

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

**21 JUNE 2021**

**DAY 413**



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

22 Woodlands Drive  
Irene Woods, Centurion  
TEL: 012 941 0587 FAX: 086 742 7088  
MOBILE: 066 513 1757  
[info@gautengtranscribers.co.za](mailto:info@gautengtranscribers.co.za)

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TRANSCRIBERS:

B KLINE; Y KLIEM; V FAASEN; D STANIFORTH



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**PROCEEDINGS RESUME ON 21 JUNE 2021**

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

**ADV MYBURGH SC:** Good morning Chairperson.

**CHAIRPERSON:** Good morning Mr Gigaba.

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

**CHAIRPERSON:** Good morning.

**MR GIGABA:** Good morning Chair.

**CHAIRPERSON:** Thank you. Good morning Mr Solomon.

10 **ADV SOLOMON SC:** Good morning – good morning Chair.

**CHAIRPERSON:** Thank you.

**ADV SOLOMON SC:** Good morning to you.

**CHAIRPERSON:** Thank you. Thank you. The oath you took on Thursday Mr Gigaba will continue to apply today. Thank you. Mr Myburgh.

**ADV MYBURGH SC:** Thank you. Good morning Mr Gigaba.

**MR GIGABA:** Good morning Mr Myburgh.

**ADV MYBURGH SC:** Could I ask you please to turn to Bundle 7(a).

20 **MR GIGABA:** Yes.

**ADV MYBURGH SC:** To Exhibit BB24.

**MR GIGABA:** Yes.

**ADV MYBURGH SC:** And if I could ask you please to turn to page 129 it is Mr Mahlangu's affidavit or in fact it is 996.129.

**CHAIRPERSON:** Just repeat the page number?

**ADV MYBURGH SC:** 996.129 Chair.

**CHAIRPERSON:** Okay.

**MR GIGABA:** Yes.

**ADV MYBURGH SC:** I just wanted to ask you a few questions in relation to Mr Mahlangu's affidavit before we finish off on him. At paragraph 106 he says:

10            "That the core functions of the Minister entailed overseeing the performance of the SOC's that fell under his responsibility and exercising shareholder power in respect of those entities. The latter function involved the appointment and removal of directors of the DPE related SOC's."

Would you confirm that?

**MR GIGABA:** Yes among others.

**ADV MYBURGH SC:** And then he says at 107.

20            "Thus my duties as the special advisor to the Minister included advising the Minister in respect of the decisions he was required to make in the discharging his core functions including the appointment and removal of directors amongst other functions."

Would you confirm that?

**MR GIGABA:** Yes of course there was a process

Chairperson to this. The advisors were – were part of a – of that process.

**ADV MYBURGH SC:** So I then wanted to come to that process Mr Gigaba. I think you will find that at page 996.133 at paragraph 120 where Mr Mahlangu sets out that process. He says at 120.1.

“Applications or nominations would be received from the public by departmental officials, ministerial advisors such as myself  
10 and the Minister himself.”

I just wanted to take you to 120.4.

**MR GIGABA:** Yes.

**ADV MYBURGH SC:** Something that you spoke about I think on Friday – 120.4.

“Based on the assessment of the skills gap in a particular board the legal and governance unit together with the unit responsible for the SOC would prefer – would prepare a skills matrix.”

20 Do you confirm that?

**MR GIGABA:** Yes.

**ADV MYBURGH SC:** I think you spoke about that on Friday.

**MR GIGABA:** Yes I confirm it.

**ADV MYBURGH SC:** If I could ask you then to have a look

at paragraph 120.6 please at page 996.134. At 120. Mr Mahlangu says:

“The DDG’s and the special advisors would then settle on a list of candidates. I would then take this list to the Minister for his consideration. This ensured that the Minister’s views were taken into account before an official memorandum was submitted to him by the department to  
10 approve recommended candidates.”

Would you confirm that?

**MR GIGABA:** Chairperson I would not. The – the official process would emanate I think as I outlined in my submission – I am not sure whether it is – just – if you just bear with me.

**ADV MYBURGH SC:** So Mr Gigaba just to locate you this is in your main bundle – it is the full affidavit of Mr Mahalangu.

**MR GIGABA:** Yes. Yes.

20 **ADV MYBURGH SC:** Your response to Mr Mahlangu is contained in a different bundle.

**MR GIGABA:** Oh.

**ADV MYBURGH SC:** That we looked at on Friday where you responded to particular sections.

**MR GIGABA:** Yes.

**ADV MYBURGH SC:** I can take you there but I – as I recall you did not – you were not called upon to respond to this particular section.

**MR GIGABA:** Because what – what the process Chairperson would entail is that the department would initiate because they would know which board members or which – which board are due for rotation at which point the – the department would prepare the skills matrix, the report of assessment of the board and – of the board collectively  
10 and individually and would initiate the process. To the extent that my advisors would bring certain issues to my attention that were still within the board – within the departmental process. That was not part of the process.

It would be informal briefings to me but it did not happen all of the time or most of the time.

**CHAIRPERSON:** I am sorry just take one step back I missed a sentence you made. You want to look at your affidavit?

**MR GIGABA:** Yes please.

20 **CHAIRPERSON:** Okay. Mr Myburgh will look – help you look.

**ADV MYBURGH SC:** Ja let me just...

**MR GIGABA:** To find the bundle.

**ADV MYBURGH SC:** Mr Gigaba let me take you to page 996.274. This is where you respond to the affidavit.

**MR GIGABA:** 99?

**CHAIRPERSON:** 6 is it?

**ADV MYBURGH SC:** 996.274.

**CHAIRPERSON:** Okay. Please do not forget the points you were making because there is one that I missed. So I want to take you back.

**ADV MYBURGH SC:** So this is your response to Mr Mahlangu that you will see that it does not deal – it is not a criticism with paragraph 120 because you were not asked to  
10 respond to it – it does not seem in the 3.3 Notice.

**MR GIGABA:** Sorry Chair I am still trying to get to 274.

**ADV MYBURGH SC:** But you might – you may set out somewhere.

**CHAIRPERSON:** Mr Myburgh

**ADV MYBURGH SC:** Ja.

**CHAIRPERSON:** You are well ahead of both of us. Just tell us the page again – 996.

**ADV MYBURGH SC:** 274 Chair.

**MR GIGABA:** 274 yes.

20 **CHAIRPERSON:** 274 okay.

**MR GIGABA:** So in – I think...

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

**MR GIGABA:** From 996 27 - .279.

**ADV MYBURGH SC:** Yes.

**MR GIGABA:** Paragraph 8.5.



**ADV MYBURGH SC:** Yes.

**MR GIGABA:** I ...

**ADV MYBURGH SC:** You set out the process.

**MR GIGABA:** I set out the process.

**ADV MYBURGH SC:** All right.

**MR GIGABA:** Now as I said Chairperson there was no in the formal process there was no requirement that the advisors should take the list and bring it to me for me to appraise my – apprise myself of the – of the list so that I  
10 could make submissions before the – the board – I mean before the department finalises the board nominations process. That would have – that would happen occasionally it was an informal part just to keep me abreast maybe of certain things which they thought were important and then they would rely on me responding to those issues.

But the formal official process of the department took place right from the department until the department would present a submission to me. So there were if I am not mistaken two or three ways in which this happened.

20 It would either be a submission which contained the rationale – the argument and the names proposed or if we were preparing for an AGM we would in the course of discussing the connoted agenda of the AGM then as part of that as we go from item to item of the connoted agenda we would then get to the board nomination process and then

the department would start by outlining this is the board that is outgoing – this is the report assessment of this – of this board. These are board members who are – who are either completing their first term and are due for reappointment or who have completed a second term and must be retired or who – who have completed a first term but for certain reasons emanating from the board assessment report we recommend that they should be retired.

10           Then we would look at those and then they would say these are board members that we are recommending – I mean these are candidates that we are recommending should fill in the gaps that are being created so that we would say the following are being retained – the following are being nominated.

          Now that is a formal process of preparing for an AGM. Obviously exceptions would happen if vacancies happened in – in the middle of a term or in the middle of a year maybe as a result of natural attrition or as a result of  
20 resignation in which case if it was really absolutely important we would have to look at that one or two vacancies to fill them in and take them to cabinet.

          But the official process did not require that advisors should as part of that process approach me with a list of people who – whom I think need to be included on the

board.

**CHAIRPERSON:** So is the – is the difference between what Mr Mahlangu is saying about the process and what you are saying simply that what you say occurred unofficially and not as a norm just for some times.

**MR GIGABA:** Yes.

**CHAIRPERSON:** What he says occurred as part of the formal process that is the difference between the two of you.

10 **MR GIGABA:** Yes. Exactly Chair.

**CHAIRPERSON:** Okay all right.

**ADV MYBURGH SC:** Thank you. As you go back to 20.6 just to pick up on the Chair's point at page 996.134. So the last sentence:

“This ensured that the Minister's views were taken into account before an official memorandum was submitted to him.”

Now that official memorandum is the decision memorandum and that you see reference being made to at  
20 paragraph 120.9.

**MR GIGABA:** Yes.

**ADV MYBURGH SC:**

“The specific sector unit and legal compliance would then prepare a decision memorandum with a motivation for the

appointment.”

And then at 120.10.

“The Minister would either approve the list with or without conditions.”

And then as I understand it Mr Gigaba what flowed from that is that on the strength of your approval the department would prepare a cabinet memorandum. Is that correct?

**MR GIGABA:** Yes that is – that would be the process yes.

10 **ADV MYBURGH SC:** And that would then serve before cabinet.

**MR GIGABA:** Yes.

**ADV MYBURGH SC:** And we have seen various examples of these decision memorandums and cabinet memorandums. I think when we started with your evidence.

**MR GIGABA:** Yes.

**ADV MYBURGH SC:** It dealt for example with the appointment of Mr Sharma etcetera.

**MR GIGABA:** Yes.

20 **ADV MYBURGH SC:** I then just wanted to take you one other thing in this affidavit and that relates to – and just to get your comment it relates to a meeting that Mr Mahlangu had with Mr Dames and Ranesh Gupta. That you see at page 996.174.

Now you see at 278 he says:

“Insofar as the meeting between Mr Gama’s  
– I beg your pardon Dames and Ranesh  
Gupta is concerned it arose out of a specific  
context.”

And then at 279 he explains and I will paraphrase  
that one of the companies owned by the Gupta family owned  
a farm somewhere in Mpumalanga and it had coal deposits.  
The Gupta’s had rights to mine this coal - that certain  
environmental complications arose and this had implications  
10 for them and the supply of coal to Eskom.

And then at 280 over the page you see at the last  
sentence:

“It is on this basis that Mr Gupta requested that I organise a  
meeting between him and Mr Dames.”

You see that.

**MR GIGABA:** Yes.

**ADV MYBURGH SC:** Now I just wanted to ask you about  
that and I think the Chairperson may have raised this issue  
on Friday. Why did Mr Mahlangu have to be involved in  
20 meeting of this sort? I mean why did Mr Gupta not simply  
arrange the meeting himself with Mr Dames?

**MR GIGABA:** As I say Chairperson – as I responded on  
Friday Mr Mahlangu must – might have wanted to  
understand what was being discussed so that if it had any –  
if there was any reason for him to alert me as to some of

the issues that were being discussed he would do so.

Because as he said in his – at the opening of his affidavit I had asked him to – to manage these relations because I did not want them to get out of hand. So if there was anything that he needed to raise with me which would require me either to talk to the CEO involved or the Chairperson of the board or talk to if need be – if necessary to say to him Mr Mahlangu please tell these guys that look this cannot be done in the following - for the following  
10 reasons. Then he would have to do so.

I think he just wanted to understand what was being discussed and what would be the outcomes of those things and certainly not in order to influence the outcomes or create the impression that I was involved.

Insofar as I understand well I do not – I do not remember how this issue was resolved and – and so I do not think he did bring it to my attention.

I think the matter ultimately required the Department of Environmental Affairs if they were environmental  
20 implications involved.

**ADV MYBURGH SC:** But is not the impression created that you are involved because your own special advisor is at the meeting and in fact sets up the meeting?

**MR GIGABA:** I think he does explain into – too that he did not lure Mr Dames to the meeting – he did not know – he

knew of the meeting in advance and agreed to it. It was the first and only time he did this and the purpose as I outlined before the commission was not to create the impression that I had any interest in the matter or that the matter had to be resolved in any particular way.

Chairperson let me set this out. This was not the only meeting and as Mr Mahlangu and I on Friday explained there were many other such meetings. In other meetings I took a more forthright approach in trying to resolve those  
10 issues because we were dealing in those instances with organisations and we needed to deal with issues of a policy nature insofar as specific SOC's or all SOC's are concerned.

I made reference to the – the legal – the – the accounting – auditing and the advertising/marketing professionals in which case we – we facilitated – he facilitated meetings Mr Mahlangu and involved me in those meetings.

But insofar as individuals were concerned he did not  
20 involve me and he only attended just so that he understands what was being discussed as I had said.

And there were many other instances Chairperson where in addition to the ones I have cited where we – we would have been involved officially as the Department in trying to resolve issues of dispute.

But all of those issues were not involving individual business people trying to get business from the SOE's. Insofar as these are concerned as I stated last week it was – it was only to create accessibility but Mr Mahlangu's presence in those meetings was not to influence those meetings because to – to the extent that I can understand he did not make any inputs in those meetings in favour of the business people concerned.

**ADV MYBURGH SC:** But was this not a pure operational  
10 issue?

**MR GIGABA:** I think Chairperson I have responded to this. It was a pure operational issue but it happened even today. Business people request meetings with various leaders of entities or even departments.

There are instances when they come to you as a Minister and you say to them I cannot – you know they – they would meet us at various levels and they say, can I meet with your – with you I want to discuss this thing. And we say to them, it is not my issue. It is a matter of the  
20 department. I can refer you to the DG – meet with the DG – talk to him; hear what the DG says. He will outline to you whatever you need to understand.

You know in democracies and South Africa is no exception you cannot create a buffer between business and government. That is why in part government established at



one stage the CEO's forum where out of concerns by business that they were – the economy was not growing – it was in the midst – we were in the midst of a – a global economic recession. It was affecting the South African economy. Our economy began to decline. A CEO's forum was established to ensure that CEO's can talk to government on matters which also involved policy which policy would be in favour of business.

Now in some instances arising out of those  
 10 initiatives labour would also say but your meetings with the CEO's is tilting economic policy in favour of business and therefore we also want a forum where we would also be able to state our views.

Now the issue with such engagement is that it is dynamic and – and in some instances quite fluid but the understanding among all those involved is that you – you do not intend to take a decision out of such engagement that may – that may or will be out of the PFMA and other existing legislation which guides how procurement and  
 20 supply chain issues operate.

So even if it was an operational matter but you - you try as government to – to ensure that you can assist business where you can. I had occasions when – where I met with the board of Investec on several occasions and various other companies for that matter.

Or in some instances I would refer those business people to – to the officials in the department to meet with them.

The understanding I reiterate was that no decision will be taken which undermined or contravened the PFMA and other supply chain and procurement processes in government and other relevant existing legislation.

**ADV MYBURGH SC:** You see Mr Gigaba I suppose I just want to make this point. On the face of this Mr Gupta did  
10 not want to meet with you. It was not where he required ministerial intervention. He did not even want to meet with Mr Mahlangu. It says at 280:

“It was on this basis that Mr Gupta requested that I organise meeting between him and Dames.”

**MR GIGABA:** Absolutely Chairperson and that is the point which I have been making. That is the point which I have been making that as government we from time to time have to assist business to meet with relevant leaders in the  
20 organisations so that they are able to state their issues and the understanding arising out of that is that there will be no decision taken which contravenes the PFMA, the supply chain management process, the procure – the public procurement process and other existing legislation.

This is the point which I am trying to emphasise. It

is not me. You know I said earlier that I did not want to be the one who facilitates these meetings and to the extent possible when somebody raised these issues with me because I do not have time to be facilitating meetings and looking at the diaries of – of leaders of entities or departments. I would ask my advisors to arrange those meetings and to go ahead.

In this case Mr Mahlangu was doing what I had said he needed to do in order to manage relations but he  
 10 understood what was the clear instruction provided to him and that is why he says in 2.8. – in 282 that there was no influence he put to bear in the meetings and – and you know even though the meeting ended the way that it did Mr Mahlangu says that – sorry is it too – is it too – into- he says that it was the first and only time that he went with Dames to the meeting because of how the meeting ended and he realised as a result of the instruction I had given that such meetings should not be resulting anything untoward. He then after that did not arrange such  
 20 meetings.

**ADV MYBURGH SC:** Sorry Chair did you – I see you took off your mask which is usually a sign that you wanting to say something.

**CHAIRPERSON:** Well sometimes – sometimes I want to say something and then I decide not to.

**ADV MYBURGH SC:** Yes.

**CHAIRPERSON:** But I want to – I want to ask only when you have finished on this point so I give you a chance to exhaust what you have on this point.

**ADV MYBURGH SC:** I just want to then raise two other things. You talk about paragraph 108 – sorry 282.

**MR GIGABA:** Yes.

**ADV MYBURGH SC:** Could I just ask you to have a look at four lines from the bottom of 282.

10            “At the meeting Mr Gupta raised his  
                 complaints. Mr Gupta was usually blunt and  
                 forward in a manner of expression.”

**MR GIGABA:** Yes.

**ADV MYBURGH SC:**

                 “This did not sit well with Mr Dames.”

**MR GIGABA:** Yes.

**ADV MYBURGH SC:**

                 “He understandably found it rude and  
                 insulting.”

20            **MR GIGABA:** Yes.

**ADV MYBURGH SC:** And then at 283.

                 “During this conversation Mr Gupta also  
                 complained that Eskom discriminated  
                 against the TNA and favoured established  
                 newspapers. Although the meeting was

tense the tension eased as the meeting progressed.”

You see that.

**MR GIGABA:** Yes I see it.

**ADV MYBURGH SC:** Do you have any comment on that?

**MR GIGABA:** I was not in the meeting Chairperson so I do not know whether it eased or did not.

**CHAIRPERSON:** Well let us go back to the point that Mr Myburgh was asking you about and the one that you have  
10 explained comprehensively.

I do have difficulty with the notion that there was a need for Mr Mahlangu to attend these meetings between Tony Gupta and SOE, CEO’s and so on when you talking about Kona, you talking about Mr Dames and so on in order to hear what was being said and report back to you.

So because I asked the question these were operational matters. I say Tony Gupta wanted to see the CEO’s as Mr Myburgh says not – not you – not your advisor. Why – why – why did your advisor not simply say

20 1. Mr Tony Gupta you are entitled to approach the CEO and CEO’s office and make direct arrangements and if he agrees the two of you will meet. I have nothing to – to do there – with that.

If subsequently – subsequently that meeting you need to see the Minister – the Minister can say see me and I hear

what you have to say but that meeting where you want to see the CEO of a particular SOE it is between the two of you. We do not have to – we do not have – the Minister does not have to hear anything about it unless one of you has reason to want to talk to him arising out of those issues. Why – why was that not the correct approach?

**MR GIGABA:** Chairperson Mr Mahlangu could have option for that – for that – for that approach but he – he – and there are two instances we talking about here. Maybe there  
10 could be three I am not sure.

It involved Mr Kona, it involved Mr Dames and I ...

**CHAIRPERSON:** And of course the –

**MR GIGABA:** I cannot recall because there were eight SOE's in the portfolio I cannot recall it there were other CEO's who – who also had a similar experience. But...

**CHAIRPERSON:** But there might not have been – it is important to say at least my recollection is those two.

**MR GIGABA:** Exactly out of eight.

**CHAIRPERSON:** But of course as you said he did facilitate  
20 other meetings that he might not have involved Tony Gupta but involved other business people and so on. And my understanding of what you were saying is it is along the same lines. You know.

**MR GIGABA:** Yes.

**CHAIRPERSON:** So the principle was the same – his

involvement. But you can deal with it.

**MR GIGABA:** Thank you. It is important also Chairperson to put on record that insofar as the SOE's are concerned I think it is two out of eight. Now, and I say, as I repeat, Chairperson. We could, with the benefit of hindsight say, he should not have been there. I do not know the extent to which it was happening in other areas. I do not know to the extent to which it is still happening even at the present moment and so it also would be important to establish the  
 10 extent to which it is still happening, the extent to which it happened in the past and even prior to 2010 because there would have been instances when it happened people, businesspeople come to or would come to where the ANC MEC was having meetings, request to meet with Ministers.

Sometimes the DG's would also be present even prior to me being a Minister. And there were instances when – I made example, I think, if not on Friday then it must have been on Thursday when one businessperson decided to write to the Public Protector protesting that  
 20 Minister Dlamini Zuma did not want to meet with them to discuss an operational matter at Home Affairs.

I do not recall how that issue was resolved but it was based on their experience or expectation that they would be thus assisted with the facilitation of the meetings and discussions. The principle was always that no

decision will be taken out of such engagements which would contravene the Supply Chain Management, the public procurement process and other existing legislation insofar as these issues are concerned.

I think the – there was an instance when I was at Home Affairs when I tried to facilitate a discussion between the Department of Home Affairs and the department insofar as the Fireblade, a private terminal was concerned. And my view was, here is a proposal which has been placed  
10 before us.

Let the department now talk with the people involved. And that is why, at the end of that meeting, the decision was that the Director General must conduct due diligence, finalise the specs for this, engage further with this company insofar as the Supply Chain Management process is concerned. We did not take the decision at the meeting itself because I understood that I as a Minister has no jurisdiction tenders, contracts, and the Supply Chain Management process in government.

20 And that is why you say then: DG, you go ahead and do this and ensure that the processes are followed to the latter, consult with other relevant departments. Now, it would then be necessary, Chairperson, again, to make a proposal in this instance that is going to be all encompassing so that there is better understanding of how



such issues should be dealt with because insofar as I could recall, they were being dealt with from the perspective of each department as it went along without there existing an all encompassing comprehensive framework for how do you engage with business people who have complaint and the men who have issues that they wish to raise, who have queries they want to raise and they use whatever opportunity they get for them to be able to raise those issues.

10           And insofar as you as the Minister are concerned or insofar as I as the Minister were concerned, I did not want to be involved in taking the decision there. I would say: You go talk about this. Whatever decision you arrive at, that then is the matter between the two of you.

**CHAIRPERSON:** What do you say to the proposition that in effect you were as Minister attending those meetings through your special advisor?

**MR GIGABA:** No ...[intervenes]

**CHAIRPERSON:** You were not physically there but he was  
20 representing you there. What do you say to that proposition?

**MR GIGABA:** As I accept, Chairperson, I was not there, and Mr Mahlangu understood that he is undertaking these engagements in order to remove me from presence. And the understanding with the SEO's and that is why I raise

this even in one of the meetings between the chairs and the CEO's of the SOE's in our portfolio that should anybody come to you – and I made example of the fact that people come to me and say to me: Man, the President has said I must come and say this to you. And I would say to them: Well, the President is my employer. If the President wants to give me an instruction, he will call me, not you. He would not tell you to come and give me instructions. I was not appointed by you.

10                   And in some instances, I would call their bluff and say: Let me call the President and find out. And they would immediately recall it and say: But no, no, no. He did not say do this. He said I must come and talk to you. I made that example to them and said: In the instance that somebody comes to you, either together with my advisors or comes alone and says I had said they must come and talk to you. Please bear in mind that I did not give an instruction as to how this issue should be resolved. You have a responsibility to follow the processes and

20 procedures existing in your organisation and has provided in the public procurement policy framework as well as the Public Finance Management Act, because in the end, you are an accounting officer. You will have to account for this decision and how you account for it, you cannot say that the Minister made me do it. I did not make you do it but

understand the environment in which we operate or operated.

And the SOE environment is very difficult in that regard, in that there are many people with interests, global organisations, global companies, and domestic companies, businesspeople, individuals and collectives who seek these types of platforms and you need to establish a very clear framework as to what decisions can be taken and what it means when somebody to a SEO saying that I have spoken  
10 to the Minister, and they have referred me to you.

So, Chairperson, in my opinion that should be an interpretation, but it would be the wrong interpretation in the sense that I had spoken to the SEO's and that is why none of them says: I, therefore, did this as a result of presuming that the Minister was in support of this.

**CHAIRPERSON:** H'm. But, you see, Mr Mahlangu makes it clear in one of his affidavits and I do not know if it is this one that whatever interactions he had with Mr Tony Gupta, they were in his capacity as your legal advisor or special  
20 advisor. I think he says somewhere he was not acting in his personal capacity when he interacted with them. They were not his personal friends.

Now, that – and then, of course, I think, one deduces from that, if Mr Mahlangu does not say so expressly, that when he was attending these meetings,

whether it is with Tony Gupta and Mr Kona, Tony Gupta, and Douglas, he was not there in his personal capacity. He was there because he was your advisor and obviously everybody who was in those two meetings knew that he was your special advisor and, obviously, it would be reasonable for them to think that – I am now talking about the SEO's – to think that he would report back to you. Would you quibble with that?

**MR GIGABA:** Chairperson, Mr Mahlangu would not have  
 10 been given this responsibility by me to instrumenting(?) it from these engagements had he not been my special advisor. So, I gave him this responsibility, understanding the role that he had to play in my office, and gave him a further instruction as to how he should conduct himself, and that is why in his affidavit, previously, he says at all times he conducted himself professionally. So, that is the first principle to establish here.

Secondly. The leaders of our SEO's understood, not only in regard to Mr Rajesh Gupta, but in regard to  
 20 every other personal who came to them, that this was the matter – this was the manner the approach they needed to take on those issues, because in the end, even as Mr Mahlangu would have organised those two meetings or others with other organisations or individuals, the manner in which these issues would be resolved would have to

take into consideration – because I had it very clear, Chairperson, no ambiguities about this, because as I say, when I spoke about this, I spoke about the plan(?).

I even made reference to how people approach me, and I made it clear to them that: Please, follow the Supply Chain Management process, because there is legislation existing. That is why the issue of Fireblade actually surprised me to claim that I had approved a name in an email(?) through verbal agreement that Fireblade should  
10 operate.

It surprised me because that is not how I understand the Public Finance Management Act and the Supply Chain Management processes arising thereof. In the end, whatever decision has to be taken which has financial implication is not taken by the Minister or by influence of the Minister.

The Minister is not an accounting officer, neither in the department over which they are minister, nor in SOE's over which they are shareholder representatives. The  
20 accounting officer is to take a decision which has fulfilled all legislative requirements in terms of Supply Chain that should have had to be approved by the board.

**CHAIRPERSON:** Mr Myburgh.

**ADV MYBURGH SC:** Thank you. Could I take you to another affidavit, please? If you go to Bundle 11 and if you

could turn ...[intervenes]

**MR GIGABA:** Just a moment. You are – you have gone to Bundle 11. I am still on 7(a).

**ADV MYBURGH SC:** Sure. And could you turn Bundle 11 – there is a flag, 15.

**MR GIGABA:** 15...

**ADV MYBURGH SC:** Then perhaps I could ask you to turn to page 942.1?

**MR GIGABA:** Nine...

10 **ADV MYBURGH SC:** Sort of mid-way into that divider.

**MR GIGABA:** Nine, four, two... Point?

**ADV MYBURGH SC:** One.

**MR GIGABA:** Okay. Yes, I am there.

**ADV MYBURGH SC:** Now this is the affidavit of the Managing Director of Fundudzi.

**MR GIGABA:** Yes.

**ADV MYBURGH SC:** Mr Ernest Nekhavhambe.

**MR GIGABA:** Yes.

**ADV MYBURGH SC:** Do you see that?

20 **MR GIGABA:** Yes.

**ADV MYBURGH SC:** And we know that Fundudzi were appointed by National Treasury to conduct certain investigations and produced a series of reports that are features in this inquiry. There are just a few things that I would like to ask you in relation to this affidavit. Could

you please turn to page 942.13.

**MR GIGABA:** Nine, two, four or ...[intervenes]

**ADV MYBURGH SC:** 942.13.

**MR GIGABA:** I am there.

**ADV MYBURGH SC:** Right at the foot of the page at paragraph 78, Mokholo stated:

“Minister Gigaba introduced an informal way of board appointments and further that there was no framework or policy in place...”

10 Now, who is Mokholo?

**MR GIGABA:** Ms Mokholo was an acting DDG... Ah, sorry, not – was a DDG Legal in government in the Department of Public Enterprises when I was there, appointed during my tenure.

**ADV MYBURGH SC:** And that we see from the top of the page, correct?

**MR GIGABA:** Yes.

**ADV MYBURGH SC:** There is a schedule setting out at paragraph 72, the various individuals who served during  
20 your tenure and it then reflects her as an acting DG. What do you say to hers or to this paragraph that she stated that you introduced an informal way of board appointments and further, that there was no framework of policy in place?

**MR GIGABA:** Chairperson, ministers do not often arrive in departments and change existing policies. There was a

policy of how board were appointed when I arrived and that policy in that nature prevailed. When I became Minister – I am not sure whether paragraph 78 is related to paragraph 75 in which paragraph 75 – it is said that:

“Minister Gigaba did not approve the memorandum and his rejection was supported by the following statement: Such a presentation should be prepared and the date set...”

- 10 Now this was in relation to my arrival in 2010 and a memorandum was brought to my attention, and this was during a time when I was receiving briefings(?) and my view was, a matter of this magnitude requires me to be briefed verbally, you present the memo, you brief me, you allow me to engage with it because if I want to ask questions: Who do I ask if I am sitting with a pile of papers in front of me? If you want to understand, why are you suggesting this? Why is this framework proposal there? I need to ask the people who are drafting this so
- 20 that they enlighten me because I am new in the depart.

And in actual fact, I was new in the environment of Public Enterprises. I had served six years as Deputy Minister of Home Affairs. At Home Affairs we did not appoint boards for companies of the schedules of the SOE's. And even where there was maybe the Immigration



Board appointed, that was the responsibility of the Minister. I only had to note the submission and that is why I proposed that, prepare such a presentation and set a date for it to happen and that happened.

We had a discussion. I refute the claim that there was an informal way of board appointments and there was no framework. In my firm understanding. When I arrived, there were certain boards in which some board members would have served for nine years or more. That includes  
10 the Board of Eskom, that includes the Board of – I cannot remember which other board but there were instances where board members who would have sat for periods of seven, eight, nine years or even more.

And the decision taken officially during my tenure was that no member of a board would serve at most for longer than two terms of three years each. So, we regularised that each board member would serve for three terms. At most, you would receive a ...[intervenes]

**CHAIRPERSON:** A short term of three years each?

20 **MR GIGABA:** Yes, which means, it is six years.

**CHAIRPERSON:** I thought you said three times.

**MR GIGABA:** Oh, sorry, sorry.

**ADV MYBURGH SC:** Ja.

**MR GIGABA:** I meant two terms of three years each. Yes. Or three years per term which will be a total of six

years with the provision that in the instance that you are not performing in terms of the board assessment. So, we also regularised board assessments on an annual basis. So, as we went to the AGM, there would be a board assessment. It was regularised.

And that board assessment would indicate to us whether somebody has taken over more board positions, because one of the things we did was to insist that you must not serve – I cannot remember on more than how  
10 many boards. I do not whether – I cannot remember whether it was on more than three or four boards. So that you are able to give your time to the SOE's because they were important drivers of our infrastructure rollout. We need board members who have got time. Who are not just embellishing their CV's but who are very involved in the work of our SOE's.

So, we introduced a number of frameworks that – and policies that ensured that the process was formalised. So, it is not true that I introduced an informal way of board  
20 appointments. Actually, what is an informal way of board appointments?

I do not understand what that concept means, an informal way of board appointments, but the board appointment process was very formalised. It involved the department. It originated from the department. It involved

engagement at their level including checking the CV's, collecting the CV's, checking the suitability of those people, their eligibility to serve on the boards until it served before me. And I think I have explained earlier today how this then would be dealt with.

If by informal they meant – they mean that I would have said in instances: Instead of just giving me a memo, come present this to me. Let me understand your rationale. Let me understand what you are suggesting here. Because  
 10 even in how you prepare for AGM's, I insisted on attending all AGM's with the SOE's including the ones I have delegated to my deputy.

I insisted that I wanted to attend them, because in the end, my deputy is – it becomes my proxy because as the Minister and the Executive Authority of the department, I am the shareholder representative. I am the one who reports to Cabinet.

Now I insisted that I would attend them even on occasion I would not make the shareholder statement but  
 20 would meet my deputy to make it, but I would be there and ensure that the decisions taken have the full approval of the shareholder representative and would insist that instead of saying to me that we are going to an AGM, we meet at the AGM, you just give me a board pack. Let the department come and present to me so that I understand

what decisions need to be taken and we deal with board appointments and other issues, the confirmation of auditors or replacing(?) thereof in those discussions.

I thought I was engaging as the Minister with the top officials in taking these decisions, unaware that somebody might have viewed it as an informal way, but they should have said to me that: Minister, then this becomes viewed by us as an informal way of doing the work – of deciding on boards.

10 But in the end, they came with that, we have discussed with them, we have agreed, there was consensus. Nobody would feel that I had been left out in terms of my views and then that is how we proceeded.

**CHAIRPERSON:** Mr Myburgh, I just want to ask a point that is not directly in line with what you are questioning Mr Gigaba on, but it arises partly from what you have said. You just said that you would have wanted the department to make presentations to you as the shareholder representative so that you could report back to Cabinet.

20 What was the way of reporting to Cabinet and the President about the stage of SOE's during your term? In other words. Would there be written reports that you as the Minister or written reports that you would have placed before Cabinet or the President to say this is the state of Eskom, this is the state of SAA, this is the state of

Transnet.

So that over the five years of your term you are able to say I kept the President informed or the Cabinet informed of what the state of these SOE's were? So, I am interested in that because one of the questions that arises for me in a different context is.

How it was possible that a number of these SOE's that we are dealing with here, Eskom, SAA, Transnet, Denel, how it is possible that they could go down the way  
10 they seem to have gone down and with a lot of corruption happening affecting their finances without something that seems effective being done to arrest the decline.

So, and I wonder whether it would just a matter of the relevant Minister or whether the relevant Minister would be keeping the Cabinet aware and the President aware and they would have had opportunities to see that things are getting worse in the worse SOE's, corruption is rising, irregularities are rising, and they would have had an opportunity to assist or intervene or grabble with the  
20 problem.

So, what was the way? Would there have been some written reports or whether just verbal reports? What was the way of communicating to Cabinet and/or President, the state of challenges in the various SOE's?

**MR GIGABA:** Chairperson, there are no reports that you

submit on a monthly or annual basis to the Cabinet on the state of SOE's. When matters of SOE's serve before Cabinet, it is usually with regards to either appointment of boards or applications for government guarantees or recapitalisation when the National Treasury together with the relevant ministry representing the shareholder would then come to Cabinet on those issues.

So, if it is a matter that involves SANRAL(?) and the Gauteng E-tolls, it would be the Department of  
 10 Transport and National Treasury. If it involves over all guarantees that would arrive from the Minister of Finance's budget process as they brief Cabinet on the physical framework.

Now, the – so, there are no reports that go to Cabinet that say – even after AGM's, you know, at the AGM, the relevant Minister would receive the report on the annual financial statements in which report he would then deal with the finance report, the audited statements which would raise irregular spending, it would raise the issues  
 20 about the salaries, and long-term and short-term incentives, what profits have been made, and so on.

Even those do not serve before Cabinet except when we would have gone Cabinet to request Cabinet to consider taking a decision on the salary scales of SOE's, CEO's and CFO's, the board members, as well as the long-

term and short-term incentive issues which were quite damages on the finances of the SOE's.

So, what then – how then that gets dealt with subsequently is. After the report of the Presidential Review Committee which was checked and when she became Commissioner of Police by Mr Mashinini, in that PRC, Presidential Review Committee, it is - you know, 315 or that report identified 715 SOEs.

The Minister of Public Enterprises has oversight  
 10 over only eight. There are 715 SOEs in the country existing at National, Provincial and Local levels and some of the public entities even though they are of the form of SOEs have not declared themselves or being declared as SOEs creates a dilemma in that there is no institution in the country, single institution which oversight over all these SOEs and therefore cabinet does not have a full view of its SOEs how they are performing what is their asset value, what are their liabilities overall, what is – how much are they spending in terms of capital investments and what  
 20 are their operational expenditures, what is the figure of the operational expenditure. It does not have a view, an overall view of what is happening in that regard.

What the PRC report then suggests is that government must establish and SOEs council which would be a council of ministers because the Minister of Public

Enterprises, who is the custodian, you know, and is viewed in the country as the custodian of our Public Enterprises only has oversight over it.

The Minister of Transport has 11 plus SOEs in their portfolio, then there are others in Energy and so on and some of these enterprises are of a commercial nature, others are non-commercial, others serve a public value like PRASA even though its commercial but it has more of a public value in that its clientele are ordinary South  
10 Africans who live in townships and rural areas who use the public railway system and therefore regularly government will have to subsidise these SOEs.

So that is the dilemma. Now there is no report, therefore, Chairperson, which I would have submitted other than anecdotal issues which relate to board appointments, guarantee framework application and something else which we might be reporting about, the appointments of CEs and other executive directors in the SOEs and those reports will not assist you very much though, when you look at all  
20 of them, they will give a sense of the board appointments over the period from 1994 but it will not explain to you, Chair, that when 1994 happened most of our SOEs had been told that they would be privatised including Transnet and therefore, for a long period Transnet did not invest in new rail capacity and locomotive capacity because they



were told they would be privatised and therefore their finances began to dwindle.

If you look at Eskom, the same would apply to them. From the outset they knew that they would be either privatised or a private competitor would be introduced. Eskom did not invest in electricity generation capacity. As a result when 2008 happened, we found ourselves experiencing load shedding and began at that period to commission new power stations, the contracts of which  
10 were entered into in a rush because the country was already experiencing load shedding and because of that, those contracts were weak and they favoured the global original equipment manufacturers and with the delays in the completion of construction, those delays have resulted in cost overruns running up to billions of rand because of the delays and the type of contracts that were entered into and the failure to appoint project managers on site that would manage both the contractors, the primary contractors, the secondary contractors and labour.

20 That is why at Medupi you had these several, I think two or three, prolonged strikes because there was no one on site on behalf of Eskom and the contractors who was managing the relations between the contractors and labour.

So those are difficulties which have been there

which hopefully the appointment of the SOEs council is going to help to resolve because it has a mandate. The minister unfortunately looks at operational issues insofar as SOEs, there are oversight inasmuch as it is strategic and is expected to be strategic is also operational, narrow. The SOEs council has that much more broader oversight which would be able to look at the whole range of policies because the department of Public Enterprises has its own governance framework which it has established but other

10 departments, provincial tiers and municipalities which also have SOEs have different government frameworks. Even we have different governance frameworks in addition to which there is an entire – there is a lead time of legislation impacting on SOEs. The Companies Act, the PFMA, key code of governance and a wide range of others. Some SOEs have got establishment legislation, other SOEs do not, they just simply exist and their governance is dependent on the framework which would have been crafted by the shareholder department.

20 So all of those issues, Chairperson, impact on the SOE environment and how it operates and they create, therefore, the loopholes that you see in many of our SOEs if you look at what they are expected to do and what, in the end, they are able to deliver.

**CHAIRPERSON:** Okay, no, thank you, that is very

important. I mean, part of what we are looking at is how strong or weak were oversight mechanisms for SOEs because the weaker the oversight mechanisms and structures over the SOEs the easier it seems it would have been for people who wanted to loot the SOEs to do so without relevant structures picking this up and then maybe that is why we are where we are with the SOEs so part of what the Commission is looking at is how strong were the oversight mechanisms, why were these things not picked  
 10 up on time and that is where the question arises from. Okay, but what you have said is helpful. Mr Myburgh?

**ADV MYBURGH SC:** Thank you. If I could take you please to page 942.14, paragraph 79?

“Mokolo further stated that the informal way introduced by Minister Gigaba resulted in almost all names in respect of board appointments originating from the minister’s office.”

Do you want to comment on that?

**MR GIGABA:** I was not aware of this, Chairperson, and to  
 20 my understanding, as I have stated it, the names, the candidates for boards emanated from the department. There would be a few instances where I think it would refer to their names which I spoke about, Ms Tjiji Maponya, Prof Zanele Magadi and a few others were, I would have said to the department, look at this as well but even those had

been brought to my attention by my advisers, they would not have emanated from me directly and so the extent that I think here what Ms Mokolo is talking about is the engagement which was there between my office as well as the department in how the names originated.

**ADV MYBURGH SC:** Well, she is actually talking about Mr Mahlangu. If you could go to paragraph 83:

“The said board members’ motivations for appointment...”

10 Now not just the names, but motivations for appointment.

“...to the SOC boards were sent by Mahlangu to Minister Gigaba, Matona, and Mokolo.”

At 84:

“Mokolo indicated that it was not Mahlangu’s role to send motivations for board appointments to Minister Gigaba. Do you want to comment on that?”

**MR GIGABA:** And 85:

20 “We could not find any indication that Minister Gigaba requested Mahlangu to provide candidates and/or motivations for board appointments.”

**ADV MYBURGH SC:** Yes.

**MR GIGABA:** I think 85 is important too, Chairperson.

**ADV MYBURGH SC:** Sorry, Mr Gigaba, can I just ask you to direct yourself firstly to the issue of Mr Mahlangu?

**MR GIGABA:** Yes, I think, Chairperson, it would have

been important to engage him on these assertions so that his understanding is established because to my understanding, he would have not had a responsibility to develop the full names for boards. That responsibility would have had to lie with the department and up until, this is what I thought happened.

**ADV MYBURGH SC:** Right. So if we could have a look at one or two other aspects of this affidavit. Could I ask you please to turn to page 942.24? If I could direct your  
10 attention and this is a section dealing with the appointment of the SAA board in 2012. If I could direct your attention please to paragraph 134?

“On 30 August 2012 Palesa Nkomo...”

Now who was she?

**MR GIGABA:** She was special adviser on economic issues.

**ADV MYBURGH SC:** Also in your office?

**MR GIGABA:** Yes.

**ADV MYBURGH SC:**

20 “...sent an email to minister Gigaba and copied Mahlangu. In her email Nkomo raised her concerns in the manner in which the proposed SAA board was compiled.”

And it says:

“Nkomo stated: Dear Minister, I would like to

confirm that the finalisation of this list was not consolidated. Here are my comments to Siya two days ago and he had ignored them. He has changed the list every day and did not include people with expertise. In the final list he has refused to include the follow people who have the expertise and will add value. The MRO consolidation at a later stage.”

And then lists certain people. At 135 it is recorded:

10            “In her email Minister Gigaba, Nkomo indicated that Mahlangu had missed all the deliberations on SAA diagnostic report. Nkomo further indicated that she did not agree with Madisela should seat on the SAA board as it would be interpreted as double-dipping by cabinet.”

Then at 136:

              “Based on Nkomo’s reaction to the proposed list there may have been a lack of transparency in the manner in which the SAA board members were  
20            nominated and finally approved.”

This is Mahlangu’s list. 137:

              “This is evident from the concerns raised by Nkomo to Minister Gigaba regarding the lack of consultations by Mahlangu when compiling the list for SAA board.”

Then at 138:

“In his response to our written questions Minister Gigaba indicated that he does not know why Nkomo raised objections, that there was no consultative process.”

139:

“Mr Gigaba further stated that he did not recall the above instance given that he did not want to micromanage the appointment of board members as it could have created an impression that he had an interest.”

And at 140:

“Minister Gigaba further stated that as far as he was aware there were sufficient internal processes within the department to consult and when there were concerns regarding consultation he would refer the issue back to the process.”

Do you have any comment further on that?

**MR GIGABA:** No, there is no further comment, Chairperson, on this, I think what I stated here that I was aware. One, I did not want to micromanage the process and two, I was not aware there was no sufficient internal consultation process because my understanding, Chairperson, was that at all times the names emanated from the department. I would have been happy if the DG

had come to me to say that Minister, actually these names have not emanated from the department, then I would have intervened at the time.

**ADV MYBURGH SC:** So you accept that this list on the face of it, did not emanate from the department, it emanated from Mr Mahlangu.

**MR GIGABA:** I do not accept it, Chairperson, because I was not aware of it. This is one view on the matter, there could be other views on the same matter, so it is an  
10 assertion that I cannot just willy nilly accept. You know, what I ...[intervenes]

**CHAIRPERSON:** You can neither accept or dispute, is that right?

**MR GIGABA:** No, I am – yes, I can neither accept nor dispute, yes.

**CHAIRPERSON:** Ja, you do not know about it.

**MR GIGABA:** That is it, yes.

**ADV MYBURGH SC:** Alright, well then let us look at what it says towards the foot of page 942.25, the appointment of  
20 Mr Mutane, something we have already looked at. I can just run through this quickly, if you go to 942.26:

“On 11 September 2012 Mahlangu sent an email to Mr Gigaba titled Motivation for Mutane. In this email Mahlangu wrote...”

And then the email is quoted. If you go to 144:



“On 12 September 2012 Mahlangu sent an email to Mr Gigaba titled Further Thoughts”

And if you look at 146, the second sentence:

“Attached to Mahlangu’s email was a document titled Doctor.docs. The said attached document was a one page summary of Mutane’s work experience.”

