we have to take it out of business rescue. And that did not last very long because the next day if you continue reading there was – a deal was

entered into with – with Oakbay.

CHAIRPERSON: Mr Seleka of course Mr Ephron has previously given evidence and today the purpose is just for him to respond to what certain witnesses have said...

ADV SELEKA SC: Yes.

CHAIRPERSON: About the Glencore/Eskom and him and to clarify whatever else we wish to be clarified.

ADV SELEKA SC: Correct.

CHAIRPERSON: Against that background, I want to ask you whether you are pacing yourself to finish by one o'clock?

ADV SELEKA SC: Before that.

CHAIRPERSON: Okay all right.

ADV SELEKA SC: Before one Chair.

CHAIRPERSON: Ja okay. In doing so I do want you to take him to the clause that – or clauses that Mr Koko referred to. Part of that he may have dealt with already.

ADV SELEKA SC: Yes.

CHAIRPERSON: But I just want to make sure I understand his answer in relation to the exclusion of the following markets.

ADV SELEKA SC: Yes.

CHAIRPERSON: So ja – so at some stage before you finish you would need to – to do that ja.

ADV SELEKA SC: To do.

CHAIRPERSON: Okay continue.

ADV SELEKA SC: Yes. So Mr Ephron can you explain this? So this is a decision where Glencore seeks or decides to take OCM out of business rescue and to comply with the 00:17:55.

MR EPHRON: Correct.

ADV SELEKA SC: The Coat Supply Agreement.

MR EPHRON: Correct.

ADV SELEKA SC: At a price of R150.00 per ton.

MR EPHRON: Correct.

ADV SELEKA SC: When Mr Koko was here he drew the Chairperson's attention to the – to the minutes of a meeting where a team that was negotiating with you – the team of Eskom negotiating with you was coming back to the BTC – the Board Tender Committee with a report that they have negotiated with you and you have offered OCM an amount of I think it was R268.00 per ton to continue supplying to Eskom and he said that they were prepared as the BTC to counter offer on that and give you OCM R296.00 per ton.

But the team that was negotiating instead of concluding the agreement with you to increase the price of coal to R296.00 meaning higher than what you even had offered they decided to invoke aspects to determine your financial position – OCM's financial position.

Do you have any recollection of that offer you had

made to Eskom?

MR EPHRON: No there is no such offer and there is no such counter offer. I do not know – I have no idea what you are talking about. So the last offer we made to Eskom was paragraph – one second – on the 30th of June 2015 paragraph 38 that was the final proposal.

We – we never received a counter proposal from Eskom but remember we – before this – before this date the 30th of June we already had negotiated prices and under the Cooperation Agreement and we had already negotiated the terms of the Fourth Addendum which was never signed.

But we still made a further reduction on the 30th of June the final proposal which is under C – CE8 we do not have to go to it but it was R300.00 per ton. We never received a response to this – to this offer. So I am – I really do not know about any counter proposal or any proposal ever made to Glencore or to OCM.

ADV SELEKA SC: Okay. Chair I can go to this clause now in the agreement. Mr Ephron please turn to page 71. On page 71 it is somewhere in the middle of the CSA and specifically dealing with clause 27 which is the hardship clause.

I have referred you to what is being excluded by this which is relying on the export market. I think in your – are you there – page 71?

MR EPHRON: Yes I am here.

ADV SELEKA SC: Paragraph 27...

MR EPHRON: Ja what clause number?

ADV SELEKA SC: 27.

MR EPHRON: 27 okay I got it.

ADV SELEKA SC: Yes. So 27.1 I think you reproduced it in your statement but I want to refer you to the next page. This is a clause dealing with the invocation of hardship.

In entering into this agreement – para – clause 21. – 27.1.

> "In entering into this agreement the parties declare it to be their intention that their – that this agreement shall operate between them with fairness and without undue hardship to any party."

The next page – clause 27.2.

> "The provisions of this clause shall apply where any new situation or circumstances arise (relevant circumstances which)"

And then they give you the circumstance but below clause 27.2.3 it reads:

> "Relevant circumstances may include without limitation the imposition of any tax, duty or other fee by any government – governmental or other authority with

executive power."

Then is this part.

"But shall not include any circumstances resulting in TNC being unable to sell coal in the export markets."