And then you see at 147:

10 “The document further indicated the following in respect of Mutane, his passion for building businesses.”

Etcetera. And then if you go to 149:

“During our review of the attached document we noted that the document was created on 12 September and last modified by Ashu.”:

The possibility exists that Ashu Chawla. I already asked you about this. Do you have anything to say about that?

**MR GIGABA:** Well, I was not aware again of where these – because, Chairperson, as I say, I left these processes to  
20 be run by the department, I did not want to keep interfering at every moment of the board appointment process because, as I say, I did not want the department to presume me to be having an interest in the issues. So even if my advisers came to me to say these are people who recommend, I would say take those names into the

department's process and let them be dealt with in that process before you bring them to me.

**ADV MYBURGH SC:** So he is not just putting forward a name, he is actually writing or presenting you with the motivation for appointment.

**MR GIGABA:** Even in that case, Chairperson, it is immaterial whether he provides motivation because even if you were to say to me appoint Mr Myburgh as a board members, whether you provide motivation or not I would  
10 say take this issue to the department, let it be dealt with there, the name of Mr Myburgh, if it passes muster in the department and process then it would return back to me through the normal routes that are established.

**ADV MYBURGH SC:** And then you will see at 151 that on the 12 September at 833 Mahlangu sent a second email to Minister Gigaba titled Revised Motivation and then at 153:

“The second document was last modified by Ashu on 12 September.”

Do you see that?

20 **MR GIGABA:** Yes, I see that.

**ADV MYBURGH SC:** And then at 154 it records the response by Mr Mahlangu to the effect that he did not have any knowledge that Mr Chawla was involved but I just wanted to pick up on something that you mentioned earlier and that is that some of the questions that we have should

be directed by Mr Mahlangu. I just wanted to point out to you – and he says this on a number of occasions, you see it in this affidavit, 155:

“Mahlangu further indicated that he was unable to respond to our questions on specific board appointments. He stated that:

‘In my view these board appointments or rotations are confidential and legally privileged. The same applies to the legal advice or notes that I prepared for the then minister during my time as his special adviser.’”

**MR GIGABA:** So that will be in one bundle so that I can direct my attention to it as well while you are presenting...

**ADV MYBURGH SC:** 942.28.

**MR GIGABA:** Oh.

**ADV MYBURGH SC:** Paragraph 155.

**MR GIGABA:** Right. This is not an attorney/client privilege, this is Mr Mahlangu being asked questions about appointments and his interaction with you and saying that they are confidential and legally privileged, it is part of his job.

**MR GIGABA:** I presume that to be his response.

**ADV MYBURGH SC:** Yes.

**MR GIGABA:** Yes.

**CHAIRPERSON:** Mr Myburgh, I wonder whether Mr

Solomon can still hear us. I see there is some signal challenges here. Mr Solomon, can you hear us? He is not answering. Are the technicians working on it? Okay. I do not know whether he would have an objection if we continue or whether we should stop.

**MR GIGABA:** Could I request a comfort break, though, Chairperson?

**CHAIRPERSON:** Oh.

**MR GIGABA:** Thank you.

10 **ADV MYBURGH SC:** Chairperson, the technical staff asked if they could have five minutes to restore the connection if possible.

**CHAIRPERSON:** Oh, that coincides with the request. Can I also request somebody to switch on the heater here? Okay, let us – maybe let us make it ten minutes because five minutes can be quite short.

**ADV MYBURGH SC:** Thank you.

**CHAIRPERSON:** We will take a ten minutes break. We adjourn.

20 **INQUIRY ADJOURNS**

**INQUIRY RESUMES**

**CHAIRPERSON:** Okay let us continue.

**ADV MYBURGH SC:** Thank you. Mr Gigaba if I could ask you to look at page 942.29.

**MR GIGABA:** I am on it.

**ADV MYBURGH SC:** And go to paragraph 163.

**MR GIGABA:** Yes.

**ADV MYBURGH SC:** It records there:

“There is no evidence that probity checks as provided for in the 2008 handbook or the subsequent DPE Board Appointment Framework were conducted on Tarney in 2012 when he was appointed to the SAA Board.”

Do you want to comment on that?

10 **MR GIGABA:** Chairperson I presumed that this had been done.

**ADV MYBURGH SC:** And in fact perhaps we could turn back ...[intervenes]

**CHAIRPERSON:** Would the decision memorandum as I understand this document to have been called not deal with such things, in other words to say with regard to this candidate for appointment we have checked his or her academic qualifications or her claims about business experience or his or her claims about connections with  
20 India or whatever, would it not deal with those things to make sure that you are aware what background checks have been done, or would it simply say, background checks have been done without telling you exactly what has been done?

**MR GIGABA:** Chairperson, it would not go into that detail

of explaining that the probity check had been done, to the extent that it served before me I would have presumed that it had been done in the back process.

**CHAIRPERSON:** Mr Myburgh.

**ADV MYBURGH SC:** Yes, thank you and just incidentally, if you go back to page 942.20, we know that Mr Essa was appointed to the Board of Broadband Infraco, it says at 119:

10            “In his response to our questions, Mr Gigaba indicated that Mr Essa's appointment on the Broadband Infraco Board was done in accordance with the processes of the department. But again, it is recorded with the funding of Fundudzi was there is no evidence that a thorough vetting process was conducted on Essa in 2011.”

Any comments or that?

**MR GIGABA:** No, no comments, Chairperson. I presumed again that this would have been done. I think, the Fundudzi Report is - was completed in 2018 or 2019. In  
20 2011, when 2011 or 2012, when the appointment was done, insofar as I am concerned because the Board appointments did not originate from me, I would therefore have presumed that all the people being recommended had been checked.

**ADV MYBURGH SC:** And then if I can ask you please to go back to 942.29.

**MR GIGABA:** Yes.

**ADV MYBURGH SC:** At 167 towards the foot of the page.

“We recommended in our final report that DPE should consider investigating whether Tarney was strategically placed at SAA to ensure that SAA closes down the Mumbai - Johannesburg to make way for Gupta linked airlines.”

168:

10 “In his response to our written questions, Minister Gigaba indicated that he was not aware of any influence which Ashu Chawla, Gupta family ended their associate/Salim Essa may have had on the appointment of Board members at the various SOE Board’s, do you have any comment on those two paragraphs?

**MR GIGABA:** if you go to paragraph 120, 167, Chairperson.

**ADV MYBURGH SC:** 167.

20 **MR GIGABA:** Yes, paragraph 167, yes. I would not be sure of this, perhaps it might have been in the minds of the people who might have nominated him. But my understanding is that the decisions with regards to closing the Johannesburg Mumbai route it started prior to 2010, prior to 2010 and he had gone through various executive directors at SAA and through various Boards of SAA, with

around 2010 the new CEO of SAA, making it very clear that SAA had no intention to pull off the Mumbai route. Between 2010 and 2014, there was no instruction to SAA to pull off the Mumbai route because that was the discussion of the airline, which would have moved from the airline, from the Man Co, Management Committee to the Board, from the Board to the Minister.

At the time, the decision on shutting down routes or pulling off routes, which were not financially viable, would  
10 be taken by the executives recommended to the Board and then sent to the Minister for final approval. The 2012 turnaround, long term turnaround strategy then came to the conclusion that that process was protracted and not very helpful to the airline in terms of taking decisions on routes.

And therefore the recommendation of the long term turnaround strategy was that the decision on routes would have to be taken by the Board instead because if it comes to the Minister, it delays the decision, the airline continues bleeding on the routes and the Minister does not have the  
20 capacity, or the department does not have the capacity to evaluate the viability or not there of, of a particular route.

This had to do with a number of other routes but insofar as the Mumbai route is concerned, I had said earlier that in 2010, the new CEO of SAA said they would not pull off the route. In 2011 it seems that Man Co



subsequently decided to pull off the route but the Board said no, do not pull off the route rather, let us explore partnerships and cooperation which would optimise the route for the airlines clients who would have been travelling from Asia to South America, Sao Paulo in particular.

So I am not sure and I think it would be necessary to test the veracity of this claim that Mr Tarney was appointed to ensure that the route is shut down. Of  
10 course, the Board of SAA in 2015, if I am not mistaken, decided to pull off the route. I was Minister of Home Affairs by then and I was no longer involved with SAA but I think it would be necessary that the veracity of this assertion be tested with Board members that were there at the time as to why they pulled off the route.

My understanding is that SAA continued bleeding on the route, its finances not only in relation to this route but in relation to its operations and as a going concern were quite weak and I think there was a period of more than a  
20 year or for about two years if I am not mistaken, when SAA was not able to go to an AGM because the auditors had raised serious concerns with regard to the going concern status of SAA.

And so a number of routes would have been affected in that instance, not only the Mumbai rout but

other routes in Europe and elsewhere. It seems that a number of long haul routes of SAA were affected. So to what extent this assertion by Fundudzi is true or not, I really cannot tell.

All I am saying is there is a broader context that needs to be looked at and it would be necessary to then engage the Board members who were there at SAA in 2015 when the decision was taken to understand the rationale and the Man Co that was there at the time so that they can  
10 explain why they took this decision.

**ADV MYBURGH SC:** And then Mr Gigaba can I ask you please to go to page 942.143.

**MR GIGABA:** 143?

**ADV MYBURGH SC:** Yeah, so Fundudzi asked you a series of questions in the process of preparing their report, do you recall that?

**MR GIGABA:** Yes.

**ADV MYBURGH SC:** And you responded by way of your attorneys, then Tshabalala Attorneys?

20 **MR GIGABA:** Yes.

**ADV MYBURGH SC:** And that response commences at 942.143. I just wanted to ask your comment on one thing, which I have identified, if you go to page 942.154.

**MR GIGABA:** Yes.

**ADV MYBURGH SC:** You were asked - if you got to the

bottom of the page to paragraph 4.11 under the heading relationship with the Gupta's, you were asked:

“Do you have any relationship with the Gupta's?”

And you your answer was:

“No.”

**MR GIGABA:** Yes.

**ADV MYBURGH SC:** Is that correct?

**MR GIGABA:** Well, I think I did explain earlier perhaps the question was a little bit ambiguous because previously,  
10 I had explained my relationship with the Gupta's in Parliament, I explained them here that it was just the social relationship. So when I said no here I was - I probably meant that there is no relationship beyond social and just cultural as I had explained.

**ADV MYBURGH SC:** So, what you could perhaps have said is that your relationship was social and cultural.

**MR GIGABA:** I could have said that, yes.

**ADV MYBURGH SC:** So as I understand that - just to end off on that issue, you considered yourself to be a friend of  
20 Ajay Gupta?

**MR GIGABA:** Yes.

**ADV MYBURGH SC:** And in fact, and you must correct me if I am wrong, one of the reasons that you felt comfortable with Mr Mahlangu intervening as between you and the Gupta's is because it then avoided the need for you to deal

with Ajay Gupta. Is that correct?

**MR GIGABA:** Let me rephrase your - the answer to your question, because it is leading in a particular direction. Chairperson, I - not that I felt comfortable in Mr Mahlangu, I instructed him to manage the relationship, so that I did not have to find myself extending beyond my social relationship with Mr Ajay in the instance because they are business people.

I knew them to be business people and I did not  
10 want for instances to arise, which would cross the lines and extend the social relationship into what now would appear to be a business engagement, I did not want that to happen.

**ADV MYBURGH SC:** So, I think the point is that your friendship was close enough so that you did not want that.

**MR GIGABA:** Yes.

**ADV MYBURGH SC:** And as I understand your evidence to you surmised that perhaps he saw it the same way and that was the reason I think you surmised why Mr Mahlangu  
20 would then have dealt with Rajesh Gupta and not Ajay Gupta, did I record your evidence correctly?

**MR GIGABA:** Yes, probably yes.

**ADV MYBURGH SC:** And what other, which of the other Gupta brothers did you know?

**MR GIGABA:** I knew all of them, I knew all of them – well,

three, I knew all three of them and I would have met them on several occasions, including when I was there for the cultural activities. When we met at the at TNA SABC breakfast programs, at some of the programs of the ANC and even at the - I think they hosted once or twice South Africa of the year award and I would have met them there also, because I was a guest, among others.

**ADV MYBURGH SC:** And I mean, are you able to put your finger on what caused you to foster friendship with Ajay  
10 Gupta, but not with the other brothers?

**MR GIGABA:** I do not know, I mean, I - it just a - there is no particular reason, he is just the person that I used to talk to probably him, I think as an elder brother to the two. He is the one that I just used to talk to, there was no specific reason that I like this one, therefore, I will foster a relationship with him.

**ADV MYBURGH SC:** And then Mr Ashu Chawla, did you meet and know him?

**MR GIGABA:** Mr Ashu Chawla I would have seen him on  
20 several occasions but just he would be greeting and so, so I did not have any discussions with him.

**ADV MYBURGH SC:** And would you see him for example, on those occasions when you went to Sahara Computers?

**MR GIGABA:** I do not actually recall whether I had seen him there, I do not recall if I had seen him there - his not

somebody that I saw that much I mean, there is quite a lot of people I have met over the years but I do recall that I have seen him.

**ADV MYBURGH SC:** And then as I remember your evidence, and please correct me if I am wrong. In relation to Mr Salim Essa your evidence as I recall, was that the first time that you met him was when you were introduced to the Broadband Infraco Board, is that correct?

**MR GIGABA:** Yes, I think so.

10 **ADV MYBURGH SC:** And did you then have occasion to meet him after that?

**MR GIGABA:** Except when we were at Broadband Infraco, I do not recall other occasions

**ADV MYBURGH SC:** Alright.

**CHAIRPERSON:** Well, let us go back to that question and your answer at page 942.154 where you were asked, do you have any relationship with the Gupta's and you said, no. I cannot remember here how you described that question but I think you described it in a way that suggest  
20 that it may have been vague or something. But it seems to me to be quite straightforward, do you have any relationship with the Gupta's, is that not a very straightforward question?

**MR GIGABA:** It could be - it is a matter of interpretation, Chair, it is a matter of interpretation. I think, perhaps I

could have expanded as I have expanded during the sessions of this Commission.

**CHAIRPERSON:** You see, because when they say, do you have any relationship with the Gupta's, they are not saying business or personal or anything, they just want you to indicate whether you have any relationship with them of whatever nature, you accept that, that is what the question requires.

**MR GIGABA:** It is a matter of interpretation, Chair. I am  
10 sure if they were also specific, I would then maybe have responded specifically because they left the question vague.

**CHAIRPERSON:** But look at it now leave out for now, how you might have interpreted it at the time you answered the question. Look at it now, do you not accept that it is straightforward?

**MR GIGABA:** No, Chair.

**CHAIRPERSON:** Why do you say is not straightforward?

**MR GIGABA:** It is not - a relationship could be anything  
20 from business to anything and my sense was that is what they were asking and that is why I have explained before the Commission my social and other relationship with them, but I made it very clear from the outset that there was no business or commercial relationship.

**CHAIRPERSON:** Ja, you see my difficulty is interpreting

any relationship to be a reference to a business relationship when the question is quite open that is my difficulty with your interpretation.

**MR GIGABA:** The family Chairperson is known as a business family, in Parliament, I had explained my relationship with them in the same way that I have explained it here at the Commission. My reading of this question was that it was vague it had been it had asked a number of issues which had to do with SOE's, the business  
10 dealings of the family, and that is probably why I responded in this sympathetic manner, but the intention was not to hide anything, because if that was the intention then I would have still gone ahead at this Commission and not disclosed.

**CHAIRPERSON:** Yes, but you see, if you turn over to page 942.155 the top question there, that question says:

“If the answer to the above is yes.”

And we know your answer was no.

“If the answer to the above is yes, what was or is  
20 the nature of the relationship with the Gupta's or their associates?”

So, I want to suggest to you that if you thought that any relationship, the reference to any relationship in the question at page 942.154 was directed at a business relationship, when you came to this question, you would



have realised that, oh, depending on my answer, in the previous question, they want to know the nature of the relationship, which is business or friendship or whatever, and that you would then have realised and gone back and said, yes, I did have a relationship, it was a friendship and not a business relationship. But the answer that you gave to the question at 942.155 was the question has become academic and falls away in view of the answer given in paragraph 4.10.1 supra, what do you say about that?

10 **MR GIGABA:** No, I take the point the Chairperson is making.

**CHAIRPERSON:** Yes.

**MR GIGABA:** Yes, that I should actually have read this – and therefore clarify it that my initial, the previous - my reading of the previous paragraph, of the previous question was not what was meant, and therefore I should have gone on to explain here as this other question, is now asking or was asking.

**CHAIRPERSON:** H'm Mr Myburgh.

20 **ADV MYBURGH SC:** Yes, I just wanted to make one point, of course when I asked you in these proceedings early on about your relationship with the Gupta's, you took us back all the way to when you were the President of the ANC Youth League, correct, that is when you started sketching it?

**MR GIGABA:** Yes.

**ADV MYBURGH SC:** Alright, could I ask you please to turn to another file and that is to Transnet Bundle 8 and could you please go to page...[intervene]

**CHAIRPERSON:** I am sorry, Mr Myburgh and I do not want to interrupt you but there is something in my mind and in all fairness, I think I should put it to you so that you can clarify it. I may be wrong but I think that the impression I had got from maybe some of your affidavits that you have  
10 delivered to the Commission, as well as maybe your earlier evidence. I think it had given me the impression rightly or wrongly that you were - your position was that you were not close to the Gupta's.

But I do know now that I think either on Thursday or Friday, you did say quite expressly, that Mr Ajay Gupta, you were friends with Mr Ajay Gupta, I do know that much earlier than that you did say that you had visited their residence several times and I think that is the word at some stage that you used and that you said the visit, some  
20 of the visits related to cultural events but you also said you went there to socialise as well.

So I am just saying I just want you to clarify, I may have had this wrong impression certainly, recently I think you made it clear that no with regard to Mr Ajay Gupta you were friends and you did say you had visited the residence

a number of times, several times to attend cultural events as well as socially but somehow I have this impression then, I just want you to dispel it if it was a wrong impression that that I gathered.

**MR GIGABA:** Chairperson, there is not an affidavit which has asked me that question or which has posed that issue to me. I think in all the affidavits I have dealt with specific allegations, which related to a number of issues for the appointments, the 1064 fleet locomotives and a whole  
10 range of other things. I have not had to respond to the question directly as it was posed here in the Commission and so what I was doing in the Commission was to respond to the question pretty much for the first time to a direct question, did you know them?

What was the nature of your relationship and clarify that it was not dealings, it was a relationship, it was of a social and cultural nature and it was confined to Mr Ajay and did not entertain all the allegations which were made by some of the previous witnesses, two of the previous  
20 witnesses and so I had to clarify that, but it was the first time that the question was posed to me in that fashion.

So in the affidavits I have not had to respond to it, except in the point on the Fundudzi Report, which I say, I probably should have answered more directly, and should have read the two paragraphs that were asking me about it

in - as one question, so that I can clarify it. But I have also indicated that in regards to that, I have provided a more elaborate response on several days, actually, that I have been appearing before the Chairperson.

**CHAIRPERSON:** It may be that, in particular, I got that impression and I say nothing more than that, it may have been an impression, it may be that I got that impression from your responses to Ms Mngoma's affidavits and maybe in evidence and I am not saying it was a direct question or  
 10 anything because I think I got the impression that Ms Mngoma was saying you and the Gupta's were very close, you had a very close relationship but that from your side, you were creating a gap or some distance without saying I did not know them, I never went to their residence, acknowledging that you did go there.

But that there was that tension between your version and her version. She on the one side, putting up things that suggested that the two of – I mean you and the Gupta's were very close, but that your response sort to  
 20 create some distance without saying you had nothing to do with them.

Maybe that is where I got that impression. What do you think about that impression from – in regard to the two versions, is it possible that maybe it is a question of she is saying, you were this close and you are saying, not that

close, but close but not as close as you saying I was?

**MR GIGABA:** Chairperson, Ms Mngoma alleges that at a certain period she says I went to the Gupta's more than...[intervene]

**CHAIRPERSON:** 20 times.

**MR GIGABA:** 20 times, then goes further in the same breath to say I would go there every Monday before going to Cape Town and return there every Thursday, Friday or Saturday upon returning from there.

10 **CHAIRPERSON:** H'm.

**MR GIGABA:** I indicated that if there were 52 weeks in a year you are talking about 104 times, no longer 20. She says that on several occasions Mr Ajay would call me and we would discuss things. I say that is not true. She says that at some point I was not picking up his calls and I asked the question if my phone rings and I do not pick it up, how do you know who is calling. She says that they gave me a car which was in her name. I say there is no such a car.

20           So I am saying, Chairperson, that perhaps it is the Chairperson's impression that – or let me rephrase and say the Chairperson's impression that Ms Mngoma – Ms Mngoma's version and mine are vastly different is correct. Let me state, Chairperson, that you know knowing someone even if you socialise with them does not make them close

to you, does not mean that when I have customary functions at home that I invite them, does not mean that they are involved in the nitty gritty of my life.

There are people in South Africa who are my close friends and those are people I would claim are close to me and there are people I know. There are people I know that I would socialise with from time to time. Does not make those people to be close to me. When I say I know you, I can visit you or I visit you. that does not certainly mean  
10 that you are close to me.

So yes, I knew them and I got invited to some of their social or cultural functions, but that certainly does not mean that we were close to the extent that Ms Mngoma was alleging.

**CHAIRPERSON:** Well, would what you have just said about closeness apply to you and Ajay Gupta as well? I would have thought that you saying you were friends meant he was closer to you compared to the others that you may have been close except that on your version you make it  
20 clear that the friendship had nothing to do with discussing businesses, it was personal.

**MR GIGABA:** A closeness would apply in that case too, Chairperson... [intervenes]

**CHAIRPERSON:** Yes, yes... [intervenes]

**MR GIGABA:** As I say, there are many people I

know... [intervenes]

**CHAIRPERSON:** Ja.

**MR GIGABA:** It does not make them close to me. There are many people I can socialise with or I do socialise with, it does not make them to be close to me. I think when you unpack the word close it means that you know the nitty gritty of my life and I know the nitty gritty of yours, we can talk, we are comfortable to share a number of things in our conversations. This did not apply in that case.

10 **CHAIRPERSON:** Okay. Alright. Mr Myburgh?

**ADV MYBURGH SC:** Yes, thank you. I want to take you then to the affidavit of Ms Mzimela. You find that affidavit at Bundle 8, starts at 247.

**CHAIRPERSON:** This bundle that we were using just now, Mr Myburgh, can it go away or... [intervenes]

**ADV MYBURGH SC:** Yes, it can, Chairperson.

**CHAIRPERSON:** Okay.

**ADV MYBURGH SC:** And if I could take you then forward to page 252, please?

20 **CHAIRPERSON:** Are we doing quite well in terms of our case, Mr Myburgh?

**ADV MYBURGH SC:** I do not think we are doing well, Chairperson.

**CHAIRPERSON:** Okay, at least that tells me something. Okay, alright. Let us continue.

**ADV MYBURGH SC:** Thank you. At paragraph 12, Mr Gigaba, Ms Mzimela says:

“My experience of the approach to governance under the then Minister Gigaba’s tenure was different. Under his tenure there developed a very grey line and what would ordinarily be the board responsibilities and duties, management’s responsibilities and duties and delegation.”

Let me deal with 13(2).

10 “No proper protocols were followed for engagement with the organisation or rather the established protocols were ignored and individuals who ordinarily would not interact with the organisation were now playing a lead role on matters normally reserved (as per the delegation) to management of the organisation or the board. Specifically the involvement of the then Minister Gigaba’s advisor, Mr Siyabonga Mahlangu, was significant and unprecedented.”

20 Would you comment on that?

**MR GIGABA:** Chairperson, Ms Mzimela should explain how many times I engaged with the board and how and how many times I as the Minister engaged with management and how. During her tenure which lasted I think until 2012, though I might not exactly recall, when I needed to meet



the board outside the framework of the AGM, a special meeting would be convened as is the norm in SOEs, because the Minister is not a board member and if the Minister seeks a meeting with the Board to discuss an issue, then a special board meeting is convened and the agenda item to be discussed is placed forth so that the board prepares for the briefing to the Minister.

That was not undermined. It was not compromised. It was not reversed. I do not recall engaging as the  
 10 Minister with MANCO of SAA, not in a formal way except when I would have visited their offices and they were showing me. Now, if Ms Mzimela was alleging that I should not have come to SAA, I am the new Minister of Public Enterprises, I want to visit Airways Park to see how – where are they based. It is an SOE in my portfolio. It is one of the important. As I arrived they applied for a bailout and so I want to come and see where they operate.

I remember Ms Carolus had also invited me to come to view their simulation for aircrafts and pilots. So when I  
 20 visited there that of course is, you know, partly informal, but it is a formal visit by the shareholder to the head offices of the entity over which they have oversight. I have a right and every duty to do so and I am sure my predecessors would have done the same and my successors would have done so.

So what Ms Mzimela seems to be suggesting is contained in paragraph 13. So paragraph 12 is in every possible way not only an – not just an exaggeration, a distortion because she does not then proceed to say this is then how Minister Gigaba then bled the line insofar as board responsibilities and duties as well as management responsibilities and duties.

She then goes in paragraph 13 to explain what the problem she is talking about and that I think what she is  
 10 saying is that the involvement of Mr Mahlangu was significant and unprecedented. I think they should have informed me because I do not think except on two occasions when Ms Carolus who was the Chair of SAA indicated to me that I was not happy with Mr Mahlangu's conduct in a particular instance where she says I then reprimanded Mr Mahlangu in her presence.

I cannot recall the second instance where they might have brought to my attention their disconcert about him, which I would have dealt with, but this significant and  
 20 unprecedented involvement was not brought to my attention. I could only rely on what I knew and what they would have brought to my attention, not what I did not know.

**ADV MYBURGH SC:** So I might touch on some other aspects of what she says about Mr Mahlangu a little later,

but let us go please to page 262.

**CHAIRPERSON:** Before that, Mr Myburgh, I note Mr Gigaba that what Ms Mzimela says in paragraph 13 that you referred to just now may well be seen as consistent, and I want you to comment on that, as kind of consistent with what Fundudzi or the Managing Director of Fundudzi said in the affidavit that we dealt with earlier, said the – I think Ms Mkobo, is it Mkobo, from the Department of Public Enterprises said about you or the position you took about  
 10 the policy and policies and framework that were there in the department for the appointment of board members.

In other words as I understand what the Managing Director of Fundudzi was saying is that they were told by Ms Mkobo that there had been existing policies or frameworks for the appointment of board members, but when you came in you sought to ignore those and deal with matters in an informal way. What Ms Mzimela says here seems to me and maybe you might say that is not justified, seems to go along the same lines when she says:

20 “No proper protocols were followed for engagement with the organisation or rather the established protocols were ignored and individuals who ordinarily would not interact with the organisation were now playing a lead role on matters normally reserved to management.”

I just mentioned that because it is a thought that came to me when I was reading it. Do you want to say something about that, that thought?

**MR GIGABA:** Yes, thank you, Chairperson. I think I explained with regard to Ms Mkobo.

**CHAIRPERSON:** Yes.

**MR GIGABA:** And what – that I did not understand what was meant by an informal way of engagement, because I explained the outline that one, I did not change – she  
10 cannot point to any decision by me to change the 2008 protocols and secondly that where I personally engaged with the department on board appointments and asked them to rather present to me directly would have been in instances where I wanted to engage with the submission so that they can explain as the people who would have originated.

You see, Chairperson, you could say somebody could come to the Chair and say the Cabinet process is informal if it is in a meeting that a formal process for  
20 Cabinet is to circulate Cabinet memos and expect ministers to write down their responses, now that is formal. But a meeting is a formal process where records are taken by the people who are supposed to take those records. That is a formal process. It cannot be regarded as informal.

In this case where there is reference to established

protocols ignored and individuals who ordinarily would not interact with the organisation were now playing a lead role on matters normally reserved to management of the organisation or the board, I have responded in two ways, that one, I never changed any protocol insofar as how I as the shareholder representative interact with the board and Ms Mzimela cannot point to any such instance where there was a directive from me. Because I reserve the right to change the protocols if need be. I did not and continued to  
10 engage with the board in the manner which is established which I thought as I was briefed is established norm in terms of governance, that the Minister cannot just simply call the board. If you want to meet with the board the department would write a letter to the company secretary, a special board meeting would be convened and agenda items would be tabled and then you engage.

Now I think what Ms Mzimela is referring to here is these individuals who would not ordinarily interact with the board or management and whose involvement she claims  
20 were significant and unprecedented and I think they should have brought those to my attention. In part that is part of why when I spoke with the board I said to – I mean with the Chairs and the CEOs of the SOEs in my portfolio, I said to them guys, ladies and gentlemen, please, when you hear anything from anybody who claims to have spoken to me or

to have been directed by me to meet with you, please do not just simply comply.

If you do not check with me, just ensure that you follow the supply chain, public procurement and other legislation – legislative processes that pertain to those issues so that you do not find yourselves gullible to people who come brandishing my name without my knowledge or simply by having spoken to me and I said to them go to talk to the relevant people.

10 **CHAIRPERSON**: Thank you. Mr Myburgh?

**ADV MYBURGH SC**: Yes, thank you. I want to pick up at page 262 and deal with the Mumbai route. There were of course two meetings that you were involved in, the one on 10<sup>th</sup> of January 2011 and the other on 14<sup>th</sup> of April 2011. Let us start by dealing with the January meeting.

Can I just ask you before we get into the detail of the meeting, this Jet Airways, what did you know about Jet Airways?

**MR GIGABA**: Nothing.

20 **ADV MYBURGH SC**: Who were Jet Airways? Where did they come from?

**MR GIGABA**: They sent a request for a meeting. They said what the meeting was about. I did not want to meet with them and that is why I invited SAA to that meeting so that the version of SAA would be put on the table, because

I was new in the portfolio and here is an airline that makes all sorts of claims. I did not know about this and so I thought let SAA come so that they put our perspective as the South African Government on the issue that was being canvassed by Jet Airways.

**ADV MYBURGH SC:** We will come perhaps to this later, but in the time of Ms Carolus and Minister Hogan, Jet Airways had also sought to arrange meetings which they refused because they considered it to be an operational  
10 issue. Why did you become involved in this?

**MR GIGABA:** Chairperson, the first reason is that here they were not only raising an operational issue, they were proposing what they presented as a win-win solution, a cooperation agreement. Now in that regard I felt let us have a discussion, let me hear what this is about and then the matter will go back to the relevant people who are supposed to deal with it.

But secondly, there were a number of other instances, Chairperson, where the shareholder would get  
20 involved. Somebody would say the appointment of a strategy equity partner for SAA which was announced last week is an operational issue. It was not announced by the Board of SAA or by the – it was not announced by the business rescue practitioner. It was announced by the Minister representing the shareholder. Why? Because the

airline is in financial distress. It is undergoing business rescue and SAA has had that problem for the longest of time.

Even as I arrived as the Minister of Public Enterprises they had applied for a bailout and secondly there were already public debates about whether SAA should not be privatised. Minister Gigaba, are you going to shut SAA down? They have been receiving a lot of bailouts. They are hurting the national fiscus.

10           Now here is an issue involving the airline on a route which we considered strategic at the time as South Africa was a member of the BRICS bloc. And so without saying to them this is the solution, I had a right to meet the parties concerned and listen to them. And as I responded in my – I think it must be my January 2021 affidavit, I listed a number of instances where I interacted with various parties or partners of SOEs in matters which someone would have regarded as operational but which we as the shareholder thought were important.

20           I met with unions on the strike in Medupi. The Eskom Board could have said to me this is operational, Minister, stay away from this, but the protracted strike was hurting the country and the capital investment which was being undertaken at Medupi, I met with the global equipment manufacturers of – that are the primary



contractors at Medupi and Kusile, the Eskom Board could have said to me no, Minister, this is an operational matter, stay away from it, but it was hurting the national fiscus, the image of the country. It was hurting the credit rating of the country and of Eskom. It was hurting the ability of Eskom to raise money from the capital markets.

It was necessary for me to call the contractors and say to them I want this matter resolved and in meeting with them the various SOEs concerned would have known that I  
10 am not doing so in favour of the contractors, but I am doing so so that issues are resolved in favour of the SOE which is an entity in my portfolio. And that is why I participated in these. That is why none – on no occasion in these meetings did I ever say that resolve this matter in the following way. I kept saying find an amicable solution, resolve this way so that we rescue the balance sheet of Eskom and – I mean, of SAA and SAA does not bleed on the route.

So if you ask, Chairperson, why did I feel the need  
20 to meet, ministers are not the same. Ministers are not the same. Their approach to issues is not the same, but what binds all of them is their common commitment to the entities of the South African State which they are overseeing. And in this case I had the interest of SAA, the best interest of SAA at heart on a route which they were

bleeding – on a route in which they were bleeding financially.

And the issues that were being brought to my attention just as I had arrived required me to say let us meet, let me understand. It would have been wrong of me to have gone to that meeting without SAA being present, because then I would not have known what is the version of SAA, nor would I have provided SAA with an opportunity to be there to state their own version in the same meeting  
 10 so that we know how we will resolve this issue and we move forward. And actually there was no intention on my part that there should be any resolution in this meeting, because I considered it to be an opportunity for me just to listen.

**ADV MYBURGH SC:** So you were appointed as Minister DPE in November of 2010 and this meeting is held very early on on the 10<sup>th</sup> of January 2011. What caused you to prioritise this as something that you attended to very early in the new year?

20 **MR GIGABA:** I did not prioritise it. I received a request and responded to it.

**ADV MYBURGH SC:** But Mr Gigaba, this is an issue that had been brewing for some time and if you look at the evidence of Ms Carolus, and we will come to it in time, there had been requests for similar sorts of meeting.

**MR GIGABA:** That was what SAA brought to my attention when we had convened the meeting that they had had this approach prior to this meeting. This was their view as the airline and as you will realise their views on the matter continued to change, to evolve, ja.

**ADV MYBURGH SC:** Alright. Well, let us have a look at paragraph 41. Ms Mzimela says:

“I arrived on time with Mr Sithole...”

He was the Chair of the Board Audit and Risk Committee.

10 Ms Carolus was not available to attend the meeting. She says:

“I arrived on time with Mr Sithole for the meeting at the DPE offices in Pretoria. On arrival we were met by Mr Mahlangu who was Mr Gigaba’s legal advisor. We were then informed that we were waiting for a representative from Jet Airlines to arrive and join the meeting. We would later be advised that Jet Airways’ representative had been delayed in Cape Town and we overheard Mr Mahlangu stating that

20 they were travelling by private jet to Johannesburg.”

Were you present in the meeting at this point?

**MR GIGABA:** Chairperson, this was on their arrival. As they say, they were met by Mr Mahlangu, so the meeting had not started.

**ADV MYBURGH SC:** Alright. At 42:

“During the period of waiting we had the opportunity to meet with Mr Gigaba who requested to be briefed on the SAA/Jet Airways relationship. I then proceeded to take Mr Gigaba through the memorandum, emphasising reasons for not recommending the cancellation of the SAA-Mumbai route. Additionally I explained to Mr Gigaba that Jet Airways owed money to SAA and were delaying in payment and therefore could not really be trusted as a partner. I indicated that any strategic partnership that could be forged with Jet Airways would need to be beneficial for both parties and more so for SAA. The memorandum alluded to the fact that the proposal by Jet Airways to close the route would have no mainstream benefit to SAA. If anything it would increasingly benefit Jet Airways.”

Do you want to comment on whether or not that happened?

**MR GIGABA:** Chairperson, my reading of what Ms Mzimela says here is that the proposal which Jet Airways had at that time made – remember, Chair, the discussions between SAA and Jet Airways had taken place – the CEO of SAA in 2004 had met Jet Airways in London and subsequent to that there had been signed inter-line agreements. So there were inter-line agreements already existing even at this time.

That is why SAA says that there was money owed to them as a result of inability by Jet Airways to pay some of the money that was due to SAA arising out of this inter-line agreement. The nature of this inter-line agreement I do not know. The nature of the inter-line agreements between the two airlines I do not know, which resulted in Jet Airlines having to pay SAA.

Now, what she is then saying is that because they are being owed and the proposal that Jet Airlines is presenting  
10 to them is only beneficial to SAA, they would have a problem with that proposal. And one of the proposals would mean that SAA would only enter into point-to-point with Jet Airways which means SAA can fly passengers from Johannesburg to Mumbai and not proceed to Delhi or other parts of India. So when they arrive in Mumbai they must deliver passengers and Jet Airways must take those passengers arriving through SAA and take them forward.

But on the contrast what Jet Airlines wanted was to be able to deliver passengers in Johannesburg and perhaps  
20 be able to take them to Durban or take them to Cape Town or take them to other destinations which were – were SAA's routes.

Now SAA was saying the agreement we enter into must either be a point to point agreement for both of us or if it includes fifth freedom rights the ability to proceed beyond

the – the original major destination which for example in the case SAA would be Mumbai. If Jet Airlines wanted to not only to land in Johannesburg and drop off but proceed to other routes SAA would need a reciprocal right in turn in regards to the Mumbai route.

Now they said this – this agreement – this proposal with Jet Airlines is making to us is not suitable. Not suitable in particular also because SAA offered an additional advantage for Indian passengers that upon arrival  
10 in Johannesburg it could then take them to South America – to Sao Paulo and so SAA wanted a different approach – a different engagement compared to the one that – that Jet Airlines was presenting and that is why Ms Mzimela said to us that no the proposal which Jet Airlines is presenting to us is not suitable – it is not conducive in our opinion it would only benefit them and not us.

**ADV MYBURGH SC:** So Mr Gigaba do you accept that Ms Mzimela conveyed to you what she states at paragraph 42?

**MR GIGABA:** Yes she did convey it.

20 **ADV MYBURGH SC:** Right.

**MR GIGABA:** Yes.

**ADV MYBURGH SC:** Let us go to paragraph 44.

“We waited for over two hours before the meeting finally proceeded with all the relevant stakeholders.”

Is that not a long time for a Minister to indulge a party – two hours?

**MR GIGABA:** I do not recall how long did we wait Chairperson.

**ADV MYBURGH SC:** So she says two hours Mr Gigaba.

**MR GIGABA:** I – it would have – it would have conflicted with my program so I do not think it was two hours.

**ADV MYBURGH SC:** All right how long was it?

**MR GIGABA:** I do not know. This was 2011 Chairperson I  
10 do not have my diary with me today.

**ADV MYBURGH SC:** I see.

**CHAIRPERSON:** Did you respond to this affidavit maybe you – you said in your response. Do you recall whether you – because one of the – one of the features I had the impression was strange was – was – was that – that you as the Minister and the SAA delegation could be kept waiting for so long and that this could be tolerated.

So if you did respond it would be – because they certainly – she certainly said her evidence was that it was a  
20 very long time and I think she said two hours even in oral evidence.

**ADV MYBURGH SC:** Yes.

**CHAIRPERSON:** Or maybe you would have remembered if you responded in a different way. Mr Myburgh do you have a correct...

**ADV MYBURGH SC:** There is the – Mr Gigaba did respond. He deals with this – the Mumbai route and the Jet Airways meetings at page 572 of the same bundle.

**CHAIRPERSON:** 572. Yes.

**ADV MYBURGH SC:** There is no reference there to the.

**MR GIGABA:** Yes.

**CHAIRPERSON:** To the duration.

**ADV MYBURGH SC:** To the duration.

**CHAIRPERSON:** Yes. Well was this affidavit a response to  
10 Ms Mzimela's affidavit or was it in general?

**ADV MYBURGH SC:** The purpose of the statement is recorded at 562 paragraph 4.

"The purpose of this statement is to supplement my preliminary statement submitted in response to Ms Mzimela."

So...

**CHAIRPERSON:** So...

**ADV MYBURGH SC:** There is a – there is another

**CHAIRPERSON:** Statement.

20 **ADV MYBURGH SC:** There is another affidavit which you find commencing at page 538 and there you will see that Mr Gigaba also deals with the Mumbai route Chairperson at page 547. And he deals with the meeting on the 10<sup>th</sup> of January at page 550.

**CHAIRPERSON:** It looks like that there is no reaction to



the – to the time. Ja I may be wrong but from what I have looked – from what I have seen it does not look like there is a reaction to the time.

**MR GIGABA:** Yes.

**CHAIRPERSON:** Okay. But you – you say you...

**MR GIGABA:** We would not have waited two hours Chairperson.

**ADV MYBURGH SC:** Ja.

**CHAIRPERSON:** You say you would not have waited two  
10 hours.

**ADV MYBURGH SC:** (Mumbling).

**CHAIRPERSON:** What is the – how much long you would have allowed to wait?

**MR GIGABA:** It – it ..

**CHAIRPERSON:** May have depended on your program.

**MR GIGABA:** Depended on my program.

**CHAIRPERSON:** But nevertheless you know.

**MR GIGABA:** Chairperson.

**CHAIRPERSON:** You know – do you think you would waited  
20 a whole hour?

**MR GIGABA:** I would not know Chair.

**CHAIRPERSON:** Maybe you would not know.

**MR GIGABA:** I would not – I would not remember.

**CHAIRPERSON:** Yes. Because I – I thought Ms Mzimela was rather emphatic that it was quite a long time and maybe

two hours.

**ADV MYBURGH SC:** Yes and we will come in a moment to Ms Carolus' affidavit. She says that the delay was reported to her.

**CHAIRPERSON:** Ja.

**ADV MYBURGH SC:** All right well then can we carry on?

**CHAIRPERSON:** Ja.

**ADV MYBURGH SC:** At page 264 paragraph 44.

10            “We waited for over two hours before the  
meeting finally proceeded with all the  
relevant stakeholders. During the time that  
we were waiting for the Jet Airways  
representative I received a call from  
Advocate Sandra Coetzee who at the time  
was employed in the SAA legal department.  
Advocate Coetzee then informed me that  
there was a gentleman from Jet Airways who  
was in possession of an agreement and he  
was demanding that it be signed because  
20            SAA had agreed to cancel the Mumbai route.  
I advised her to stall because I had no  
knowledge of this agreement and we had not  
even commenced with the meeting with Mr  
Gigaba and the representative from Jet  
Airways.”

Do you want to comment on that?

**MR GIGABA:** I was not aware of this gentleman at – at SAA and this would have been improper given that we had had no meeting and the meeting we were going to have was – was going to be for me to listen to understand what the issues have been – that are being brought to us by Jet Airways are.

It could be I think as I said earlier that prior to 2010 the – the previous Manco of SAA had agreed to pull out of  
10 the route that when the new CE of SAA took office – I think around February 2010 she – she then indicated that they had no intention. So the new CE had – had then decided that no we are not pulling out of the route instead we are going to – we are prepared to pursue win/win cooperation.

So what these people from Jet Airways may have been doing was to approach the meeting on the basis one of not knowing what it entails to meet a Minister in South Africa that I do not take decisions of that nature on behalf of the airline.

20 Secondly they may have come on the basis of understanding of a previous understanding and that is why they would then have been told that no, no wait the issue of pulling out is not on the table.

In actual fact you are here – you requested a meeting with our Minister – you come; you brief our Minister

and when you finish briefing our Minister he will decide how we move forward in that regard.

**ADV MYBURGH SC:** So you say they might have been under the impression that it was a done deal.

**MR GIGABA:** Based on a decision which could have been taken before 2010 – before I was even Minister at Public Enterprises.

**ADV MYBURGH SC:** And they knew they meeting with you on this day I take it.

10 **MR GIGABA:** Yes.

**ADV MYBURGH SC:** I see. Then at 46.

“Eventually the Jet Airways representative led by Mr Goyal arrived we went into the meeting. Present in this meeting was myself, Mr Sithole and Mr Gigaba, a Deputy Minister Mr Ben Martins, Mr Mahlangu and there were other DPE representatives. Mr Goyal commenced the meeting by running through his CV etcetera.”

20 Go to the last sentence.

“He proceeded to arrogantly state that SAA should get rid of the route because they had a better product that would be more suitable for the market.”

You remember that?

**MR GIGABA:** Ja. The man was quite arrogant.

**ADV MYBURGH SC:** So Mr Gigaba ...

**CHAIRPERSON:** That is your recollection as well.

**MR GIGABA:** Yes.

**ADV MYBURGH SC:** Why did you not put a stop to this meeting? I mean here these people are two hours late - man comes in he behaves arrogantly.

**MR GIGABA:** Chairperson as I see I do not – I do not think it was the meeting was two hours late and when you agree  
10 to a meeting perhaps we may not be the same.

You know I will listen to you even when I do not agree with you. I do not have to just stand up and walk out simply because I do not agree with you.

I will listen to you and when you finish your presentation I will take my own decision. Ultimately Chairperson the decision is mine. Your approach to the meeting, your arrogance in that meeting, this was not the first time we met arrogant people not only in SAA but it happened even after this I had – I had had similar  
20 experiences in my previous – in my previous experiences and not on any occasion would I simply stand up and leave.

Even I have attended meetings where people have pulled out guns and placed them on the table – we – we continued with those meetings.

**ADV MYBURGH SC:** All right. Then it goes on to say:

“He attacked SAA for delaying the closure of the Mumbai route specifically the current management for being stubborn whilst previous SAA management had already confirmed that they would ensure that the route was closed. I then pushed him for the name of the individual from SAA that agreed to the closure. He then reluctantly mentioned Mr Chris Smythe who was the acting CEO before I took up the position. Mr Smythe was also the person whom had canvassed the closure of the Mumbai route to the board. Mr Goyal continued to seemingly instruct everyone present about the how the process should be taken forward. I experienced Mr Goyal address at the meeting synonymous to him addressing his executives. At that point Mr Martin stepped in as he seemingly did not take kindly to Mr Goyal’s instructive tone. He said something to the effect that quote “we are here to assists but do not tell us how we should be doing things in our country.”

You confirm that?

**MR GIGABA:** Yes.

**ADV MYBURGH SC:** And then at 49:

“Mr Gigaba was silent throughout the exchange. Mr Goyal apologised and the meeting continued. Mr Gigaba’s contribution to the meeting was to indicate that he would like SAA to set up an urgent meeting with Jet Airways to discuss potential cooperation between the airlines. Mr Gigaba gave no reason why the meeting was urgent. I did  
10 not consider it to be a matter of urgency especially when the terms presented were to the detriment of SAA. I did not understand why Mr Goyal was being afforded special attention by the Ministry.”

Do you want to comment on that?

**MR GIGABA:** Chairperson I never said that they should set up an urgent meeting. I said they need to set up a follow up meeting to discuss the issues which they were raising because Ms Mzimela’s own admission was that they wanted  
20 a win/win solution that they were bleeding on the route they would want a win – they would prefer a win/win solution but they were certainly not going to pull out of the route.

Chairperson you – you could by now be discussing something different that the – that you know you knew the route was bleeding - you knew the airline was struggling on

the route – you knew there was a proposal – you knew that the airline was willing to discuss a win/win solution and you sat back and did nothing.

Doing nothing is not good governance. Doing nothing is not good governance. But saying let us explore solutions without prescribing what solutions ought to be sought and that is all I did. We need to have – you guys – and I directed them to have a follow up meeting. I said you must continue having a follow up meeting. You need to find  
 10 one another on this issue. You need to as she says to discuss potential cooperation because SAA itself had said that they were willing to – to explore a win/win solution on the route because they were obviously bleeding.

In routes of this nature there is a number of options which could be explored because the problem with – you know if you take the route itself SAA must take passengers from Johannesburg to India and also take passengers back from India to Johannesburg. It cannot fly an empty matter from Mumbai to Johannesburg.

20 Now you have two airlines both of which are affiliates of the Star Alliance. They are flying the same route. Now in those instances you – you would usually say that perhaps on the following days we will cover the route so we fly on Monday night and then we return on Tuesday night. You fly on Wednesday night and return on Thursday



night but you – you – among others you would explore those options and you would explore options for 00:18:25 travel upon arrival at the point of destination. There is a number of options that could be explored and you agree to establish one portal for the booking of tickets or – or whatever – however – whatever other mechanism which ensures that in the end you do not fly empty seats but you are able at any time that you – you take your flight on air to have fully occupied seats and to the point of destination and on  
10 return.

So these were all the options which could be explored. We did not as the department say, explore the following options. We just said to them, we hear you – the Deputy Minister has intervened and called you to order now let us end this.

You go and have further discussions because previously you are approaching us on the basis of an agreement or commitment which had been made by an acting CE Mr Smythe but there is a new CE now at SAA and  
20 that CE is saying from their perspective they are not willing to pull out of that route and therefore it means the proposal you are presenting to SAA is not acceptable.

You now need to discuss a – a – on the basis of a proposal which would take the best interest of SAA and place them on the table and find an agreement which

addresses the interest of both airlines on an amicable and –  
on a equitable basis.

**ADV MYBURGH SC:** So if I understand the only thing you  
do not agree with at 49 is that you said there should be an  
urgent follow up meeting

**MR GIGABA:** Yes.

**ADV MYBURGH SC:** All right. Now Mr Gigaba why – why  
did you keep quiet whilst this – this gentleman Mr Goyal  
was busy attacking ...

10 **MR GIGABA:** But my Deputy spoke. He is a Deputy  
Minister.

**ADV MYBURGH SC:** So that is – I am not asking you that.  
I am asking why did you not speak?

**MR GIGABA:** But I am responding to it. If the Deputy  
Minister intervenes and speaks he is speaking also on my  
behalf.

**ADV MYBURGH SC:** I see. All right.

**CHAIRPERSON:** Well I think Mr Myburgh's question is  
really this. You were chairing the meeting based on what  
20 Mr – Ms Mzimela was saying.

**MR GIGABA:** Yes.

**CHAIRPERSON:** And this man was busy behaving in a  
completely unacceptable manner and attacking the  
management of your SOE. Why is it that the Chairperson of  
the meeting was not the one who intervened? Why did it

take – have to take the Deputy Minister to intervene because it creates the impression that the Deputy Minister may well have been waiting for the Chairperson to put a stop to this but when he realised that the Chairperson was not putting a stop to this he intervened. Why did you not stop these people quite early and say, you are not going to come here and behave like this. This is unacceptable. If you want to talk business SAA and we are here but you are not going to be allowed to behave like this. Why did you

10 not do that?

**MR GIGABA:** I am not accustomed to interjecting people while they are talking Chairperson. And it was not my practice – my – my way of chairing meetings. So I would let you speak and then I would call you to order once you have finished.

The Deputy Minister could not wait and interjected and when he did so I did not stop him. And when he finished interjecting and calling the person to order I then supported him in that regard.

20 **ADV MYBURGH SC:** You supported him.

**MR GIGABA:** The Deputy Chair – the Deputy Minister.

**ADV MYBURGH SC:** So what did you say?

**MR GIGABA:** I supported the Deputy Minister in what he had said – I reiterated what he had said and insisted that the meeting should be conducted in a professional way – in

a manner that is respectful of all the parties involved including myself in particular as the Minister and Chairperson of the meeting.

**CHAIRPERSON:** Maybe we should take the tea break now Mr Myburgh.

**ADV MYBURGH SC:** Yes thank you Chairperson.

**CHAIRPERSON:** Let us take the tea break. It is about twenty nine minute or half past – we will resume at quarter to. We adjourn.

10 **INQUIRY ADJOURNS**

**INQUIRY RESUMES**

**CHAIRPERSON:** Okay, let us continue.

**ADV MYBURGH SC:** Thank you. Mr Gigaba, we were just finishing off on the meeting of 10 January. I just want to, in fairness to you, to take you to your affidavit at page 551 at paragraph 38.

**MR GIGABA:** Yes.

**ADV MYBURGH SC:** It is where you record, as you have stated, that:

20                               “Actually, I had during the set meeting recall called him to order in that regard...”

Is that then in the context of what Mr Martin said, and you concurred with him?

**MR GIGABA:** Yes.

**ADV MYBURGH SC:** And then if you go over the page to

paragraph 39 at page 552, you record that:

“I was silent during the meeting because I was listening to what was being discussed which is courteous.

I did not want to be perceived as taking sides.

It is, therefore, mischievous to suggest that my silence meant anything more...”

You did not want to be perceived as taking sides, you say?

**MR GIGABA:** It is my view, as I have said Chairperson,  
10 that when I chair meetings, I would sit and listen to the person talking and only respond thereafter.

**ADV MYBURGH SC:** Alright. If we go then back, please, to page 267 and if we can deal with the events – or, in fact, 266 which deals with the events in the immediate run up to the 14 April meeting. Now, Ms Mzimela says that, at paragraph 50:

“As per their request of Mr Gigaba, SAA, and Jet Airways, then schedule a follow-up meeting.

20 That meeting took place on the 24<sup>th</sup> of January...”

At paragraph 52:

“Jet Airways persisted that SAA cancel the route and coach share on them.

SAA had indicated that this was not

negotiable..”

And then at paragraph 53 at the end:

“At the end of the meeting, the two entities  
were not able to find consensus...”

Ms Mzimela then goes on to say that on 11 April 2011, she writes a memorandum to the DG providing him with an update on the discussions “that we had had”, as she puts it, “with Jet Airways”. A few sentences after that:

10 “The proposals put forward by Jet Airways  
were not commercially viable to SAA...”

And then we get to the meeting on the 14<sup>th</sup> of April 2011. Now, why did you call this meeting, Mr Gigaba?

**MR GIGABA:** It was to receive a briefing from SAA on what had transpired subsequent to our previous meeting and on SAA and Jet Airways, on what had transpired since our previous meeting.

**ADV MYBURGH SC:** Now, Ms Mzimela had written to your DG a memorandum which sets out the position, correct?

20 **MR GIGABA:** Yes, sir. And it is also important, Chairperson, to reiterate that on certain occasions a memorandum does not set out and answer questions you might have to the pieces of paper that are sitting in front of you, that it is necessary to call people, sit before you, and you engage with them and understand what the issues that they have set out in the memorandum are.

The – it seems from this account that the SAA management wanted, not only a hands-off shareholder, but they also wanted a shareholder that simply disappeared, that just was not there. It was my discretion to convene meetings with your entities and I exercised that discretion. That does not mean that we would force them to take any decision that was commercially unviable for the entity.

**ADV MYBURGH SC:** So, Ms Mzimela says at paragraph 56 at page 268 that:

10                    “Around 14 April, the chairperson and I were requested to attend an urgent meeting with Mr Gigaba in Cape Town with less than 24-hours’ notice...”

**MR GIGABA:** Yes.

**ADV MYBURGH SC:** “Ms Carolus was unable to attend given the short notice”. She goes on to say:

                         “The Minister’s office called an afternoon to request our urgent attendance the next day to the meeting in Cape Town.

20                    They had said that this meeting was very urgent and needed to take place immediately...”

Now what was the urgency?

**MR GIGABA:** Well, since the Minister is part of his office, I do not know why my officials would have said it is very

urgent and why the meeting would have been convened at such short notice. I think it was just an admin issue.

**CHAIRPERSON:** You have – did you accept what Ms Mzimela says in terms of what she says they were told by your office? In other words. Do you accept that they were called at a short notice ...[intervenes]

**MR GIGABA:** I cannot ...[intervenes]

**CHAIRPERSON:** ...the day before and then had to be there the following day? But you say there must have been  
10 an admin issue within your office, or do you say, no, they were not called at such short notice, they were given enough time or, are you saying, I actually do not know how much time they were given? If they say they were given that little time, I do not have a basis to dispute, but this is what I know to – should have been done by my office. Whether they did or not, I do not know.

**MR GIGABA:** That is correct, Chairperson. Because I would not know when the invite was sent to them and certainly, if they were unable to attend, they would have  
20 indicated that, unfortunately, neither the CEO nor the chairperson or any board member for that matter is able to attend. I think that is why we were able to accept it that the chairperson cannot attend but there is another board member standing in for the chairperson, but as to the – as to when exactly the meeting was called, I would not really



be aware, as Chairperson correctly says.

**CHAIRPERSON:** Mr Myburgh.

**ADV MYBURGH SC:** Yes, thank you. And then she goes on to explain at paragraph 57 that:

“Given that Ms Carolus was not available, arrangements were made for her (that is Ms Mzimela) to attend the meeting together with a Mr Dacha(?)...”

**MR GIGABA:** Yes.

10 **ADV MYBURGH SC:** At the end of 57 is recorded:

“The Minister’s office had not provided us with an agenda but merely requested that we fly to Cape Town for an urgent meeting...”

Do you have any comment on that?

**MR GIGABA:** I would have expected them to have been provided with the agenda.

**ADV MYBURGH SC:** And then at paragraph 59, Ms Mzimela explains that she then attends the meeting together with Mr Dacha. And present at the meeting are,  
20 amongst others, yourself, and Mr Mahlangu. At paragraph  
60 ...[intervenes]

**MR GIGABA:** And Ms R Lephule(?), Professor Busi Gumede, Mr Matona and other department personnel.

**ADV MYBURGH SC:** Correct.

**MR GIGABA:** Yes. I think it is important to also indicate.

**ADV MYBURGH SC:** Alright. Those are DPE personnel?

**MR GIGABA:** Professor Gumede was my economics advisor at the time before Ms Ngoma(?) ...[intervenes]

**ADV MYBURGH SC:** Alright.

**CHAIRPERSON:** In terms of the agenda, did – was there an agenda that you had approved for that meeting with SAA?

**MR GIGABA:** I would have said, Chairperson – I mean, if you consider the facts that the DG was in Cape Town, the –  
10 Ms Lephule was the DDG for Transport Enterprises. They would have been called and told why they are being called to Cape Town and I would have expected that the SAA leadership would also be informed.

**CHAIRPERSON:** But is that answer to the effect that you cannot remember what – whether there was, or you had approved an agenda but that is what you expect should have happened?

**MR GIGABA:** The agenda would have been approved, Chairperson. And I think, again, I do not know what the  
20 communication arrangement between my office and SAA would have been because I would have expected them to be informed that this is what you are here to discuss.

**CHAIRPERSON:** Mr Myburgh.

**ADV MYBURGH SC:** Ja, I just want to go back. Do you accept that this meeting was set up at less than 24-hours’

notice?

**MR GIGABA**: I think I have responded to the Chairperson just a few minutes earlier. Chairperson ...[intervenes]

**CHAIRPERSON**: And your answer is. You do not know?

**MR GIGABA**: Yes.

**CHAIRPERSON**: But you ...[intervenes]

**ADV MYBURGH SC**: Alright.

**CHAIRPERSON**: ...expected that the SAA should have been given more notice?

10 **MR GIGABA**: Yes.

**ADV MYBURGH SC**: Yes.

**MR GIGABA**: And if they were not able to attend, they would have indicated that: No, sorry. We are not able to come.

**CHAIRPERSON**: H'm.

**ADV MYBURGH SC**: Alright. Well, did you know that Ms Carolus was unable to attend this meeting?

**MR GIGABA**: I think I was informed?

**ADV MYBURGH SC**: When?

20 **MR GIGABA**: If this was in 2011 - Chairperson, I cannot recall the details of when exactly I was informed of her unavailability.

**ADV MYBURGH SC**: Well, can you remember whether it was before or after the meeting took place?

**MR GIGABA**: I think ...[intervenes]

**ADV MYBURGH SC:** Was it before the meeting or at the meeting?

**MR GIGABA:** I just said to Chairperson, I cannot recall whether it was before the meeting or at the meeting.

**ADV MYBURGH SC:** At paragraph 60”

“Mr Gigaba indicated at the start of the meeting that he had several items that he wanted to cover with us, but first he wanted an update on Jet Airways/SAA discussions.

10 This surprised me because updates had regularly been provided to the Transport Team at DPE.

I then commenced to provide the same update already provided on several previous occasions that the Jet Airways relationship was not beneficial to SAA.

It simply did not make commercial sense to enter into the proposed coach sharing arrangement.

20 I indicated that the team had been open-minded in finding a workable solution to the partnership without much success as Jet Airways’ focus was not geared towards a commercial code share partnership but still intend on getting SAA metal off the route

completely.

Before I could even conclude my briefing,  
Mr Mahlangu angrily intervened...”

You want to comment on that paragraph?

**MR GIGABA:** Chairperson, I certainly would not have said that there are several issues to discuss if there was one issue on the table. And it would surprise me why the CEO of SAA would not want to provide an oral briefing to the shareholder regardless of the fact that she would have  
10 written to the shareholder on several occasions, because it is important to keep the shareholder in mind, you know.

One of the things that are important about such matters, Chairperson, is that, you know, they sometimes gets discussed at bilateral levels of – between countries because they impact on economic and trade relations between counties and it is important at any given point in time as the minister who would attend those bilateral meetings, either at ministerial level or should the head of state and government meet, it is important for one to be  
20 able to provide a detailed briefing which would even be able to explain if a relationship is unable to be established, the reasons why.

Such is the case, because it could very well be that what was an obstacle for SAA could be brokered by another party sometimes at the level of minister to

minister. If I may use an example. When the Department of Home Affairs agreed on new visa regulations in 2014 and announced them in May, the Government of China had given the Department of Home Affairs free visa facilitation centres in China, but after many discussions between the departments – after I had visited China and upon my meeting with my colleague, we agreed to extent the visa facilitation centres in China, I think, to about six – five or six.

10           The same had applied in India. I was able to broker an agreement. So, it could very well happen that what is unattainable for the NTT interacting with its partner or potential partner could be brokered by another partner, maybe by the senior politicians when they meet and discuss to say: Let us do this in the following way and then we instruct the junior partners to then go and implement the agreement or the framework that we have outlined.

20           To me, there was nothing untoward in asking SAA to provide an oral briefing to me and explain what the challenges they were confronted with and take. Now, the angry intervention by Mr Mahlangu, I do not recall. What I do recall is him saying that what was needed was a non-adversarial approach to discussing the issue that was being discussed, but I do not recall this angry intervention.

**ADV MYBURGH SC:** So, you say that Mr Mahlangu was calling for a non-adversarial approach?

**MR GIGABA:** That is what I recall him saying.

**ADV MYBURGH SC:** Yes.

**MR GIGABA:** But an angry intervention on his part, I do not recall.

**ADV MYBURGH SC:** Well, let us go to what it is that Ms Mzimela says.

**CHAIRPERSON:** I am sorry. This is in relation to the  
10 briefing between SAA and yourself, is it not?

**MR GIGABA:** Yes.

**CHAIRPERSON:** But why would Mr Mahlangu say to SAA – why would he call for a non-adversarial approach to SAA? Because as I understand it, SAA had not been adversarial or aggressive towards Jet Airways. It is Jet Airways who had been aggressive and adversarial to SAA.

**MR GIGABA:** I was not raising it, Chairperson, in relation to the meeting, this particular meeting ...[intervenes]

**CHAIRPERSON:** Oh, okay.

20 **MR GIGABA:** ...when we were still talking to SAA.

**CHAIRPERSON:** Oh, okay.

**MR GIGABA:** I am saying. My recollection is that ...[intervenes]

**CHAIRPERSON:** Ja.

**MR GIGABA:** ...he had called for a non-adversarial

solution.

**CHAIRPERSON:** Okay.

**MR GIGABA:** But I do not recall his angry intervention.

**CHAIRPERSON:** Okay. Mr Myburgh.

**ADV MYBURGH SC:** Thank you. So, let me deal with paragraph 61 and 62 together.

10 “He, Mr Mahlangu, said Ms Mzimela paraded SAA for wasting time and taxpayers’ money on the Mumbai route when there were RDP houses and toilets to be build.

I attempted to continue with the SAA was applying in protecting the closure of the Mumbai route.

20 However, Mr Mahlangu was hearing none of it. He continued his rant and then became personal in stating that he had a problem with executives who failed to do what they are told and continuously present analyses only and do not understand issues of international importance...”

At paragraph 62:

“Mr Gigaba failed to reprimand Mr Mahlangu on his unacceptable rude behaviour.

As a result, I lost my temper and told Mr Mahlangu in no uncertain terms that I will



not tolerate anyone disrespecting me as I strive to always be respectful of others.

I informed him that he could not talk to me in that in that manner and attack me personally.

We were engaged in business discussions.

Mr Gigaba remained silent throughout this incident...”

Do you want to comment on that?

**MR GIGABA:** Chairperson, it is – it happens in the nature  
10 of discussions that people become heated, they talk in a heated manner towards one another, and as I say, I had come from an experience where there had been plenty of this. I did not think that anybody needed to be babysit in conversations, especially given the fact that these were all senior and very experienced people that whatever – however robust they may have been towards one another, that we would be able to find a solution. My duty is to listen to you and sift through the noise and understand what are the issues that are being said and thereafter be  
20 able to provide a summary to the discussion.

**CHAIRPERSON:** But the role that Ms Mzimela describes here as having been displayed by Mr Mahlangu appears to me to have been quite unacceptable for an advisor to the Minister. I know Mr Mahlangu seems to take a different approach in his affidavits, but my expectation would be

that Mr Mahlangu's role was generally to speak to you, advise you and then what approach you would take based on his advice or not based on his advice is a different matter.

Otherwise, he had no, as they say in legal language, he had no locus standi at this meeting and – except insofar as he was giving that by you. He had no right to be at that table at that meeting except insofar as you said: As my advisor. Please come.

10           But the role that he was playing, it was as if now he was there in his own right and he had a particular position. That is the impression I get, and it just seems to me, not what I would expect of an advisor. I would expect that even if – I might not necessarily say he should not have spoken at all, except to speak to you and advise you and maybe some people would say that, but the tone and the manner of speaking gives me the impression that this was somebody now who seems to think that he was at this meeting in his own right.

20           Whereas, as I see it, you were the person who had the right to call the meeting and to be there and he was only there insofar as he was your advisor, you know. Otherwise, he could not claim to be entitled to be there and to speak. Actually, if you said: Keep quiet. He would have had no basis to challenge that and say: Well, I am

entitled to be in this meeting, and I am entitled to speak.  
He could not say that.

So, his role, to me seems to be different from your role, from the role of Ms Mzimela and people like that who occupied certain positions, but I have some understanding of Ms Mzimela's attitude or position towards Mr Mahlangu's tone and approach in that meeting. Do you want to say anything about that?

**MR GIGABA:** Thank you, Chair. I have spent 14-years,  
10 Chairperson, as a member of the National Executives, six of which years I was Deputy Minister. I had attended many, many meetings with ministers and advisors spoke. They spoke forcefully, they spoke persuasively, you know, in meetings of this nature because they are viewed as internal meetings. You getting different opinions. You are trying to understand from different angels.

They would speak. They would speak in meetings of the Minister with top managers of the department and in some instances, they would speak even in sessions which  
20 where – minister to minister. You know, to bring different perspectives from their expertise. Their views are not regarded as final.

Their views are regarded as a contribution to the meeting and ultimately everybody understands that the ultimate decision belongs – is that of the principals and

that is what my experience on these would have been.

And that is why Mr Mahlangu, Mr Ngoma and others would have spoken. And even during the times when I was a Deputy Minister, the advisors to the ministers in many of our meetings would also be allowed to speak freely.

**CHAIRPERSON:** It may well be that it is not incorrect. I am just saying, my expectation was different. Yes. Mr Myburgh.

10 **ADV MYBURGH SC:** Yes, thank you. I just want to go to paragraph 61 about the last sentence.

“It is recorded that he, Mr Mahlangu, stated that he had a problem with executives who failed to do what they are told and continuously present analyses only and do not understand issues of national importance...”

Now, surely, Mr Gigaba, that is beyond the pale ...[intervenes]

**MR GIGABA:** But ...[intervenes]

20 **ADV MYBURGH SC:** ...advisor to say to the CEO of SAA.

**MR GIGABA:** But, Chairperson, an opinion is only that, an opinion. I am the principal. The decision is mine. When you state your opinion, and you say you are not doing what – you are failing to do what you are told to do. What are you told to do? Let us go back to the decision of the

meeting of the 11<sup>th</sup> of January, which I had said: Go discuss, find a win-win solution if you can.

And SAA comes back to us to say: We are not able to find a win-win solution because we are owed money, the party with whom we are negotiating is arrogant. They want a solution which favours them. And so, we are not able to find a solution.

So, Mr Mahlangu's opinion as just simple his opinion and did not represent the view of the meeting or  
10 the shareholder because insofar as I was concerned, SAA had done what I had asked them to do. They had come back to say: We are not able to find an agreement. And in my view, as I said previously, that when the disagreements and the negotiations, it does not mean that if we disagree today then it is over.

We could disagree today and then the other party goes to think about what has been disagreed upon and upon reflection or consideration of the facts presented by the other party, they then change their minds to come back  
20 and say, in actual fact, we are able to compromise, or we want to table another proposal.

But this was just simple Mr Mahlangu's opinion, not a representative opinion, either of the Minister or the DG or the meeting itself as taken place at the time.

**CHAIRPERSON:** Of course, the picture that seems to

emerge in terms of that meeting with the Jet Airways representatives and this one is that – or maybe seem to be that, at the meeting with Jet Airways, Mr Gopal, I think was his surname.

**MR GIGABA:** Goya(?).

**ADV MYBURGH SC:** Goya.

**CHAIRPERSON:** Goya, yes, ja. Was ...[intervenes]

**MR GIGABA:** Mr Chairman, if you are thinking of Gopal, you may be thinking about the one, I think, on commercial  
10 ...[indistinct]

**CHAIRPERSON:** [laughs]

**MR GIGABA:** [laughs]

**CHAIRPERSON:** Well, I have not been to the centre of Durban in a long time, but maybe. [laughs] The impression that may be seen to be emerging, maybe that at the meeting with Jet Airways, Mr Goya was putting pressure on SAA to agree to their position, namely, to withdraw from the Mumbai route and you required when certainly the SAA delegation expected you to say  
20 something much earlier than you may have said.

At this meeting, on what Ms Mzimela is saying, it seems that it was your advisor who was pushing them towards – or putting pressure on them to agree to Jet Airways' position, because you are saying, as I understand you, you understood that SAA had one what you had asked

them to do, to have a follow-up meeting with Jet, they had had discussions, no agreement had been reached. From what you are saying, I again gain the impression that your attitude was there was no blame to be laid at the door of SAA for the fact that no agreement was reached but Mr Mahlangu's attitude seems to be different otherwise one would not understand why he is saying he has – he had a problem with executives who failed to do what they are told and continuously present analysis only because that seems

10 to be directed at saying that is what you SAA executives have been doing, you have been told to do something, you have failed to do it, you keep on presenting us with analysis. So I am saying to you it could be seen as he was putting pressure on the SAA executives to agree with Jet Airways in this situation. What would you say to that understanding of Ms Mzimela's evidence in relation to Mr Mahlangu?

**MR GIGABA:** Chairperson, let me first refer you to the same bundle page 551.

20 **CHAIRPERSON:** Yes.

**MR GIGABA:** Which was my affidavit.

**CHAIRPERSON:** Yes.

**MR GIGABA:** On paragraph 38.

**CHAIRPERSON:** Yes.

**MR GIGABA:** Where I say – actually, I had during the said

meeting called him to order in that regard, which I have spoken about.

**CHAIRPERSON**: You are referring to Mr Goyal?

**MR GIGABA**: Yes.

**CHAIRPERSON**: Yes.

**MR GIGABA**: And then I proceed to say in the wrapping session with our delegation I clearly indicated to the team that they had to do what was in the best interests of SAA, that I would take advice from them. There would have  
10 been no doubt whatsoever as to what I meant by that. Then – so let me first think, Chair, that in respect to the forcefulness of Jet Airways that SAA must pull out of the route, my view was do what is in your best interest.

**CHAIRPERSON**: You are taking advice from them.

**MR GIGABA**: I will be advised by you, as our team, not the others. Now certainly, Chair, the issue of executives who keep presenting – who continuously present analysis did not – I do not want to say did not arise because what SAA was now presenting to us was not analysis but report.  
20 You know, if they were presenting analysis, that would be one thing but they were presenting a report. We have tried to talk, these guys are standing to their initial version and therefore we are not able to agree with them and so to me ...[intervenes]

**CHAIRPERSON**: Did they not provide an analysis of the



discussions maybe?

**MR GIGABA:** Even if they did provide an analysis Chairperson, but the fact of the matter is that they were presenting a report so were no longer dealing with an analysis perhaps prior to the meeting of January we would have been dealing from our end with a report *cum* analysis but at this stage we were dealing with a report and if you analyse the report but what you are analysing you are providing an analysis to the report and there is nothing  
10 else you can do when a report is being presented that says we are not able to find an agreement because what we seek – at this meeting, Chairperson, if I may just elaborate a big further, Mr Daga had informed us that the previous Manco of SAA had proposed withdrawal on the route but ...[intervenes]

**CHAIRPERSON:** That is Mr Smythe?

**MR GIGABA:** No, no, no, Mr Daga. This meeting of April was attended by Mr Daga on behalf of the board.

**CHAIRPERSON:** Yes.

20 **MR GIGABA:** Instead of Ms Carolus.

**CHAIRPERSON:** Yes.

**MR GIGABA:** So when he made his – or it could be, sorry, Chair, now I get what you are asking.

**CHAIRPERSON:** Yes, ja, ja.

**MR GIGABA:** It could be that he was referring to Mr

Smythe. Then he says the board had disagreed and was of the view that SAA should seek cooperation without disadvantaging the airline and he gives a broad analysis of what had happened, of their perspective as the board which was that they need to look at the route not only from the point to point view of connecting routes but – sorry, they needed to look at the route not only from the point to point perspective, which I was outline earlier in the Johannesburg to Mumbai, Mumbai to Johannesburg but he

10 said their view as that they needed to look at this from the point of view of connecting onwards, in India as in Johannesburg because if you travel to India you have an advantage of being able to travel to different parts of Asia. If you travel to Johannesburg you have the advantage of being to connect to different parts of SADC and even other parts of Africa.

Now in that regard, SAA presented a view, according to Mr Daga, that in addition SAA has an advantage of taking passengers from India to South

20 America so the board was concerned that Jet Airlines were not prepared to discuss with SAA in good faith and that is why they were of this very same view that we are not able to find an agreement with Jet Airlines but we will not concede to the proposal that we need to cancel the route.

**CHAIRPERSON:** Mr Myburgh?

**ADV MYBURGH SC:** Yes, thank you. If we return to paragraph 62 at page 269 do you accept that Ms Mzimela lost her temper and told Mr Mahlangu that she had considered him to be disrespecting her?

**MR GIGABA:** Much as I do not recall the incident, I think I do not recall the incident, I can neither accept nor deny that she lost her temper. I said earlier, Chairperson, that in my opinion in meetings people sometimes lose their tempers and speak harshly towards one another and I do  
10 not always interject to prevent them from being robust in engagement so I – if this is what Ms Mzimela put as her version about Mr Mahlangu, it is her version.

**ADV MYBURGH SC:** Well, seems that that must have happened because it is common cause between Mzimela and Mahlangu that a few days after the meeting, if you look at page 270 headed paragraph 62.1 at the top, Mr Mahlangu telephoned her to request a few minutes of her time. He then takes the train to OR Tambo and they have a meeting where he apologised.

20 **MR GIGABA:** I do not know, Chairperson if Mr Mahlangu also agrees to this version but if he did apologise then it is good for him.

**CHAIRPERSON:** But obviously it would also if he accepts this it would mean that ...[intervenes]

**MR GIGABA:** The incident ...[intervenes]

**CHAIRPERSON:** ...then must behaved unacceptable at the meeting.

**MR GIGABA:** Yes.

**ADV MYBURGH SC:** Yes but then it raises the question why you did not intervene, Mr Gigaba.

**MR GIGABA:** I have explained, Chairperson, I think on more than three occasions now why I allowed the discussion to continue. The duty of the Minister in Chairing the meeting of adults is not to keep intervening  
10 and protecting people who are having robust opinions on issues. They talk and chair the meeting, you then decide they have spoken, you sift through the noise and decide how you resolve the issues. If somebody feels that this point was harsh on me then they raise it with you and you talk to the relevant person but I took the conversation in the context of a conversation.

In the end what was going to resolve the issue that we were sitting and faced with, we were sitting to discuss, was not the anger, the robustness and, you know,  
20 interjections of the individuals concerned, it was the facts that we were being put or that were put before us and that is what the Chairperson would look at and not who was angry and therefore try to intervene and stop people.

I have sat in many meetings where even guns have been pulled before. We have not run away, we have not

abandoned those meetings, we have continue to discuss and resolve the issues.

**CHAIRPERSON:** Would you not accept that out of the duty of anybody chairing a meeting is that those who participate in the meeting, you know, speak and act – do not speak and act in a disrespectful manner to others?

**MR GIGABA:** Absolutely, Chairperson.

**CHAIRPERSON:** In other words, they can be robust but that does not give them a licence to disrespect other  
10 people participating in the meeting.

**MR GIGABA:** Absolutely, Chairperson, and the issue of disrespectfulness therefore could also be a person opinion. Some people are much too sensitive, others are not sensitive at all. So you may think that someone has been disrespectful towards you in how they raise their point only to find that that is only your opinion of how events happened. Others had viewed these as a robust engagement which was not disrespectful, which ultimately achieved results because the one alleged to have been  
20 disrespectful did not after all force their way into the agreement and resolution of the meeting.

**CHAIRPERSON:** Mr Myburgh?

**ADV MYBURGH SC:** Yes, let us go then to paragraph 63.

“Mr Daga, who was perturbed at how the meeting was degenerating addressed Mr Gigaba and told

him that he was concerned at the direction the meeting was going. Mr Daga also told Mr Gigaba that he did not understand why Mr Mahlangu took the view which he had expressed that he believed SAA, especially Mzimela, were sabotaging the potential arrangement between SAA and Jet Airways. Mr Daga categorically stated that the executive had done extensive work around the analysis of the closure of the Mumbai route and the board was satisfied with the quality of that analysis hence they resolved to not cancel the Mumbai route. We flatly refused to be bullied by Mr Mahlangu.”

Do you want to comment on that?

**MR GIGABA:** Three things, Chair, arise out of this paragraph. The first one is that, that Mr Daga was perturbed at how the meeting was degenerating is Ms Mzimela’s personal opinion.

When she goes further in the next paragraph to quote what – or to refer, to paraphrase Mr Daga, she does not say Mr Daga at any stage expressed a view that the meeting was degenerating. After all, the meeting continued until the end and after all of these robust engagements, the meeting did not collapse into chaos.

And the third point I wish to state is that the final

paragraph where Ms Mzimela says they flatly refused to be bullied by Mr Mahlangu is again her opinion which binds Mr Daga but in how she paraphrased Mr Daga in previous sentences, she does not say that Mr Daga has said or accused Mr Mahlangu of bullying them.

What Mr Daga did in the meeting was to direct our attention at how the executive had conducted itself professionally in conducting extensive analysis of this route and the proposal which was sitting before them and  
10 that he disagreed with Mr Mahlangu when he said that he believed that SAA was sabotaging the potential arrangement between SAA and Jet Airways.

In the end what SAA was presenting to us was an outcome of their own analysis of the proposal which had been presented to them by Jet Airways and therefore they were saying herewith is the report which indicates from our perspective that Jet Airways is not negotiating with us in good faith.

**ADV MYBURGH SC:** So there are key aspects of this  
20 paragraph that you dispute in relation to what Mr Daga said?

**MR GIGABA:** In relation to – look, I do not know whether I am disputing them or I am just simply saying that Ms Mzimela presents – so I am saying, Chair, that ...[intervenes]

**CHAIRPERSON:** You are making certain observations on them.

**MR GIGABA:** Yes. I am saying Mr Daga expressed his views that drew attention to what the SAA Manco had done and their view as SAA representing both the board and Manco but I am saying that the other aspects are Ms Mzimela's personal views about whether Mr Daga thought the meeting was degenerating or that he had said they are refusing to be bullied by Mr Mahlangu.

10 **ADV MYBURGH SC:** Alright, I ...[intervenes]

**CHAIRPERSON:** Of course what Ms Mzimela does say at paragraph 63, Mr Daga said, you know – you know, because you have made the point of distinguishing between Ms Mzimela's view of what Mr Daga may have thought and what Mr Daga may have said. What she does attribute to Mr Daga is that she says Mr Daga did say that – did express the view or did say that Mr Mahlangu had expressed the view that SAA, especially Ms Mzimela, was sabotaging the potential arrangement between SAA and Jet  
20 Airways.

In other words, as I understand this, Ms Mzimela is saying one of the things that Mr Daga said at the meeting is here is Mr Mahlangu who is accusing SAA, particularly Ms Mzimela, of sabotaging a potential agreement with Jet Airways. At least that point she does make came from Mr



Daga.

**MR GIGABA**: Yes.

**CHAIRPERSON**: Okay.

**MR GIGABA**: Yes, Chairperson.

**CHAIRPERSON**: Ja.

**MR GIGABA**: And I also have referred to it.

**CHAIRPERSON**: Ja, okay. Mr Myburgh?

**ADV MYBURGH SC**: Perhaps I can just take you back to 62.1?

- 10 **CHAIRPERSON**: Of course – I am sorry, Mr Myburgh, of course this was quite a serious thing for Mr Mahlangu to accuse SAA and Ms Mzimela of to say something that you, as minister, had said SAA must explore with Jet Airways, Mr Mahlangu was saying, in your presence, Ms Mzimela and SAA were sabotaging because your – what you had expressed on your evidence at the previous meeting between Jet Airways and SAA, which you chaired, was have a follow-up meeting, try and see if you can reach agreement, I will take advice from you, SAA, but here now
- 20 your adviser is saying at this meeting, in effect, according to what this paragraph says, he says your adviser accused SAA and Ms Mzimela of sabotaging an agreement because I think your position was if you can reach agreement with Jet Airways that is fine but if you do not reach agreement, I will take advice from you but this accusation says, in

effect, you have a CEO who is trying to sabotage an agreement here. So this was quite something serious, you would agree?

**MR GIGABA:** It was something serious, Chairperson. You know, which I did not take serious because the advice that I sought from SAA I had received and how the meeting is then concluded and what happens going forward is then based on my understanding and appreciation of the advise that SAA has brought to me as I had asked them to do.

10 Any other thing is just – was just a personal opinion of the individual who was talking.

**CHAIRPERSON:** Mr Myburgh?

**ADV MYBURGH SC:** Yes, I just wanted to perhaps take you to page 552 where you deal with the meeting on the 14 April in paragraphs 41 to 47. You will notice, Mr Gigaba, that you do not dispute at all Ms Mzimela's rendition of what Mr Mahlangu said and how he behaved or about what Mr Daga said. Would you confirm that?

**MR GIGABA:** Chairperson, when I responded to the  
20 submissions or affidavits of Ms Mzimela I responded to issues which I thought were material, important for me to respond to, I did not seek to respond to sentence by sentence.

What I regarded as important are issues which I responded to in my affidavit and I am glad that I have got

the opportunity to, through the Chairperson, to then respond further and clarify further on sentence – or paragraph by paragraph, sentence by sentence assertions of Ms Mzimela and other witnesses.

So to the extent that in my own affidavit I would not have responded sentence by sentence, it is not because I considered those to be true, it is because I lifted up from the affidavits which things which I thought were significant for me to respond to.

10           Well, what you were invited you to respond to was from paragraphs 56 all the way to 68 dealing with the events of the meeting, that in terms of a 3.3 notice.

**MR GIGABA:** Chairperson, I responded to issues which implicated me with the expectation that Mr Mahlangu would be able to respond to issues which implicated him. I did not expect or think that I was being invited to respond to matters which implicated me, Mr Mahlangu and any other person. So insofar as the matters which implicated me, I responded to those issues.

20           Insofar as to whether I kept quiet in the meeting or not, I responded to that and, as I say, I lifted issues that I thought were important for me to respond to. I did not expect that there was a prescription as to who I should respond to the affidavits which were presented before me.

I also had an expectation that I would be invited to

this session where I would have opportunity orally further to respond to any questions in terms of which I might have omitted certain issues in my written affidavit.

**ADV MYBURGH SC:** Now perhaps I can take you back to 62.1 at page 270. I omitted to read to you the last sentence of that paragraph.

**CHAIRPERSON:** I am sorry, 270?

**ADV MYBURGH SC:** Bundle 8, page 270, Chairperson.

**CHAIRPERSON:** Ja. Okay, alright.

10 **ADV MYBURGH SC:** That paragraph, it is numbered 6.1.

**CHAIRPERSON:** Ja.

**ADV MYBURGH SC:** This is what Ms Mzimela had to say about the apology. She says:

“Personally apologised to me for his bad behaviour and informed me to the effect that at the end of the day he was just doing his job and acting on instruction.”

Do you want to comment on that?

20 **MR GIGABA:** There was no instruction, Chair, and I think I have responded to this, again. I have responded to this. There was no instruction. If there was an instruction it would emanate from Ms Mzimela that there was this instruction or I myself would have said so or this instruction would have emerged anyway. My instruction was simple.

**ADV MYBURGH SC:** Alright and ...[intervenes]

**MR GIGABA:** Go and talk to these people, find out if you can reach an agreement and come back, report to me.

**CHAIRPERSON:** Do I understand that sentence that Mr Myburgh has referred to mean – to refer to an instructions to Mr Mahlangu? So in other words when he says he was acting on instruction, I understand it to refer to an instruction to him rather than instruction to SAA. I do not know whether he understand it differently.

10 **MR GIGABA:** Chairperson, I understand it to mean exactly that but then I would only be schizophrenic to give one opinion to SAA and give another to Mr Mahlangu because by so doing, I would be ensuring that there no – I myself now would be ensuring that there is no way forward.

The important instruction here to understand is the one that says explore the possibility to cooperate and come and report to me and there is no other instruction which I gave after that because had I given any instruction, after this meeting of April, I would then have gone all out  
20 to ensure that my instruction is actually carried out.

By Ms Mzimela's own admission, the last time she met with me on this issue or heard from me about it was at this meeting of April 2011.

**ADV MYBURGH SC:** Is he not saying that – he is apologising to her - we know, at least on her version, what

offended her. Is he not saying that I was instructed to say what I said?

**MR GIGABA**: By who?

**ADV MYBURGH SC**: By you or who else would have instructed?

**MR GIGABA**: [inaudible – speaking simultaneously]

**CHAIRPERSON**: That is what I want also ...[intervenes]

**MR GIGABA**: It does not say that.

**ADV MYBURGH SC**: But who else would have instructed  
10 him?

**CHAIRPERSON**: That is what I was also saying to say when I read that sentence my understanding is that he is talking about an instruction to him and I would imagine that the only person who could give him an instruction that he would – in accordance with which he would act or speak at such a meeting could only be his Minister.

**MR GIGABA**: Chairperson, with all due respect, Chairperson.

**CHAIRPERSON**: Ja.

20 **MR GIGABA**: I would not give anybody words, I would not put words into anybody's mouth and ask them to go and say them in a meeting against any individual. If I wanted to talk Ms Mzimela I would have spoken to her. If I wanted to talk to the Chairperson of the board of SAA, I would have spoken to her, I would not have given an instruction

to anybody to go be rude to anybody, that is not correct.

**ADV MYBURGH SC:** But, Mr Gigaba, I mean what would you say to the proposition that Mr Mahlangu was doing your bidding while you kept quiet?

**MR GIGABA:** That would be an incorrect proposition, Chairperson, because again then I would be providing, conflicting, signals on the one hand to say to SAA do what you must do, advise me, I will take advice from you and on the other hand say to Mr Mahlangu and Mr Mahlangu alone  
10 that go be rude towards this CEO of SAA, try to force her to concede to this. But, in the end, you know, it is not only the CEO of SAA who takes a decision or who would take a decision on these issues, it is the Manco, it is the board.

Remember that at SAA there are various executives who deal with routes, there is a commercial executive, a commercial director at SAA and others who deal with issues of this nature and then the board itself would be the final arbiters on issues of this nature before a recommendation is made to the minister.

20 So you can bully the CEO all you want but unless you are able to bully the entire board, you are not going to get any result and if I had I wanted any particular outcome I would have had to adopt a different approach which engaged the Board in this regard, so that it delivers the outcome which I would have wanted and I would not have

taken a seemingly hands-off approach that said to SAA arrive at a decision that is in your best interests and advise me so that I know how to deal with this issue going forward, and then after the meeting you see the mistake of reading sentence by sentence and disconnecting each sentence from the entire process that arrived at the fact that Ms Mzimela says she doesn't recall beyond April 2011 her discussing this issue with me or having a meeting with me to discuss this issue, is that it then leads you clutching  
 10 at straws unable to get the full picture because in the end the decision to move out of the Mumbai route was taken not during my tenure, it was taken in 2016 when I had left the Department of Public Enterprises.

**ADV MYBURGH SC:** Alright, let's see if we can finish this off before lunch, at 64, Mr Gigaba responded and stated that he would still like SAA and Jet Airways to try and find each other. He then asked Jet Airways personnel to be invited into the meeting. Jet Airways individuals had evidently been waiting to be invited into the meeting. No  
 20 further discussions took place at this point, except for introductions.

It is my assumption that the earlier meeting – sorry, it is my assumption that the earlier meeting it says and how I presume it should not have not, played out, or how it played out did not go according to plan. The meeting was



closed without further discussions taking place, except Mr Gigaba's directive that DPE DG, and Mr Matano would coordinate further discussions between the parties.

Any comment on that?

**MR GIGABA:** The meeting Chairperson had been briefed including by the Board member, Mr Taka, that the SAA Board was still interested in a number of solutions on this route. As I have said one of those solutions was connecting routes, they were interested in SAA optimising  
 10 passengers from Asia for the route to South America and they were confirmed that Jet was not prepared to discuss with them in good faith, and that is why I then said to the DG, DG – because as I say Chairperson we must not miss this point, the fact that we may be – when we are negotiating the fact that we may be disagreeing now doesn't mean that the disagreement is permanent. Both airlines were bleeding on the route, it was not only SAA, perhaps that is the point that we fail to make, it was not only SAA that was bleeding on the route, Jet was bleeding  
 20 on the route and that's why Jet was so anxious to benefit from the route at the expense of SAA. We didn't want that to happen, but we were conscious of the fact that SAA was also bleeding on the route and SAA did not want to get out of the route, it was important that South Africa should be able to fly to Mumbai, India, to Beijing, China, to San Palo,

Brazil and to Moscow in Russia. These were BRICS countries, so it was in our interest that we should be able to passengers to those countries and that we should be able to optimise on those routes, and that is why whereas we did not want to just agree with Jets that we will pack our bags and leave the Mumbai route, you are the ones who are going to bring people from India to South Africa and take people from South Africa to India. We thought it would be better to find a solution.