You see that part.

MR EPHRON: Sure.

ADV SELEKA SC: Yes. I have already asked you – well by putting a version to you that you could not rely upon that reason or ground to invoke the hardship clause that is you know your inability to sell coal to the export market...

CHAIRPERSON: Yes maybe let us put it this way. What was said here by either Mr Brian Molefe or Mr Koko both is that your so called hardship that – or OCM's or Glencore's so called hardship that it was complaining about was brought about largely if not exclusively by the fact that you were no longer selling coal to the export market. That is why you were going through these financial challenges and that was not – that was a circumstance which fell outside of the hardship clause of the hard – of the ambit of the hardship clause.

So if you went to arbitration and that point was raised the arbitrator would have been bound to say but I do not have jurisdiction to – I am now putting this in my own words as I understood what they – he was seeking to say to

arbitrate or come to your rescue because this has come about because of a circumstance which falls outside the ambit of clause 27.

I think you did answer it earlier on but I just want to make sure that you answer it with an understanding of the wording of the clause that Mr Koko relied on.

MR EPHRON: Sure if I can – if I can answer I mean we obviously looked at this extensively. So just to be clear when – when hardship was invoked the mine was in full production.

So hardship was being incurred by the mine long before a decision was taken to – to cut the exports. The only reason why Exports were cut and which was done in – from a process was started in January 2015 and ended in July 2015 was to reduce the losses that Eskom was in – that Optimum was incurring during that time.

So when you read the clause and Chair shall not include circumstances resulting in TNC at the time obviously Optimum being unable to sell coal to the export market that did not apply because we were selling coal in the export market.

And this is not the reason why we declared hardship. We declared hardship on the basis that – that the – that there were factors that had changed in the market that resulted in the price escalation factor not being

representative of true mining inflation.

So I am not sure where the allegation is – is coming from.

CHAIRPERSON: So are you saying that OCM/Glencore continued to sell coal to the export market right up to the end?

MR EPHRON: So – so we – we – the hardship was invoked after obviously a long process of understanding the mine hardship was invoked in July 2013 the mine was in absolute full production. 50% of the coal was going to export, 50% of the coal was going to Eskom.

Its exports only ceased in July 2015 and that was only a mechanism to reduce the financial exposure that was – that had been incurred on the mine. Because after this point actually the losses were – were slightly less. They were not – they were not palatable but they were less than – than what they were but that is what we did two years later. So...

CHAIRPERSON: Did – in other words...

MR EPHRON: At the time of hardship the –

CHAIRPERSON: In other words are you saying there was a time when OCM/Glencore ceased selling coal to the export market and that was in July 2015.

MR EPHRON: Ja that was – it was two years.

CHAIRPERSON: Ja.

MR EPHRON: Two years after hardship was invoked ja.

CHAIRPERSON: Yes. But I guess part of what you...

MR EPHRON: So...

CHAIRPERSON: I guess part of what you are saying you invoked the hardship clause long before that – that is in 2013. At that stage ...[intervenes]

MR EPHRON: Long before that with – with – correct and that – and with reasons that had nothing to do with the export market. It was with reasons specifically and identifiable for the Eskom...

CHAIRPERSON: Yes. Now when you seized to sell coal to the export market, would that have been after the termination of the cooperation agreement or before? Can you recall?

MR EPHRON: One second. It would have been before.

CHAIRPERSON: Okay.

MR EPHRON: No, during that time, actually. During that – the cooperation agreement was – the cooperation agreement was cancelled on the 22nd of June. So we were going through at that time. We were going through a process.

CHAIRPERSON: Ja. Okay, alright. Let me ask this question and that goes, firstly, the issue of arbitration. Did Eskom do anything to obstruct your or OCM's and Glencore's process to take arbitration to finality? Is there

anything you are saying Eskom did to prevent or unduly delay the – your journey to final arbitration on this hardship issue?

MR EPHRON: No, I think in the normal course, they – you know, it is not – if one take to then have a hearing immediately. So the longer you can wait to have a hearing, the better off they are because you do not do anything until the hearing is held. So when we tried to get meetings and when we – even when we sent them a hardship letter, they immediately sent back that hardship letter once it is correct and so on.