10           So that is why in the end I said DG can you talk further with these people so that the issues that SAA have raised that they believe Jet Airways is unwilling to concede or understand at your level as the DG can you try to facilitate an engagement further so that we can get an agreement in that regard, so the view that this meeting or the assumption that Ms Mzimela that the earlier meeting had not gone according to plan, is actually incorrect, the meeting had gone according to plan, we had received the reports that we wanted, and we had understood even from  
20 the point of SAA through the mouth of a board member that they were still keen on finding a solution on the route and therefore if the DG could assist to facilitate that solution and deal with the obstinacy of Jet Airways with regard to what SAA wanted, that would have been beneficial to us because what would not benefit South Africa or SAA was to

fly empty seats either from Johannesburg to Mumbai or from Mumbai to Johannesburg because you had two airlines from these two countries that are trying to cannibalise one another on the route and duplicating the route taking passengers from one another and therefore both of them ending up as losers because in that case SAA would eventually given its weak balance sheet would eventually have to get off the route because they would arrive at the conclusion that we are flying empty seats and  
 10 so this route is of no benefit to us.

**ADV MYBURGH SC:** If I could ask you then, I am going to skip forward, there seems to be some detail here that is not in dispute, so let me take you to paragraph 77. One of the things that struck me the most, says Ms Mzimela, about the Mumbai route discussions was that when Mr Gigaba took over DPE became very involved in the detail of the Mumbai route and in ensuring that the SAA and Jet Airways deal materialise. We were never called to the DPE to discuss any other co-share arrangement despite many  
 20 other challenging routes. Co-share discussions with all other airlines were pursued and managed by the Commercial Department.

Your comment on that?

**MR GIGABA:** That is because no other airline sent a direct request to us. Had they we would have also done

the same and met with SAA and I think Chairperson the context is also quite important, beginning of 2011 we had just arrived and so we found ourselves having this meeting, these two meetings and after that we never had other meetings. I think it is important to complete Mzimela's paragraph 27 to say no further engagement was also held on Jet Airways with Minister Gigaba as she had said in her previous paragraph because we then besides the fact that no other airlines had approached us with  
 10 regards to facilitating discussions on these routes, we also then never pursued these discussions.

But it is important Ms Mzimela left SAA in 2012, it is important to say there were discussions in around 2016 or so, between Kathar Airlines and Dubai Airlines with the Minister of Finance on a Code-Share agreement between SAA and these airlines, I think on the South Africa Dubai route or on some other route, so what Ms Mzimela says here only suffices to explain her own experience early in 2017 but subsequent to that there were instances  
 20 ...[intervenes]

**CHAIRPERSON:** In 2012.

**MR GIGABA:** In 2012, thank you Chair, thank you. It suffices as it relates to her tenure which ended in 2012, subsequent to that when SAA had now been transferred as an entity under National Treasury there were discussions

which involved the shareholder with other airlines to the same effect and those discussions also did not yield any conclusions because it was felt I mean I don't what was the exact nature of those engagements but they did not yield any conclusions in the manner that those airlines may have been proposing

**ADV MYBURGH SC:** Alright and then at paragraph 78:

10        "From documents I have been shown by the Commission's investigators it appears DPE and Jet Airways were in direct communication discussing issues relating to the Mumbai route which would ordinarily have been dealt with operationally by the Commercial Division of SAA."

And then she refers to certain letters in that regard at paragraph 79, and then perhaps I could just read to you at paragraph 80:

20        "This kind of interaction was very odd, the DG's office had no business discussing operational issues with potential operational partners. The role of the shareholder is to provide strategic overview and not involve themselves in operational issues. The discussions Jet Airways were having with DG should have been held with the SAA Executives."

Your comment on that?

**MR GIGABA:** Just two things, one I think the DG may

have been talking to them to try and get more information pursuant to what I had asked him to do to see if he can assist in brokering an agreement. What SAA Chairperson does not dispute is the fact that they wanted an agreement on that route, not that they – they don't say we did not want to pull out and it end there, they do admit that we wanted an agreement and what stopped us from reaching an agreement with Jet Airways was the fact that Jet Airways was not negotiating with us in bad faith, and that  
10 is why I asked the DG to assist them.

The second point Chair that I would like to make is that inasmuch that this was an operational matter for SAA the – ultimately the decision on routes is a shareholder decision or was a shareholder decision and that is why the long-term turnaround strategy that was drafted in 2012, I think adopted in 2013 or – in 2013, that's why it is suggested that the shareholder needs to get out of having to be the final decision maker ...[indistinct] because yes besides that it is an operational matter and the – it delays  
20 decision making for the airline to decide whether to pull out of routes or not if it still has to do an entire assessment that will be sent to the Minister of Public Enterprises and then the transport enterprises plus the teams that deal with finance even have to do their own evaluation of issues which had already, which already

would have been evaluated and assessed by the airline so that was to solve the problem but the important point which I am making Chair is that the DG would have been pursuing the mandate I had given him, given the fact that the SAA had also indicated that they don't just simply want to stay on the route they are interested in a solution which would be a win/win solution between them and Jet Airlines so that they also could pick up some benefit from the route.

**ADV MYBURGH SC:** Chairperson I see that it is lunch  
10 time.

**CHAIRPERSON:** I sensed earlier on that you would prefer to finish this affidavit before we take lunch, maybe depending how long that might take, maybe we should try and do that.

**ADV MYBURGH SC:** Yes I should have just one or two questions, so if I might just quickly finish this.

**CHAIRPERSON:** Yes, let's do that.

**ADV MYBURGH SC:** Ms Mzimela then goes on to deal with Mr Mhlangu and she says that at 82:

20 "Mr Mhlangu he was at SAA regularly which was very unusual for a ministerial advisor. Mr Mhlangu had a particularly keen interest in SAA procurement ...."

And she refers to a IT tender and then at paragraph 84 she refers to another meeting that Mr Mhlangu convened in

relation to procurement of legal firms and at 85 she says that Mr Mhlangu regularly accused her of not being a clean player because she insisted on everything being in writing. Do you want to comment on any of that?

**MR GIGABA:** Chairperson with regard to 82 I was not aware of this and certainly as I had said my view was I am not getting myself involved in any procurement processes of SOE's, I was not in business, I still am not in business even as we speak, so I was not aware of this and so this

10 will go to the IT tender, I didn't know anything about this IT tender, the airline aviation system, I didn't know anything about it, yes then the issue with regard to legal firms I think what Mr Mhlangu did he picked it up I think from different people who would have been talking to him and subsequently proposed a meeting between the two black lawyers organisations and BLA and Nadel which took place at my offices in Pretoria and we had a discussion with them on the basis of which we then engaged with the Chairperson's forum which was a forum of Chairpersons,

20 and CEO'S of SOE's where we had a discussion about legal and other professional services because it was not only legal services that were complaining that black firms are not getting – one that they were not getting sufficient work from SOE's, two that the amount of work they would get would be trivial compared to the amount of work that



would go to big white owned legal firms.

Now we then discussed not only in relation to the legal profession, it was accounting it was also advertising and marketing agencies and took a composite view that is with regard to legal issues, I mean to legal firms and then Mr Mhlangu not being a team player I think that is Ms Mzimela's opinion with which I cannot engage because she is expressing her own opinion, whether she is right or not I think it could be in relation to how they interacted with him  
10 and so she is expressing her own opinion but I think the area of that I wanted to speak strongly at was the one of the legal firms and even then he would not have been expected to directly involve himself in procurement issues, not only of SAA but of SOE's broadly.

**ADV MYBURGH SC:** Thank you Chairperson.

**CHAIRPERSON:** Okay let us take the lunch adjournment, it is five past one, so we will resume at five past two.

We adjourn.

**REGISTRAR:** All rise.

20 **INQUIRY ADJOURNS**

**INQUIRY RESUMES**

**CHAIRPERSON:** Okay let us continue.

**ADV MYBURGH SC:** Thank you Chairperson. Good afternoon Mr Gigaba.

**MR GIGABA:** Good afternoon.

**ADV MYBURGH SC:** Could I ask you please having finished Ms Mzimela's affidavit could we go to Ms Coetzee's affidavit. That you find in Bundle 8 and let me ask you to go to page 8. So this will be in tab 1.

**CHAIRPERSON:** Mr Myburgh for what it is worth I just want to mention to you that the witness who was supposed to start testifying at 3 other arrangements have been made. He is not going to testify today. But the – there are others who will testify later.

10 **ADV MYBURGH SC:** I understand there is witnesses starting at 4.

**CHAIRPERSON:** Yes if we can start at four that would be good but I think the priority is to finish with Mr Gigaba. So ...

**ADV MYBURGH SC:** We will certainly get as far as we can.

**CHAIRPERSON:** Ja.

**ADV MYBURGH SC:** DCJ.

**CHAIRPERSON:** Ja what is your sense at the moment?

**ADV MYBURGH SC:** We have still got a long way to go.

20 **CHAIRPERSON:** Is that so?

**ADV MYBURGH SC:** So – as you know.

**CHAIRPERSON:** Ja.

**ADV MYBURGH SC:** Mr Solomon is available until five.

**CHAIRPERSON:** Yes. Yes.

**ADV MYBURGH SC:** So whatever happens I do not

suppose we can go past that.

**CHAIRPERSON:** Ja. No, no we cannot go past that. We cannot go past that. If we cannot start – if we have not finished with Mr Gigaba by four we probably could continue maybe up to half past four – maybe up to five but let us see.

**ADV MYBURGH SC:** Thank you Chairperson.

**CHAIRPERSON:** Okay.

**ADV MYBURGH SC:** Mr Gigaba could I ask you to go to  
10 page 12. There is really only two paragraphs that I want to raise with you.

**CHAIRPERSON:** I am sorry you said Bundle 8?

**ADV MYBURGH SC:** Bundle 8 page 12 Chairperson.

**CHAIRPERSON:** I do not have it here

**ADV MYBURGH SC:** It is the – it is the same bundle that we were in before lunch that contained Ms Mzimela's affidavit.

**CHAIRPERSON:** Oh I am sorry – I am sorry. What is the page number?

20 **ADV MYBURGH SC:** Page 12. Mr Gigaba in paragraph 17 and 18 you would have seen this. Ms Coetzee deals with this telephone call that she received from someone who said that they were coming to sign an agreement. This is on the 10<sup>th</sup> of January 2011. When I was leading your evidence in respect of Ms Mzimela we dealt with this call –

she – she gave evidence about what was reported to her. I do not suppose you have got anything that you wish to add to this – this version of Ms Coetzee which I have already put to you albeit indirectly.

**MR GIGABA:** No.

**ADV MYBURGH SC:** There is then one thing I would like to deal with in your Rule 3.4 application in relation to Ms Coetzee. Could I ask you to please to turn to page 35.

**CHAIRPERSON:** Is that 35?

10 **ADV MYBURGH SC:** 35.

**CHAIRPERSON:** Okay.

**ADV MYBURGH SC:** And could I ask you to have a look at paragraph 21. You say in the second sentence dealing with these two meetings.

“After all during that time and I am not sure if it has changed in the MOI all decisions on routes and co-share agreements had to be presented to the shareholder for approval.”

Is that correct?

20 **MR GIGABA:** Yes.

**ADV MYBURGH SC:** So were you referring to a MOI that was in place at the time in 2011?

**MR GIGABA:** Yes.

**ADV MYBURGH SC:** Do you have a copy of that?

**MR GIGABA:** I asked for it I did not get it.

**ADV MYBURGH SC:** Right. And as you understand it it provided that decisions on routes and co-share agreements had to be presented to the shareholder for approval.

**MR GIGABA:** Yes.

**ADV MYBURGH SC:** Is that right? Is that correct?

**MR GIGABA:** Yes Sir.

**ADV MYBURGH SC:** So as I understand that would it then be for management to decide the issues and then for the shareholder to approve.

10 **MR GIGABA:** Yes Sir.

**ADV MYBURGH SC:** Right. Could I then ask you – there are three of these affidavits that go together Mzimela, Coetzee and then Carolus. Can we go to Carolus? Ms Carolus' affidavit Mr Gigaba you find in another file. In Transnet Bundle 11. Ms Carolus' affidavit you will find at tab 13. The affidavit itself or statement itself commences at page 809. If I could take you please to page 820. Paragraph 31 Ms Carolus says:

20            "In SAA's dealings with the Department subsequently Mr Mahlangu continued to appear in meetings often completely unrelated to legal matters without the Minister. He was often the most vocal person whilst departmental officials were silent. For example Mr Mahlangu played a

particularly prominent role in the efforts to get SAA to redirect spending on an emergency newspaper the New Age as well as our interactions with the Minister and with the department relating to the Mumbai – Johannesburg route.”

Do you have any comment on that?

**MR GIGABA:** As I have responded earlier Chairperson that insofar as the issues that did not relate to the discussions  
10 that we were having I was not aware of this and they were not brought to my attention.

**ADV MYBURGH SC:** All right and then if we can go to paragraph 41 at page 822. Here Ms Carolus is dealing with the Mumbai route but under the tenure of Minister Hogan – your predecessor. She says at paragraph 41:

20 “During their efforts to get SAA to abandon the route my office at SAA received several calls requesting that I meet with the President of Jet Airways. As with all requests for meetings I asked the office to enquire what it was in connection with. I was told over the page that it was to discuss the Mumbai route. I asked the office to indicate that such discussion is best broached through our usual channels in

management. This was the appropriate procedure since the board only considered routes when management presents proposals for consideration and then only if it is a deviation from those agreed at the annual strategic planning session. I asked the office to refer Jet Airways to the CEO and to inform them that the board would be happy to discuss route proposals from the  
 10 CEO in our normal course of business.”

You want to comment on that? Of course Ms Carolus was at the time the Chairperson of SAA.

**MR GIGABA:** Yes Chairperson I think she is referring to board procedures. I was not a member of the board of SAA and then I was Minister in which case my approach to meetings and which meetings I accepted did not depend on how SAA had established within itself as a corporate – how it should deal with issues.

**ADV MYBURGH SC:** And then perhaps more direct  
 20 relevance to you at paragraph 42.

“It was then brought to my attention that the President of Jet Airways would seek to quote “escalate the matter to the Minister:” I cannot recall who brought this to my attention. It is highly unusual for one

competitor in the market to make such an approach to SAA let alone a Minister. As a courtesy I immediately informed Minister Hogan. She felt that it was out of her remit as the shareholder representative to discuss deviations from routes with third parties before proposals would process through SAA structures.”

Do you want to comment on that?

- 10 **MR GIGABA:** Well I – well I guess by the time of Minister Hogan one of the things which they were raising if one goes by this submission by Ms Carolus was a deviation from the route. At my time or during my time it was not a deviation from the route. There were proposing a partnership with SAA part of which would – which could involve according to their proposal a SAA completely withdrawing from the route which they were told was not going to happen.

- 20 Now secondly Ms Hogan was Minister of Public Enterprises for a period of just over a year. In the experience after she had left when SAA was in the National Treasury two airlines escalated proposals on co-share agreements to the shareholder and they were met – they were met with and discussed with.

So all I am saying is what happened Ms Hogan’s experience was within a time period what happened



thereafter was not confined to my experience but it also happened when SAA was in the National Treasury and the Minister of Finance then which was not me met with those – if not – if not both of them but one of them. But the issue of co-share between SAA and Carter Airways and Dubai Airlines was considered during that time.

**ADV MYBURGH SC:** Mr Gigaba perhaps I can just ask you a slightly broader question. In your time how did you draw the line between the board's authority and your authority?

10 How and where did you draw it?

**MR GIGABA:** That was governed by the king code, it was governed by the PFMA, it was governed by – by the memoranda of incorporation which would clearly spell out what are the responsibilities of the Minister.

Now I do not know with regard to what issue is this question because it is quite broad – so broad in actual fact that it would require me to get all the relevant documentation from the time so that I am able to provide a substantive response to this. But if the question intends or  
20 infers or intends to ask about co-share agreements or – or routes I think I have explained this quite adequately and very repeatedly Chairperson that these issues at the time required the Minister to approve them.

That it was the long term turnaround strategy which proposed that they should actually fall within the remit of

the board so that speedy decisions are taken which could save the airline loss of funds on the routes which are – which are considered financially unviable.

**ADV MYBURGH SC:** But as I understand it you have accepted that it was for management to determine a change and for you to approve it.

**MR GIGABA:** Chairperson if – the word approve means the Minister is the final authority on the matter. So the board is in actual fact making a recommendation to the Minister.

10 The Minister reserves every right to say I do not approve and that is why I said last week that cabinet in discussing the long term turnaround strategy and the challenges experienced on the India and particularly on the Beijing route was of the view that perhaps and I think the issue was raised then by the Minister of Tourism was of the view that government could perhaps have to consider the possibility of subsidising the routes which from the point of view of the airline were financially unviable but from the strategic view of the country were considered strategy.

20 Now I have indicated that one of the challenges with the route to India was the landing slot in India and the same applied to the Beijing route and the reason why SAA soon after launching the route I think to Beijing in 2013 wanted to immediately get out of it was because the route was financially unviable because the landing time in Beijing was

quite awkward for travellers who could wish to travel on what either within South East Asia or within China itself.

And that is why cabinet said besides negotiating I remember that the issue of negotiating the landing slots in Beijing was raised not only at – at the level of the officials it was also raised at the level of Ministers – it was raised at the level of President – the Heads of States of both countries.

And – and the – the issue was how do we ensure  
10 that this route becomes financially viable because it was of strategic importance to South Africa.

If you want to benefit from the hundreds of millions I mean if I am not mistaken by 2018 China was reported to be sending about 800 million tourists abroad and the discussion in South Africa was, how do you benefit from these hundreds of tourists even if you did not get all 800 million but if you got 100 million of those the tourism sector in South Africa would do well.

So all of these decisions – all of these discussions  
20 are not mere technical bureaucratic matters which must be handled at the level of the operators of the airline. They also belong within the remits of the political decisions makers and that is why at the time the view was, if the airline – if the management of the airline recommends that the airline pulls out of the route it must make a

recommendation to cabinet – to the Minister.

But the dilemma the department took long to decide on these issues and therefore the LTTS recommended that, no these decisions must be taken by the – by the board of the airline. But cabinet was saying, wait a minute if the route is strategic for us and the airline based merely on financial considerations decides to pull out of a route is it not necessary that the airline should make a recommendation to cabinet through the relevant Minister  
10 that cabinet should subsidise that – the airline for its operations on that route? And the question was, how much would such subsidies be?

So there was a whole range of discussions taking place so I think it should be very, very narrow to argue that the decision was a decision of the airline because then we need to debate what does approval by the Minister mean?

Because if you say the Minister must approve a decision it means that the Minister is not a rubber stamp on the matter. It means that the Minister reserves the right to  
20 say, I do not agree with the recommendation of the management I suggest that the airline continues operating rather I am going to seek financial assistance for the airline to continue operating on that route.

**ADV MYBURGH SC:** If I could take you please to page ...

**CHAIRPERSON:** I take it you accept that in that event

where the Minister or cabinet for strategic reasons take a different view and say, the airline should continue with the route – I take it that the subsidy that you are talking about that would have to be put in by government would have to be of such an amount that the continuation of the route by the airline must be economically viable.

**MR GIGABA:** Indeed Chairperson.

**CHAIRPERSON:** Because you cannot expect the airline to continue on a route that is economically not viable.

10 **MR GIGABA:** Indeed.

**CHAIRPERSON:** Just because it is strategically good for cabinet.

**MR GIGABA:** Indeed Chairperson and that is the context in which the issue of subsidy arose.

**CHAIRPERSON:** Okay.

**MR GIGABA:** But it was not. Let me hasten to say that decision was not taken.

**CHAIRPERSON:** Yes, ja.

20 **MR GIGABA:** It was not taken but it was an issue that was being ...

**CHAIRPERSON:** Discussed.

**MR GIGABA:** At great length discussed.

**CHAIRPERSON:** Ja.

**MR GIGABA:** The point that I was emphasising was the point of the approval.

**CHAIRPERSON:** Ja.

**MR GIGABA:** Because the approval means the Minister is not a rubber stamp.

**CHAIRPERSON:** Mr Myburgh.

**ADV MYBURGH SC:** Yes thank you. Can we then go to page 824. So here Ms Carolus then deals with the Mumbai route during your tenure and she deals with the January and April meetings but we need not go through all of this because we know that she is relying on reports principally  
10 from Ms Mzimela and we have already gone through her evidence. There is just one or two things I would like your comment on.

You will see at paragraph 45 she says:

“They reported to me – those were Sithole and Mzimela it is dealing with the January meeting that upon arrival they were informed that they had to await the arrival of another party. All of them including Minister Gigaba waited for three hours.”

20 Ms Mzimela you know said it was two hours but – you want to comment on that so far as you can?

**CHAIRPERSON:** Well I do not know whether Mr – I am not sure Mr Myburgh whether you need to really put that to him because in the context of Ms Mzimela he has responded.

**ADV MYBURGH SC:** He cannot recall.

**CHAIRPERSON:** The only difference might be three hours or two hours.

**ADV MYBURGH SC:** Fair enough thank you Chairperson.

**CHAIRPERSON:** So in the light of the time constraints.

**ADV MYBURGH SC:** Yes.

**CHAIRPERSON:** It is unlikely his answer will be of anything other than what he has said. Am I right Mr Gigaba?

**MR GIGABA:** Yes indeed Chairperson.

10 **CHAIRPERSON:** Ja thank you.

**ADV MYBURGH SC:** And then perhaps in a similar vein at paragraph 47 I just wanted to point out that Ms Carolus it is plain from that that she had not received an agenda for the April meeting but as I understand it Mr Gigaba you have – your evidence is you would have assumed that that would have been sorted out by the DPE.

**MR GIGABA:** Yes.

**ADV MYBURGH SC:** Can I take you please to paragraph 51. There is something I would like you to comment on  
20 here. She says at page 827.

“We found it peculiar that the Minister was so determined to assist Jet Airways and find one another with the Mumbai route when in fact there was an unnecessary dragging of feet on dealing with other route proposals

that were central to SAA strategy too. For example the DPE took unnecessarily long to give SAA permission to close the Botswana route that was making excessive losses. It did not make sense that we were not being supported to close a route that was making even bigger losses than the Mumbai route.”

You want to comment on that.

**MR GIGABA:** Chairperson the issue of the – let me start  
10 with the – let me start from

**CHAIRPERSON:** 51.

**MR GIGABA:** No, no from the – from the end.

**CHAIRPERSON:** Oh

**MR GIGABA:** And move to the beginning. The issue of the Botswana route I do not know how long it took to resolve it – I do not even know when it was submitted to DPE and Ms Carolus does not also indicate when it was submitted to DPE for a decision.

I have responded to say that the issue of routes  
20 Chairperson I – I keep repeating myself in these issues which is very important. The issue of routes and the decision it took – you see that is why it would be wrong Chairperson to read the submission by I think Ms Mzimela that the decision on routes was a decision – was a decision of the management and board.



Because if you read then what Ms Carolus says in 51 it actually affirms the point I have made. It was the decision of the shareholder and the reason why the long-term turnaround strategy was proposing that the issue of routes must be taken away from the shareholder to the – to the board and the management was because of the time it was taking.

I think it is an issue which needs to be resolved because on the one hand it could take long to resolve. It 10 could be quick for a board to take a decision on the route but the board is looking after the commercial interest of the airline.

The shareholder on the other hand is looking after not only the commercial but also the non-commercial – the non-commercial mandates. Sorry let me – ja – the shareholder is looking at the commercial and the non-commercial mandates of – of an entity. In which case the shareholder might feel that even though commercially the decision has to fall within the airline but on a route but how 20 do we then ensure that the shareholder is able to influence a particular decision especially where the shareholder feels that there are non-commercial interests – I am not talking about the shareholder representative now I am talking about the shareholder as government – where government feels that there is an – a particular interest in us being able to fly

South Africa – to fly directly to Beijing not through Hong Kong, not through Malasia certainly not through Dubai but to take our own metal put our flag in the air and fly it to Beijing because Beijing is the strategic partner for South Africa as a fellow member of the Brix block.

So that needs to be resolved because if failure to resolve that would result in either commercially interests predominating or it might result in the pursuit of non-commercial interest which would undermine the commercial  
10 interest of the airline.

Now coming further back to – to then the issue that Ms Carolus raises of what was peculiar about being so determined to assist Jet Airways and SAA find one another.

I think I have already indicated that neither Ms Mzimela or if I may rephrase both Ms Mzimela and Mr Doug have already indicated that they were interested in a partnership agreement with Jet Airways but which would not be disadvantageous to SAA and which would not benefit Jet Airways at the expense of SAA.

20 So the issue of why are you being involved? I think becomes unnecessary and pedantic because at the end of the day they both are interested in a partnership. They both are losing on the – on the route and it does not help them to say that we are losing on the route there is a possibility for a partnership – we cannot find agreement with one another

but let us continue making losses on the route.

The issue that we were trying to do with our intervention was based on a request which had been brought to us to facilitate the meeting to ensure that there is a meeting of the parties.

I was asked a question earlier – why did you not do it with regard to other matters that was in Ms Mzimela's affidavit? I said because the parties involved there had not come to us to ask us to intervene. And then I indicated that  
10 when the parties that were – that sought a co-share agreement between SAA and Dubai came to the shareholder to request a meeting to discuss the issues including taking a stake at SAA.

Those issues were discussed by the shareholder. Nobody said there is something peculiar about that. In actual fact it was necessary for the shareholder to do that and I have also indicated in regard to broader issues which also involved other entities including Eskom that the shareholder would have and did intervene to try and resolve  
20 issues that were prevalent in those SOE's at that time. And there was nothing peculiar about that. It was the responsibility of the shareholder to do that without prescribing what form of an agreement needs to be arrived at.

**CHAIRPERSON:** But what would be wrong with the

shareholder adopting the position that says, management we have employed you to run this airline and run it profitably or in accordance with the compacts – the agreement between the shareholder and yourselves and the board. You run with it if you – if you fail you will have to account if you do not run a proper you know – do not run it properly you will have to account and we do not want you to complain that some decisions take long because they have got to go to cabinet and all of those things. The only – the

10 only areas where we will get – where you need our decision are really on the ABCD. What route you run that is up to you and must be profitable. You know what the compact agreement says, you know what the targets are and if anybody tries to come to the Minister and says, the management is refusing to agree to this. You say those people would pay them a lot of money for them to run that airline. If you cannot reach an agreement with them that is a problem. Their business is to run that airline. We are not running the airline. So, you go to them. Do not come

20 to us. Is that too artificial an approach? [laughs]

And I ask it because one does get the impression sometimes, maybe just from the media, that some of these SOE's do not be given enough freedom to let the boards and the CFO's to run the business. There is a lot of – id o not want to call it interference but certainly matters where

the politicians, the government gets involved quite a lot. That might be an impression that is not justified but that is certainly is part of what one gets.

So, one wonders whether maybe it is not to say: Look, we must employ people who have the expertise, the experience, and who understand what this government wants, but once we know that those are the people we have appointed, we let them run with it because we know they understand the mandate and then we will only limit  
10 our involvement to A, B, C, D. Full stop.

**MR GIGABA:** Chairperson, thank you for the question. And it is a question we need to find an answer to. SOE's are not ordinary commercial enterprises.

**CHAIRPERSON:** Of course.

**MR GIGABA:** They are – by their nature, they have got a mandate which extends beyond ...[intervenes]

**CHAIRPERSON:** Making profits.

**MR GIGABA:** ...making profits. And because the shareholder is a political entity, called the state, they have  
20 developmental mandates and they – this mandate can be expressed in a whole range of ways. You can ask them to declare dividend to the state.

I think Telkom does that and at some stage Transnet used to do that and some other SOE's, or you could define a developmental mandate, so that – what they

do, even though in terms of their developmental mandate, even though it does not emanate from the national fiscus but contributes towards the applicable government spend on development in the country. Now, different countries take different approaches.

I think the problem in South Africa is that we have had an ad-hoc approach in this regard. As I think – as I have indicated on several occasions. There is no over(?) acting(?) policy framework in South Africa which spans(?)  
 10 out the ownership responsibility, the shareholder responsibility, the – and spans out the commercial and non-commercial mandate and the funding of non-commercial mandates because the biggest problem that SOE's face with non-commercial mandates is that they are not funded and you expect SAA to fly routes to the commercial to generate revenue and you expect it, at the same time, to implement transformation to train black pilots and do a number of other things with the funding of which is not immediately available on their balance sheet and you  
 20 also expect them to fly certain routes.

One of the biggest advantages up until a few years ago for SAA was its dominance of the African skies. Its ability to fly to different routes in Africa. And the competition for SAA in that regard was to buy airways and be – role being played by Kenya Airways and Ethiopian

Airways, but SAA remained dominant, particularly, on – or including on original routes in SADEC(?).

So, if you say to managers that run the airline or run the SOE commercially. Yes, they will run, but the developmental mandate will suffer. What I think countries, like, OECD countries are doing is to begin to – is to insist, one, on the developmental mandate being clearly – one, they insist on a policy framework which clearly spells out the developmental mandates and the funding mechanism  
10 for such developmental mandates.

So, that the airline does not – or the SOE does not find itself conflicted as to whether to just operate commercially because you expect a dividend from it or to also dabble into non-commercial developmental mandates and then accuse them of not being financially viable because they have to borrow money from the left-hand in order to provide funding to the right-hand.

And that becomes the way that other countries have sold this, and I think countries, like, China and other  
20 countries which are member countries of OECD countries have done that. I think Namibia has also done that in its legislation, in its SOE legislation.

What South African has to do is to also begin to move towards that direction because it is unfair of us to expect that SOE's will be run only commercially when there

are state-owned enterprises. But then the other problem, as I conclude Chairperson, is that the shareholder government's model for our state-owned enterprises is not – does not exist.

The Department of Public Enterprises has tried to develop the shareholder government's model, but they have not been in concluding and then taking it to parliament so that pass because in that way you will address, not only these issues of mandates and how  
10 decisions are made.

You will address not only issues of governments and resolve the dilemma faced by the fact that there is a multiplicity of legislation which end up duplicating one another but you will also deal with the issue of centralisation of the shareholder government's framework and the creation of a single shareholder governance for our SOE's which will help them to operate far much better than they are doing or have been doing up until now.

**CHAIRPERSON:** Mr Myburgh.

20 **ADV MYBURGH SC:** Yes, thank you. If I could move to a different topic addressed by Ms Carolus in her affidavit? That is the New Age at page 828. She says at paragraph 55:

“With regard to the New Age Newspaper, an initial approach was made to the SAA



Marketing Department and processed through the normal procurement channels.

It was finally turned down by the Bid Adjudication Committee, the BAC, because it did not meet the business criteria...”

**MR GIGABA:** Excuse me.

**ADV MYBURGH SC:** 828. This is of Bundle 11.

**MR GIGABA:** Bundle... Page 828?

[Parties intervening each other – unclear]

10 **MR GIGABA:** Oh. Okay, I am there.

**ADV MYBURGH SC:** I think it is the page after ...[intervenes]

**MR GIGABA:** Yes.

**ADV MYBURGH SC:** ...the Botswana route. You want me to read that again?

**MR GIGABA:** You ...[intervenes]

**ADV MYBURGH SC:** With regard to the ...[intervenes]

**MR GIGABA:** ...55.

**ADV MYBURGH SC:** You are right.

20 **MR GIGABA:** Yes.

**ADV MYBURGH SC:** 56:

“I was called by the then Director General, Mr Matona, requesting an urgent meeting with me to discuss the matter.

At that stage, I had no knowledge about the

matter because this is a management matter and outside of the board remit.

I indicated that it should be discussed with management and not the board.

He informed me that there had been problems with management in this regard.

I eventually agreed to meet with them.

10 I got a briefing from Ms Mzimela on the matter and took her along with me to the meeting because I considered it inappropriate and unnecessary for me to get involved in what was clearly a management decision...”

At paragraph 57:

“I was surprised to find Mr Mahlangu at the meeting because we were not discussing any legal agreements, nor was the Minister presented.

20 I assured the meeting, that within our legal and policy prescripts, SAA would be prepared to support a new entrant in the media space to encourage media diversity, but I asserted firmly that, especially as a public entity, we had to adhere to our procurement frameworks. We needed to be able to demonstrate the business case for our expenditure.

I further asserted that this was a matter for management to process and not the board...”

Do you have any knowledge or comment about this?

**MR GIGABA:** I have no knowledge of this meeting, but I think it was important for to bring the CEO of the airline and it was important that, especially when they were meeting with the DG of Public Enterprises and it was important that she outlined that whatever decision they would need to take, would have to be taken by management and adhere to the procurement frameworks.

**ADV MYBURGH SC:** So, what is Mr Mahlangu now doing at this meeting?

**MR GIGABA:** I do not know.

**ADV MYBURGH SC:** I see. And then you see at the foot of page 829, the last two lines:

“We used the media that had proven records of consumption by the targeted segments.

It was not in our company’s remit to fund the growth of a media entity through the SAA budget.

The board did not see the need to discuss this further...”

Any comment on that?

**MR GIGABA:** Ja, on paragraph 58?

**ADV MYBURGH SC:** 58, right at the bottom of page 829.

**MR GIGABA:** Oh, yes. No, she is stating their  
...[intervenes]

**ADV MYBURGH SC:** Their position.

**MR GIGABA:** ...their position, ja.

**ADV MYBURGH SC:** Yes. Alright. And then just one  
other thing on this affidavit. At paragraph 72, it says:

10 “Eight of twelve board directors resigned from  
the board on 27 September 2012 after a major  
deterioration in our relationship with Minister  
Malusi Gigaba.

By then, various members of the board had at  
different times approach in indicating their  
desire to resign due to the deterioration of the  
relationship...”

Do you want to comment on that?

20 **MR GIGABA:** It was their opinion that the relationship had  
deteriorated, and I think it became – they justified it by  
arguing that I had on several occasions called them  
unpatriotic which cannot be true. I had utmost respect for  
boards and would not have gone to call them unpatriotic. If  
I was reported as such, I think she does indicate that I  
assured her that I had been misrepresented.

**ADV MYBURGH SC:** And in a similar vain. In paragraph  
74 at page 534 in the third line on the right-hand side:

“Eight of twelve members decided to resign in

protest to the hostility from the Minister and his team...”

You want to comment on that?

**MR GIGABA:** It is their opinion, again, Chairperson. There was no hostility on my part. As Mr Carolus continues to indicate, I continued to talk to engage her on various aspects that related to the boards.

**ADV MYBURGH SC:** So, what ...[intervenes]

**MR GIGABA:** There was no hostility on my part.

10 **ADV MYBURGH SC:** So, what caused two thirds of the board to resign, on your understanding?

**MR GIGABA:** I had gone to Cabinet to request rotation for the board. There were two for the ATM. There were two for an ATM and they had not met the deadline for the submission of financial statements. We were in discussion on recapitalisation framework with National Treasury which recapitalisation framework was finalised just a few days during the time.

20 Unfortunately, a day after they – I think a day or two after they had resigned. Now, when I had gone to request their resignation, I then – unfortunately, we were confronted with a leak. I think there were two leakages during the time which compelled me to fly back from Cape Town to Johannesburg to come and deal with those issues.

And that was the – and the SAA Board was one of

the boards which had experienced such leakages. I cannot recall now who, in terms of the rotation of the board, was being recommended for retention or for retirement but we were suddenly confronted in the early morning with the resignation of twelve board members subsequent to the leak and we had to act immediately to try and announce the appointment of the new board.

I think we had to do that prior the ATM, the scheduled ATM, because of the unexpected, sudden  
 10 resignation of an existing board. In my opinion, I think they resigned because of the announcement – of the leak that happened. It could very well be that they confirmed(?) that the leak as part of what they viewed as hostility, but I want to assure the Chairperson, there was no hostility towards that board on my part.

And the reason why I came down to try and talk to them was to apologise for the leak and to inform them that we would try to investigate where it had emanated from. But as we all know, leaks happen, and it is very difficult to  
 20 investigate where they emanate from because the person who leaks information could have come from any angle.

And unfortunately, at the time we were dealing with a number of other leaks but not only relevant – not only pertaining to my portfolio but to other portfolios as well.

**ADV MYBURGH SC:** Alright. Well, Ms Carolus deals with

that in her affidavit, a Business Day article at page 73, et cetera, but let me then take you to her conclusion, if I may? That you will find at paragraph 79 at page 827. She says:

10                    “In hindsight and given the evidence that has emerged in the Commission, it is clear that the board and my chairpersonship was placed under pressure to see to the demand to abandon the Mumbai route in order to favour Jet Airways.

It is also clear now that there was an attempt to favour the New Age with SAA's business.

Both Minister Gigaba and Mr Mahlangu exerted pressure on the board and management in this regard.

I have no doubt that the board at that time was seen as an obstacle to these attempts to influence its decisions.

20                    Indeed, the mass resignation on 27 September 2012 feels more like a constructive dismissal in order to pave the way for a more compliant board...”

Do you want to comment on that in conclusion?

**MR GIGABA:** Yes, thank you very much. Yes, it is quite an unfortunate conclusion by Ms Carolus that she draws

here because throughout her affidavit she points to pressure being applied by me to any effect. She does not say that I have applied pressure in favour of New Age. She does not say I applied pressure in favour of abandoning the Mumbai route, but she arrives at this conclusion purely based on hearsay innuendo and her own assumptions at the time.

She says in her submission that when she had raised issues with me, I had attended to those issues promptly. She does not say that I had failed to meet with her when she requested to meet with me and so I do not understand how and where she then arrives at this conclusion that we had tried to exert pressure on the board and management in favour of the New Age and abandoning the Mumbai route.

It is important to note that the Mumbai route was eventually abandoned in 2015, that by Ms Mzimela's submission, I had not discussed this at all with them since the meeting of April 2011.

That I had not discussed with them the issue of the New Age and the issue that they – that she presents in her submission with regard to the Board AGM which could not take place because they had failed to comply with the submission date of the financials because the auditors were concerned about the – growing concern status of SAA



is an issue which is in the regulations and there was nothing that could be done about that.

The mere fact that the recapitalisation was provided to them, was provided to the airline after they had resigned, it was a mere coincidence.

**ADV MYBURGH SC:** Sure.

**MR GIGABA:** Because that would have happened regardless of the fact that they had resigned or not. That recapitalisation would have been provided which would  
10 have paved the way for the growing concern status to be addressed and the AGM to begin to be organised as scheduled.

**ADV MYBURGH SC:** I want to just take you to paragraph 68, please. Just to go back. In the middle of 68, it says that:

“The AGM was postponed on a number of times at the Minister’s behest...”

Do you accept that?

**MR GIGABA:** No, it is a lie. It is not true. The Minister  
20 does not instruct the postponement of the ATM. The ATM is organised as scheduled. It never gets postponed at the behest of the Minister but the department which should have been engaging with National – with SAA would have considered all the issues placed before them, including the fact that SAA had not complied with the submission

schedule for the annual financial statements because the auditors were concerned about the growing concern status.

Safe to say, they were still awaiting recapitalisation as requested from National Treasury. So, it was not me that decided that no, no, no postponed the ATM, postpone the ATM. We could not hold an AGM when the growing concern status was not finalised.

**CHAIRPERSON:** Well, as you say that you would not instruct an AGM to be postponed. It occurs to my mind  
10 that I have heard evidence in the context of the Eskom Work stream by Mr Tsotsi who was Chairperson of the Eskom Board at a certain stage, as well as, by I think somebody who was Deputy DG of the Department of Public Enterprises in early 2015 or was acting DG at the time.

I do not know if it was Ms Makoko(?) who – also whom said they received calls from the then President Zuma, giving instructions that a meeting of the Board of Eskom that was scheduled for the 26<sup>th</sup> of February 2015 should be postponed. So, I am just saying. As you say,  
20 you would not give that instruction. I just remember that there is this evidence that has been heard in a different context. You might – you do not have to say anything. I just mention it.

It crossed my mind that there was evidence that indicated that the President called to say that board

meeting must be postponed. Of course, he has not said anything whether that is true or not, but there are two witnesses who have said he phoned.

So. Ja. I am not saying that I am doubting your evidence. I am just saying there is that evidence that I have heard.

**MR GIGABA**: And in this instance, Chairperson, I would not know whether it was a board ATM, or it was a board meeting.

10 **CHAIRPERSON**: Ja.

**MR GIGABA**: Board meeting, you can postpone.

**CHAIRPERSON**: Ja.

**MR GIGABA**: And, you know, my understanding up until now and I will remain with what I understand, was that even a board AGM, I would not call for its postponement. There would be instances where a board requests me to attend a meeting because there are issues they want to raise with me. There are instances when I would request to attend a scheduled board meeting or convene a special  
20 board meeting, in which case, as I have explained earlier, a special board meeting would be convened, an agenda circulated, but an AGM does not get postponed or rescheduled by the Minister because it is – there are legal requirements for an AGM to take place during the time when it is scheduled.

The only time it does not take place by that time is when there are financial issues concerned or other matters of such a nature that the department would say on the basis – on this basis, we suggest that the AGM be postponed. I think I have made an example of SAA that this was not the first or the last time that SAA's AGM was rescheduled. There was another instance, I think between 2014 and 2015 – I cannot remember – when AGM too close to two years to actually take place because of the financial  
10 position of the airline.

**CHAIRPERSON:** Well, you said a board meeting you can postpone. Do you mean a minister can postpone a board meeting?

**MR GIGABA:** No, no.

**CHAIRPERSON:** Okay.

**MR GIGABA:** No.

**CHAIRPERSON:** You did not mean to say that because ...[intervenes]

**MR GIGABA:** No, I did not mean to say the Minister can.

20 **CHAIRPERSON:** Oh, okay.

**MR GIGABA:** As I said, Chairperson ...[intervenes]

**CHAIRPERSON:** Ja.

**MR GIGABA:** That is why I immediately ...[intervenes]

**CHAIRPERSON:** Ja.

**MR GIGABA:** ...indicated that you can be invited

...[intervenes]

**CHAIRPERSON:** Ja.

**MR GIGABA:** ...to a board meeting. You can call a special board meeting, or you can request to attend a scheduled board meeting.

**CHAIRPERSON:** Ja, yes.

**MR GIGABA:** But you yourself cannot postpone ...[intervenes]

**CHAIRPERSON:** Ja, you can make a request if it was a  
10 meeting you were going to attend, I guess.

**MR GIGABA:** Yes.

**CHAIRPERSON:** To say: Can we postpone it because of A, B, C, D. If you were going to attend.

**MR GIGABA:** Yes.

**CHAIRPERSON:** But you cannot just phone and say a board meeting that you were not going to attend to say it must be postponed.

**MR GIGABA:** No ...[intervenes]

**CHAIRPERSON:** As far as you know.

20 **MR GIGABA:** As far as I know, Chairperson.

**CHAIRPERSON:** Ja.

**MR GIGABA:** Thank you.

**CHAIRPERSON:** Okay. Mr Myburgh.

**ADV MYBURGH SC:** Yes, thank you. Just to expand upon that a little. At paragraph 69 at page 832. It says:

“By then there were growing concerns by a number of members of the board about what they felt was outright hostility and/or carelessness from our shareholder because they felt he was dragging his feet with the processes to secure the growing concern status for SAA...”

You want to comment on that?

**MR GIGABA:** Chairperson, the Minister of Public  
10 Enterprises does not sit with a stash of funds that they can avail to any SOE on the basis of it either failing to comply with growing concern status or requiring recapitalisation. The decision on recapitalisation and bailing out an entity rests solely with National Treasury which should look at how and when it would have to find funds to address such issues.

The Minister of Public Enterprises does not sit in their office with such funds and so the statement that the Minister was dragging, or the shareholder was dragging  
20 their feet with regard to addressing the growing concern status of SAA is disingenuous and the former Chairperson of SAA knows it very well as someone who is also quite experienced in serving on boards.

**ADV MYBURGH SC:** But could I ask you then to have a look at paragraph 71 at page 833?

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

**ADV MYBURGH SC:** Yes.

“Upon requiring from myself on 25 September, the Minister expressed his utter dismay that his department officials has not despatched the guarantee letter to SAA yet.

He assured me that it was approved by National Treasury and that he would ensure it reached us by the next day.

10 It did not arrive on 26 September 2012...”

Would you like to comment on that?

**MR GIGABA:** Chairperson, my assurance that the letter would reach them by the next day was depended on a number of factors. One of those is the despatch. The Minister – Chairperson, we must not create this sense that ministers are people who write letters, convene meetings, despatch letters, sit with stashes of money that they can despatch to SOE’s. You have officials that you talk to. And the letter to SAA would have to be despatched by the  
20 department, not by the minister or the minister’s office. Ms Carolus knows this, she knows it very well but she chooses to apportion the blame to the minister because it is convenient and suitable for her to do so in this regard but in reality, the procedure that is followed – I will talk to the DG and say DG, the letter to SAA, why is it delayed? Can

you dispatch it because I would have received the letter from National Treasury assuring us that the recap framework, recapitalization framework is approved and the figure attendant thereof and so the DG would have to initiate the processes from the department to ensure that the letter arrived at them.

This letter would have been received by the board of SAA even if they had not resigned. The fact that they chose to resign prior to them receiving the letter is their  
10 own fault, is their own mistake, it has nothing to do with the fact that the letter in actual fact was ultimately received and that is why the AGM of SAA eventually took place on the date that it did even though it was now after the date that had been scheduled for it to take place.

**ADV MYBURGH SC:** Mr Gigaba, perhaps I can just get your crisp answer. 71:

“Upon enquiry from myself on 25 September the minister expressed his utter dismay that his department officials had not dispatched the  
20 guarantee letter to SAA yet. Did you express such dismay?”

**MR GIGABA:** Probably I would have.

**ADV MYBURGH SC:** Right.

“He assured me that it was approved by National Treasury and that he would ensure it reached us by



the next day.”

Did you give those assurances?

**MR GIGABA**: The assurance was dependent upon the department acting on the dispatch of the letter. Chairperson, I wish to repeat. The ministers do not dispatch letters, they are not – they are on ...[intervenes]

**CHAIRPERSON**: Yes, but remember Mr Myburgh is simply asking you whether you gave that assurance.

**MR GIGABA**: Yes.

10 **CHAIRPERSON**: Whether it was complied with or implemented may be another matter.

**MR GIGABA**: The crisp answer is that yes, the assurance probably was given, the events are of 2011 and I did not keep records of them and however, it was dependent upon certain things happening because, as the minister, I was not my own dispatch facilitator.

**ADV MYBURGH SC**: And then the last sentence, I take it you agree with:

“It did not arrive on 26 September 2012.”

20 **MR GIGABA**: It probably did not – I would not be sure of that, I am sure we would have to look at the records which are available both at DPE and at SAA.

**ADV MYBURGH SC**: And then if we go to page 834 and paragraph 74, the fourth line, I have already read to you:

“Eight of twelve members decided to resign in

protest to the hostility from the minister and his team. Did not want to face the prospect of being delinquent directors.”

This, says Ms Carolus, was reinforced when the letter of guarantee was subsequently sent to SAA by the close of business the next day.

**MR GIGABA**: Chairperson, this was simply coincidental. Even if they had not resigned on the 25<sup>th</sup> the letter would have arrived on the 26<sup>th</sup>. The fact that they chose to  
 10 resign on the 26<sup>th</sup> would not have prevented the letter arriving on the 26<sup>th</sup> and so the fact - its arrival on the 26<sup>th</sup> had nothing to do with their resignation, it means that the dispatch business was such that it would arrive on the 26<sup>th</sup> because Ms Carolus herself says that they resigned on the 27<sup>th</sup> and the letter arrived on the 28<sup>th</sup>, the following day, which – and she had spoken to me on the 26<sup>th</sup>. Now, you know, I would really understand if you are talking about weeks that passed or months but you are talking about a gap of three days, just three days. You talk on the 25<sup>th</sup>  
 20 and you say the letter would arrive the following day. The board resigns on the 27<sup>th</sup>, the letter arrives on the 28<sup>th</sup>. Just three days, only three.

**ADV MYBURGH SC**: Alright and then just before we finish off completely on the question of the Mumbai route could I ask you please to turn to bundle 8, back to bundle 8 and to

go to page 58.

**MR GIGABA**: Yes I am there.

**ADV MYBURGH SC**: And please would you have a look at paragraph 24:

“I had also indicated that there was no anomaly in me meeting with Jet Airways. In this regard the Articles of Association applied during my tenure.”

Paragraph 22.4.7, this of the Articles of Association states that:

10 “SAA would not without the consent of the minister exit from routes and airports save for instances where the use of diversion airports is required. In order for me to give consent to the termination of the Mumbai route, I needed to satisfy myself that such would be in the interest of SAA.”

Do you confirm that?

**MR GIGABA**: Yes.

**ADV MYBURGH SC**: And then if you go to page 72, you will find the Articles of Association and that particular  
20 paragraph. Sorry, it is page 93. You will see there at 93, 22.4:

“Subject to the significance and materiality framework applicable from time to time the company shall not without prior approval of the Minister..”

And then sub 2:

“...commence or exit from routes.”

Do you see that, Mr Gigaba?

**MR GIGABA**: I can see 22.4 ...[intervenes]

**ADV MYBURGH SC**: 22.4:

“...commence or exit from routes and airports save for instances where the use of diversion airports is required.”

**MR GIGABA**: Yes.

**ADV MYBURGH SC**: Of course SAA did not want to exit  
10 the Mumbai route, Jet Airways wanted to exit the Mumbai route.

**MR GIGABA**: Yes.

**ADV MYBURGH SC**: Alright, could I then take you please back?

**MR GIGABA**: No, but it is important, Chairperson, remember SAA is not an entity which existed only in 2010 or 2011. Remember that the Acting CE, Mr Smythe, is alleged to have agreed to the exit on the route which application had not been submitted to ministers and Mr  
20 Daga says that the board had not agreed with that and so the new CEO of SAA came in and stated clearly that they were not going to exit the route and therefore, sitting before me or serving before me was no application for SAA to exit the route.

**ADV MYBURGH SC**: Alright, could I ask you then please

to go back to file 11 and let us deal further with this New Age issue. Could I ask you please to turn to tab number ...[intervenes]

**CHAIRPERSON:** Is that a different a bundle, the previous one?

**ADV MYBURGH SC:** I think you still have 8 and 11 but it is different, it is going to 11, that is bundle 8 you have in front of you, Chairperson.

**CHAIRPERSON:** Yes, okay, that is where you are going  
10 to.

**ADV MYBURGH SC:** I am going to 11.

**CHAIRPERSON:** Going to 11. Okay, I had sent it away.

**ADV MYBURGH SC:** Yes, you can – I am sorry. So tab 12 please? And if you could turn to page 781? The statement by Mr Mafika Mkwanazi.

**MR GIGABA:** So on page what?

**ADV MYBURGH SC:** 781.

**MR GIGABA:** Okay.

**ADV MYBURGH SC:** Tab 12.

20 **MR GIGABA:** Yes.

**CHAIRPERSON:** Okay, continue.

**ADV MYBURGH SC:** He says:

“Meeting the Guptas. After I was appointed as  
Chairman...”

Now that would have been Chairman of Transnet.

“...in December 2012, I received a call in January  
2011 ...[intervenes]

**CHAIRPERSON:** Did you say 781?

**ADV MYBURGH SC:** 781.

**CHAIRPERSON:** Okay, yes.

**ADV MYBURGH SC:** Bundle 11 under the heading,  
Chairperson, Meeting the Guptas.

“After I was appointed as Chairman n December..”

Are you there, Mr Gigaba?

10 **MR GIGABA:** Yes, yes, I am there, I am there.

**ADV MYBURGH SC:**

“...in December 2010. I received a call in January  
2011 from Mr Tony Gupta and he informed me that  
he got my contact details from Minister Gigaba and  
requested me to meet.”

What do you have to say to that?

**MR GIGABA:** I think I responded to this in my affidavit and  
said I did no such.

**ADV MYBURGH SC:** And then – sorry, you said that you  
20 did not provide him?

**MR GIGABA:** No, I did not provide Mr Tony Gupta with  
details of Mr Mkwanazi.

**ADV MYBURGH SC:** Alright, but you knew Mr Mkwanazi’s  
contract details presumably?

**MR GIGABA:** Ja, but that does not mean that I provided to

everyone.

**ADV MYBURGH SC:** Yes. Alright and have you any idea then where Mr Tony Gupta got Mr Mkwanazi's contact details from?

**MR GIGABA:** They had extensive contacts and connections, Mr Chairman, I do not know where he would have got Mr Mkwanazi's contact details and certainly one of the things that, you know, I had said repeatedly concerned me was about this name dropping. I was not  
10 aware that this meeting had taken place and had Mr Mkwanazi – I said this in my affidavit that had Mr Mkwanazi called me immediately to say that this has happened, I got this call, this person says they got my number from you, I honestly would have said to him please do not go to such a meeting and I would have clarified it to him that I had not given Mr Gupta his number.

**CHAIRPERSON:** Mr Myburgh, remind me, is the position that Mr Kona made a similar allegation namely that he was phoned by Tony Gupta for a meeting and Mr Tony Gupta  
20 said he got his number from Mr Gigaba?

**ADV MYBURGH SC:** I am not sure offhand, Chairperson.

**CHAIRPERSON:** No. Okay, alright. Maybe I am confusing – maybe it is only one instance, this one.

**MR GIGABA:** To my knowledge it is only Mr ...[intervenes]

**CHAIRPERSON:** Only this one. Oh, okay, alright. Yes,

continue.

**ADV MYBURGH SC:** Chairperson, I understand that Mr Solomon has been experiencing difficulties with the internet connection.

**CHAIRPERSON:** Oh.

**ADV MYBURGH SC:** We have received, if I understand it correctly, my colleagues phoned now, goes into a blank screen.

**CHAIRPERSON:** Ja.

10 **ADV MYBURGH SC:** I will read to you what the message says. So Mr Solomon's junior has sent a message which says:

"The Chair should please be informed..."

Says:

"...if the connection is not working. Our client is unrepresented when we are able to hear and interact with the Commission."

I do not know if Mr Solomon...

**CHAIRPERSON:** Mr Solomon, are you there? The screen  
20 shows IT, so I guess there must be some problem.

**ADV SOLOMON SC:** Yes.

**CHAIRPERSON:** Okay, can you hear me?

**ADV SOLOMON SC:** Yes, Chair, and there have been intermittent interruptions.

**CHAIRPERSON:** Yes.



**ADV SOLOMON SC:** All we are requesting is when that happens that the Chair is advised of those interruptions so that if needs be we just adjourn till the connection is restored but at the moment we can hear, so it is just raising something that had occurred a few times in the past.

**CHAIRPERSON:** Yes. No, that is fine, of course, you know, this technology is good most of the time but sometimes it lets us down.

10 **ADV SOLOMON SC:** Yes.

**CHAIRPERSON:** So with the interruptions I think that when we next meet you should try your best to be here in person so that it does not interfere too much. When everything goes smoothly, it is fine, there is no problem, it is just that sometimes these interruptions can end up causing quite some delays. So let us continue today but I know that you still need to cross-examine, I think, Ms Mngoma, and I do not know whether with regard to Ms Mzimela. I think your last position was that probably you  
20 would want to cross-examine her. I think that if at all possible maybe you could make an effort to be here in person so that we avoid the risk.

**ADV SOLOMON SC:** Certainly, Chair, we will bear that in mind but we are prepared to live with the moderate interruptions.

**CHAIRPERSON:** Yes, yes, it is just that when they lead to delays that is the only problem.

**ADV SOLOMON SC:** Sure.

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

**ADV SOLOMON SC:** Thank you.

**CHAIRPERSON:** Thank you, thank you.

**ADV MYBURGH SC:** So, as I understand it, what you are suggesting is that Mr Tony Gupta was effectively namedropping here, is that what you are saying?

10 **MR GIGABA:** I think here he was namedropping, Chair, because I had not provided him Mr Mkwana's contract details, neither did I know about this meeting.

**CHAIRPERSON:** And I know we have touched on this point and I seek to do nothing more than just draw some connection with it. To the extent that he may have been namedropping here, that might support the proposition that for him the presence of your adviser in the meetings that he was having with the CEOs might have served a similar purpose. When he name drops, when he drops your name,

20 I got the number from the Minister, your number from the Minister, it is like sending the message that one, the Minister and I are close or two, the Minister actually wanted us to talk, wanted us to meet, wanted me to talk to you, you know? Now when he brings the Minister's adviser to a meeting, it may be another way of saying, you know,

this meeting has got the blessing of the Minister and if he says certain things there, you know, and maybe the Minister's adviser does not object, it might create the impression that, you know, this person or the Minister has no objection. But we have talked about it, I am just, you know, saying there may be some connection with this namedropping, the attitude and wanting the Minister's adviser to be present at meeting where on the face of it, the Minister's adviser should not be there.

10 **MR GIGABA**: Yes and the ...[intervenes]

**CHAIRPERSON**: You might not be able to say anything, I am just sharing with you what is going on in my mind when you say this was namedropping.

**MR GIGABA**: Yes.

**CHAIRPERSON**: Ja, okay. Mr Myburgh?

**ADV MYBURGH SC**: Yes, thank you. I just want to take you through this page, it is not very long.

"I obliged..."

Says Mr Mahlangu.

20 "...and on arrival I handed my keys over to the valet who proceeded to park my vehicle. There is a particular manner in which they welcome you in the house. You take off your shoes, turn left, walk a long corridor whereupon I was met by Duduzane Zuma and gentleman who introduced himself as

Tony Gupta. At the start of the meeting we discussed what each of us were doing in the economy. Tony Gupta proceeded to introduce himself as a friend of the Zumas, that they owned Sahara Computers, they employ over 10 000 people in their operations. They shared that I was looking into a potential property development in Kwazulu-Natal that would cost above a billion rand. Reference is made to Mail and Guardian newspapers relate to this conversation.”

And then he says:

“He then explained that he is aware...”

Now that is Mr Tony Gupta.

“...that he is aware that Transnet has a marketing budget of 1 billion and that they want 30% to 50% of the billion rand budget allocated to the New Age newspaper. I told him that he was talking to the wrong person as the Chair of the board is not involved in procurement processes. The practicalities of how this would be achieved were not explained to me nor did I bother to enquire. I advised him to follow the established Transnet procurement procedures. Duduzane said nothing the entire time.”

So this is something that Ms Carolus has also given

evidence about the marketing budget, New Age budget. Do you have any comment on this?

**MR GIGABA:** Chairperson, again, I was not aware of this meeting and I think consistent with the response I have provided before that had I been alerted to this I would have indicated to Mr Mkwanaazi that I did not provide the details, please do not go to the meeting and I did not even know that Transnet had a marketing budget of a billion rand, so this was improper and I think Mr Mkwanaazi was correct to  
10 say that they need to follow the procurement processes of the department – I mean, of Transnet.

**CHAIRPERSON:** Well there is something that – when one reads what Mr Mkwanaazi says Mr Tony Gupta said here on the third paragraph on page 781, one is reminded of Mr Themba Masugu's evidence about his meeting with Mr Ajay Gupta in 2010, I think October or thereabout, where he said Mr Ajay Gupta said to him I know that GCIS has got I think 600 million budget, we want all of it, or something like that.

20           So here it is not all of it but we want 30% to 50% of it. That is something you cannot say anything about but I am just saying the evidence of two different witnesses here talking about different members of the Gupta family making similar demands to different people at different times. Mr Myburgh?

**ADV MYBURGH SC:** Yes, thank you. And then he says in the second last paragraph:

10 “I was contacted for a second meeting and I then requested Adv Siyabonga Mahlangu who was the special adviser to Minister Gigaba to accompany me. My reasoning was that I needed a witness and if there was any substance in their allegations with regard to relations with member of parliament Adv Mahlangu would be in a position to relay my position on this strange arrangement with the minister. Tony reiterated the proposition he had made in the initial meeting in the presence of Duduzane and Adv Mahlangu. I gave him the same feedback, that as Chairman I was not involved in day-to-day procurement issues at Transnet. I then made it clear that I did not have any interest in seeing them again.”

Have you got any further comment on that?

20 **MR GIGABA:** Ja,. Chairperson, as I said in my response on paragraph 7.6, page 788 I was also not aware that Mr Mahlangu had been invited to this meeting as a witness and it is my view that Mr Mkwanaazi was correct to insist that day-to-day procurement processes must be followed and it was correct of him to say he had no further interest in seeing them again because I think this was just

improper.

**ADV MYBURGH SC:** So can you think of any reason why Mr Mahlangu would not have informed you of this meeting?

**MR GIGABA:** I do not exactly know, I do not exactly remember why he would not have informed me.

**ADV MYBURGH SC:** Would you have expected him to?

**MR GIGABA:** Of course both of them should have informed me.

**ADV MYBURGH SC:** Did you know anything about the  
10 Gupta's attempt to try and secure the placement of business with the New Age newspaper?

**MR GIGABA:** I heard about it, I do not exactly recall when but I heard that they were trying to talk to various entities, various people, various departments to subscribe to the New Age breakfast, so – but it is not something which was brought to my attention or brought to me to deal with.

**ADV MYBURGH SC:** Now this relates to Transnet, I think what I perhaps omitted to ask you.

**MR GIGABA:** No, related to Transnet, Chairperson, no.

20 **ADV MYBURGH SC:** Okay, but Mr Mahlangu's evidence, what I was meaning, relates to Transnet. I think I perhaps omitted to ask you, in relation to what Ms Carolus had to say about SAA, did you ever come to learn about that meeting between Carolus, Mzimela, the DG and Mr Mahlangu?

**MR GIGABA:** No.

**ADV MYBURGH SC:** Could I then take you please to another affidavit and a related issue and that is at divider 11, Mr Pretorius.

**MR GIGABA:** Which one is it?

**ADV MYBURGH SC:** The same file.

**MR GIGABA:** Okay.

**ADV MYBURGH SC:** File 11, divider 11.

**MR GIGABA:** Oh.

10 **ADV MYBURGH SC:** I think tab 11 right in the front, Mr Gigaba and the affidavit itself commences at page 7.

**MR GIGABA:** Yes, I am on it.

**ADV MYBURGH SC:** Now, perhaps I could – this is an affidavit of Mr Pretorius.

**MR GIGABA:** Yes.

**ADV MYBURGH SC:** And he was employed by Eskom as Acting General Manager of Strategic Marketing and Branding.

**MR GIGABA:** Yes.

20 **ADV MYBURGH SC:** If I could take you perhaps directly to paragraph 35?

**MR GIGABA:** Yes, I am on it.

**CHAIRPERSON:** Do you say page or paragraph 35?

**ADV MYBURGH SC:** Page 16, paragraph 35.

**CHAIRPERSON:** Oh. Continue?



**ADV MYBURGH SC:** It says at paragraph 35:

“I could see no real benefit to Eskom in the business breakfasts. I told Mr Choeu that in my view the TNA proposal was not cost-effective compared to other options in the marketing mix and that we had in any event not received a formal proposal. Our view was that it made no marketing sense either to sponsor the TNA business breakfasts or to advertise in the TNA newspapers particularly because the newspaper did not have audited circulation figures, the issue which I address below. I was also of the view that the cost was too much in comparison with similar offerings.”

If I can then take you please to paragraph 36.

“When I raised this concerns with Mr Choeu ...”

Now he was the Divisional Executive Corporate Affairs.

“...he told me that the instruction to conclude the contract with TNA had come to him directly from Brian Dames, the then Eskom’s, and the Minister of Public Enterprises, Mr Malusi Gigaba. Do you want to comment on that?”

**MR GIGABA:** I think Mr Choeu already has commented and both Mr Dames and Mr Choeu have already commented on these. It is nonsense.

**ADV MYBURGH SC:** Right. Well, what is your comment?

**MR GIGABA:** My comment is similar to theirs that this is

not true.

**ADV MYBURGH SC:** At 37:

“I also told Mr Choeu that it would be necessary for the proposal because it was a sponsorship to be taken to the Sponsorship Committee for approval. However, Mr Choeu told me that the contract needed to be concluded quickly because Mr Gigaba had already been secured for the first business breakfast on 12 April. It was therefore decided that we should ask the Media Shop to do the negotiation and procurement of the media.”

Got any comment on that?

**MR GIGABA:** I do not know about the sponsorship processes of Eskom. Mr Choeu had already said I think in an affidavit submitted before this Commission, that Mr Pretorius was not telling the truth in this regard. I gave no such instruction and in the event that they sponsored a business breakfast programme because I was going to be speaking on it, it is something that they would have done internally without informing me.

It is important to state that, you know, the business breakfast programmes were broadcast live on SABC which had a very large viewership and that they were attended by business people from different angles and they addressed a number of issues, not only pertaining to

Eskom... [intervenes]

**ADV MYBURGH SC:** Sorry, I beg your pardon. DCJ, I have just been given a message from the technical people to say that the signal has dropped and if we could please have a five minute break in order to see if it can be restored.

**CHAIRPERSON:** Ja, it is really giving us problems. Then we will adjourn for seven minutes. We come back, if it is working and then in 10 minutes if it is not working we – is  
10 it fine now? Okay, let us continue. I think I must complain more. It comes back if I complain. Alright.

**ADV MYBURGH SC:** Sorry, Mr Gigaba, I do not know, I have interrupted your train of thought. Please feel free to recommence your answer if you would like.

**MR GIGABA:** Thank you, Chair. I was saying that insofar as securing sponsorships on the basis that I was going to be addressing, I was not aware of internal processes that took place in that regard. Mr [indistinct] had indicated in an affidavit submitted before the Commission that I had  
20 given no such instruction and I want to reiterate that.

And thirdly that these business breakfast programmes insofar as they were covered, because the coverage on the New Age Newspaper would only follow the live coverage on SABC which had and probably still has the widest coverage in terms of viewership and were

attended by business people from different angles. And so they would go to reach – they would reach out to a large spectrum of people, but that that is as far as I got involved in participating in some of the programmes, because then the sponsorship issues had nothing to do with me.

**ADV MYBURGH SC:** Right. Could I then please ask you to turn to Bundle 8. You can put away that file, Chairperson. And Bundle 8, can I ask you please to turn to the affidavit of Mr Tsotsi age page 760, that is under tab 3.

10 Are you there?

**MR GIGABA:** Yes, sir.

**ADV MYBURGH SC:** At paragraph 4.1 at page 761 he says that:

“I was appointed to the Board of Directors of Eskom Holdings (Pty) Ltd in July 2011. At the time of the said appointment Mr Malusi Gigaba was the Minister of Public Enterprises.”

I take it you agree with that?

**MR GIGABA:** Yes.

20 **ADV MYBURGH SC:** I want to then take you please to paragraph 6.1. It says that:

“The ANC had its usual fundraising gala dinner on the eve of 8 January – the eve of 8 January at rally in Nelspruit in 2014. Eskom and the SABC were two of the main sponsors and so the Chairpersons

of these SOEs were afforded not only the opportunity to address the gathering, but also offered seats at the high table which consisted of the ANC top six and two of the older Gupta brothers. The table had nametags so that those who did not know one another were able to introduce themselves. This was the first and only encounter I had with these Gupta brothers. I have got to see or talk to them thereafter.”

10 Did you attend this gala dinner?

**MR GIGABA:** Yes, I have attended all gala dinners of the ANC since January 8<sup>th</sup>, except the one in 2019. Oh no, I think it is 2020.

**ADV MYBURGH SC:** Then he says at 6.2:

“I was requested by Tony Gupta to meet him at their Saxonwold residence on some three occasions and once at their Sahara Computers offices in Midrand.”

It goes on to say that:

20 “Tony Gupta generally asked me for assistance on matters they were experiencing some problem with Eskom on, as well in situations where they could advance their business interest.”

Do you have any comment on that?

**MR GIGABA:** No.

**ADV MYBURGH SC:** Now what I would like to lead you on

if I may is – can perhaps most conveniently be done by me taking you to the relevant extract of Mr Tsotsi’s evidence which you find at page 808. Now just to refresh your memory, Mr Gigaba, this relates to a key part of his evidence insofar as it relates to you was or concerns the appointment of Colin Matjila over a Mr Steven Lennon as the acting CEO. And if I could ask you to have a look at page 808, he says in the quote referring now to his affidavit:

10            “For the most part my tenure in the board was very smooth until towards the end of the first board term when Colin Matjila was appointed as Chief Executive from about April 2014.”

And then it goes on to say, quoting another paragraph of his affidavit, 2.3:

              “The instability set in when a whistle blower alleged to the Eskom Board through the Audit and Risk Committee that Mr Matjila had not followed correct procedures as prescribed by the delegation  
20            authority in awarding the renewal of the TNA Media contract.”

So he was appointed it seems as the acting CEO and then there was this controversy around the TNA Media contract. But he is then asked can you tell us a bit about Mr Matjila’s appointment, how that had occurred, in line 22 he says:

“What happened was that when Brian Dames who was the substantive Chief Executive at the time was going to leave the company, the board then decided on two issues or rather took a view on two issues let me say and the view the board took was that first of all we should not have any of the board members acting as Chief Executive.”

Then if you can drop down five lines on the right hand side.

10            “The other matter that the board took a view on, in fact on this one it was really a decision, and the decision was that the board would ask one of the executives to avail themselves to act in that period. The individual that we asked was a gentleman named Steve Lennon.”

If I could ask you please to go to page 810. It is over the page, the second line on the right hand side.

                 “The board then instructed me to get the Minister’s consensus on this matter as would be the case and  
20            I met with the Minister and the Minister was quite content and happy that Steve Lennon should act.”

And he is asked who was the Minister at the time and he says it was Minister Gigaba. Chairperson says okay and then he continues at 10:

“Yes, this was I think around December 2013.”

Then if you go to page 811, the third line:

“Dr Lennon did agree. Chairperson, okay. Tsotsi, and I told him of course that the Minister had consented to this.”

And if you drop down please to line 19:

“Just before Mr Dames left...”

Now we know that is in March 2014.

10        “...I got a call, a call from Minister Gigaba and he was quite irate and this was an experience I had never had with him before and I was extremely taken aback and his manner was very surprising. But I, I managed to calm him down and to have a proper conversation with him and this was the time when we were about to go to the local government elections in 2014. He was lambasting me for or rather for the board to have requested a white man to act when in fact we were facing and the ANC was facing an election, a local government election and this would prejudice...”

20        And then at line 10 the Chairperson says:

“2014. I think it was a general election.”

To which he agrees. And then at line 22:

“Certainly over the phone and I made it clear to him that I thought that this was not him speaking, that someone had put him up to this and then he said...”



If I could take you please to page 813 at line 6, witness continues:

“And I said this is not you, you, you. This is certainly not you as far as I know you. Someone has put you up to this, so let us just not get into this. If you wish to have a conversation, let us have a conversation.”

And then the third last line from the foot of the page:

10 “He then asked me to inform the board that he would like Colin Matjila to act, so I went back to the board.”

And then over the page at 814, the third line:

“No, that was a subsequent conversation.”

And then at line 7:

20 “And so I went back to the board and I informed the board I was unhappy because it flew in the face of a decision that we had made and none of us as board members would be – should be eligible to act in a position of Chief Executive and of course Mr Matjila was a board member at the time.”

And then at line 19 – sorry, second last line from the foot of that page:

“Did you ever say to him that I consulted you on the board’s contemplation to approach Mr Lennon to be the acting Chief Executive Officer and you gave me

your blessing? What has changed now? What is wrong? And he answers, I certainly did. I do not recall whether it was during the conversation or afterwards, but I certainly made the point to him just to remind him that we had the conversation and he, he gave his consent to Dr Lennon acting and I obviously was perplexed as to why this change of mind. Chairperson asks, did he give you an explanation what has changed, what had caused  
10 him to change his mind. Witness says, no he did not give me an explanation.”

And then just a few other lines. Again the second last line.

He says:

“It was very embarrassing and I felt in a way I thought there was a sense of guilt or whatever, but I did go back to Steve and could not in all good conscience say to him what Gigaba told me.”

At paragraph 11:

“Already in the industry the word was out that he  
20 was going to be acting.”

And at line 19:

“To that extent, Chair, Steve decided that as a result of that he could no longer serve at Eskom. He felt that, you know, his integrity was somehow affronted by all of this and then requested to retire

at the time. So it was a very unhappy ending for him.”

So that is the full version of Mr Tsotsi. Do you want to comment on that?

**MR GIGABA:** Thank you, Chairperson. In the first instance the appointment of CEO and acting CEO was the discretion of the Minister. The board had no business interfering in that, you know, because even in terms of especially making a recommendation on an acting CE, I  
10 had given them three months within which to appoint a new CE and I was going to appoint an acting CE and I had said to them within three months they needed to have completed the process of appointing the new CE.

And three months does not mean or did not mean the new CE must be appointed and be in office. It meant the process. Within three months you need to submit a recommendation as to who will become the next CE and then I take that name to Cabinet.

Now it is quite crucial to note that Mr Tsotsi, and he  
20 says I had a good working relationship with them and I did, it is quite crucial to note that he forgot something quite important, as significant as a general election, and confuses a general election with a local government election. It is not trivial, because it speaks to grasp of issues that are sitting in front of you. I mean, a general

election is a general election. There is a new President, not a mayor. There will be a new administration, not continuation and so on. So it must be borne in mind.

When he briefed me, it is not true that I consented. I said I need to apply my mind. I need to apply my mind and see if I agree with what you are suggesting. And after applying my mind I had a view that no, appoint Colin because, you know, it could very well happen that someone who says I am not interested in being the CE might upon  
10 tasting the position take a view that I now want to apply. They have already acted. You have created an expectation. What do you do, how do you remove the expectation?

There was no angry outburst on my part. I am not disposed towards angry outbursts, especially with elders. Mr Tsotsi is a senior to me by far. I have the upmost respect for that and I would not just burst out at him, not under any circumstances, no matter how angry I am and he had not upset me in any possible way.

20 And I have always taken a view that being a Minister does not mean that I have a right to just burst out at people and talk to them anyhow. So I did not speak to him in the manner that he suggests and he suggests elaborately this angry outburst to a point where he said to me this is not you. Chairperson, I do not drink alcohol.

**CHAIRPERSON:** Well, I wanted to say that is precisely was his point, but he did not refer to alcohol. He said when he was giving evidence, if I recall correctly, he said I had known Minister Gigaba for a long time, from the time when he was leader of the ANC Youth League. I had a good relationship with him. We were working very well. But on this particular day the way he spoke it was uncharacteristic of him, precisely what you are saying in a way because you are also saying I would not talk to him  
10 like that. And I think you may be saying I would not talk to anybody like that maybe, you would not... [intervenes]

**MR GIGABA:** Yes.

**CHAIRPERSON:** You are not given to bursting out. So he said I have known him for a long time. We had a good relationship. And I think he said also as Chairperson of the board and you being the Minister, you had worked very well, but this was just something that happened that he could not understand himself, you know, which is I think why he says – he said this is not you.

20 **MR GIGABA:** Yes, Chairperson. And as I was saying, Chairperson, I do not drink alcohol, I do not smoke drugs, I do not have mood swings. I maintain the same posture and demeanour in my engagements, no matter how robust they may be and so there was no possible way, there is not, that I would have burst out and spoken to him in a manner

which would make him to say to me no, wait a minute, this is not you that I am talking to. It is not possible. It never happened.

When I called him and had a discussion with him I said look, I am of a different view. I have applied my mind. I am of a different view. I believe on the one hand that we need to speak to the part of transformation and here we are talking about someone who is going to act for three months, it could be four, it could be five, until the new CE  
10 is ready to assume office. Let us speak to the part of transformation. Let us appoint Mr Matjila. He possesses the requisite skills to act in this position.

But certainly that the board thinks somebody in management might not upon tasting the position want to occupy it permanently. My view is it is possible that they may. Having tasted the position they may then apply and consider themselves to be front runners by acting and expect that to have created reasonable expectation that they should occupy the position. And so my suggestion is  
20 that allow Mr Matjila to act, prevail on the board to understand this and appoint the new CE timeously within the time limit I have given you.

And this time limit, Chairperson, was also not random on my part. It is a time limit I had given SOEs back I think in 2011. I think in one of my previous

submissions here I indicated that I told SOEs that if there is a vacancy arising try to fill it up within three months so that we do not sit with vacancies for too long. And that is what we discussed.

I did not have an outburst with him and I certainly I did not know that I would be leaving after May 2014, but I expected that regardless of what would happen they would comply with the time limit I had given them and there would be a new CE in office in four to five months. They would  
10 be able to move on in that regard.

**CHAIRPERSON:** So is the position that you agree that he did suggest the name of Dr Lennon or Mr Lennon – I am not sure which is the right title for him – or that he did say the board was considering appointing – having him appointed as an acting group CEO, but what you disagree with is that one, you said that is fine and you disagree that you came back to him and you were angry and you changed.

What you are saying is, yes, they did suggest or  
20 say or give Mr Lennon's name. I said I wanted to apply my mind. I went away, applied my mind. I came back to him. I spoke to him in a normal way. I said we should continue with transformation and that Mr Matjila should be appointed. Is that a correct summary of what you say?

**MR GIGABA:** Yes, Chair.

**CHAIRPERSON:** Mr Myburgh?

**ADV MYBURGH SC:** Have you got any sense then where Mr Tsotsi gets this story from?

**MR GIGABA:** I do not know where he gets this story from, because even after I had left Public Enterprises I continued having good relationship with them. Whenever we would meet we would have cordial conversations.

**ADV MYBURGH SC:** And what about the fact that the board had decided that none of its members should act as  
10 the CEO in the intervening period?

**MR GIGABA:** The discretion lay with the Minister, Chairperson. The discretion was the Minister's discretion and what the board sought to avoid in appointing an Executive Manager, Director at Eskom who in their opinion might have wanted – might have not wanted to apply for the position. Everybody knows – everybody knew that Dr Lennon had ambition to be CE of Eskom. Everybody knew that at the time. Chairperson?

**CHAIRPERSON:** Well I wanted you to finish before I ask  
20 you.

**MR GIGABA:** Okay, thanks. Everybody knew he had ambition to be CE of Eskom. I did not want to prejudice him by placing him in a position where he will now be said to be unavailable. He was certainly one of the most experienced Executives Directors at Eskom at the time and



I was of the view that it is possible that you might act in a position and upon acting you then taste the position and you now want to apply and then you are told that no, you cannot apply because the condition for your appointment as an acting CE was that you are not going to be available.

And then you could have long protracted legal [indistinct] with somebody challenging the fact that there is no legal prescript preventing them from having to act and still apply to occupy the position permanently, that the  
10 board had no right to prevent anybody from applying for the position. And so it really was my discretion and it is how I applied my mind and thought about the matter.

**CHAIRPERSON:** Mr Myburgh?

**ADV MYBURGH SC:** I just want to ask you one other thing and that is isn't Mr Tsotsi's version borne out by the fact that he seems to have told Mr Lennon that he was going to act and that when he then had to go back and tell him that you had changed your mind Mr Lennon then resigned, doesn't that sequence of events bear out Mr  
20 Tsotsi's version that you must have changed your mind.

**MR GIGABA:** No what it bears out is that he had difficulty going back to Mr Lennon because he had on right to assume my powers and go talk to Mr Lennon and say to him the Minister has agreed when the Minister had said they are applying their mind on the issue. Industry, where

it is going out to the industry prior to my consent and an announcement, because I would need to inform the board as the shareholder representative, that was an anomaly and I think we must not take away the powers of the Minister and allow the usurpation of those powers on the basis that people might have been informed that they are to act in positions. The power of the Minister to take the decision must still vest with the Minister, because in the end as the shareholder representative even though the  
 10 appointment of acting CE's is not going to go to cabinet, it doesn't go to cabinet, but the Minister must still exercise that discretion to take that decision and then inform the Board.

The Board shouldn't have gone out to inform anyone including the industry as to who was going to act when they had not received final word from me.

**ADV MYBURGH SC:** But of course Mr Tsotsi's version is that you had agreed and you then changed your mind.

**MR GIGABA:** Of course.

20 **ADV MYBURGH SC:** You take issue with that I understand.

**MR GIGABA:** Of course my version is I had not agreed, I had said I am going to apply my mind, and applying your mind must never ever be presumed to mean consent.

**ADV MYBURGH SC:** How long did Mr Matjila act for?

**MR GIGABA:** I don't exactly know because he was appointed I think was it in April 2014.

**ADV MYBURGH SC:** I think March/April ja.

**MR GIGABA:** Ja, then one month or two months later I was appointed Minister of Public Enterprises and I left, sorry of Home Affairs, of Home Affairs, thank you Chair.

**ADV MYBURGH SC:** So do you know ...[intervenes]

**CHAIRPERSON:** Well Mr Matona was appointed with effect from, as Group Executive of Eskom with effect from I  
10 think 1 October 2014 if not 1 November, but I think October, so I suspect that Mr Matjila must have acted until Mr Matona assumed duty.

**MR GIGABA:** Yes we could be slightly surprising Chairperson because to my understanding by the time the general elections took place the Board had completed the recruit process. I think what could have delayed the actual appointment was the appointment of a new Minister.

**CHAIRPERSON:** The change of Ministers.

**MR GIGABA:** The change of Ministers, which then  
20 created the time delay.

**CHAIRPERSON:** Ja, because I think he was the immediate acting or CEO or Mr Matona's assumed it is. Mr Myburgh?

**ADV MYBURGH SC:** Thank you. I just want to deal with a few isolated issues, could I ask you please to go to bundle

7, and if you could please turn up page 996.101.

**MR GIGABA:** You are in a rush. 7A?

**ADV MYBURGH SC:** 7A yes.

**MR GIGABA:** 996?

**ADV MYBURGH SC:** 101.

**MR GIGABA:** I am there.

**ADV MYBURGH SC:** So you would have seen this affidavit from Ms Rossouw.

**MR GIGABA:** Yes.

10 **ADV MYBURGH SC:** She says she is the bursar at a primary school and ...[intervenes]

**ADV SOLOMONS SC:** Chair sorry if I could just come in here?

**CHAIRPERSON:** Ja.

**ADV SOLOMONS SC:** I object to Mr Myburgh dealing with this statement on two bases, one we did not receive a 3.3 notice in respect of Ms Rossouw, but secondly and more fundamentally he has been very specific about which witnesses he is going to traverse with Mr Gigaba and Ms  
20 Rossouw is not one of them, so he has had no opportunity to deal with her evidence at all, and on the contrary he would be taken by surprise in having to deal with her evidence when Mr Myburgh specifically excluded her from the list of witnesses that Mr Gigaba was expected to deal with.

**CHAIRPERSON:** Mr Myburgh?

**ADV MYBURGH SC:** Mr Chairperson I – I mean Mr Gigaba as we can see is going to have to come back on another occasion, I have no difficulty to leave the matter over till then.

**CHAIRPERSON:** What I want us to consider is whether you can't identify the areas where you were going to have questions on for him.

**ADV MYBURGH SC:** Yes.

10 **CHAIRPERSON:** And put questions to him in writing and he will be asked to respond by way of an affidavit to those questions, particularly if they relate to issues where maybe there is no apparent controversy but maybe a controversy may develop, but that could be the start and when those responses are received then one can waive them and see whether it is necessary to have him back or not. Where one can deal with them without any further oral evidence then we could look at doing it that way, what do you think of that?

20 **ADV MYBURGH SC:** Uhm ...[intervenes]

**CHAIRPERSON:** It may well be that in regard to some it is important to hear oral evidence but I am just raising this as a ...[intervenes]

**ADV MYBURGH SC:** So where we are Chairperson now is there are 15 33 notices and affidavits.

**CHAIRPERSON:** Ja.

**ADV MYBURGH SC:** We have dealt with 12 of the 15 so we have two more to deal with and those three are the two Alexkor gentlemen, Mr Craythorne and Mr Bishop, the issues are perhaps relatively narrow there and then we have Mr Mamiad from the Treasury.

**CHAIRPERSON:** Yes.

**ADV MYBURGH SC:** That's perhaps slightly more complicated but what's then left really are these small  
10 issues, this affidavit the photograph, the two public protector reports.

**CHAIRPERSON:** Yes.

**ADV MYBURGH SC:** So yes that is a possibility but right now if Mr Gigaba is not comfortable dealing with this affidavit I don't intend to deal with it, but if what you are proposing, and I see it is edging towards half past four, if what you are proposing is that we should do that in respect of everything that is left I am happy to have a shot at that and if I understand you correctly he would then put up his  
20 answers, hopefully that will be done in quite a short period of time and then we could approach you perhaps as to whether it is necessary for Mr Gigaba to be led on any specific issue which would then presumably narrow down to an hour or two, is that what you have in mind?

**CHAIRPERSON:** Well I certainly, what I have in mind is

that maybe we could stop here or maybe we could go for another 30 minutes, I am not sure, we can look at that, but certainly that whatever we haven't covered it can then be put to him by way of questions, he responds in – by way of an affidavit. That's one scenario, but the other scenario which I haven't mentioned is this that depending on how much time we might take, it may well be that on one of the mornings before the end of this week if everybody is available we could come together and maybe have an hour  
 10 or an hour and a half or two hours and at that stage just focus on what really requires oral evidence and questioning.

**ADV MYBURGH SC:** That is another possibility, but I don't know to what extent that amount of time could assist.

**ADV MYBURGH SC:** I think Chairperson perhaps a hybrid would work, because it would then give us an opportunity to focus our minds on in respect of what is left, what is contentious.

**CHAIRPERSON:** Ja.

20 **ADV MYBURGH SC:** I think if we could have a two hour slot we could probably knock off the contentious stuff. There might then still be a need for an affidavit in respect of things like for example this affidavit, it is a simple question of is it admitted, it is half a page.

**CHAIRPERSON:** Ja, ja, ja.

**ADV MYBURGG SC:** So I would propose if we try and do both and it might be sensible then to adjourn now so that we can reflect on what is really left that is contentious, and I would have thought that we would probably deal with the three of the 15 affidavits that remain and as for these smaller issues they can be dealt with by way of an affidavit.

**CHAIRPERSON:** Okay no that is fine. Before we proceed let me check whether Mr Hulley has arrived, he is  
10 to lead evidence with the next witnesses. Okay, no are the witnesses available? Your witnesses? Okay, alright.

Mr Solomon you heard the exchange between myself and Mr Myburgh, have you got any input to make?

**ADV SOLOMON SC:** Chair only that we would welcome if we could dispense with Mr Gigaba coming back if it would be possible, we will cooperate in supplying answers to questions on affidavit and then we can make the determination whether it is absolutely necessary to have him back.

20 **CHAIRPERSON:** Ja, of course there is still the question of you cross-examining Ms Mngoma. Now she – Ms Mzimela and Ms Coetzee were scheduled to avail themselves for cross-examination by you this Wednesday I think, this Wednesday?

**ADV SOLOMON SC:** Yes.



**CHAIRPERSON:** As I understand the position Mr Myburgh indicated I think on Friday that Ms Mzemela will not be available and you indicated that if I recall correctly you thought you would not need to cross-examine Ms Coetzee. If that remains the position we could use the morning of Wednesday for the cross-examination of Ms Ngoma, but it may well be that we could start earlier with Mr Gigaba because Ms Ngoma could come in at ten, maybe we could start earlier with Mr Gigaba on Wednesday morning and try  
10 and finish on the disputed areas or controversial areas or important areas and thereafter then you could cross-examine Ms Ngoma, how does that sound to you?

**ADV SOLOMON SC:** That would be in order Chair, just a question of between now and Wednesday would there be enough time to iron out the areas with Mr Myburgh?

**ADV MYBURGH SC:** Chairperson if I could perhaps suggest this, I think what I would try my best to do is use – if we were to start at half past eight and we had one and a half h ours I will try my best to focus on what I consider to  
20 be the contentious issues and then we will rest with the rest of our questions being decided by way of affidavit, so we need not necessarily engage with Mr Solomon. What I haven't dealt with in that one and a half hours I will ask him to deal with in an affidavit.

**CHAIRPERSON:** Ja, you understand that Mr Solomon?

**ADV SOLOMON SC:** Yes, that is in order then Chair.

**CHAIRPERSON:** Yes. Okay Mr Myburgh do you know whether Ms Mngoma would be available for Wednesday?

**ADV MYBURGH SC:** I don't know offhand Chairperson but I can certainly find out I am sure in the next half an hour.

**CHAIRPERSON:** Ja, okay, alright, let's say you will try and find that out, but the plan is, and this can be confirmed maybe tomorrow, the plan therefore is that we would start at half past eight with Mr Gigaba, so that all the  
10 contentious issues could be covered, and after he has finished whatever has not been covered will be dealt with by way of written questions and then an affidavit in response and after Mr Gigaba has finished giving evidence then if Ms Ngoma is available she would then take the witness stand and be available for cross-examination.

Okay, so that is our arrangement.

**ADV MYBURGH SC:** Thank you Chairperson.

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

**CHAIRPERSON:** You understand Mr Gigaba? Yes, okay  
20 alright, so we are going to then adjourn the proceedings relating to Mr Gigaba now and we will resume on Wednesday morning and then I will adjourn for about ten/fifteen minutes to enable the next work stream to set up and then I will come back and then we will continue.

**ADV MYBURGH SC:** Thank you.

**CHAIRPERSON:** We adjourn.

**INQUIRY ADJOURNS**

**INQUIRY RESUMES**

**CHAIRPERSON:** Good afternoon Mr Hulley, good afternoon everybody.

**ADV HULLEY SC:** Thank you Mr Chair.

**CHAIRPERSON:** Are you ready?

**ADV HULLEY SC:** We are ready to proceed Mr Chair.

**CHAIRPERSON:** Yes.

10 **ADV HULLEY SC:** Mr Chair we will be hearing today in the evidence in respect of the Law Enforcement Agencies work stream and we will be hearing the evidence of Ms Ngubane who I understand – who I understand prefers to be called Ms Zulu because she is remarried – she is actually married and now goes by the married name of Zulu. Ngubane I understand was her maiden name.

**CHAIRPERSON:** Sorry what was the married surname?

**ADV HULLEY SC:** Her maiden surname is Ngubane.

**CHAIRPERSON:** Oh. Okay. Yes do you – do you want to  
20 indicate what her evidence will relate to for the benefit of the public.