They tried whatever they could to delay but that is normal mitigation, I guess. I do not think necessarily there were any mala fides at the time. It was just, you know, one party reacting to another party's overture to say that we have hardship.

CHAIRPERSON: H'm. Okay, alright. Mr Seleka.

ADV SELEKA SC: Thank you, Chair. So that is the – that is the clause. I think you have answered, Mr Ephron. Mr Ephron, please turn to page, just to confirm that this your letter invoking on hardship, page 328. Is that 382? Yes. That will be ...[intervenes]

MR EPHRON: Yes, this looks like it. Yes.

ADV SELEKA SC: Is that – sorry, it starts on page ...[intervenes]

MR EPHRON: Ja, for some reason, I thought it was the 13th of July but I see it is the 3rd of July.

CHAIRPERSON: Well, this is the 2013 one?

ADV SELEKA SC: Yes.

MR EPHRON: That is correct. So I thought it was – I had in my papers as the 13th of July but that is wrong. It is the 3rd of July. This is correct. This is the document.

CHAIRPERSON: Were you not talking about 20 July 2015 when you said that?

MR EPHRON: No, no, no. This is – Advocate Seleka about this letter. I think it was the 3rd of July 2013. This is the letter.

CHAIRPERSON: Ja, okay.

MR EPHRON: This is the exact letter we sent through yesterday.

CHAIRPERSON: Okay, alright.

ADV SELEKA SC: So this when you invoked the hardship clause?

MR EPHRON: Correct. As you can see, it is an extensive letter.

ADV SELEKA SC: Yes. And you are saying in this letter – well, at this stage, July 2013, OCM was still providing coal to the export market?

MR EPHRON: Absolutely.

ADV SELEKA SC: And it was only in July ...[intervenes]

MR EPHRON: ...full production.

ADV SELEKA SC: Full production. And it was in June/July 2015 that you closed the export component of the mine?

MR EPHRON: Correct.

ADV SELEKA SC: Chair, I think that – well, there is one more question but I do not see the documents here. I am going to have to refer you to a different ...[intervenes]

CHAIRPERSON: While you are doing that. Let me ask him a question while you are looking at that. You said in your initial or first statement, Mr Ephron, that as I understand it, you said that Glencore took over OCH and OCM when they did not understand the price adjustments mechanisms of the coal supply agreement.

Did you get to understand how that price adjustment mechanism worked, subsequently? Or is the position that you never understood how they worked? I am just asking because you did not invoke them.

MR EPHRON: No ...[intervenes]

CHAIRPERSON: So ...[intervenes]

MR EPHRON: No, no, no. We immediately understood it as soon as we came in. It took about a year, really, to get to the bottom of it but I know that you do not have the time but if you read ...[intervenes]

CHAIRPERSON: No, no, no. Insofar ...[intervenes]

MR EPHRON: ...you read the hardship doc ...[intervenes]

CHAIRPERSON: Hang on.

MR EPHRON: If you read the hardship notice ...[intervenes]

CHAIRPERSON: Yes. Hang on, hang on, Mr Ephron ...[intervenes]

MR EPHRON: ...read the hardship notice that ...[intervenes]

CHAIRPERSON: Hang on, hang on, hang on. We do have the time to hear fully what you want to say in response to what has been said.

MR EPHRON: Oh, okay, okay.

CHAIRPERSON: So but we ...[intervenes]

MR EPHRON: No, I was referring to the fact that there was an extensive hardship notice document which Advocate Seleka just referred to on page 382. So, ja, it is an eight or ten page document.

CHAIRPERSON: No, no we can go to whatever document ...[intervenes]

MR EPHRON: ...exact appear ...[intervenes]

CHAIRPERSON: ...you want to.

MR EPHRON: This letter, the hardship invitation letter, goes to extensive detail of the hardship reasons here and the price mechanism in the contract.

CHAIRPERSON: What page is that letter?

MR EPHRON: The extensive...

CHAIRPERSON: Is it this one that ...[intervenes]

MR EPHRON: At 330 – page three – one second.

CHAIRPERSON: Okay.

MR EPHRON: Page 330 – it starts on page 332.

CHAIRPERSON: Oh, the letter that we were looking at just now?

MR EPHRON: Yes, that is exactly – it is 328.

CHAIRPERSON: Yes, okay, okay.