**ADV HULLEY SC:** So Mr Chair you will recall that there was testimony that had been given by Mr Trevor White who was a forensic auditor some of which touched upon the evidence of Mr Mabuyakhulu, Mr Michael Mabuyakhulu and

in particular there was a dispute between the testimony that had been provided by Mr Trevor White and Mr Mabuyakhulu as to the circumstances relating to a donation of some R1 million / R1.053 million that had been paid – that had apparently been given to Mr Shabalala or a Mr – and the evidence was that Shabalala had handed it over to Mr Mabuyakhulu for onward transmission to the ANC as a donation.

Now there was some uncertainty as to the precise  
 10 nature of Mr Trevor White's affidavit. Mr White has in fact provided a supplementary affidavit where he has clarified what his testimony has been. Mr Mabuyakhulu will come and testify during the course of tomorrow sometime but in the meantime, we have managed to get an affidavit from Ms Zulu or Ms Zulu who has explained the circumstances in which she (talking over one another).

**CHAIRPERSON:** I guess – I guess we will have to be consistent because her affidavit says Ngubane otherwise whoever reads the transcript will think Ms Zulu is somebody  
 20 else but that is – we mean no disrespect to her in-laws.

**ADV HULLEY SC:** Indeed.

**CHAIRPERSON:** Good – good afternoon Ms Ngubane – Ms Zulu.

**MS NGUBANE ZULU:** Good afternoon Chair. I will pass on the message to the in-laws.

**CHAIRPERSON:** I guess you – you need to make sure that they must know that you were protective of your new surname. Yes.

**MS NGUBANE ZULU:** Will do so Chair.

**CHAIRPERSON:** Yes. Yes Mr Hulley.

**ADV HULLEY SC:** Thank you Mr Chair. So Mr Chair we will just lead evidence on the circumstances in which the affidavit of Mr Mzila was obtained. Ms Ngubane was the attorney who was dealing with the matter at the time and  
10 she was the person who prepared the draft affidavit on behalf of Mr Mzila.

**CHAIRPERSON:** Ja.

**ADV HULLEY SC:** So if she can be sworn in.

**CHAIRPERSON:** Okay right. Please administer the oath or affirmation.

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

**MS NGUBANE ZULU:** Sibusisiwe Nkosinomusa Ngubane Zulu.

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

**MS NGUBANE ZULU:** No I do not.

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

**MS NGUBANE ZULU:** 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.

**MS NGUBANE ZULU:** So help me God.

**CHAIRPERSON:** Thank you Ms Ngubane.

**ADV HULLEY SC:** Thank you Mr Chair.

**CHAIRPERSON:** I think if say Ngubane Zulu that should be fine because then at least Ngubane is there – that is in the affidavit. Okay all right that will cover the in-laws.

10 **ADV HULLEY SC:** Thank you Mr Chair.

**CHAIRPERSON:** Okay. Thank – thank you for availing yourself Ms Ngubane Zulu to give evidence in the commission and to assist – to assist us. Thank you for availing yourself.

**ADV HULLEY SC:** Thank you Mr Chair.

**MS NGUBANE ZULU:** Thank you Chair.

**CHAIRPERSON:** Okay Mr Hulley.

**ADV HULLEY SC:** Ms Ngubane Zulu if you could be so kind as to turn with me to page 163. Mr Chair there should be  
20 bundle which is marked LEA27 before you and if we could turn to page 163 of that bundle.

**CHAIRPERSON:** Yes.

**ADV HULLEY SC:** Now if you have that page I would appreciate it if you could turn to that page.

**CHAIRPERSON:** Have you got that page Ms Ngubane

Zulu?

**MS NGUBANE ZULU:** I am going to quickly go to it Chair. Maybe just to also request your indulgence because this bundle I am looking at it electronically.

**CHAIRPERSON:** Ja.

**MS NGUBANE ZULU:** So I am going to be scrolling on the same screen that I am looking at.

**CHAIRPERSON:** Okay.

**MS NGUBANE ZULU:** Yes. If Advocate Hulley can just  
10 repeat the page number please.

**ADV HULLEY SC:** It is page 163.

**CHAIRPERSON:** So you will look at the black numbers if that has not been explained to you. They appear on the left hand corner of each page. They would be written LEA-27-163 but when we refer to the pages we will not mention LEA; we will not mention 27 we will simply say 163.

**MS NGUBANE ZULU:** Chair the bundle in my possession is marked and Advocate Hulley on the email that has sent me this morning reference was made to the page numbering  
20 that is in red the RR4TSW.

**ADV HULLEY SC:** To be of assistance to the witness Mr Chair. There is two numbering systems as you are aware Mr Chair but they both in this case they both identical so if you could look at the top right hand corner it should be 163 anyway Ms Ngubane Zulu.

**MS NGUBANE ZULU:** Thank you

**CHAIRPERSON:** Well basically what you are looking for is for your affidavit.

**ADV HULLEY SC:** Correct.

**CHAIRPERSON:** That is the – your affidavit that is at page 163. It is where it starts.

**MS NGUBANE ZULU:** Thank you Chair.

**CHAIRPERSON:** I hope this not an indication.

**MS NGUBANE ZULU:** So Chair in this bundle – in this  
10 bundle it actually moves from RR40-TSW-0057 and then it goes straight to RR4TSW1358.

**CHAIRPERSON:** No it looks like you have a completely different bundle.

**ADV HULLEY SC:** If you looking – if I might be...

**CHAIRPERSON:** Have – were you given one bundle or more than one?

**ADV HULLEY SC:** You should be...

**MS NGUBANE ZULU:** I was given more than one bundle  
Chair.

20 **CHAIRPERSON:** The one that we are using at the beginning of it if you have got the whole bundle it is has got Exhibit RR7 written that is inside not necessarily outside and what it has got is Mr Mabuyakhulu's application. You have got a Notice of Motion there paragraphs – page 2 and 3 and then you have got his affidavit that is Mr



Mabuyakhulu at page 5. When I say page 5 I am referring to the page that is marked LEA-27-005 but I just say page 5. Have you got a Bundle that has got Mr Mabuyakhulu's affidavit at the beginning or his application?

**MS NGUBANE ZULU:** It is not an application I have got the bundle that has got his affidavit Chair but if Advocate Hulley can just indicate to me if – which affidavit he is referring to because I am quite familiar with the contents of the affidavit especially the one that we had discussed in our  
10 consultation.

**ADV HULLEY SC:** It is the affidavit which of yours Mr Ngubane Zulu which is dated the 17<sup>th</sup> of May of 2021. In other words..

**MS NGUBANE ZULU:** Thank you I am comfortable with that.

**ADV HULLEY SC:** An affidavit that you deposed to last month. Have you got it?

**MS NGUBANE ZULU:** Yes I am comfortable with us going ahead Chair.

20 **ADV HULLEY SC:** Okay.

**CHAIRPERSON:** Ja okay all right.

**ADV HULLEY SC:** Thank you Mr Chair. Now I would like you to turn to – if you could identify the document in the first place. So if you could turn to page 163 of that bundle and identify what that document is.

**CHAIRPERSON:** Do you have it or you were saying you were comfortable to deal with it even if you do not – you are not looking at it?

**MS NGUBANE ZULU:** Yes Chair I was saying I am comfortable to deal with it.

**CHAIRPERSON:** Yes.

**MS NGUBANE ZULU:** Even if I am not looking at it.

**CHAIRPERSON:** Yes.

**MS NGUBANE ZULU:** But I can certainly confirm that I did  
10 depose to an affidavit.

**CHAIRPERSON:** That is on the 17<sup>th</sup> of May.

**MS NGUBANE ZULU:** On the 17<sup>th</sup> of May.

**CHAIRPERSON:** 2021 at...

**MS NGUBANE ZULU:** That is correct Chair.

**CHAIRPERSON:** At – at Durban North – in a police station, is that right?

**MS NGUBANE ZULU:** That is correct.

**CHAIRPERSON:** No, no a Commissioner of Oaths HydePark by the Sea?

20 **MS NGUBANE ZULU:** That is correct.

**CHAIRPERSON:** Did you – is that correct? Okay all right. It is an affidavit that has got one, two, three pages and on the fourth page it is just your signature as well as the Commissioner's certificate or certification, is that correct?

**MS NGUBANE ZULU:** That is correct Chair.

**CHAIRPERSON:** That is correct.

**MS NGUBANE ZULU:** I can confirm that that is my hand there.

**CHAIRPERSON:** Yes. I think let us go ahead.

**ADV HULLEY SC:** Thank you Mr Chair.

**CHAIRPERSON:** We will accept that this is the one.

**ADV HULLEY SC:** Now according to your affidavit you confirm here that you had been dealing with a matter – an investigation ...

10 **CHAIRPERSON:** Maybe – maybe we should just admit this affidavit.

**ADV HULLEY SC:** Pardon me Mr Chair.

**CHAIRPERSON:** You confirm that the contents and – of that affidavit are to the best of your knowledge true and correct Ms Ngubane Zulu?

**MS NGUBANE ZULU:** I do Chair.

**CHAIRPERSON:** Yes. You – you would like me to admit it.

**ADV HULLEY SC:** Please.

**CHAIRPERSON:** As exhibit what?

20 **ADV HULLEY SC:** It is Exhibit RR7.6 Mr Chair.

**CHAIRPERSON:** RR7?

**ADV HULLEY SC:** Point 6.

**CHAIRPERSON:** Point 6.

**ADV HULLEY SC:** Thank you Mr Chair.

**CHAIRPERSON:** The affidavit of 17 May 2021 by Ms

Sibusisiwe Nkosinomusa Ngubane which starts at page 163 will be admitted as an exhibit and marked as Exhibit RR7.6. Yes continue.

**ADV HULLEY SC:** Thank you Mr Chair. Now Ms Ngubane Zulu in the affidavit you speak at paragraph 4 of the circumstances in which you came to – to deal with this matter and you say if I might read for your benefit.

“That in 2009 I was approached by Mr Sezo Mchunu who was the Provincial Secretary at  
10 the time.”

**CHAIRPERSON:** Well – well she might just want to tell us the story.

**ADV HULLEY SC:** Yes.

**CHAIRPERSON:** Maybe you might just let her do that because she does not have the affidavit.

**ADV HULLEY SC:** Thank you Mr Chair.

**CHAIRPERSON:** Maybe you can say in – Ms Ngubane Zulu you are a practicing attorney is that correct? Are you a practicing attorney?

20 **MS NGUBANE ZULU:** Yes I am.

**CHAIRPERSON:** When – from when have you been practicing as an attorney?

**MS NGUBANE ZULU:** I have been in practice from 2007.

**CHAIRPERSON:** Okay.

**MS NGUBANE ZULU:** If I am not mistaken.

**CHAIRPERSON:** Okay. In 2009 in which law firm were you practicing as an attorney?

**MS NGUBANE ZULU:** I was practicing at Ngubane Wills Incorporated.

**CHAIRPERSON:** Yes. Were you a partner in that firm at that stage?

**MS NGUBANE ZULU:** That is correct Chair.

**CHAIRPERSON:** Okay. You remained in that firm for up to when or are you still in that firm?

10 **MS NGUBANE ZULU:** I remained in that firm up to now.

**CHAIRPERSON:** Yes.

**ADV HULLEY SC:** And I also work as a legal – yes.

**CHAIRPERSON:** Okay all right. Mr Hulley.

**ADV HULLEY SC:** Thank you Mr Chair.

**CHAIRPERSON:** Do you want to take it from there.

**ADV HULLEY SC:** Thank you Mr Chair. Now if I understand correctly your firm represents the ANC KwaZulu Natal, is that correct?

20 **MS NGUBANE ZULU:** Yes the firm at the time represented the ANC in KwaZulu Natal.

**ADV HULLEY SC:** And in 2009 you were approached by Mr Senzo Mchunu in relation to an investigation that was being conducted by the SAPS relating to a donation, is that correct?

**MS NGUBANE ZULU:** That is correct. At the time I was

dealing with other matters on behalf of the ANC and Mr Senzo Mchunu was the Provincial Secretary and approached our service urgently to deal with an urgent request that had been received by the ANC from the SAPS who were investigating a certain matter.

**ADV HULLEY SC:** Now if I understand correctly from your affidavit in fact Mr Wills was dealing with the matter as well.

**MS NGUBANE ZULU:** That is correct. So maybe just to give clarity Mr Wills is – is the criminal law specialist and I  
10 deal with a lot of you know...

**CHAIRPERSON:** Civil.

**MS NGUBANE ZULU:** I always dealt with the civil matters and also the litigation. So in this instance when we got the instructions obviously the instructions were to the firm and the bulk of the matters relating to this and further consultations and instructions were given directly to Mr Wills. But at the time I was asked by the client to confirm you know a specific matter through the – you know the preparation of an affidavit.

20 **ADV HULLEY SC:** Now if I understand correctly the – your law firm made contact with the investigating officer whose details have been provided to you by Mr Mchunu. Is that correct?

**MS NGUBANE ZULU:** Yes. The details of the investigator were provided at the time and Chair I must maybe also

apologise and indicate to yourself that you know this was obviously in 2008/2009 and one may not have the exact recollection but you know all the details at the time but the – between myself and Mr Wills the investigator was contacted and he basically indicated that there was an ongoing investigation and they required confirmation that the ANC had in fact received a donation of R1 million from you know at the time. So that was basically the enquiry – they were just looking for confirmation that a R1 million had  
10 been received by the ANC.

**CHAIRPERSON:** Maybe let us put it this way so you can just tell the story as it happened – as you remember it if that is fine. Mr Hulley.

**ADV HULLEY SC:** Thank you Mr Chair.

**CHAIRPERSON:** Is it correct that in 2009 you handled a matter on behalf of the ANC in the course of which you prepared an affidavit that was to be signed and was actually signed by Mr Delani Mzila? You remember the – handling such a matter?

20 **MS NGUBANE ZULU:** Yes that is correct Chair I do remember the matter.

**CHAIRPERSON:** Can you tell me how that came about and what happened and whether – how it came about that Mr Mzila signed that affidavit and we know that he also signed another one later on and you might not have been involved

in the drafting of the second one. Can you just tell how the story happened.

**MS NGUBANE ZULU:** Thank you Chair. I – as I have indicated I was contacted by Mr Senzo Mchunu who was the Provincial Secretary at the time for the African National Congress indicated that he had received a call from an investigator who was looking into a certain matter and they required confirmation that an amount of R1 million had been donated to the African National Congress in KwaZulu Natal  
10 Province.

We then together with my colleague Mr John Wills reached out to the investigator. Once again Chair as I indicated I could not recall the name of the investigator when you know I consulted with Mr Hulley but he did indicate to me that the investigator was Colonel Du Plooy and I accept that and also once we had spoken to him we then obviously were able to go back to – I went back to Mr Mchunu the Provincial Secretary at the time and I informed him you know of exactly what the issue was.

20 He was then of the view that the – because the manner...

**CHAIRPERSON:** Maybe let us start by you – to tell us what the investigating officer said. What information were you looking for and what did he tell you as you recall?

**MS NGUBANE ZULU:** So the – so as far as I can recall



Chair the investigator I cannot remember all the details but I can certainly confirm that the investigator was looking for confirmation from the ANC that an amount of R1 million had been received as a donation. So that was the crux of the matter and what the investigator was looking for. And he did indicate that there was an ongoing investigation and Chair I would want to also indicate that I mean I – I have no recollection of the details of the investigation.

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

10 **MS NGUBANE ZULU:** Or – yes.

**CHAIRPERSON:** Ja continue.

**MS NGUBANE ZULU:** But the issue was just the confirmation.

**CHAIRPERSON:** Yes.

**MS NGUBANE ZULU:** Of receipt by the ANC KwaZulu Natal of the R1 million donation.

**CHAIRPERSON:** Okay continue. I interrupted you when you said after speaking to the investigator you went back to Mr Mchunu and what happened?

20 **MS NGUBANE ZULU:** Thank you Chair. I then went back to Mr Mchunu as the person who had basically sought our assistance just to give him feedback that we had engaged with the investigator and he had clarified exactly what information he was looking for.

He then indicated that because this related to fund

raising issues that is basically a matter that would be dealt with by the finance office through the Provincial Treasurer and the Provincial Treasurer at the time was Mr Mike Mabuyakhulu.

**CHAIRPERSON:** Yes.

**MS NGUBANE ZULU:** He – he then obviously I did brief them that the matter was urgent and the – the investigators were just looking for this confirmation and therefore there needed to be cooperation which he did not have any  
10 difficulty with and he immediately contacted Mr Mike Mabuyakhulu just to bring to his attention that there was this request which came from you know the investigator.

Mr Mabuyakhulu then said it is fine he will engage with myself and Mr John Wills just to give us background and basically confirm if such monies were received.

Chair I do not remember if once again I need to clarify this I do not remember if I then met with Mr Mabuyakhulu on the very same day or if the arrangement was made and then we engaged at some point but I can  
20 confirm that we did engage and it was a very brief engagement because from what I understand is that further engagements were held with my colleague and partner Mr John Wills.

But I can then as stated in my affidavit Mr Mabuyakhulu then did confirm that he indeed the African

National Congress KwaZulu Natal had received a donation of R1 million and that this was basically received as part of preparations for the ANC conference – Provincial Conference.

And he also – Chair I do not have full recollection but if you look at the affidavit because now having looked at it years later.

**CHAIRPERSON:** Yes.

**MS NGUBANE ZULU:** You know the – the affidavit has  
10 very, very specific you know statements that are there.  
Firstly the affidavits...

**CHAIRPERSON:** Which affidavit are you talking about?

**MS NGUBANE ZULU:** The affidavit that Mr Mzila deposed to.

**CHAIRPERSON:** Okay all right. Continue.

**MS NGUBANE ZULU:** I am not sure Chair Mr Hulley would want to admit that affidavit first?

**CHAIRPERSON:** We will look at it later but I just want you to tell what happened.

20 **MS NGUBANE ZULU:** Sure.

**CHAIRPERSON:** As naturally as you can.

**MS NGUBANE ZULU:** Thank you Chair. Then – because if you look at the content of the affidavit it clearly states that firstly the – the donation had been made by a certain Doctor somewhere and secondly that such a donation was received

through Mr Sipho Shabalala. Now that is contained in an affidavit and obviously as a – as a you know a legal practitioner those would be instructions that you receive from client and then you know we would prepare an affidavit based on instructions that client has received.

I then obviously enquired ...

**CHAIRPERSON:** Well – oh well I ...

**MS NGUBANE ZULU:** As part of...

**CHAIRPERSON:** Before we go to the affidavit your  
10 engagement with Mr Mabuyakhulu is it that engagement from which you indicated or you put in – information in Mr Mzila's affidavit that the donation that was spoken about came from Dr Savoy? So in other words where did that – who in the ANC told you about that?

**MS NGUBANE ZULU:** Chair there were two people that were ANC representatives who gave information that is – or content that is contained in that affidavit that I directly engaged with. It was Mr Mabuyakhulu and Mr Mzila and I – I believe that the bulk of the affi – of the content had been  
20 given to myself by Mr Mabuyakhulu. Because at a later stage I then spoke to Mr Mzila to basically – maybe Chair if I can just continue from where I left off?

**CHAIRPERSON:** Ja continue ja.

**MS NGUBANE ZULU:** But those are the two individuals that actually gave information that formed part of the content

that is in the affidavit Chair.

**CHAIRPERSON:** Yes continue then. So you got the information from Mr Mabuyakhulu and what were your instructions in terms of what to do now that you had spoken to Mr Mabuyakhulu?

**MS NGUBANE ZULU:** Once I had spoken to Mr Mabuyakhulu he then – so I – I asked if you know there were – there were – there was proof or any documentation such as an acknowledgment letter or any element just  
10 confirming receipt of this donation. He then requested that I must actually engage with the Mzila who is responsible for the financial administration of the – the ANC office – Provincial office. I then – and he also indicated that because of Mr Mzila's position he is the one – he was the one who was going to depose to the affidavit.

And Chair I must highlight that this was nothing unusual because having done work for the ANC over the years they – once you have consulted with them as client they would then make a determination on who will depose to  
20 an affidavit.

For example if it is a matter that relates to Ethekeini region they will say, the regional secretary will sign the affidavit but this would follow various consultations. So it was nothing unusual and we have done that previously. And hence then I engaged with Mr Mzila to basically now say to

him, Mr Mzila these are the instructions that we have received and this is the background that is – they have been advised that you are going to depose to the affidavit by the Provincial Treasurer and Mr Mzila at the time appeared to me as someone who had full knowledge of the matter because he did indicate that yes indeed the – the Provincial Treasurer had engaged him on the matter.

I then – I remember certainly Chair that some of the information that I obtained from Mr Mzila was just to – for  
10 completeness of the affidavit, his qualifications and which informed me that he possessed a Bcom degree and I also specifically – because in as much as I knew that he worked in the ANC office, I was not certain of his job title. He then gave that to me and advised that he was the finance manager but throughout the discussions – so there was no other opposition, or any other issues raised. We went through, as the Chair would have seen, the affidavit is a simple two-pages that basically confirms that the donation was received, that it had come from a certain Dr Savoy,  
20 and it had been received through Mr Sipho Shabalala and that was basically the confirmation.

And it was then emailed to Mr Mzila and Mr Mzila – at the time, I was based in Pietermaritzburg and the investigator was in Durban. So, I then asked Mr Mzila to go through the affidavit – in fact, telephonically we

engaged on it because it was just a basic affidavit and then completed it and then I emailed it through to him and he – and I asked him to print it out and get it signed and commissioned and delivered to the investigator at the time to which he agreed. So, that was basically the events on my side, Chair.

**CHAIRPERSON:** Mr Hulley.

**ADV HULLEY SC:** Thank you, Mr Chair. Ms Ngubane-Zulu, if you could look at Bundle RR-4 at page 1843.

10 **CHAIRPERSON:** If she would be able to see that one.  
[laughs]

**ADV HULLEY SC:** By ...[intervenes]

**MS NGUBANE-ZULU:** At which page?

**ADV HULLEY SC:** At page 1843. For your benefit, Mr Chair, it is Bundle D in ...[intervenes]

**CHAIRPERSON:** Yes, I ...[intervenes]

**ADV HULLEY SC:** ...in the series(?).

**CHAIRPERSON:** I assume it is the one – the second one that is here?

20 **ADV HULLEY SC:** That is correct, Mr Chair.

**CHAIRPERSON:** Yes. Did you get the page number, Ms Ngubane-Zulu?

**MS NGUBANE-ZULU:** Chair, I am just going...

**CHAIRPERSON:** It is taking you to Mr Mzila's first affidavit. Is that correct, Mr Hulley?

**ADV HULLEY SC:** That is correct, Mr Chair.

**MS NGUBANE-ZULU:** Sorry, Chair. I am not very good with technology, and I am proving to be one of them.

**CHAIRPERSON:** [laughs]

**MS NGUBANE-ZULU:** I am now on page 15.

**CHAIRPERSON:** Yes. The page is 1843. Is that right? And this time we are looking at red numbers because there are no black numbers.

**ADV HULLEY SC:** Correct, Mr Chair.

10 **CHAIRPERSON:** Yes. Have you got it?

**MS NGUBANE-ZULU:** Yes.

**CHAIRPERSON:** Have you got it?

**MS NGUBANE-ZULU:** Yes, I am just scrolling down.

**CHAIRPERSON:** Oh.

**MS NGUBANE-ZULU:** I am now at page 166.

**CHAIRPERSON:** Okay.

**MS NGUBANE-ZULU:** I am almost there, Chair. Apologies for the delay.

**CHAIRPERSON:** [No audible reply]

20 **MS NGUBANE-ZULU:** 1843?

**ADV HULLEY SC:** That is correct.

**CHAIRPERSON:** Ja.

**ADV HULLEY SC:** Now just to identify this document. It has got the words affidavit between the tramlines and it purports to be an affidavit prepared by Mr Delani Mzila and



if you look at page 1844, the following page, it has got the details of the deponent and it has got the details of the commissioner of oaths on the following page. Now you have spoken of a document ...[intervenes]

**CHAIRPERSON:** It has got the signature of the deponent and the details of the commissioner of oaths?

**ADV HULLEY SC:** The signature.

**CHAIRPERSON:** Ja.

**ADV HULLEY SC:** Thank you, Mr Chair. And of course,  
10 the details of the commissioner of oaths. Have you seen this document before, Ms Ngubane-Zulu?

**MS NGUBANE-ZULU:** I did see it, the signed version of it, Chair. I did see it when the Commission emailed it to me.

**ADV HULLEY SC:** And is this consistent with the document that you had emailed in a draft form to Mr Mzila?

**MS NGUBANE-ZULU:** The contents, it looks – it certainly looks consistent, but although I do not recall but I doubt very much there would have been much of, you know, changes on the document because by the time I sent it to  
20 Mr Mzila we had, basically, fully discussed the content of the affidavit.

**CHAIRPERSON:** So, is the position that after Mr Mzila had signed the affidavit that you had sent to him, you did not see it because you asked him to sent it to the investigator?

**MS NGUBANE-ZULU:** That is correct, Chair.

**CHAIRPERSON:** So, you did not ask him to ...[intervenes]

**MS NGUBANE-ZULU:** So ...[intervenes]

**CHAIRPERSON:** You did not ask him to send you a signed copy?

**MS NGUBANE-ZULU:** No, Chair.

**CHAIRPERSON:** Ja.

**MS NGUBANE-ZULU:** I did not get a signed copy. I am not sure, Chair, if maybe a signed copy was at some point  
10 sent to my colleague ...[intervenes]

**CHAIRPERSON:** Yes.

**MS NGUBANE-ZULU:** But I did not receive the signed copy.

**CHAIRPERSON:** Okay, but you have had a chance to read this document, is that right?

**MS NGUBANE-ZULU:** Yes, I have Chair.

**CHAIRPERSON:** Does it accord with what – with the content of the affidavit that you had prepared and sent to Mr Mzila?

20 **MS NGUBANE-ZULU:** That is correct, Chair.

**CHAIRPERSON:** Okay, continue Mr Hulley.

**ADV HULLEY SC:** Thank you, Mr Chair. Now you had an opportunity to chat with Mr Mzila about this affidavit subsequently. Is that correct?

**MS NGUBANE-ZULU:** That is correct, Chair.

**ADV HULLEY SC:** And could you tell us about the nature and the content of the discussion that the two of you had and when it took place?

**CHAIRPERSON:** Yes, and when it took place.

**MS NGUBANE-ZULU:** So, once again, Chair, I do not have the exact recollection when that discussion between myself and Mr Mzila took place. Firstly, it was not a formal meeting where, you know, he had arranged to meet with me, or I had done the same. I was, basically, you know  
10 attending to other work or in other instructions at the ANC office and I saw Mr Mzila, who basically indicated, and we had a very cordial relationship. You know, greet each other all the time.

So, we had bumped into each other, and he had indicated that he just wants to speak to me quickly. You know, I must come pass when I am done. Come pass his office when I am done with my other work. So, that is exactly what I did. I went pass his office and Mr Mzila then raised, you know, an issue which was a bit surprising to me  
20 at the time because he indicated that he had, basically – he reminded me about the affidavit, you know, that he was – he had deposed to and I said: Yes, obviously, I remember.

And he said: You know what? He realises that he should not have done that. That is a highly complex

matter, and he has been talking – he has been discussing it with even other, you know, comrades. And he has been warned because he does not have much of a background around matters arising there from and does not have direct knowledge of what happened. And you know, he - Mr Mzila is a very, you know, he is funny guy, so to speak.

So, you know, he just said: Shu! You know, I almost got myself into trouble. I said: What do you mean? He said: Shu, you almost got me, you know, arrested. You  
10 know, but in – obviously, we were discussing this in isiZulu, Chair, you know. And he said, obviously, this was just too much. He did not understand. And I said: Oh, okay. And he said: No, no, no. But he has resolved the matter. You know. Because I was quite concerned.

And I did not have much, you know, background around what his concerns were and what the new developments were. So, I then asked him, you know, what had happened and then he said: No, the matter has now been resolved. He has given – he has, basically,  
20 submitted another affidavit clarifying his position around the matter.

And you know I was quite relieved and that was basically the – and I just assured him, obviously, I am not as, you know, he is someone that I knew within the ANC office but also I had, you know, the obligation as a legal

representative that if the matter had been raised with me, I would have, actually, you know, insisted that we discuss it as I had been instructed by the ANC provincial leadership and would have discussed it.

And that was the end of the matter, but at the time when we discussed it, he seemed to be quite comfortable because he felt that he had put on record, you know, and given background or clarified certain issues that needed to be clarified.

10 **ADV HULLEY SC:** Right. So, if I understand your testimony correctly. He had explained to you that he had prepared a subsequent affidavit?

**MS NGUBANE-ZULU:** Yes.

**ADV HULLEY SC:** In which he provided that clarity?

**MS NGUBANE-ZULU:** Yes, and he did – he even informed me that he had done so independently in his personal capacity, and he did it – because I was also quite interested. I think that is also important because I was just wondering if, you know, the same matter had been  
20 given to, you know, other lawyers had been instructed to deal with the matter.

And he said, no, he had done so independently, and he secured the services of a Mr Gulu(?) to – just to help him put together, you know, an affidavit, clarifying, you know, the issues that needed to be clarified.

**ADV HULLEY SC:** And when you refer to Mr Gulu that had assisted him in preparing that affidavit, are you referring to a legal representative?

**MS NGUBANE-ZULU:** Yes, that is correct.

**ADV HULLEY SC:** And Mr Gulu, according to your affidavit, he was an attorney, is that right?

**MS NGUBANE-ZULU:** That is what I understood. Yes, that is correct.

**ADV HULLEY SC:** Now... So, you yourself was not  
10 involved in any way in the preparation of a second affidavit, according to your testimony, is that correct?

**MS NGUBANE-ZULU:** No, I was not Chair.

**ADV HULLEY SC:** And did you ever get to – did Mr Mzila provide you with a copy of the second affidavit at all?

**MS NGUBANE-ZULU:** Not at all, Chair.

**ADV HULLEY SC:** Thank you, Mr Chair.

**CHAIRPERSON:** So, as I understand your position. Are you saying, one of the things that you – part of the information that you were given before preparing  
20 Mr Mzila's first affidavit was that the donation that the ANC had received or had been made by Dr Savoy, is that understand of your evidence correct?

**MS NGUBANE-ZULU:** Chair, I am not sure at what point the name of Dr Savoy and Mr Shabalala, you know, came up.

**CHAIRPERSON:** Yes.

**MS NGUBANE-ZULU:** Because I know when I saw the affidavit now, I had no recollection of, you know, the discussion around, for example, Mr Sipho Shabalala.

**CHAIRPERSON:** H'm?

**MS NGUBANE-ZULU:** But I was reminded by the affidavit. What I can confirm, Chair, is that firstly, the content of the affidavit was based on instructions that, you know, we had received from client and being the ANC Kwazulu-Natal and  
10 the two individuals that I had personally engaged with in relation to the contents of the affidavit were Mr Mike Mabuya Gulu and Mr Delani Mzila.

**CHAIRPERSON:** Okay.

**MS NGUBANE-ZULU:** So, the entire content came from the two individuals.

**CHAIRPERSON:** Yes. You say you could not remember the name of Mr Shabalala being told to you. Is that correct? But you saw ...[intervenes]

**MS NGUBANE-ZULU:** Yes. Now, obviously, years later  
20 ...[intervenes]

**CHAIRPERSON:** Yes.

**MS NGUBANE-ZULU:** ...I could not recall the, you know, the names, but when I looked at the affidavit, I am quite certain of this, that that would have been based on instructions that we received at the time.

**CHAIRPERSON:** Oh, is what you are saying that prior to you seeing Mr Mzila's affidavit that was supplied to you by the Commission, you would not – you did not remember whether Mr Shabala featured in this thing, in this matter, but after you had seen it you remembered that he had featured, or is the position that you just see it here in the affidavit, his name, but you have no recollection, even now, that it did feature then?

**MS NGUBANE-ZULU:** No, Chair. Prior to being supplied  
10 with the affidavit, I did not have recollection, but after seeing the affidavit, I can certainly confirm that the content of the affidavit was based on instruction that came from client.

**CHAIRPERSON:** Yes. Now, between Mr Mabuyakhulu and Mr Mzila, who had told you that the donor or donation had come from Dr Savoy, if anybody did say that to you?

**MS NGUBANE-ZULU:** Chair, I would be lying. I do not have the exact recollection ...[intervenes]

**CHAIRPERSON:** Yes.

20 **MS NGUBANE-ZULU:** ...of who said what.

**CHAIRPERSON:** Yes.

**MS NGUBANE-ZULU:** You know, once I remembered, you know ...[intervenes]

**CHAIRPERSON:** Yes.

**MS NGUBANE-ZULU:** ...even before looking at the



affidavit and what I am certain of is that there was confirmation that the donation was received and that was basically common cause, you know, between Mr Mzila and Mr Mabuyakhulu at the time, because like I said earlier, when I engaged with Mr Mzila, I remember he specifically said that: No, when I was trying to just give him the background to say why, you know, I am making contact with him and, you know, and he indicated that, yes, indeed, he had engaged with Mr Mabuyakhulu.

10           So, there was no dispute in my view around the content of the affidavit, but I cannot exactly say that this, you know, is what was said by this individual, but there was certainly instructions that I got from Mr Mabuyakhulu that caused for a draft confirming receipt of the amount of a donation to be done and then the second discussion or engagement took place with Mr Mzila, just confirming, you know, the contents of the affidavit or inserting whatever details that required to be inserted.

**CHAIRPERSON:** Well, I see that in your affidavit to the  
20 Commission in paragraph 5 you say the following in the first line:

“After I briefed Mr Mabuyakhulu about the request from the investigator, he confirmed to me that the ANC KZN had indeed received a donation of R 1 million from a certain Dr Savoy

when they were preparing for one of the ANC conferences.

I asked him if there was any proof of this donation being made or an acknowledgment sent to the donor.

He advised that such administration would have been handled by Mr Delani Mzila who deals with day-to-day ANC finance matters.

10 Mr Mabuyakhulu then requested me to assist with drafting the affidavit, confirming receipt of this donation, as he was certain that it had been received.

He also advised that Mr Delani Mzila would be the deponent and will accordingly sign the affidavit once he confirmed the details in his records regarding the receipt of a donation...”

So, here you are specific that it was Mr Mabuyakhulu who said that indeed the ANC KZN had received a donation of R 1 million from a certain Dr Savoy when they were  
20 preparing for one of the ANC conferences? Is that correct? Is that not correct? What is the position?

**MS NGUBANE-ZULU:** Chair, that affidavit was basically confirming the content of the affidavit that I had received from the Commission that Mr Mzila had deposed to. I want to be very cautious and not just a portion, you know, the

content of the affidavit for certain to any individual because at the time there was no dispute around it and I do also accept the content of Mr Mzila's affidavit, the later one, which obviously I have now – because I do not have evidence of what was the understanding, his understanding at the time.

Safe for the fact that I relied on the fact that he held a certain position within the ANC, and he basically confirmed with me that a discussion had taken place with  
10 Mr Mabuyakhulu. And he understood, basically, you know, the content of the affidavit, but I do not want to, basically, say in this instance, this is what I was told by Mr Mabuyakhulu and/or Mr Mzila.

But I want to confirm that jointly, after having consulted with Mr Mabuyakhulu, I – the content was also confirmed by Mr Mzila who then deposed to the affidavit. So, those were the instructions, in my view, that came from the ANC as a client.

**CHAIRPERSON:** Well, in this paragraph, you are not –  
20 you did not equivocate, you are not uncertain. Your sentence is quite clear. You say:

“After I briefed Mr Mabuyakhulu about the request from the investigator, he confirmed to me that the ANC KZN had indeed received a donation of R 1 million from a certain

Dr Savoy...”

Are you now saying that is not true?

**MS NGUBANE-ZULU:** Chair, I am not saying that is not true. What I am saying is that that confirmation, I am certain it had come from – maybe in the affidavit, I specifically said it came from Mr Mabuyakhulu. What I even informed the evidence leader was that I am certain that there was confirmation of the donation that was received.

10 I then – my memory was assisted by having sight of the actual affidavit by Mr Delani Mzila because then that is what put me in a position to actually confirm that. I would not want to, you know, approach a specific information or allegation to, you know, either one of them but rather to say I have consulted with the one and then I did not consult with the second one and the content of the affidavit was confirmed by both parties and then it was deposed to by Mr Mzila.

**CHAIRPERSON:** So, must – how must I read this  
20 sentence of your affidavit then? Must I read it in a manner that says you do not know whether Mr Mabuyakhulu was the one who said that the ANC had received a donation of R 1 million from a certain Dr Savoy? Must I read it on the basis that you do not know whether he said that, or how must I read it to mean?

**MS NGUBANE-ZULU:** Chair, I would request that it be read as these were the instructions that came from the ANC as a client and the consultation of the information would have come from two parties and that is what I can certainly confirm that it was Mr Mabuyakhulu and Delani Mzila who basically gave the content of the affidavit, and it was put together as such.

So, the instructions – maybe what I should said in the affidavit is that the ANC did indeed confirm that, you know, it had received the donation and that the donation had come from Dr Savoy. Chair, unfortunately, this was 2008 and I have tried, and I had the same engagement with the evidence leader, and I said I cannot, you know, outright say this is what Mr Mabuyakhulu said, this is what Mr Mzila said.

The only issue that I remember certainly is that Mr Mabuyakhulu could not contribute any content because he said he does not have information in relation to this and referred me to the relevant office which was the finance office in this instance.

**CHAIRPERSON:** So, is your position, as you give evidence, that it was one of two people ...[intervenes]

**MS NGUBANE-ZULU:** That is correct.

**CHAIRPERSON:** ...who told you told the donation had been received – a donation of R 1 million had been

received from a certain Dr Savoy, and you are saying it is either – it was either Mr Mabuyakhulu or Mr Mzila. Is that what you are saying?

**MS NGUBANE-ZULU**: That is correct, Chair.

**CHAIRPERSON**: H'm. Now, did you prepare the affidavit before speaking to Mr Mzila or meeting with him or did you prepare it only after you had met him?

**MS NGUBANE-ZULU**: So, to be ...[intervenes]

**CHAIRPERSON**: [Indistinct]

10 **MS NGUBANE-ZULU**: Mr Mzila – I contacted – the first engagement was with Mr Mabuyakhulu, Chair.

**CHAIRPERSON**: H'm?

**MS NGUBANE-ZULU**: Thereafter, a draft was prepared. And that is the point I am trying to make, Chair, that I cannot exactly say that at the time of engaging with Mr Mzila, paragraph A and B and C were already there. I cannot confirm that. And hence I then needed to then engage with Mr Mzila and take him through the instructions that I had received at the time, and he appeared to be very  
20 much aware.

And I got further information from him - what I have definite recollection of is that Mr Mzila gave me, obviously, his educational background and his position at the ANC office at the time, but the discussion – there was nothing that was disputed at the time or contrary to, you

know – basically, there were no contradictions around the instructions at the time.

Because by the time I was explaining myself to Mr Mzila to say that this is what, you know, has happened. We received the instructions, we engaged with the provincial secretary, thereafter the provincial treasurer. He confirmed that he was aware of such engagement.

**CHAIRPERSON:** Yes. I may be mistaken but I understood Mr Mzila's second affidavit to say that he did not have  
10 personal knowledge of the donation, other than what he was told by Mr Mabuyakhulu. Is that your understanding as well of – part of what his affidavit says?

**MS NGUBANE-ZULU:** That is the understanding, Chair, that I now have.

**CHAIRPERSON:** Yes.

**MS NGUBANE-ZULU:** And it is in the second affidavit.

**CHAIRPERSON:** Yes, yes.

**MS NGUBANE-ZULU:** And because I do not have background, I have no reason to actually dispute, you  
20 know, the content of his affidavit.

**CHAIRPERSON:** Yes, yes. Okay, Mr Hulley. Anything?

**ADV HULLEY SC:** Thank you, Mr Chair. Just one further point. The affidavit that you prepared on the 17<sup>th</sup> of May of 2021, that particular affidavit, Ms Ngubane-Zulu, who did you prepare that affidavit? Did you consult with anybody

before you prepared that affidavit?

**MS NGUBANE-ZULU:** I did not consult with anybody. What I did, Chair. I think it is very important to mention this, that because these were instructions that came from, you know, client, I did alert the current Provincial Chairperson, Mr Sihle Zikalala that I have been – I have received a notice to appear before the Commission and that would be dealing with matters relating, you know, the ANC and the – you know, a donation that was received. He  
10 then, you know, accepted, and indicated that it appears they have in the office or what. I am not sure if it was himself or someone else in the office had already received that notice so that confirmation I got from Mr [indistinct].

**ADV HULLEY SC:** And when you say that when you had a consultation with the evidence leaders you are referring to a consultation that took place the Saturday, is that correct?

**MS NGUBANE ZULU:** That is correct.

**ADV HULLEY SC:** But when you prepared this affidavit  
20 did you have an consultation with the evidence leader when you were preparing this affidavit?

**MS NGUBANE ZULU:** No, I did not.

**CHAIRPERSON:** Are you talking about her affidavit to the Commission?

**ADV HULLEY SC:** Correct, Mr Chair.



**CHAIRPERSON:** Okay. Or the answer is you did not, ja.

**MS NGUBANE ZULU:** The first contact that I made with the evidence leader was on – well, initially there were emails that were sent last week and therefore we confirmed my appearance for today and we arranged for a consultation to take place on Saturday evening.

**ADV HULLEY SC:** Thank you, Mr Chair, I have no further questions.

**CHAIRPERSON:** Okay, thank you very much, Ms Ngubane  
10 Zulu, thank you for having availed yourself, you are now excused.

**MS NGUBANE ZULU:** Thank you, Chair.

**CHAIRPERSON:** Okay, alright. Do I need to adjourn for a few minutes before you can get Mr Mzila?

**ADV HULLEY SC:** He is on the screen already.

**CHAIRPERSON:** Okay, shall we just continue?

**ADV HULLEY SC:** Thank you, Mr Chair.

**CHAIRPERSON:** Okay.

**ADV HULLEY SC:** Mr Chair, I think we have sufficient  
20 context of what Mr Mzila's evidence is about.

**CHAIRPERSON:** Yes, yes, yes, so you should be quite short with him.

**ADV HULLEY SC:** It should be short, if he could be sworn in.

**CHAIRPERSON:** Yes. Good evening, Mr Mzila.

**MR MZILA:** Good evening, Chairperson.

**CHAIRPERSON:** Yes, thank you for availing yourself to assist the Commission. The registrar will administer an oath or affirmation to you now.

**MR MZILA:** Okay, Chairperson. I am not (indistinct – recording distorted)

**CHAIRPERSON:** Oh, okay, alright. Are you legally represented or not? You are not represented.

**MR MZILA:** Yes.

10 **CHAIRPERSON:** Okay, alright. Okay, she will administer the oath or affirmation to you. Okay, continue?

**REGISTRAR:** Will you be taking the oath or affirmation?

**MR MZILA:** The oath.

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

**MR MZILA:** Denali Mzila.

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

**MR MZILA:** No.

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

**MR MZILA:** Yes.

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

**DELANI MZILA:** So help me God.

**CHAIRPERSON:** Thank you. Are you left-handed, Mr Mzila?

**MR MZILA:** No.

**CHAIRPERSON:** She said raise your right hand and you raised your left hand.

**MR MZILA:** Oh, okay.

**CHAIRPERSON:** Okay, alright.

**ADV HULLEY SC:** Mr Chair, I know that Mr Mzila had  
10 requested the opportunity to testify through an interpreter.  
I understand that one was arranged, it was – I understand  
that he is also going to be linking in virtually because Mr  
Mzila is from Kwazulu-Natal. We understand that if we get  
an interpreter from Johannesburg it often causes problems.

**CHAIRPERSON:** And the paperwork that needs to be  
done, has it been done?

**ADV HULLEY SC:** I understand that ...[intervenes]

**CHAIRPERSON:** Whenever there is an interpreter we  
should have that done.

20 **ADV HULLEY SC:** I understand that the interpreter has  
been sworn in, he was the gentleman that testified  
previously – sorry, that we used previously and whom you  
commended.

**CHAIRPERSON:** Where is the paperwork relating to him?

**ADV HULLEY SC:** I understand that given the lateness of

the hour because the request only came through, if I understand correctly, today. But the paperwork itself had not been prepared. But I understand that the interpreter, the specific interpreter has been sworn in previously by you, Mr Chair.

**CHAIRPERSON:** Ja, but I need to see whether that is factually true.

**ADV HULLEY SC:** Yes. Could I ask that the matter stand down briefly, Mr Chair, in order to sort out this.

10 **CHAIRPERSON:** What is his name, the interpreter? You do not have the name?

**ADV HULLEY SC:** We will provide you with his details in a moment, Mr Chair.

**CHAIRPERSON:** I wanted to see whether it is going to ring a bell. I know a certain interpreter that we used when Mr Mahlangu – was it Mr Mahlangu?

**ADV HULLEY SC:** I believe so, Mr Chair.

**CHAIRPERSON:** That would have been done under your work stream.

20 **ADV HULLEY SC:** That was under my work stream, I believe it is the same interpreter.

**CHAIRPERSON:** Ja, that is going to delay us. Mr Mzila, are you intimidated by the language that is used in this forum? You think you will not manage answering questions in English?

**MR MZILA:** No, I will try, Chairperson.

**CHAIRPERSON:** Hey?

**MR MZILA:** But I will try, Chairperson.

**CHAIRPERSON:** But I do not want you to feel that you have to use English if you really wish to use isiZulu, but I am just asking. Sometimes people say well, I do know English it is just that maybe sometimes legal terms might give me problems.

**MR MZILA:** Comrade Chairperson because (indistinct –  
10 recording distorted)

**CHAIRPERSON:** I think, Mr Mzila, you think you are in an ANC meeting now, you said Comrade Chairperson.

**MR MZILA:** Oh, sorry.

**CHAIRPERSON:** Okay, so maybe let us stand down for five minutes.

**ADV HULLEY SC:** Thank you, Mr Chair.

**CHAIRPERSON:** Let us see if we can sort this out. Obviously this should have been sorted out much earlier.

**ADV HULLEY SC:** It ought to have been, Chair, I  
20 apologise for that.

**CHAIRPERSON:** Ja.

**ADV HULLEY SC:** Unfortunately, the request only came through today.

**CHAIRPERSON:** Ja, okay, I will stand down for about five minutes.

**ADV HULLEY SC:** As it pleases you, Mr Chair.

**CHAIRPERSON:** If the documentation is not here we might have to see what – how we are going to handle this. I do not want us to lose a lot of time.

**ADV HULLEY SC:** Thank you, Mr Chair.

**CHAIRPERSON:** We adjourn.

### **INQUIRY ADJOURNS**

### **INQUIRY RESUMES**

**CHAIRPERSON:** You have a report back for me, Mr  
10 Hulley?

**ADV HULLEY SC:** Thank you, Mr Chair. Mr Chair, I have confirmed with both the interpreter, Mr Kulekani Zoto as well as with the witness, Mr Mzila, that they will be available for Thursday, if we could sort out the paperwork in the interim.

**CHAIRPERSON:** Yes. Okay, Mr Mzila, there is some paperwork that should have been ready with regard to the interpreter that might delay things now whereas there is another witness that I must still hear. So I am happy that  
20 you and the interpreter have agreed to be available at some stage on Thursday. The exact time you will be told and then we can then have your evidence at that time. Once your evidence does it should not take long, it should be a short time.

**MR MZILA:** Okay.

**CHAIRPERSON:** Is that fine?

**MR MZILA:** Okay, thank you, Chairperson.

**CHAIRPERSON:** Okay, alright and thank you to the interpreter as well. Thank you, you are both excused now.

**ADV HULLEY SC:** Thank you, Mr Chair.

**INTERPRETER:** Thank you, Chairperson.

**CHAIRPERSON:** Thank you. Okay. Then I can release you as well.

**ADV HULLEY SC:** Thank you, Mr Chair, I will appreciate  
10 it.

**CHAIRPERSON:** Yes.

**ADV HULLEY SC:** If I can tender apologies of course for the mishaps.

**CHAIRPERSON:** Yes.

**ADV HULLEY SC:** But unfortunately the request only came through this morning.

**CHAIRPERSON:** Yes. Okay, no, that is fine, that is fine. I am going to adjourn for a short time to enable the Eskom work stream to set up before we proceed. We will adjourn  
20 for five minutes. We are adjourned.

#### **INQUIRY ADJOURNS**

#### **INQUIRY RESUMES**

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

**ADV SELEKA SC:** Good evening, Chairperson.

**CHAIRPERSON:** Are you ready? We have had some delay but let us start as soon as possible.

**ADV SELEKA SC:** Yes, we are ready, Chairperson.

**CHAIRPERSON:** You are ready.

**ADV SELEKA SC:** We are ready indeed. Mr Prish Govender is the next witness.

**CHAIRPERSON:** Yes.

**ADV SELEKA SC:** Mr Govender is represented by counsel and an attorney.

10 **CHAIRPERSON:** Yes.

**ADV SELEKA SC:** Maybe they could place themselves on record before the affirmation or oath is taken.

**CHAIRPERSON:** Yes, they may do so from where they are if their microphones are working.

**ADV DORFMAN:** Thank you, Chair, Danie Dorfman is the name. I have appeared in front of you previously.

**CHAIRPERSON:** Yes.

20 **ADV DORFMAN:** I am representing Mr Govender on instruction of Messrs Logan Naicker Attorneys to the left of me.

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

**ADV DORFMAN:** Mr Chair, can I perhaps just to guide us in how we move forward with our business and it might expedite the process, if I may?

**CHAIRPERSON:** Yes, yes.



**ADV DORFMAN:** Mr Chair, we were being handed large bundles of documents from about quarter to three yesterday afternoon until quarter past nine last night.

**CHAIRPERSON:** Yes.

**ADV DORFMAN:** There was comforting session between Mr Govender and Mr Seleka in the presence of my attorney around about six o'clock where certain topical issues were identified. It is the understanding that Mr Seleka will focus his attention on leading the evidence of Mr Govender with  
10 reference to those topical issues. We are ready to address those. If issues arise that falls outside the ambit of those topical issues that was discussed last night, it may require some indulgence to allow Mr Govender to address that.

**CHAIRPERSON:** Yes.

**ADV DORFMAN:** At least that we have sufficiently covered the aspects that this Commission is interested in and that we can move on with our business.

**CHAIRPERSON:** Okay. No, that is fine, that is fine. Okay, registrar, please administer the oath or affirmation.

20 **REGISTRAR:** Please state your full names for the record?

**MR GOVENDER:** Prishotham Govender.

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

**MR GOVENDER:** No, I do not.

**REGISTRAR:** Do you consider the oath to be binding on

your conscience?

**MR GOVENDER:** 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.

**PRISHOTHAM GOVENDER:** So help me God.

**CHAIRPERSON:** Thank you, Mr Govender and thank you for availing yourself, Mr Govender, to assist the  
10 Commission.

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

**CHAIRPERSON:** Mr Seleka?

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

**CHAIRPERSON:** Well, for the benefit of the public, I think you may just take a few minutes to say what areas Mr Govender's evidence will cover. Ja.

**ADV SELEKA SC:** Yes. Thank you, Chair. Mr Govender submitted an affidavit that traverses matters beyond what we intend focusing this evening. The focus of this  
20 evening's evidence is on the McKinsey Trillian transactions in particular the corporate plan and what has been referred to as the service level agreement. Both those transactions were being negotiated almost simultaneously in 2015. The one was concluded in December 2015 and the other one, being the corporate plan, December 2015, and the service

level agreement or the Master Services Agreement purportedly concluded in 2016. Mr Govender would testify before the Commission about the role he played in respect of those two transactions and also about other persons who would have played a role along with him, outline to the Chairperson the nature of that role.

**CHAIRPERSON:** Okay.

**ADV SELEKA SC:** And in particular the reasons why – how the payments were made to Trillian.

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

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

**CHAIRPERSON:** You can go ahead.

**ADV SELEKA SC:** Before we go ahead, let me do housekeeping issues. Mr Govender's affidavit, Chairperson, is contained in Eskom bundle 14(d) and the affidavit is found on page 13.33.

**CHAIRPERSON:** Yes.

**ADV SELEKA SC:** Mr Govender you should follow as well, page 1333.

20 **MR GOVENDER:** I am there, Chair.

**ADV SELEKA SC:** Thank you. The affidavit starts on that page and it carries on until page 1354. If you would please go there? 1354, are you on that page, Mr Govender?

**MR GOVENDER:** I am, Chair.

**ADV SELEKA SC:** Yes. There is a signature there above deponent. Is that your signature?

**MR GOVENDER:** That is correct, Chair.

**ADV SELEKA SC:** Do you confirm this to be your affidavit?

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

**ADV SELEKA SC:** Do you confirm the correctness of the contents of your affidavit?

**MR GOVENDER:** I do.

10 **ADV SELEKA SC:** Thank you. Chairperson, I beg leave to have the affidavit of Mr Govender admitted as EXHIBIT 43.1 together with the annexures thereto.

**CHAIRPERSON:** Is there a letter before 43?

**ADV SELEKA SC:** EXHIBIT U43.1. Thank you, Chair.

**CHAIRPERSON:** The affidavit of Mr Prishotham Govender, it starts at page 1333 is admitted as an exhibit and will be marked as EXHIBIT U43.1.

**AFFIDAVIT OF PRISHOTHAM GOVENDER HANDED IN AS EXHIBIT U43.1**

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

**CHAIRPERSON:** Before you proceed, Mr Seleka, last week when we sat in the evening there was an issue that one staff member or technician would need to leave at half past seven in order to make it home before the curfew and I asked the question whether we would be able to continue in

his or her absence with the others who would be able to stay maybe up to eight, there was nobody who could give an answer. I need to find out what constraints we have and it looks like the people who are supposed to be here who should be able to tell me are also not there now and that is exactly what happened last time. So the people from the Commission who are supposed to sit behind you, Mr Seleka, Reverend Stemela is not here today.

**ADV SELEKA SC:** The investigator will look for...

10 **CHAIRPERSON:** Will try and find out.

**ADV SELEKA SC:** Ja.

**CHAIRPERSON:** Okay, let us continue.

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:** So that we all are on the same page as to how much time we are going to be here.

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

**CHAIRPERSON:** Okay, alright, let us continue in the meantime.

20 **ADV SELEKA SC:** Thank you, Chair. Mr Govender, some extensive evidence has been led on the Trillian/McKinsey matter before the Commission. There are certain issues that the Commission would like you to clarify and I am going to ask you questions in relation to those issues but feel free to explain to the Chairperson, if you need to, elaborate, explain, clarify relative to the questions I will be asking you.

So I would like to start with the corporate plan, Mr Govender, because you do say in your affidavit that you had been asked by Mr Koko to put together a contract in regard to the corporate plan and to put together documentation for the approval of the appointment of McKinsey. Do you recall that?

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

**ADV SELEKA SC:** Ja, just keep your microphone on. Just keep it on, yes. Could you – do you confirm that that  
10 is what happened, that you received instructions from Mr Koko to do that?

**MR GOVENDER:** That is correct, Chair.

**ADV SELEKA SC:** Ja. Did you put together the contract and the documentation for approval?

**MR GOVENDER:** Chair, just to – maybe if I could elaborate a little bit? And I apologise, I should have been looking at you, Chair. The contract – there was a couple of things happening in that point of time. We were nearing the end of the negotiations on the Master Services  
20 Agreement and if you would recall, that is the bigger contract. At the same time, during September, there was a request from Mr Koko that I work with the procurement team because I was engaging with McKinsey at the time as part of the negotiations of the MSA that I work with the procurement team to put together this contract on a sole

supplier basis. Two, on an urgent basis complete the corporate plan that needed to be done.

So the acting Commodity Sources General Manager was a gentleman by the name of Mr Charles Kalema. Mr Kalema assigned a procurement specialist to assist with the necessary documentation that needed to be put in place. I, in turn, had top engineers working with me on the negotiation process on the MSA. I assigned one of those top engineers to work with – and the lady must please  
 10 forgive me but it was Mokolya...Maybe you can help me there, Adv Seleka.

**ADV SELEKA SC:** Which paragraph?

**MR GOVENDER:** Her first name was Siamo.

**CHAIRPERSON:** Well, let us find out what page you are on.

**MR GOVENDER:** Chair, I am on page 1347.

**ADV SELEKA SC:** Yes, paragraph?

**MR GOVENDER:** 46.

**CHAIRPERSON:** What paragraph?

20 **MR GOVENDER:** 46, Chair.

**CHAIRPERSON:** Yes and ...[intervenes]

**MR GOVENDER:** Somewhere in the middle of the paragraph you will see Mr Kalema had signed, Mr Siamo.

**ADV SELEKA SC:** Makolwane.

**MR GOVENDER:** Makolwane. So Ms Makolwane assisted

with the documentation because they had the templates and knew exactly what information needed to be put in there and the proposal sent by McKinsey, which is referenced on paragraph 45, was used by and large as the basis for the documentation that was prepared.

**CHAIRPERSON:** I may have missed this because we are going straight to the important issues.

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:** But I think it is important for you to state  
10 what position you held at Eskom at that time.

**MR GOVENDER:** Sure, Chair. At this particular time I was project director in the Group Capital division and reported – my direct line of report was Mr Abram Masango.

**CHAIRPERSON:** Okay.

**ADV SELEKA SC:** Yes, I have also seen in your affidavit that you have referred to Mr Mabelane as your direct reporting line.

**MR GOVENDER:** Yes.

**ADV SELEKA SC:** So could you clarify the position, I  
20 think it's in the paragraph that I am looking for. Oh, on page 1388.

**CHAIRPERSON:** Well, he will remember it off by heart.

**MR GOVENDER:** I do.

**CHAIRPERSON:** Ja.

**MR GOVENDER:** I do not remember it off by heart but I



know what Advocate is talking about, Chair.

**CHAIRPERSON:** Ja, when were you reporting to Mr Mabelane, when were you reporting to Mr Masango?

**MR GOVENDER:** Sure. Chair, without taking the Commission's time, this is always long stories but in 2014 Eskom was experiencing a crisis with diesel deliveries to our Ankerlig and Gourikwa plants in Mossel Bay and Cape Town. At that time I was project director within the Group Capital division and I was requested by my boss who was  
10 at that time Mr Dan Morakane to assist Mr Koko in the space of commodity sourcing to by and large make sure those deliveries, and it was close to about 155 trucks that were delivered on a daily basis to the Ankerlig site, for example, to assist to with that process to make sure the necessary diesel deliveries get to the site and I then held my role in Group Capital, as project director and supported Mr Koko as the Acting General Manager for Commodity Sourcing.

That role continued – I think Mr Koko was  
20 suspended early in 2015. Mr Mabelane then acted in Mr Koko's place as the Group Executive for Technology and Commercial. I continued to report to Mr Mabelane.

In and around the beginning of or the end of July, beginning of August of 2015, I was asked to leave the McKinsey negotiations on the MSA and then for me it

proved very difficult to manage the Group Capital work because I had a portfolio in Group Capital that I used to look after, leave the negotiations with McKinsey and run the commodity sourcing area from a procurement process perspective. So I asked Mr Mabelane if he could – if I could not act in that role anymore, Commodity Sourcing GM, and just focus on my work in Group Capital and then also negotiate the contract with McKinsey and that was prudent as well because then the process issues get dealt  
10 with by the procurement specialists.

**ADV SELEKA SC:** So in this position of General Manager Commodity Sourcing prior to the suspension of Mr Matshela Koko, you were reporting to him?

**MR GOVENDER:** For a very short period of time, Chair.

**ADV SELEKA SC:** Okay, then he gets suspended.

**MR GOVENDER:** Yes.

**ADV SELEKA SC:** Then Mr Edwin Mabelane acts in his position.

**MR GOVENDER:** Correct.

20 **ADV SELEKA SC:** And then you reported to Mr Mabelane.

**MR GOVENDER:** Correct.

**ADV SELEKA SC:** So when Mr Koko comes back from suspension, I think it is 20 July 2015.

**MR GOVENDER:** Yes.

**ADV SELEKA SC:** Were you now – had you relieved

yourself from that position of General Manager Commodities?

**MR GOVENDER:** I was – sorry, Chair, I was in the process of engaging with Mr Mabelane at that time just before Mr Koko came back and Mr Mabelane finally announced the decision of me where I would stop acting as the GM for commodity sourcing I think around the 5 August or something of that – I have it on record somewhere but I can furnish that to the Commission if needs be.

10 **ADV SELEKA SC:** And so that was to allow you to perform the function of – is it a lead negotiator, to lead the negotiations in respect of the MSA contract or would be contract with McKinsey?

**MR GOVENDER:** Yes.

**ADV SELEKA SC:** Just to clarify. In Eskom terms what happens is the board delegates authority to usually an Exco member so Group Executive level member to conduct negotiations with a said company. In this case it was McKinsey and that delegated authority goes to the Group  
20 Executive that is the one that is responsible for or accountable for the negotiation process.

The negotiation process then has a lead negotiator. In this case on the MSA it was me and the team then that supports the lead negotiator also gets defined in the documentation that goes to the board but ultimately the

lead negotiator and the team that supports him, we have to then report to the delegated authority which is the Group Executive that the board has delegated.

**ADV SELEKA SC:** So who was the Group Executive?

**MR GOVENDER:** So it was initially when the mandate to negotiate, Chair, was approved by the board it was Mr Mabelane and then Mr Koko I think returned and forgive me if I do not recall the dates, Mr Koko ...[intervenes]

**CHAIRPERSON:** 18, 20 July 2015.

10 **MR GOVENDER:** Yes. Mr Koko returned and I was then also required to report to Mr Koko because he is now back in his role but also I have to say that Mr Mabelane remained involved. So Mr Mabelane went back to his old position which I think was senior general manager in the technology division and he would have also – and the technology of Eskom is where the top engineers programme sat in terms of its history in Eskom and so Mr Mabelane – I was also reporting to Mr Mabelane. So I was reporting to Mr Koko and Mr Mabelane on the progress of  
20 the negotiations.

**ADV SELEKA SC:** Well, let us first take Mr Mabelane during the time of the suspension of Mr Koko. What role did he play in the negotiations for the MSA?

**MR GOVENDER:** Mr Mabelane – the MSA needed to be set up in terms of the approvals that needed to go to the

board and if you recall, at that time I was the acting general manager commodity sourcing. So Mr Mabelane – and if, Chair, if I can go to the relevant – sorry, Chair, if we can just jump around to the MSA which is on page 1338 and specifically paragraph 20.5.

**CHAIRPERSON:** That is at 1339?

**MR GOVENDER:** Yes, sorry, Chair, yes, 1339.

**CHAIRPERSON:** Yes, continue?

**MR GOVENDER:** So whilst I was reporting to Mr  
10 Mabelane as the acting GM for commodity sourcing, Mr Mabelane presented me with – if you can see in paragraph 20.5, a memorandum that was approved by Mr Brian Molefe with regards – and it was the approval to continue with the Top Engineers programme on a self-funding basis. He then requested – then Mr Mabelane requested me to prepare the necessary board paperwork. That then went to the board and the mandate to negotiate was approved by – first it went to the Exco procurement committee and then it went to the board tender committee, the BTC, to acquire the  
20 mandate to negotiate and I think that mandate to negotiate is – and I am sure I have attached it somewhere, Chair, or if not then the Commission should have it on record in terms of the approvals that was made by the board.

**ADV SELEKA SC:** Yes.

**MR GOVENDER:** And I think there is a date in there – or

there is a date associated with the approval. I cannot remember the date.

**ADV SELEKA SC:** Yes, the meeting of the BTC.

**MR GOVENDER:** The meeting of the BTC. So the BTC approves the mandate to negotiate and there is a little bit of a period that lapses because McKinsey is getting ready for the negotiations, we are formulating Dr Weiss who was the McKinsey's – McKinsey's lead at that time in terms of the Eskom engagement. He was putting his team together,  
10 we were putting our team together, we were finding slots in our diaries to start the negotiation period.

So there was not much interaction with Mr Mabelane initially but then there was – then the negotiations happened from July till about end of August, Chair, beginning of September, let us call it middle of September and in that period there were various items that were negotiated as part of the MSA, various packages and feedback then had to be provided to the group executive for commercial and technology who then ultimately signed  
20 off the documentation that went to the BTC in October where the recommendation was to conclude the contract with McKinsey and company.

**ADV SELEKA SC:** Yes, so that resolution is of 6 July 2015 by the BTC.

**MR GOVENDER:** Sorry, Chair, is that the mandate to

negotiate?

**ADV SELEKA SC:** Ja, I think that is the mandate to negotiate.

**MR GOVENDER:** To negotiate, correct, yes.

**ADV SELEKA SC:** Well, let us – I am going to do this for you so that you can see exactly the focus of where we are at this stage. So you, in respect of the MSA, the instructions you say you received from Mr Mabelane to prepare the documentation for submission, is that correct?

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

**ADV SELEKA SC:** And the documentation were prepared on the basis that the appointment will be made on a risk basis.

**MR GOVENDER:** That is correct, Chair.

**ADV SELEKA SC:** As opposed to a rate basis, a fee rate basis.

**MR GOVENDER:** That is correct, Chair.

**ADV SELEKA SC:** And can you tell the Chairperson when about was this, Mr Govender?

20 **MR GOVENDER:** When about the documentation was prepared?

**ADV SELEKA SC:** Yes.

**MR GOVENDER:** In about June, July.

**ADV SELEKA SC:** June, July 2015?

**MR GOVENDER:** '15, ja. Just before – it would have

been prepared before the board actually approved the mandate to negotiate.

**ADV SELEKA SC:** Okay. Now I have seen in your affidavit that the risk base option was a route taken against the backdrop of lack of funding in the sense that you say this project had started in 2013/2014 but it stopped because there was no funding and so it was decided that let us do a risk based self-funding model and proceed with the project. Is that correct?

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

**ADV SELEKA SC:** So in which event the requirement to budget for a transaction would be – would not apply, would be avoided.

**MR GOVENDER:** Chair, that is not entirely correct because the board provided us with a mandate to negotiate on a risk basis or self-funding basis.

When we went through the negotiations with McKinsey, McKinsey wanted as part of that process certain upfront payments to mobilise their teams and to actually  
20 set up operations and so forth and so on and in the feedback to the board we, as part of the negotiation process, also included where the negotiation team did not fully align with the board's mandate and we were clear in the documentation to the board that one of the things that we did not align on with McKinsey was the issue of them



wanting some upfront payments and that was fed back to the board.

So, as a company, you would say then well, we now certainly have to budget – if the board approves that, we certainly have to budget for these upfront payments because over time it will net off as McKinsey makes the savings.

**ADV SELEKA SC:** Yes, okay. I do not quite correctly follow that. I understand a down payment McKinsey – saw  
10 it, I think it was 460 million.

**MR GOVENDER:** Yes, yes.

**ADV SELEKA SC:** But the contract was said to be zero, of zero value because it was self-funding.

**MR GOVENDER:** Correct.

**ADV SELEKA SC:** And the main thing as I think you indicate in your affidavit was that this contract was pitched on the basis that it will be a self-funding contract, it will be risk-based as you say.

**MR GOVENDER:** Correct.

20 **ADV SELEKA SC:** Because there was no funding in 2014 to carry on with it. So my question to you was because there is a requirement in your policy to have a finance person approve that there is a budget or confirm that there is a budget for this transaction before you can do the transaction. If it is now self-funding contract, that

requirement would be avoided, that that is what I am saying to you and I want to know from you whether is that correct or not?

**MR GOVENDER:** If there was no upfront or R416million of up-front payments that was required by the service provider then there would not be a need for us to set up a budget.

**ADV SELEKA SC:** Now there is an issue – well before I get to that issue, can I ask you, before I forget, about  
10 whether Mr Koko himself, I asked you about Mr Mabalane in the negotiations, what role he played if any, let me ask you the same question in regard to Mr Koko. Did he play any role in these negotiations?

**MR GOVENDER:** Yes Chair when – and I cannot recall the exact the date but – now off-hand, but as we were proceeding with the negotiations we were getting to the end, and if you recall I mentioned September was when we were starting to reach the end of the negotiation process.

I think it was end of August Mr Koko asked the team  
20 led by myself for an update as to where we are with the negotiation process and he was particularly interested in obviously moving the program along and what no - where were we with everything and the team then assisted me to pen Mr Koko a letter, giving him a full account of everything and every aspect of the entire negotiation

process.

So, that was one interaction, the other interaction with Mr Koko is I sent him the service level agreement, which we were also Chair progressing in parallel with the negotiations. So if you recall, the service level agreement became the eventual contract. So we were progressing completing the service level agreement and there was interaction between Eskom legal and McKinsey's legal in terms of progressing the SLA. That is the one - the other  
 10 issue and there is a couple of other engagements that I cannot recall offhand but I do have on record, which I can provide to the Commission if needs be.

**ADV SELEKA SC:** Yes, if you could please provide us with that it will be appreciated. Are these emails or also reports?

**MR GOVENDER:** Will do, Chair.

**ADV SELEKA SC:** Yes, I was asking whether is it emails or reports as well?

**MR GOVENDER:** Oh, sorry advocate, no, they are emails  
 20 and attachments.

**ADV SELEKA SC:** Okay.

**CHAIRPERSON:** Okay, before we proceed, Mr Seleka, did you get an answer?

**ADV SELEKA SC:** I got the answer Chair that, yes, some persons will leave at half past seven but we are – I

understand able to continue until half past eight.

**CHAIRPERSON:** Okay.

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:** Okay, no that is fine, thank you very much to the staff and technicians for their cooperation. Okay, let us continue.

**ADV SELEKA SC:** Thank you, then Mr Governor, let me go to the issue. Would you have been familiar with the Eskom directive on cost containment? It is the July 2014  
10 directive of Eskom that seeks to implement the National Treasury instruction of 1/2013/2014. In terms of which, when we go into it, in terms of which you could only appoint consultants on a fee basis and not on a risk basis. Were you familiar with that?

**MR GOVENDER:** Chair, if you ask me no, do I know it in detail the answer is probably not but that document was very topical at the time we were concluding the MSA, very topical. So I do not know the details of it because the procurement team were the practitioners that kept up to  
20 speed with all of those type of documents.

**CHAIRPERSON:** Can I take you back to the earlier topic that Mr Seleka asked you about as for one question. Was Mr Koko's involvement during the negotiations limited to what you have said, namely, just asking for report backs, reports from you?

**MR GOVENDER:** Chair, that is why I say to you I cannot recall but let me go back through my information and see what is the full extent that I can provide you.

**CHAIRPERSON:** Okay.

**ADV SELEKA SC:** Well, can I also ask you this question, do you know whether or not he engaged with the Regiments employees in the negotiation process?

**MR GOVENDER:** Chair, not to my knowledge I do not have - I would not know.

10 **CHAIRPERSON:** So, is the answer that you do not know?

**MR GOVENDER:** I do not know, Chair.

**CHAIRPERSON:** Okay.

**ADV SELEKA SC:** As the leads negotiator, did you engage with McKinsey officials?

**MR GOVENDER:** Correct.

**ADV SELEKA SC:** Did you also engage with Regiments officials?

**MR GOVENDER:** Correct?

**ADV SELEKA SC:** Which ones?

20 **MR GOVENDER:** So, Chair let me give you some background. We had negotiated all of the packages, except one package, which was the balance sheet unlocking activities and the balance sheet unlocking activities, we only started negotiating that with McKinsey in and around the beginning of November 2015.

At the time, McKinsey introduced two individuals in particular, it was Mr Wood and Ms Mothepo, right because McKinsey used at the time, Regiments which was where Ms Mothepo and Mr Wood initially came from and McKinsey had explained to us as the negotiating team, that Trillian - a company called Trillian was being formed and they would ultimately become McKinsey's subcontractor and that people from - and I think there is a I remembered now in the Labour Relations Act, there is a particular section that deals with that where you transfer employees...[intervene]

**ADV SELEKA SC:** Yes, the Chairperson also knows it.

**CHAIRPERSON:** The Chairperson also knows it.  
[laughing]

**MR GOVENDER:** But on the on that basis, there were employees that were being transferred...[intervene]

**CHAIRPERSON:** That is 197.

**MR GOVENDER:** Correct, that was being transferred from Regiments into the Trillian company and that is how we started engaging with Ms Mothepo and Mr Wood initially, and then we proceeded with the balance sheet unlocking package negotiations during the month of November.

**ADV SELEKA SC:** Okay, that November 2015?

**MR GOVENDER:** Correct, Chair.

**ADV SELEKA SC:** Yes, so the - you say the directive was

topical, at that stage.

**MR GOVENDER:** Yes.

**ADV SELEKA SC:** Because you would recall that it had to do with National Treasury approval, that if you are deviating from the directive, and in this case, the deviation being appointment on a risk basis was supposed to be a feed this basis, you did not require National Treasury approval, you recall all that?

**MR GOVENDER:** Correct, Chair.

10 **ADV SELEKA SC:** Mr Koko has come and said that approval was not obtained.

**MR GOVENDER:** The deviation?

**ADV SELEKA SC:** Yeah, the approval to deviate.

**MR GOVENDER:** Yes.

**ADV SELEKA SC:** He said it was not obtained.

**CHAIRPERSON:** Do you agree that the approval from National Treasury was not obtained to authorise the deviation, is that your understanding?

**MR GOVENDER:** A formal deviation, approval was not  
20 acquired from National Treasury.

**CHAIRPERSON:** Was not acquired or required?

**MR GOVENDER:** Not acquired.

**CHAIRPERSON:** Okay.

**MR GOVENDER:** Yes.

**CHAIRPERSON:** So you agree with Mr Koko on that?

**MR GOVENDER:** Yes, yes.

**CHAIRPERSON:** Okay.

**ADV SELEKA SC:** Yeah, because to get an approval, you must do a request in writing and in fact, the National Treasury instruction says to obtain the approval they have to engage the Presidency and receive the consent of the Presidency for the deviation, were you aware of that?

**MR GOVENDER:** Yes, I was aware of that because Mr Mabalane explained it to me remember at that time, and  
10 when we were going through all of this processes he - and I think it was in late 2015, there was an organisational change. So, group technology and commercial kind of like splits where commercial, the commercial part of it fell under a chief procurement officer who reported into the chief financial officer.

And the technology division to my understanding was that he joined the Generation. So Mr Koko was I think became the Head of Generation and Technology and then Mr Mabalane became acting CPO, chief procurement  
20 officer and then CPO.

**CHAIRPERSON:** So, you have said that the National Treasury approval was not obtained, but what you say about whether it was required, it should have been okay. Are you able to say that - to say whether it was a requirement or was it not a requirement?



**MR GOVENDER:** Chair, let me give you my account of what was happening at the time regarding this whole process and forgive me if I have limited knowledge and understanding all of this...[intervene]

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

**MR GOVENDER:** ...the National Treasury stuff, but in the process of running the negotiations, and in my feedback report to Mr Koko the negotiation team was of the view that this deviation application would be required for the risk  
10 based contract, and it is in the report to Mr Koko, as well. And as we had - as we went forwards, in terms of the process, and I am trying to think about how do I shorten it for you Chair, because it is quite a long story and it is actually also covered in my affidavit to some extent.

**CHAIRPERSON:** Well, you - in terms of my question, you can just give your understanding whether your understanding was that it was compulsory to obtain the approval of National Treasury in order to have the deviation or your understanding was that it was not  
20 compulsory to get it, or you do not know.

**MR GOVENDER:** Chair at the time when I submitted or when I submitted the report to Mr Koko, and even at the time when we fed back to the Board, and I think it was - that was in September 2015. In terms of the feedback from the report, my understanding was at that time that the

deviation was required.

**CHAIRPERSON:** Okay and did that change at some stage? **MR GOVENDER:** Yes, Chair and I can explain that to you as well.

**CHAIRPERSON:** Ja.

**MR GOVENDER:** Maybe I will wait for Mr Seleka, I do not want to...[intervene]

**CHAIRPERSON:** Okay, maybe to finalise this point, do you want to explain whether it changed and how it changed?  
10

**MR GOVENDER:** Yes, Chair so basically, this issue kicked around because there was an understanding in Eskom from I think the compliance officer who worked in legal that this deviation was being - that was required. McKinsey did some of their own research, submitted an opinion from themselves, and then eventually in the beginning of December, submitted an opinion from Ledwaba and Mazwai, forgive me if I get the name wrong Chair.

20           Where it said that this practice notes or there was a practice note if I could recall it correctly was where it allowed for this risk based contract – it allowed Eskom to enter this risk based contract was still - was valid. So you could, you know, valid in terms of Treasury and National Treasury, and Eskom could actually enter this contract on a

risk basis. What happened the time was that Eskom was not happy with that view, Eskom...[intervene]

**CHAIRPERSON:** That is enter this contract without the approval of National Treasury?

**MR GOVENDER:** Yes, because you can in terms of the other rules of National Treasury.

**CHAIRPERSON:** But what you are telling me now is what the McKinsey opinion was saying.

**MR GOVENDER:** Correct, Chair.

10 **CHAIRPERSON:** You are not giving your own...[intervene]

**MR GOVENDER:** No, no.

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

**MR GOVENDER:** Eskom was not happy with that obviously and then Eskom legal also suggested that we get a separate opinion and I think the separate opinion came from Advocate Kennedy, if memory serves me correct and in that opinion there was some - my understanding from Mr Mabalane there was some uncertainty regarding whether the practice note that allows for the risk based for Eskom  
20 to enter into this risk based contract was actually still in place, or it was repealed.

So, eventually what happened was in and around the beginning of February of 2016 Mr Mabalane sent to Mr Kalema and Mr Dave Gorey, the two procurement practitioners to National Treasury to ascertain whether this

practice note that allowed Eskom to enter into a risk based contract was still valid and they came back with a view firstly, verbally that this practice note was valid and then I think, Mr Gorey it is - I am sure I put it into my affidavit, if I did not, I am sure I have got the information somewhere.

Mr Gorey sent Mr Tshitangano, if memory serves me correct.

**CHAIRPERSON:** The head of legal?

10 **MR GOVENDER:** No, no.

**CHAIRPERSON:** The head of the legal department?

**MR GOVENDER:** No, no Mr Tshitangano worked at National Treasury in the procurement - was the chief director, or even procurement department and I think he – not I think I know he asked Mr Tshitangano whether this practice note was valid, and Mr Tshitangano replied.

Now I then asked the guys the procurement team, including Mr Mabalane...[intervene]

**CHAIRPERSON:** And he replied to say what?

20 **MR GOVENDER:** It is still valid that Eskom can use the risk based contract or practice note was valid, implicit in the practice note was one of the contracting methodologies was risk based contracting.

**CHAIRPERSON:** So as you understood it, did Mr Tshitangano say Eskom could conclude this contract

without obtaining National Treasury approval?

**MR GOVENDER:** Chair...[intervene]

**CHAIRPERSON:** Or did he say you still need National Treasury approval to conclude this kind of contract?

**MR GOVENDER:** He did not say that – and I...[intervene]

**CHAIRPERSON:** You are not sure.

**MR GOVENDER:** You have the and maybe we can go to that.

10 **ADV SELEKA SC:** Yes, the email, well the page...[intervene]

**CHAIRPERSON:** Ja, you can proceed, ja.

**ADV SELEKA SC:** Yeah, the page and the paragraph is 13, in the affidavit, I beg your pardon 1340.

**CHAIRPERSON:** Page 1340 that is where I am.

**ADV SELEKA SC:** Paragraph 20.13.

**CHAIRPERSON:** Yes:

20 “In February 2016 Mr Dave Gorey senior manager commercial and Mr Charles Kalema acting General Manager of commodities sourcing met with Mr Solly Tshitangano of the National Treasury, Mr Gori has effected and in fact mailed to Mr Tshitangano on or about 4 February 2016 inquiring as to whether that his Note 3 of 2003, which deals with risk based payment basis is still valid and effective and later that day he received an electronic mail from Mr

Tshitangano confirming that the aforesaid practice note is still valid. Please see attached hereto.”

That is what you wanted to refer to.

**MR GOVENDER:** Yes, I wanted to highlight to you that issue, yeah.

**ADV SELEKA SC:** And Chair, maybe we should go to those annexures.

**CHAIRPERSON:** Ja.

**ADV SELEKA SC:** The annexures, E and 7, which is page  
10 1399. Is that where you are Mr Govender? So there are two emails on that page.

**MR GOVENDER:** That is correct, Chair.

**ADV SELEKA SC:** The one in the middle of the page is for Mr Dave Gorey Thursday February 4 2016, to Mr Solly Tshitangano, CC Charles **Kalema**, subject is practice Note number SCM3 of 2003. The email reads:

“Good afternoon Solly.

Thank you for your hospitality this morning we look forward to further productive engagements in the  
20 future. As we discussed please confirm for us that practice Note number SCM3 of 2003 entitled appointment of consultants is currently valid and effective for public entities such as Eskom. We understand that this practice notes and others will be incorporated into a new set of regulations once

the review process has been completed.”

And he says:

“Best regards.

Dave Gorey.”

And the email above, I believe is a reply from Mr Tshitangano, correct? Just remember to speak to the mic.

**MR GOVENDER:** Sorry, Chair, that is correct.

**ADV SELEKA SC:** Yes, which that is a – yeah it is a reply on the 4<sup>th</sup> of February 1523, Dave Gorey is being replied to  
10 and CC’s is Charles Kalema, Vukani Ndaba, Sindele Mxunyelwa, and he says:

“Dear Dave.

Practice Note 3 of 2003 is still applicable until replaced with new instructions after the promulgation of the new Treasury regulations. The retainer/ contingency fee principles are not clearly outlined in the practice notes. If you intend applying them, you need to do some further work to ensure that you do not compromise the principles of  
20 Section 217 of the Constitution and other legislation.”

But did...[intervene]

**CHAIRPERSON:** Oh, that surname where you were saying Mxunyelwa, Mr Seleka.

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

**CHAIRPERSON:** It is Mxunyelwa, M-x-u-n-y-e-l-w-a, Mxunyelwa, when you say Mxunyelwa it means something completely different, it is another meaning. Fortunately for you, it is a nice meaning.

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

**CHAIRPERSON:** So you will not be sued, okay alright. You want to see okay, alright.

**ADV SELEKA SC:** Thank you, Mr Govender, did you have sight of this emails at the time?

10 **MR GOVENDER:** Absolutely, Chair.

**ADV SELEKA SC:** Did you understand what is meant by retainer/contingency fee principle?

**MR GOVENDER:** I, assumed at the time, Chair - with Mr Gorey and what that meant and his view was that aligned to the basis for the contracts in terms of MSA that we were negotiating.

**ADV SELEKA SC:** But did you understand it?

**MR GOVENDER:** Yes, Chair I understood it to be that.

**ADV SELEKA SC:** Yes, to be what?

20 **MR GOVENDER:** To be the contract, the type of contract we were negotiating with McKinsey.

**ADV SELEKA SC:** That it is a contingency fee contract?

**MR GOVENDER:** That it is a risk based contract.

**ADV SELEKA SC:** A risk based contract?

**MR GOVENDER:** Yes.



**ADV SELEKA SC:** Is it the same as contingency?

**MR GOVENDER:** I am not sure Chair but my view when I asked Mr Gorey about this, he says – he said to me, that is the case.

**CHAIRPERSON:** Now what was your understanding of a risk based contract?

**MR GOVENDER:** That - my understanding of a risk based contract is that you enter into a contract with a party that continues to work, generates value and then based on  
10 whatever parameters you negotiate with that company in terms of a success fee, that portion gets paid off to that company.

**CHAIRPERSON:** Okay. So, if there is no success, there is no fee?

**MR GOVENDER:** Correct, Chair.

**CHAIRPERSON:** Ja, and that is the risk?

**MR GOVENDER:** Yes.

**CHAIRPERSON:** Okay.

**ADV SELEKA SC:** Yes, now, the practice note, which is  
20 referred to there is 3 of 2003.

**MR GOVENDER:** Yes, Chair.

**ADV SELEKA SC:** But Eskom by this time, this is now 2016 that is even before the approval, I mean, after the approval by BTC to conclude the contract, by this time Eskom had adopted for implementation the National

Treasury instruction of one, 2013/2014 much, which comes much later after this practice note, which you say you were aware of it is the Eskom document.

How did Eskom deal with that aspect of the practice, of the directive in relation to what they received from Mr Solly here? Because in terms of the directive cost containment, it is mandatory. You are required to contract on a risk – on a fee rate basis. Failing, which ask for a deviation from National Treasury.

10           So how did you as the lead negotiator or even the executive - the team you were working with deal with this aspect within Eskom?

**MR GOVENDER:**   Yes, Chair maybe I could explain the issue of whether we proceed with the contract or seek the deviation was an issue that was dealt with by the procurement department and Mr – and specifically Mr Mabalane. When we received this feedback from Mr Tshitangano I did not know how you, ja Tshitangano.

**MR GOVENDER:**   Tshitangano.

20   **ADV SELEKA SC:**   He will be more in trouble than I was, Chair.

**CHAIRPERSON:**   H'm.

**MR GOVENDER:**   I am sorry if I offended anybody.

**ADV SELEKA SC:**   No, I am saying you will be more in trouble than I was.

**MR GOVENDER:** I discussed the specific issue with Mr Mabalane and I said, I asked him. How does this now allow us to continue with the contracts with McKinsey. If you recall at this stage already...[intervene]

**CHAIRPERSON:** In other words, were you saying how does this 2003 practice note or instruction allow us to proceed with this contract in circumstances where we are aware of the 2013 directive?

**MR GOVENDER:** Correct, Chair.

10 **CHAIRPERSON:** That is the question you were facing, ja.

**MR GOVENDER:** Correct, Chair. So if you recall by this stage, Mr Mabalane had already signed in December 2015 a notice to proceed with McKinsey and company on the MSA and I do not recall the exact wording but when he signed that notice to proceed - and I am sure it is on record somewhere in the pack, he - we were still unsure about whether we could proceed on the risk basis or not.

20 So in - and maybe we must just find that Chair, so that I could read it out to you but basically in that document, or notice to proceed he said that if we cannot continue with this, on this risk based approach, we will have to come back to the drawing board and that is the basis he signed it.

Now we fast forward and we go into February. There is this engagement at National Treasury, the team

comes back with this email. I discuss it with Mr Mabalane and say to him, how does this allow us to continue, number one, as per your question, in light of the fact you still got this 2014 and National Treasury guidelines 2013 directives instructions and the second part was, what does Mr Tshitangano, not to get myself into trouble - mean when he says...[intervene]

**CHAIRPERSON:** Mr Tshitangano.

**MR GOVENDER:** Yes, Mr Tshitangano what does he mean  
10 with regards to further work in terms of not compromising Section 217 of the Constitution because I think that is covered somewhere in the PFMA, if I am not making a mistake.

**CHAIRPERSON:** Yes.

**MR GOVENDER:** So there were discussions between Mr Mabalane, Mr Gorey and Mr Kalema and then Mr Mabalane came back to me and said, look we - this practice note the fact that it is valid and it covers the risk based contracting approach, and it is not been - in his view not been  
20 superseded by the 2013/2014 guidelines or practice directive that we – he is happy that we could go ahead with the contract. And I am sure if you – if you – if Mr Mabelane would be much more proficient than – and explaining this to you.

**CHAIRPERSON:** Ja.

**MR GOVENDER:** Chair than – than I am but that was my understanding. So they were happy and the second part they were happy with was that this – this issue of the Section 217 was dealt with and I – I then asked the question, should we not have gotten something more formal back from National Treasury? You know instead of an email. Could there not have been a natural approval and the comment was, this is how they dealt with National Treasury and they have dealt with a number of transactions where  
 10 they have got feedback through emails on direction to follow with the procurement department and National Treasury and they followed that.

**ADV SELEKA SC:** You have be – because you see his writing is also not particularly clear and he says the retainer/contingency fee principles are not clearly outlined in the practice note. And then he goes on to tell you:

“If you apply them you need to do some further work to ensure that you do not compromise the principles of Section 217 of the Constitution and other legislation.”

20 Now when he says they are not clearly outlined in the practice note did anybody go back to him and say, what do you mean?

**MR GOVENDER:** I do not know Chair – I do not know.

**ADV SELEKA SC:** In regard to the principles of Section 217 of the Constitution did you understand what he was

referring to?

**MR GOVENDER:** I merely asked the question in terms of what was the issue with the – with the 217 and both Mr Gori and Mr Mabelane confirmed that we – that this was not an issue for us – this section but I did not – I did not fully understand what it meant.

**ADV SELEKA SC:** You know it is competitive tender process.

**CHAIRPERSON:** So what Mr Seleka is doing is just for your  
10 information to tell you what the gist of Section 217 is. You understand that it requires that every organ of state that seeks to acquire goods or services that it should do so in a manner that is fair, that is cost effective, that is transparent and there is a fourth requirement.

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:** So that is competitive process that it requires. Okay. Mr Seleka.

**ADV SELEKA SC:** And here so – so seen instead was the approach followed.

20 **MR GOVENDER:** Correct Chair.

**ADV SELEKA SC:** Let me accelerate Mr Govender. I saw in the minutes you were part of the Steerco – the Steering Committee.

**MR GOVENDER:** Yes Chair.

**ADV SELEKA SC:** Yes.

**MR GOVENDER:** Yes Chair.

**ADV SELEKA SC:** I saw in the minutes of the first meeting.

**MR GOVENDER:** Yes.

**ADV SELEKA SC:** And I can open to it if you cannot recall where you giving feedback something to the effect that you told the Steerco that you have received Treasury approval for the conclusion of the MSA.

**MR GOVENDER:** Chair...

**ADV SELEKA SC:** Shall I open it?

10 **MR GOVENDER:** Yes, yes can we go to that.

**ADV SELEKA SC:** This Eskom Bundle 14(c). Page 875.33. – 875.33 is the minute of the 9<sup>th</sup> of February 2016 – minutes of the Top Consultants Program Steering Committee. So once you have found them please go to page 87536 paragraph 8.