MR EPHRON: If you browse through that letter, you will see ...[intervenes]

CHAIRPERSON: Ja.

MR EPHRON: ...it goes through – it is an extensive letter.

CHAIRPERSON: Ja.

MR EPHRON: It goes through all the details around hardship, why hardship, what is happening with the escalation of prices, why the prices had done what they have done.

CHAIRPERSON: Ja.

MR EPHRON: What has happened to the cost of the mines.

CHAIRPERSON: Yes.

MR EPHRON: It has got everything.

CHAIRPERSON: Yes.

MR EPHRON: It has got everything. It talks about how it

is calculated. It has the graphs. It has got the PPI adjustments. It has got – it is an extensive document.

CHAIRPERSON: Yes. So, I guess, the point you are making is that, the reading of that letter will demonstrate that you got to a stage where you understood how these mechanisms – price adjustment mechanisms under the contract worked but you took a certain view of their utilities. Is that correct?

MR EPHRON: Correct.

CHAIRPERSON: Okay, alright. Mr Seleka.

ADV SELEKA SC: Thank you, Chair. Okay, this is going to lead me to a completely different aspect and I will conclude with that. It deals with the penalties, Mr Ephron.

Because there was an issue about Eskom allegedly failing to notify OCM as and when they provided coal that was non-compliant and as a result, allegedly of that failure, Eskom could not pursue certain amount of penalties against OCM.

But when Mr Koko was here, he drew the Chairperson's attention to a clause in the agreement. I will refer you firstly to that one which is on page 49, Clause 9.6 which imposed an obligation on the part of Eskom to give monthly notices. Let me know ...[intervenes]

MR EPHRON: Okay.

ADV SELEKA SC: Let me know when you are there.

MR EPHRON: I am here.

CHAIRPERSON: He is there.

ADV SELEKA SC: Now, this clause requires Eskom – well, let us see – unless ...[intervenes]

CHAIRPERSON: Sorry, you are at page 49?

ADV SELEKA SC: 49, Chair.

CHAIRPERSON: Paragraph or clause?

ADV SELEKA SC: 9.6.

CHAIRPERSON: Okay.

ADV SELEKA SC: Yes.

CHAIRPERSON: Alright.

ADV SELEKA SC: Which reads:

> "Unless T & C's notified in writing to the contrary within 15-days after each day's delivery of coal, such coal shall be deemed to conform in all respects to the specifications and Eskom shall have no claim whatsoever in regard thereto or arising there from.
>
> Such notification shall specify full details relating to the delivery of coal concerned including the date of delivery, the quantity the coal concerned, and full details of the non-conformity of the such coal to these specifications..."

Were you familiar with this clause?

MR EPHRON: I would not say that I am familiar with that particular clause but I will take it as read.

ADV SELEKA SC: Now the settlement agreement which became the second addendum to the ...[intervenes]

CHAIRPERSON: Maybe before you go there, Mr Seleka, can I ask this question?

ADV SELEKA SC: [No audible reply]

CHAIRPERSON: Do you know, Mr Ephron, whether Eskom did usually and regularly comply with this requirement during the period, let us say from 2012 right up to 2015 or up to business rescue time, namely, when you had delivered coal every day, did they regularly sent notices to indicate that the coal did not comply with the specifications or with the quality or the quantity or is it something you do not remember?

MR EPHRON: Yes, it is a quite a long time ago but I think, I do recall that there were reasonable regular letters and that they referred – they did not necessarily refer to all the qualities. They only may have referred to size if I recall.

CHAIRPERSON: Yes.

MR EPHRON: So I cannot seem to recall exactly whether every month – but what was happening was normally if there were some penalties, there was – a setoff would apply.

CHAIRPERSON: Ja.

MR EPHRON: ...in both instances and then specifically the one that caused most of the problems with the sizing and that is where there was – that is where the whole thing went a bit wayward because if you want to set out on size and then Eskom is entitled to reject it. And whether they should have rejected it at the time without burning it or not, we do not know. That would have been an assessment for the arbitrator in some sort of legal form. I cannot seem to recall exactly.

CHAIRPERSON: Okay, alright. Mr Seleka.

MR EPHRON: Thank you, Chair. So that – that is the position in regard to Clause 9.6 but then there is a settlement of arbitration which starts on page 303, Mr Ephron.

MR EPHRON: One sec.

ADV SELEKA SC: Settlement of arbitration and second addendum to the Hendrina Coal Supply Agreement. I see that ...[intervenes]

MR EPHRON: I have got it.

ADV SELEKA SC: Yes, thank you. I see that this settlement agreement on pages 317 and 318 was concluded on the 12th of April 2011 between Eskom, Optimum Coal Holding and Optimum Coal Mine.

MR EPHRON: I am with you.

ADV SELEKA SC: So this would have been before the acquisition by Glencore?

MR EPHRON: Correct.

ADV SELEKA SC: But you would have taken over this CSA with its addendums to it – addenda to it?

MR EPHRON: Correct.

ADV SELEKA SC: Now let us go to page 311. Clause 3.4.2. And this is under the heading: Quality of Coal. Clause 3.4. It starts on page 310. So, 3.4.2 says:

> "The parties specifically agree and record that the spreadsheet in respect of the quality of coal sold and delivered by Optimum to Eskom, exchange between the parties on a daily basis will continue or constitute ongoing compliance with the provisions of Clause 9.6 of the CSA..."

You follow that provision?

MR EPHRON: I do.

ADV SELEKA SC: Ja. Now, the explanation by the witness, Mr Koko, was that this, essentially, if not in fact, maybe in fact, changes or varies the position in Clause 9.6 in that – and I will add this on my side – that you no longer require to give a notice as envisaged in 9.6 but that the spreadsheet here envisaged an extension on daily basis will constitute compliance with 9.6 in which event

...[intervenes]

MR EPHRON: Okay.

ADV SELEKA SC: ...in which event, if the spreadsheet is exchanged – and you will tell us whether or not it was – that means there is full compliance with 9.6 and Eskom, if failing to give you notice as originally envisaged in 9.6, cannot be said to have waived the right to impose the penalty or to claim that amount.

CHAIRPERSON: Do you understand the proposition?

MR EPHRON: Ja, I am just not sure where you ...[intervenes]

CHAIRPERSON: Let me put the question this way, Mr Ephron. Mr Koko said, based on this Clause 3.4.2, the position was that after this settlement agreement relating to arbitration, the position was that Eskom was no longer required to give OCM or Glencore notice within 15-days that your coal was defective in this way or that way, whether it is quantity or quality.

All that was required was the exchange of this spreadsheet and therefore, to the extent that anybody may have thought that you could have said to them when they put up their claim for R 2 billion penalties, to the extent that anybody may have thought you could say but where are your notices that you served on us in terms of Clause 9.6 because if there are no such notices then your claim

must fail.

You have no claim against us. He was saying that kind of argument was no longer available after the conclusion of the settlement agreement because of Clause 3.4.2. all that was required was to show that that spreadsheet was exchanged. You have something to say to that?

MR EPHRON: Right.

CHAIRPERSON: H'm?

MR EPHRON: Yes, so I do not think we ever disputed that. So I am not sure ...[intervenes]

CHAIRPERSON: Ja.

MR EPHRON: I am not sure on what grounds it had been discussed. So we have to speak to that because it was ...[intervenes]

CHAIRPERSON: It was understood ...[intervenes]

MR EPHRON: ...that he had plenty of grounds in terms of the penalty calculations to dispute the penalties but I do not recall disputing penalties on the basis of no notices given.

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

MR EPHRON: In fact, we never got it. In fact, we never got into a formal dispute on the notice on the penalties. We were always – the first time the dispute arise is when we got the demand letter in ...[intervenes]

CHAIRPERSON: In 2015.

MR EPHRON: ...in July 2015 but that was never a dispute. It was always – which was always under discussion because Eskom were on site all the time. So they knew what was happening every day.

CHAIRPERSON: Ja.

MR EPHRON: So it was never a dispute on penalties. It was always a disagreement but it was never a formal dispute.

CHAIRPERSON: Yes.

MR EPHRON: So I am not sure where that comes from.

CHAIRPERSON: Okay. No, that is fine. Mr Seleka.

ADV SELEKA SC: Yes. Okay. So the disagreements, you say Mr Ephron, to the Chairperson, were on different grounds and not ...[intervenes]

MR EPHRON: Correct.

ADV SELEKA SC: ...this particular ground?

MR EPHRON: Correct.

CHAIRPERSON: That is what he is saying, ja.

MR EPHRON: No, I do not recall. But – I do not recall.

ADV SELEKA SC: Okay. Chairperson, that brings me to the end of my questions.

CHAIRPERSON: Ja.

ADV SELEKA SC: H'm.

CHAIRPERSON: Just before we finish, Mr Ephron. Just

to sum up and I know that you said that this is dealt with, I think in the letter that we looked at earlier on. Why was the price adjustment mechanism in the CSA not invoked by OCM/Glencore? Do you want to just in summary just deal with that? Or is it – or tell me ...[intervenes]

MR EPHRON: Chairperson, can you repeat the question?

CHAIRPERSON: Yes.

MR EPHRON: I think we broke up a little bit.

CHAIRPERSON: Yes, maybe let me start by saying. Am I correct in understanding that OCM/Glencore did not invoke the price adjustment mechanism provided for in the CSA to deal with its challenges about the price?

MR EPHRON: That was the basis of the hardship. The mechanism in the contract on an annual basis was the basis for the hardship because every year the contract would be increased by a lower amount than mining inflation.

CHAIRPERSON: Yes.

MR EPHRON: So if mining inflation was 10% in one year, the contract would only go up 8%.

CHAIRPERSON: Yes.

MR EPHRON: And the following year the same and it was every year, the gap between costs and selling price was diminishing because of the adjustment mechanism. And that letter that I referred you to in – on ...[intervenes]

CHAIRPERSON: Ja, 12 ...[intervenes]

MR EPHRON: ...down page 328.

CHAIRPERSON: Ja.

MR EPHRON: I goes into all the details around that.

CHAIRPERSON: Ja. So are you ...[intervenes]

MR EPHRON: So had that mechanism been reflective of mining inflation, there would have been no hardship ...[intervenes]

CHAIRPERSON: So, in other words ...[intervenes]

MR EPHRON: ...simplistically.

CHAIRPERSON: In other words, are you saying the price adjustment mechanism in the coal supply agreement may have been a good idea to deal with the issue of increasing the price from time to time but the problem with this price adjustment mechanism is that it was based on increasing the price according to the inflation rate but because that OCM/Glencore were incurring required that the price be adjusted by more than that? Is that what in sum you are saying?

MR EPHRON: Yes, but not specific to OCM's costs.

CHAIRPERSON: Yes.

MR EPHRON: Specific to industry inflation.

CHAIRPERSON: Okay.

MR EPHRON: It is not OCM's costs that were never...

CHAIRPERSON: Yes.

MR EPHRON: If one looks at, like the other adjustment mechanism practise in the other Eskom contracts are basis what is happening to the fuel price, what is happening to the cost of salaries and wages, what is happening to the cost of mining equipment, and the mechanism in the Optimum contract was not reflective of what is happening in the market.

CHAIRPERSON: Ja.

MR EPHRON: Not what is happening at Optimum.

CHAIRPERSON: Yes. So, in other words, are you saying it had become unrealistic over the years or at the particular time this mechanism ...[intervenes]

MR EPHRON: Exactly.

CHAIRPERSON: Ja.

MR EPHRON: Over the years, exactly, exactly.

CHAIRPERSON: Okay, alright. Is there anything else you wanted to say before we adjourn? You are done?

MR EPHRON: No, thank you.

CHAIRPERSON: Alright.

MR EPHRON: I am done.

CHAIRPERSON: Ja. [laughs]

MR EPHRON: Thank you so much.

CHAIRPERSON: Thank you very much, Mr Ephron for coming back to deal with these matters. We are now going to release you because we have dealt with the questions

that needed to be dealt with. We are going to adjourn for the day. And then, in terms of the public, as things stand, the Commission will not sit tomorrow. If that changes in the course of the afternoon, the public will be informed.

Otherwise, the next hearing will be on Tuesday, not in the morning but in the afternoon at four o'clock when I will hear various applications for leave to cross-examine that have been brought by various parties whose applications have not yet been decided. After that, then the hearings will continue on Thursday and Friday next week and beyond that. We adjourn.

INQUIRY ADJOURNS TO 15 JUNE 2021