**MR GOVENDER:** I have it Chair.

**ADV SELEKA SC:** Yes. It says:

“A high level MS overview. A high level overview of MSA was given by Prish”

20 Is that yourself?

**MR GOVENDER:** That is – that would be me Chair.

**ADV SELEKA SC:**

“He informed the committee a letter of ...”

**CHAIRPERSON:** That is at what paragraph of the minutes?

**ADV SELEKA SC:** 8 – paragraph 8 Chair. Oh Mr Govender

also speaks at paragraph 7 you do not need to go to 7.

**CHAIRPERSON:** Oh you are at 8 okay. Now I can see 8.

**ADV SELEKA SC:** Yes.

“So a high level review of the MSA was given by Prish. He informed the committee the letter of acceptance was issued to McKinsey in November 2015. National Treasury approved confirmation of the contract methodology for the risk base approach for the chief procurement officers’ office.”

10                    That is the statement I am referring to.

**MR GOVENDER:** Yes I do admit the English is not very precise but this – this feedback that I provided was discussed with Mr Mabelane before the Steering Committee and you would see Chair that as part of the attendance Mr Mabelane was there, Mr Gori was there, Mr Kaleema who had – who were the procurement officials that we are looking after the process. And this is the – this is what we aligned on in terms of giving feedback to the Steering Committee and – and that was accepted by the procurement  
20 officials as well because this sought – this confirmation of – in – captured in that email that came from ...

**ADV SELEKA SC:** Mr (inaudible)

**MR GOVENDER:** Yes. Was what was articulated in paragraph 8 of the minutes.

**ADV SELEKA SC:** Yes but there is a – there is a clash or



contradiction in the two positions is it not? Because the way the team of Eskom interpreted Mr Solly's email was to the effect that we do not need Treasury approval because practice note 3 of 2003 still applies. But your reporting says the opposite. It says:

"We in fact have received."

Well I am heading my words there.

"We have received National Treasury approval for this methodology of a risk based contract."

10 **MR GOVENDER:** But not in terms of a deviation approval.

**ADV SELEKA SC:** Ja that is what you need to explain because we see your statement – your statement I think to put it mildly cannot be correct with reporting.

**MR GOVENDER:** My understanding was Chair at the time in engagement with the – the procurement people and Mr Mabelane is that we could – based on the email that Eskom received we could go ahead and contract McKinsey on a risk based approach. We could go ahead with that contract that was negotiated and that what – that is what I was trying  
20 to articulate here. I was not trying to suggest that Eskom went and acquire a deviation from National Treasury or – and in fact further to what I said previously where I asked why can we not something – a letter from National Treasury. My understanding and what I presented here was that we – it was the – the opinion of the Treasury – oh sorry it was

the opinion of the procurement practitioners that this contracting methodology was something that Eskom could go ahead with.

**ADV SELEKA SC:** So – are you saying the statement was just not ...

**MR GOVENDER:** I do not –

**ADV SELEKA SC:** Was just not nicely captured.

**MR GOVENDER:** Well ...

**ADV SELEKA SC:** You reflect that in.

10 **MR GOVENDER:** The English across all of these things are not 100% accurate but I am – I am telling the Chair what my understanding was and what I actually said to the committee. And I – and if I was wrong in what I said the procurement officials we were with – could have easily raised their hands and said, but you know to the chairman of the Steering Committee what Mr Govender is not entirely correct. This is – this is what really happens.

**CHAIRPERSON:** If – is the position not that what was critical for everybody was to know whether you needed the  
20 approval of National Treasury or not before you could proceed to conclude the contracts? Is that not what was in issue?

**MR GOVENDER:** Before you could conclude the contract  
Chair?

**CHAIRPERSON:** Hm.

**MR GOVENDER:** The contract you talking about was concluded in – in terms of the letter to – the notice to proceed was in December 2015. At that time there was no approval or discussions with National Treasury up until that time.

**CHAIRPERSON:** So what was the issue? Why did you ask National Treasury then in response to which they sent you this email?

**MR GOVENDER:** My understanding is because we had this  
10 two...

**CHAIRPERSON:** What was the issue ja that is what I am – ja.

**MR GOVENDER:** The – yes – we had the two conflicting legal opinions. The from McKinsey.

**CHAIRPERSON:** Yes.

**MR GOVENDER:** And the one from Advocate Kennedy.

**CHAIRPERSON:** Yes.

**MR GOVENDER:** Where my understanding was that Advocate Kennedy's – in his – in his legal brief or his legal  
20 opinion basically said it is – or alluded in his legal brief that he was not sure whether the practice note which is SEN2003 was actually superseded by the 2013/2014 instruction and his view when he concluded his legal opinion his view was that Eskom should go and apply for a deviation to move ahead with the...

**CHAIRPERSON:** Yes.

**MR GOVENDER:** So that conflict because you had the Ledwabwa and Motswayo opinion and you had this other opinion. Mr Mabelane then decided well he – in his mind it was a conflict.

**CHAIRPERSON:** Ja but now on your understanding why was it important to get clarity on this issue in the light of the two opinions?

**MR GOVENDER:** Because Chair remember we – we signed  
10 the – Mr Mabelane signed a notice to proceed in December and we were starting to kick off the contract.

**CHAIRPERSON:** Yes.

**MR GOVENDER:** With McKinsey.

**CHAIRPERSON:** Yes.

**MR GOVENDER:** But this issue of uncertainty still remained.

**CHAIRPERSON:** Yes.

**MR GOVENDER:** And if – if that was not resolved as per the notice to proceed that Mr Mabelane signed we would  
20 have had to then go back to the drawing board with McKinsey.

**CHAIRPERSON:** So it was important to get clarity in order to decide whether to proceed or to go back to the drawing board?

**MR GOVENDER:** Yes Chair.

**CHAIRPERSON:** Yes. Now you were seeking to do that after the letter of acceptance.

**MR GOVENDER:** Correct Chair.

**CHAIRPERSON:** Yes. Now at that time the clarity you were seeking is it not true that the clarity you were seeking was whether in the first place this was a matter or an agreement that should have been preceded by obtaining an approval from the National Treasury that you could deviate.

In other words was that not the issue that was still  
10 troubling you namely, did we need the approval of National Treasury to deviate to conclude this contract or not? Because as I understand it that was what was troubling people that we do not want to conclude – go on only to find that later on we are told we should have obtained approval from National Treasury to deviate – we want to have clarity on that.

**MR GOVENDER:** That is correct Chair.

**CHAIRPERSON:** That is what was the – was the issue.

**MR GOVENDER:** That is correct Chair. The ideal – the  
20 ideal thing to have done would have been to sort the clarity first before we moved ahead.

**CHAIRPERSON:** Yes.

**MR GOVENDER:** In – ja.

**CHAIRPERSON:** But now coming back then to what you told the Steering Committee in paragraph 8 is it not correct

to understand you to have said to them National are – National Treasury had confirmed or approved that you could go ahead and conclude the contract. You say here approved confirmation of the contract methodology for the risk based approach to the Chief Procurement Officers' office.

If that was the issue that we had – that everybody was concerned about should we have obtained approval? Where you not saying here National Treasury actually did  
10 approve – we did obtain approval?

**MR GOVENDER:** Chair what I was saying here and to the Steering Committee is the interaction I explained with regards to the email that the procurement ...

**CHAIRPERSON:** From (inaudible).

**MR GOVENDER:** Yes and my – and my follow up discussion with Mr Mabelane and Mr Gori about what this – what that email meant for Eskom and can we now – my question to them directly was, can we now proceed with the contract as a risk based contract? And their answer to me was, yes and  
20 that is the basis of what – of what I said here.

**CHAIRPERSON:** So you were saying based on your understanding and your understanding being based on what Mr Mabelane had said to you. You were saying proceeding with this contract has the approval of National Treasury.

**MR GOVENDER:** I – Chair I was saying that proceeding

with the contract was – was in line with what was allowed by National Treasury.

**CHAIRPERSON:** Ja.

**MR GOVENDER:** Ja.

**CHAIRPERSON:** Ja so there was nothing wrong with proceeding as far as you are understood the position.

**MR GOVENDER:** From the procurement team yes.

**CHAIRPERSON:** Ja.

**MR GOVENDER:** Yes.

10 **CHAIRPERSON:** Okay. Mr Seleka.

**ADV SELEKA SC:** Yes thank you Chair. Mr Govender it would be difficult I suppose even for the people on Steerco. This Steerco is chaired by Mr Singh.

**MR GOVENDER:** Correct Chair.

**ADV SELEKA SC:** Mr Koko was there.

**MR GOVENDER:** Correct Chair.

**ADV SELEKA SC:** Mr Mabelane was part of it.

**MR GOVENDER:** Correct Chair.

20 **ADV SELEKA SC:** And he was the – what the chief procurement officer.

**MR GOVENDER:** At that time yes.

**ADV SELEKA SC:** And so there is a directive of Eskom of 2014 which implements the cost containment of the National Treasury instruction. It is reviewed in 2015 and you have another what they call a position paper by Mr Matshela

Koko in August which he signs the same National Treasury into law at Eskom. It is law anywhere because it is National Treasury instruction which forms part of the Act because the PFMA says it is comprised of the provisions of the Act and the instructions issued by the National Treasury.

So it would be hard if you have those internal documents of Eskom to say you know fairness to you that your team was misled by that statement. They should have known.

- 10 **MR GOVENDER:** Chair firstly it is news to me that there was a subsequent document in 2015 and then there was something that Mr Koko signed into law ...

**ADV SELEKA SC:** Well I am guessing 00:19:18 into law?

**MR GOVENDER:** In August Koko – I was not aware of that because I was not part of the procurement function. But they were a number of people in that committee that would have know exactly where – or exactly about Advocate Seleka is talking about in terms of the documents he is referred to.

- 20 **ADV SELEKA SC:** Ja because if National Treasury approval is required as Mr Koko has said which I believe is correct the failure to obtain it is fatal to the conclusion of the agreement. In other words you cannot conclude that agreement and it be a valid and standing agreement. You understand.



**MR GOVENDER:** I do understand Chair.

**ADV SELEKA SC:** Ja. So – but because you ultimately Steerco decides to terminate the MSA and one of the reasons is that there is a growing concern within Eskom legal that you require National Treasury approval. You remember that. In one of the Steerco – you want to be refreshed?

**MR GOVENDER:** Yes Chair because I – maybe I do not recall that – because – you – because I suppose you talking  
10 – sorry Chair – I am talking to Advocate Seleka. But I wanted to find out if Advocate is referring to the reasons for terminating the MSA.

**ADV SELEKA SC:** Yes.

**MR GOVENDER:** And – and what was presented to the board.

**ADV SELEKA SC:** Yes.

**MR GOVENDER:** In terms of the termination.

**ADV SELEKA SC:** Correct yes. That is the reasons for terminating.

20 **MR GOVENDER:** Okay can – can we have a look at that submission that went to the board?

**ADV SELEKA SC:** Yes.

**MR GOVENDER:** Yes.

**ADV SELEKA SC:** The investigator ...

**MR GOVENDER:** Because I – I do recall Chair there was a

concern with regards to National Treasury but I do not – I do not recall whether there was a growing concern in – the growing concern in Eskom legal I cannot remember.

**ADV SELEKA SC:** Yes, no it was – it was one of the reasons. Thank you. So that is Eskom Bundle 14(c).

**MR GOVENDER:** Bracket?

**ADV SELEKA SC:** C.

**MR GOVENDER:** How do we find that?

**CHAIRPERSON:** It is not the one we were using just now?

10 **ADV SELEKA SC:** I was at...

**CHAIRPERSON:** That has got the minutes.

**ADV SELEKA SC:** Yes I think that is the one.

**CHAIRPERSON:** It is not that one?

**ADV SELEKA SC:** Yes I think that is the one Chair.

**CHAIRPERSON:** It is the one?

**ADV SELEKA SC:** It is the one (c) page 829.19.

**CHAIRPERSON:** Okay you say where must we go? What page?

**ADV SELEKA SC:** 828.19.

20 **CHAIRPERSON:** 929.2?

**MR GOVENDER:** 19 – 19.

**CHAIRPERSON:** 19.

**ADV SELEKA SC:** Point 19.

**CHAIRPERSON:** That a fresh piece. – page?

**ADV SELEKA SC:** 229.

**CHAIRPERSON:** 229.

**ADV SELEKA SC:** Yes .19.

**CHAIRPERSON:** .92

**ADV SELEKA SC:** Point 19. – 829.19.

**CHAIRPERSON:** You are swallowing your words today Mr Seleka.

**ADV SELEKA SC:** Oh.

**CHAIRPERSON:** Okay. No it cannot be this same bundle because this one does not have 229.

10 **ADV SELEKA SC:** Oh let me...

**CHAIRPERSON:** It cannot be the same bundle. This bundle starts somewhere at 600 and something.

**ADV SELEKA SC:** I have the minutes here.

**CHAIRPERSON:** So just repeat.

**ADV SELEKA SC:** 829.

**CHAIRPERSON:** Ja you see this was – this is Bundle 14 that we were looking at the – 14(c)

**ADV SELEKA SC:** Yes that is the one Chair – 14(c).

**CHAIRPERSON:** Okay.

20 **MR GOVENDER:** Mr Chair if I...

**CHAIRPERSON:** Eskom Bundle 14(c) page

**ADV SELEKA SC:** 829

**CHAIRPERSON:** 29.

**ADV SELEKA SC:** Ja 829

**CHAIRPERSON:** 829

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:** You are swallowing your words.

**ADV SELEKA SC:** Am I?

**CHAIRPERSON:** Ja. 829. I thought you were saying 229.

**ADV SELEKA SC:** No 829.

**CHAIRPERSON:** Okay. No.

**UNKNOWN COUNSEL:** Mr Chair may I indicate I have got the similar challenge to you but at ...

**CHAIRPERSON:** Yes.

10 **UNKNOWN COUNSEL:** (talking over one another) level. I have received these bundles electronically last night.

**CHAIRPERSON:** Yes.

**UNKNOWN COUNSEL:** And I have extreme difficulty locating the exact page you are referring to. I have got a hard copy available.

**CHAIRPERSON:** Oh is that so.

**UNKNOWN COUNSEL:** Ja – we – this is some 6000 plus pages that we received electronically last night.

**CHAIRPERSON:** Yes.

20 **UNKNOWN COUNSEL:** So I have got to electronically search a very difficult and challenging to find the actual page.

**CHAIRPERSON:** Yes.

**UNKNOWN COUNSEL:** I believe Mr Govender is possessed of it but we – we cannot – I mean I cannot follow

it intelligently consider what has been put to the witness.

**CHAIRPERSON:** Yes.

**UNKNOWN COUNSEL:** On the electronic ...

**CHAIRPERSON:** Is there a spare hard copy that can be given to his counsel – Mr Govender's counsel?

**UNKNOWN COUNSEL:** Can I say what my electronic copy has? It is got an electronic pagination at the top. If I could have that page number I will find it. Mine is – mine is for example I have got 3000 – 3852 pages. If I could have the  
10 page number I will be able to get it.

**ADV SELEKA SC:** Yes. I know those page – page numbers are sometimes mis-aligned. Page – the electronically piece 3034.

**UNKNOWN COUNSEL:** 3034.

**ADV SELEKA SC:** Yes.

**UNKNOWN COUNSEL:** I am indebted to you Mr Seleka.

**CHAIRPERSON:** Okay all right. Is there somebody who could check the electronic pages each time we make a reference to the hard copy pages so that he can follow.

20 **ADV SELEKA SC:** Yes.

**CHAIRPERSON:** Okay.

**UNKNOWN COUNSEL:** That would be very helpful – thank you Mr Chair.

**CHAIRPERSON:** All right. You said on the hard copies 829. Mr Seleka.

**ADV SELEKA SC:** Yes Chairperson.

**CHAIRPERSON:** And after 829 its point was?

**ADV SELEKA SC:** Point 19 – Point 19.

**CHAIRPERSON:** Okay. Okay. It is a submission document?

**ADV SELEKA SC:** Ja.

**CHAIRPERSON:** Okay.

**ADV SELEKA SC:** I think what I am looking for maybe – the reasons are there Mr Govender. There is one particular  
10 reason which I am referring you to.

**CHAIRPERSON:** These are reasons for what just to?

**ADV SELEKA SC:** For the – so these documents – these document 00:27:14 a submission document dated 9 June 2016. What is being sought here is a resolution from the BTC to council the McKinsey risk base process or the contract.

**CHAIRPERSON:** Okay.

**ADV SELEKA SC:** And they give the reasons on the next page in those bullet points on page 829.20. But I must  
20 have seen the reason I am looking for somewhere else Mr Govender because the – the solid bullet points on page 829.22 solid bullet points reads:

“On 25 February 2016 McKinsey responded to Eskom’s letter. It is Eskom’s view that the letter did not fully address the concerns

raised.”

Bearing in mind that – the next bullet point.

“Bearing in mind that the McKinsey risk base process was conducted via sole source albeit permissible within the approved procurement procedures such contracts attract a higher level of scrutiny.”

Next bullet point.

10 “One such contract with McKinsey that was awarded during the course of last year for the rapid finalisation of the corporate plan and key inputs for National Treasury equity injection has been the source of an audit finding to which the necessary management responds where provided. Furthermore National Treasury has requested key information regarding contracts with McKinsey.”

20 What the picture I have in mind is I might have read that in Mr Govender – Mr Mabelane’s affidavit but I will have a look at it in a moment. Let me exhaust these reasons.

“The above bullets create a significant need for management intervention to formulate all of the responses and detracts from the

delivery of key business objectives.”

Then you have the next bullet point.

“With this in mind it may be prudent to terminate the contract finalisation process for the McKinsey risk base contract. It is management’s view that McKinsey will have to be compensated for work carried out to date. Such costs will need to be negotiated and finalised with McKinsey.”

10 And the – it is the penultimate.

“It is recommended the approval for the costs be presented to the appropriate tender committee for approval of payment...”

Then you have the last one which does not address the issue I wanted to raise with you. But there is captured the National Treasury requiring information regarding the contract as one of the reasons why he would rather terminate the contract. And the contract was then terminated as a result of this submission.

20 **MR GOVENDER:** Well, the board approved the termination process.

**ADV SELEKA SC:** Yes. So, if you take the evidence of Mr Koko – let me paint a picture for you. That the writing was on the wall, he uses those words, already in March – February/March 2016 that National Treasury approval...



The contract could, therefore, not be concluded without National Treasury approval. So, what follows thereafter, it is purported conclusion of the agreement. So, the parties purport to conclude the agreement. You understand what I am saying?

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

**ADV SELEKA SC**: They act as if they are concluding the agreement when the agreement is in fact nullity because of the lack of prior approval.

10 **MR GOVENDER**: Chair, I do not understand fully.

**CHAIRPERSON**: Well, I am thinking Mr Seleka may be expecting too much ...[intervenes]

**MR GOVENDER**: [laughs]

**CHAIRPERSON**: ...lawyer [laughs]

**ADV SELEKA SC**: [laughs]

**CHAIRPERSON**: [laughs]

**MR GOVENDER**: I am sure he is over(?) qualifications. I am just humble [laughs]

**ADV SELEKA SC**: [laughs] Okay, let us ...[intervenes]

20 **CHAIRPERSON**: Well, let me ask this question.

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

**CHAIRPERSON**: When was it when the board approved the cancellation?

**MR GOVENDER**: In June, Chair.

**CHAIRPERSON**: In June?

**MR GOVENDER:** Yes, Chair.

**CHAIRPERSON:** And that is the approval. And when did the actual cancellation happened as far as you know?

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

**CHAIRPERSON:** I mean, the board take a resolution ...[intervenes]

**MR GOVENDER:** The board ...[intervenes]

**CHAIRPERSON:** ...but somebody must implement the resolution. So, that is what I am talking about.

10 **MR GOVENDER:** Oh, okay.

**CHAIRPERSON:** The implementation ...[intervenes]

**MR GOVENDER:** Okay.

**CHAIRPERSON:** ...of that resolution of the board to say this must be cancelled.

**MR GOVENDER:** So, let me start with this submission that went to the board on the 9<sup>th</sup>.

**CHAIRPERSON:** H'm?

**MR GOVENDER:** This submission was preceded by a Steering Committee meeting. I cannot remember which  
20 number was it but I think it was in early June ...[intervenes]

**CHAIRPERSON:** Yes.

**MR GOVENDER:** ...the Steering Committee.

**CHAIRPERSON:** Okay.

**MR GOVENDER:** And then – I think, Chair, if memory

serves me correctly. That meeting, there was an open session and a closed session. There was a closed session with only the main members of the Steering Committee which was chaired by Mr Singh and then there was an open session that included McKinsey and Trillian staff. So, the decision to cancel and basically the reasons you see here for the cancellation was discussed and then was actually formulated into this feedback report that went to the board.

So, what happened thereafter was, there was an  
10 implementation process based on the board's mandate – oh, sorry, based on the board's decision to cancel the contract. And it was agreed in the subsequent Steering Committee that – I think it was in July – that the tool, the tracking tool that was used to capture the initiatives across the organisation over 1600 initiatives would be frozen as of that date in terms of all its approvals and government approvals and so forth, so that you could do a calculation as to what the fees would be then due to McKinsey.

Subsequent to that July meeting, there was  
20 another Steering Committee in August and in that Steering Committee there was payments or parts of payments requested by McKinsey and Trillian and that ended up going into a submission that went to the BTC in August. So, effectively, what then happened was, post August, the agreement with McKinsey was that they would remain on

the ground so that the actual board decision of cancelling the contract and the subsequent work could be transitioned to another party.

So, that was the – how can I say to you – the sequence of events in terms of how the implementation of the board's decision happened.

**CHAIRPERSON:** But the actual termination or cancellation happened when? Are you able to remember that? In September, in October, in July, in August  
10 ...[intervenes]

**MR GOVENDER:** Oh, the final termination agreement, Chair, happened in – I think it was February 2017.

**CHAIRPERSON:** H'm.

**MR GOVENDER:** Was it – it was 2016.

**CHAIRPERSON:** Well, I am not sure that anybody has talked about ...[intervenes]

**ADV SELEKA SC:** No, they have to – Mr Govender also talks about in his affidavit.

**CHAIRPERSON:** Oh. H'm.

20 **ADV SELEKA SC:** But Govender, I think, that is a very simple question. You need to tell the Chairperson the date of termination of the letter which you do mention the date in your affidavit.

**MR GOVENDER:** Yes.

**ADV SELEKA SC:** Which is the letter of termination by

Mr Koko(?) ...[intervenes]

**MR GOVENDER**: Oh, okay.

**ADV SELEKA SC**: Yes.

**MR GOVENDER**: I now understand. [laughs] Sorry, Chair. Apologies.

**CHAIRPERSON**: H'm.

**ADV SELEKA SC**: So, after this decision was – the board had taken the decision, Mr Mabelane penned a letter – sorry, sorry. Mr Mabelane had penned a letter to  
10 McKinsey, informing them of the board decision of termination. So.

**CHAIRPERSON**: And that was when? Was it in ...[intervenes]

**MR GOVENDER**: It was June, Chair.

**CHAIRPERSON**: Yes.

**MR GOVENDER**: Yes.

**ADV SELEKA SC**: Yes.

**CHAIRPERSON**: Okay.

**ADV SELEKA SC**: Yes, but there is a discrepancy there  
20 because the termination was in fact made before the board – I think it was the BTC – before the BTC made the decision to terminate. So, Mr Mabelane writes the letter on the 16<sup>th</sup> of June 2016, that is the only... Terminating, but BTC only sat on the 22<sup>nd</sup> of June to resolve to terminate.

**MR GOVENDER**: I – sorry, Chair. I was not aware of that

because this submission that was prepared is dated the 9<sup>th</sup> of June and you can see that I supported it based on the fact that it was prepared by myself, and the project management team and it was approved by Mr Mabelane on the 6<sup>th</sup> of the sixth. So, I was not aware that it only got to the board on the 22<sup>nd</sup>, Advocate.

**ADV SELEKA SC:** Ja. You see, I think, you kind of dealt with that in your affidavit which is Eskom Bundle 14(d), pages 13 and 41 and you do give the date when  
10 Mr Mabelane had cancelled the MSA.

“Mr Mabelane advised me that he formally notified McKinsey of the cancellation decision on 16 June 2015(sic)...”

**CHAIRPERSON:** But in his letter, did he then go on to talk about what would – some transitional arrangements or what?

**ADV SELEKA SC:** I do not think ...[intervenes]

**CHAIRPERSON:** Provided for what Mr Govender was saying happened in August and so on. In other words, that  
20 the board had said terminate and then his letter said it is terminated.

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:** But we know that McKinsey continued, is it not?

**ADV SELEKA SC:** Correct.

**CHAIRPERSON:** To do some work.

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:** So, was that based on something that he said in that letter? Because, otherwise, one would have expected that if they say the contract is terminated, McKinsey will stop.

**ADV SELEKA SC:** I cannot recall off hand but now I have the letter in front of me.

**CHAIRPERSON:** Yes.

10 **ADV SELEKA SC:** Which is dated 16 June 2016.

**CHAIRPERSON:** Ja.

**ADV SELEKA SC:** Addressed to mister – to Dr Wise. Termination of Top Consultant Group, MSA.

“This letter serves to officially notify McKinsey and Co. of a board decision taken on 9 June 2016 to terminate the McKinsey Risk Base contract.

20 You are hereby requested to engage with Mr Prish Govender to discuss the pertinent issue to give effect to the board resolution.

In conclusion, Eskom will embark on a transparent procurement process to reallocate the activities under the risk base contract.

McKinsey and Company is welcome to participate in this process...”

And he signs it. For the record, I am going to give the page number and please look for it in the electronic - oh, he has it. The electronic it is page 3233. In the hard copy, it is 877.26 and this is Eskom Bundle C.

**CHAIRPERSON:** So, in the letter, he does not talk about what was to happen after the termination, other than that he said – we advise you, talk to Mr Govender ...[intervenes]

**ADV SELEKA SC:** Ja.

10 **CHAIRPERSON:** ...about ...[intervenes]

**ADV SELEKA SC:** To give ...[intervenes]

**CHAIRPERSON:** ...in the implementation of the termination ...[intervenes]

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:** ...the resolution.

**ADV SELEKA SC:** Correct.

**CHAIRPERSON:** Yes ...[intervenes]

**MR GOVENDER:** That is correct.

**ADV SELEKA SC:** Give effect to the board resolution.

20 **CHAIRPERSON:** Yes.

**MR GOVENDER:** That is correct, Chair.

**CHAIRPERSON:** Was it then in your discussion with Dr Wise that this idea that McKinsey could continue doing some work that arose and was agreed or what?

**MR GOVENDER:** No... [laughs] So ...[intervenes]



**CHAIRPERSON:** Where did that come from?

**MR GOVENDER:** So, when Mr Mabelane penned this letter to Dr Wise, Dr Wise, and the Project Management Team from Eskom, which was led by me, got together and I – and there was a McKinsey team that was with Dr Wise, he was not on his own, and we were deciding how best to bring this process to a conclusion.

And part of that conclusion process was a couple of key things that we had to take care of. One was the fact  
10 that there was work ongoing extensively across the organisation, in many parts of the organisation and how best to bring that to close. This auditing way to that I had discussed with you was an issue of how we now terminate that.

The third part of this equation was, you cannot just draw a line in the sand and say McKinsey is off the ground because you lose a whole lot of value immediately. You need to transition it to a new vehicle, a new delivery vehicle in the form of another contractor or perhaps even  
20 back to the Eskom people to carry on. So, those issues were discussed with Dr Wise and myself. And the teams.

It was one part of that issue was, how do we deal with the wave(?) tool? It was presented to the Steering Committee in July and the Steering Committee excepted the fact that as of the 15<sup>th</sup> of July, we will do, what we call,

basically freeze it, and see – freeze the wave to – and see what the implications in terms of the all the approvals are. Then, there was a Steering Committee in August, particularly, to address, how do we move this – the programme aspects to other entities?

And out of that Steering committee in August or in that Steering Committee in August, bearing in mind that we did not pay any down payments although we asked the board to approve it and the board did approve it, the  
10 consultants in that committee, if memory serves me correct, were complaining about the fact that they had worked already for eight odd months, nine odd months and they had not received any payment all from – even though value was created.

And so, that committee took a few decisions. Those decisions ended up to be part of an August submission that went to the BTC, and I am sure that Advocate can point out the August submission. It is on file as well. And that August submission, if memory serves me  
20 correct, had mentioned a transition period.

**CHAIRPERSON:** H'm.

**MR GOVENDER:** Ja.

**CHAIRPERSON:** And that was – you say that was a resolution of the BTC?

**MR GOVENDER:** Correct, Chair.

**CHAIRPERSON:** And it was in August?

**MR GOVENDER:** Yes, it would be on file here.

**CHAIRPERSON:** Okay. No, that is fine. So, in other words. Are you saying that whatever work McKinsey did after they had been notified that the board had taken a resolution to terminate the contract, whatever work they did after that, was at some stage in August given approval by the BTC to say there is a transitional period and in effect gave the impression to whatever you might have  
10 thought should be done because you took the view they could not just take a deadline and say ...[intervenes]

**MR GOVENDER:** Yes.

**CHAIRPERSON:** ...this end. You needed to think about what the implications would be.

**MR GOVENDER:** Yes.

**CHAIRPERSON:** And make some arrangements.

**MR GOVENDER:** Yes.

**CHAIRPERSON:** So that there would be some value to Eskom ...[intervenes]

20 **MR GOVENDER:** Yes.

**CHAIRPERSON:** ...of the contract.

**MR GOVENDER:** Correct, Chair. And the August board submission, the board approved some payments at that stage, and they approved the transition period.

**CHAIRPERSON:** H'm.

**MR GOVENDER:** And McKinsey as part of the discussions, the negotiations with them to bring this or process to an end, wanted to get paid during that transition period as well. They wanted to get paid, but not on a risk basis, they wanted to get paid on a fixed fee basis. And that, actually, went into the submission as well.

And they, actually, did submit one invoice to us after they had got paid in August for that period and, but we did not pay that invoice because we were – Mr Singh  
10 was very adamant that we should make sure that we properly bring this whole process to a conclusion, and he wanted certain things looked at.

He wanted to look – he wanted the value of the contract to be looked at, he wanted the legal review done and he wanted the contract to be audited. So, he did not want to – actually, he wanted to follow a proper process to get that done.

**ADV SELEKA SC:** Ja. Well, that said, Mr Govender. There is a minute of Steerco, you know, just picking on the  
20 Chairperson's question. The minute of 15 July 2016, where key objectives are recorded. The page number is Eskom Bundle - I think that is the one you have – (c), it is page 875.61 for - the electronic page is 3187.

**MR GOVENDER:** 3187?

**ADV SELEKA SC:** It is the minute of 15 July 2016. So,

that is the beginning of the minute. If you turn to the next page, paragraph 8 and you can explain this to the Chairperson. Paragraph 8 deals with key objectives.

**MR GOVENDER**: Sorry, Chair. Just to confirm. Are we looking at the 15<sup>th</sup> of July or the 4<sup>th</sup> of August ...[intervenes]

**ADV SELEKA SC**: 15 July.

**MR GOVENDER**: That is on 875.65?

**ADV SELEKA SC**: No, 875.61.

10 **MR GOVENDER**: Oh, sorry.

**ADV SELEKA SC**: So, there are key objectives on the next page point 62, paragraph 8 and you can explain that to the Chairperson. One of the key objectives, if you – that penultimate, the second from the bottom.

“All MSA activities will...”

I think they have got the spelling wrong.

“...seize as of today until further notice as per  
Steerco instruction from McKinsey  
Management...”

20 **MR GOVENDER**: Yes. And that related to my comment to this chair insofar as freezing the wave two(?).

**ADV SELEKA SC**: H’m.

**MR GOVENDER**: Yes.

**ADV SELEKA SC**: So, you address that?

**MR GOVENDER**: Yes.

**ADV SELEKA SC:** Well, it says all MSA activities here.

**CHAIRPERSON:** Because ...[intervenes]

**MR GOVENDER:** No, this was ...[intervenes]

**CHAIRPERSON:** ...to be to stop.

**ADV SELEKA SC:** Yes.

**MR GOVENDER:** Yes.

**ADV SELEKA SC:** And walk out. [laughs]

**MR GOVENDER:** [laughs]

[Parties intervening each other – unclear]

10 **CHAIRPERSON:** The minute taker did not know how to spell that...

**MR GOVENDER:** Yes, let me give you – I know that is probably, Chair, a lawyer's view, but let me give you the actual events that happened in a sense. This statement is in relation to the wave two(?). So, you freeze the wave two. So, you do not allow anybody to make anymore approvals. So, you do not allow the value of – because every time in a stream – I am sorry to use the Commission's terminology now, but in a stream, for  
20 example, you have the claim stream, you have the generation stream, you have procurement stream.

Every time somebody in those streams whoever the stream leader was made an approval in the wave two. You would have had an implementation level... that would then Eskom liable to pay additional money to McKinsey.

So, the decision – what we talked about here was that wave needs to be frozen, but the actual activities that were ongoing could not all of a sudden, you know, just – you drop everything.

If the guys were busy at some mine, improving the operations at the mine, you just cannot just drop and leave. There had to be a logical transition period process undertaken.

**ADV SELEKA SC:** Ja.

10 **MR GOVENDER:** And that actually – you know that thought process, Chair, like I have described, went into the board submission in August, then was approved.

**CHAIRPERSON:** You are keeping an eye on your time, Mr Seleka?

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:** Oh.

**ADV SELEKA SC:** That is what I was doing now.

**CHAIRPERSON:** Oh, okay.

**ADV SELEKA SC:** I see it is running away from us.

20 **MR GOVENDER:** Mr Govender, I am going to do this. If you – because we were – I was addressing the issue of the distinction between the date of termination and the date of the resolution by BTC.

**MR GOVENDER:** Yes, Chair.

**ADV SELEKA SC:** It is still in that same document. The

BTC decision you will find on page 875.1. You will find the ...[intervenes]

**MR GOVENDER:** Sorry, Chair, let me just get to that ...[intervenes]

**ADV SELEKA SC:** Yes.

**MR GOVENDER:** ...for you.

**ADV SELEKA SC:** So, it is an extract from the final minutes of Eskom Board Tender Committee.

**MR GOVENDER:** 871 point...?

10 **ADV SELEKA SC:** 875.1. Electronic, 3126.

**MR GOVENDER:** 875... Yes, I got it. Thank you.

**ADV SELEKA SC:** Extract from the final minutes of Eskom Board Tender Committee held at Umkhulu(?) Board Room on 21 June 2016. And you have the Board Tender Committee grant(?).

“It was resolved.

A grant approval to cancel the McKinsey risk base process.

Allow all costs to be negotiated and  
20 finalised...”

So, in his affidavit, Mr Mabelane says this is the date when the BTC resolved to cancel the MSA.

**MR GOVENDER:** Which was the 21<sup>st</sup> of ...[intervenes]

**ADV SELEKA SC:** Which is the one of 21 June 2016 which is some five days after he had terminated on the



16<sup>th</sup> of July – of June.

**MR GOVENDER**: I see your point now.

**ADV SELEKA SC**: Yes.

**MR GOVENDER**: I do see your point now and...

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

**MR GOVENDER**: I suppose we will have to ask Mr Mabelane why he signed the termination letter before the board approved. Yes.

**ADV SELEKA SC**: Well, he signed it on the 16<sup>th</sup> which is  
10 ...[intervenes]

**MR GOVENDER**: Yes, correct.

**ADV SELEKA SC**: But you know what he is saying, also, in his affidavit, which we shared with you? He says he got – when he signed the termination letter on the 16<sup>th</sup> of June 2016, he got the assurance from you and Mr Singh that the board has given the green light to terminate.

**MR GOVENDER**: I did see that.

**ADV SELEKA SC**: Yes.

20 **MR GOVENDER**: The limited time that ...[intervenes]

**ADV SELEKA SC**: Yes.

**MR GOVENDER**: Sorry, Chair, I should be addressing you.

**ADV SELEKA SC**: Yes.

**MR GOVENDER**: Apologies. I did see that in the limited

time. I have the documentation last night. And I do not understand why Mr Mabelane would say that because he approved the board submission that went to the board. So, what – and he was the key procurement officer and the official at the Board Tender Committee. So, why did he say he got the confirmation from myself and Mr Singh?

I, actually, do not recall being at the board when this thing was terminated. I do not recall being at the board. So, I think we must probably seek better clarity  
10 from Mr Mabelane on that, Chair, because in mind, I was asked to prepare that cancellation submission to the BTC. I prepared that – well, the team prepared, the Project Management Team.

I looked at it and then it went to Mr Mabelane for approval and then it went to the BTC process. I do not know why there is this discrepancy, Chair.

**ADV SELEKA SC:** Ja, okay. I am looking at my time. Then comes the payments. Payments to Trillian in particular. The Steer Committee knew that by the end of  
20 March 2016, McKinsey had said: We no longer want to have discussion with Trillian in order to consider them as our BEE partner. You remember that? You deal with it in our affidavit.

**MR GOVENDER:** Correct, Chair.

**ADV SELEKA SC:** It is already in March 2016. So,

McKinsey says: We never concluded a contract with Trillian. As a subcontractor, as our BEE partner, we never, because we informed you, Eskom. Now, the question is. Why did Eskom made payments directly to Trillian when Trillian did not know the contract with McKinsey, Trillian did not have a contract with Eskom.

It was not an Eskom supplier. And it would not have directly being contracted to render services to Eskom. You deal with that in your affidavit, how the payments  
10 came about. Could you just explain that to the Chairperson?

**MR GOVENDER:** Okay, we are dealing with the MSA?

**ADV SELEKA SC:** The MSA, yes.

**MR GOVENDER:** Yes, okay. So, Eskom did receive from McKinsey a letter. I think it was the end of March, basically, saying and I can recall soe reasons for why they cannot proceed with Trillian as a subcontractor. So, what they wrote in that letter did not fully explain how McKinsey behaved thereafter, because what happened was, the  
20 teams between Trillian and McKinsey still continued to work with each other and they continued in my recollection right up until August, right up until that August Steering Committee.

And all through that process, like, every one of the Steering Committees in between, McKinsey presented –

there was work being presented by Trillian as well in terms of the work that they were busy with.

So, McKinsey continued working alongside Trillian and based on that, the Steering Committee took a decision that because these teams continued to work alongside each other, both McKinsey and Trillian need to get compensated for that work that they performed up until the end of – oh, sorry, up until the August Steering Committee for the August board submission.

10 **ADV SELEKA SC:** Ja, but why did you allow that? I did not know that you have done it. Why did you allow when you knew there was no contract between the two for Trillion to still be around.

**MR GOVENDER:** Me personally. No, steerco. Chair, there was work that was – my understanding was that there was work ongoing and there was – and McKinsey continued to work with Trillion and the steerco wanted the work to complete to get to a logical point of completion or logical point of transition and that is why the steerco allowed this  
20 arrangement to continue.

**ADV SELEKA SC:** Ja and there were... [intervenes]

**CHAIRPERSON:** [Indistinct] was for how long again?

**MR GOVENDER:** I must be careful what I say because are you saying – are you asking me... [intervenes]

**CHAIRPERSON:** Was it for two years, three years?

**MR GOVENDER:** No, the MSA, Chair, continued or the activities associated – let us forget about the termination... [intervenes]

**CHAIRPERSON:** I am talking about the formal in terms of the actual contract that has been agreed, what was in the agreement?

**ADV SELEKA SC:** I think it was a three year contract, Chair.

**MR GOVENDER:** It was a three year contract.

10 **CHAIRPERSON:** Okay, ja [indistinct].

**ADV SELEKA SC:** Ja, it was a three year contract and it was terminated about five months after its purported conclusion. January to... [intervenes]

**MR GOVENDER:** I am cautious to say I understand because I am thinking what does purported mean... [intervenes]

**CHAIRPERSON:** Mr Seleka must stop confusing us. Ja, it was the board's decision or BTC's decision that it should be terminated happened within about five months, six  
20 months or thereabout after it had been concluded. Is that right?

**ADV SELEKA SC:** Correct. Correct... [intervenes]

**CHAIRPERSON:** Five months, six months or thereabout.

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

**CHAIRPERSON:** Ja.

**ADV SELEKA SC:** Yes. You know, on this issue I was raising with you about why you continued to let Trillion around, in your engagement at least by email with Mr Moodley of CDH one of the commentaries for the principle of settlement, he said in fact the contract would be dissolved on the very basis that there was no BEE partner. And so you terminated so that you only incur costs for the main contract and you do not have to pay the BEE part. Can you recall that commentary?

10 **MR GOVENDER:** Maybe you must show it to me.

**ADV SELEKA SC:** You attached it here in your... [intervenes]

**CHAIRPERSON:** We are at half past, so just... [intervenes]

**ADV SELEKA SC:** Expedite it.

**CHAIRPERSON:** So just wrap up, because we do not want people to be in breach of the COVID regulations in terms of the curfew.

**ADV SELEKA SC:** Page 1474, that is Annexure EN22.

20 **CHAIRPERSON:** What, 1474?

**MR GOVENDER:** Is it the file that I had in front of me?

**ADV SELEKA SC:** No, now I am back to your affidavit.

**MR GOVENDER:** My affidavit?

**ADV SELEKA SC:** Eskom Bundle 14D, sorry.

**MR GOVENDER:** Yes. Sorry, give page number again.

**ADV SELEKA SC:** 1474. He does not have the electronic page, but that is EN22. If you follow the affidavit you sent to us.

**MR GOVENDER:** I will try and follow from what my learned friend puts to the witness. I cannot locate the page.

**ADV SELEKA SC:** Annexure EN22.

**CHAIRPERSON:** Are you able to put your question and maybe Mr Govender might be able to answer it without  
10 having to look and if he cannot answer without... [intervenes]

**ADV SELEKA SC:** Yes, let me read from the email... [intervenes]

**MR GOVENDER:** My attorneys provided me with a copy. I have got it, thank you.

**ADV SELEKA SC:** Okay. Let me read from the – it is an email from Paul Cowley to yourself, Mr Govender, on the 3<sup>rd</sup> of February 2017 and he deals with the what he calls – he outlines the principles of the agreement based on the  
20 work we have conducted. Now if you go to the paragraph from the bottom, one, two, three:

“It should be noted that as a prerequisite for successfully winning the mandate for the TPC project, the supplier was required to enter into a contract with a BEE partner.”

You see that?

**MR GOVENDER**: Yes, Chair.

**ADV SELEKA SC**: “Including the fair distribution of the contract value. The failure to put this in place could be grounds for full dissolution of the contract in place, rendering only a time and materials based payment due to the supplier.”

**MR GOVENDER**: That is correct.

**ADV SELEKA SC**: So my point was you could have gotten  
10 rid of Trillion and only be liable to paying McKinsey much earlier on... [intervenes]

**MR GOVENDER**: According to... [intervenes]

**ADV SELEKA SC**: ...because there was no contract between McKinsey and Trillion.

**MR GOVENDER**: According to – this is according to Oliver Wyman.

**ADV SELEKA SC**: Yes. Okay. That is the position he is postulating to.

**MR GOVENDER**: Okay. I just wanted to find out, Chair,  
20 this email from Paul Cowley, what reference does it have in my affidavit, because I think it has reference to the fact that I sent this very same email to Ms Daniels.

**ADV SELEKA SC**: Page 1345.

**MR GOVENDER**: 1345.

**ADV SELEKA SC**: Paragraph 35, that is where



you... [intervenes]

**MR GOVENDER:** Sorry, 1345.

**ADV SELEKA SC:** Ja.

**CHAIRPERSON:** Are you able to answer him quickly, Mr Seleka, because we must wrap up. We must stop now.

**MR GOVENDER:** 13, sorry... [intervenes]

**ADV SELEKA SC:** Ja, he says he forwarded them to Ms Daniels.

**MR GOVENDER:** Yes, because as part of the Oliver  
10 Wyman review process they knew that we were putting in a  
settlement agreement in place with McKinsey and part of  
that settlement agreement I asked them to look at some  
principles that – sorry, sorry, Chair – I asked them to look  
at some principles that we need to incorporate into the  
settlement agreement from a technical perspective and  
they prepared this memo for me. And I have submitted that  
memo to Ms Daniels to consider it and to relay it to CDH  
who was helping us with the termination agreement. And I  
know that Oliver Wyman raised that issue, but I was  
20 confident that if that was the case it would be caught by  
CDH and Ms Daniels as the legal experts to say that, you  
know, we did not have to pay them anything  
and... [intervenes]

**CHAIRPERSON:** Ja. Okay, alright.

**ADV SELEKA SC:** Yes. Thank you, Chair. We have

to... [intervenes]

**CHAIRPERSON:** Ja. In terms of what you needed to cover, how much did you not get to?

**ADV SELEKA SC:** We did not address the corporate plan, the issues relating to corporate plan. That is four questions there, Chair.

**CHAIRPERSON:** Ja.

**ADV SELEKA SC:** But the four questions do not translate into time.

10 **CHAIRPERSON:** Ja, no that is fine. Just, ja, corporate plan and what else?

**ADV SELEKA SC:** And – yes, I think we have got the MSA except Mr Govender, we needed to go into how the payments were made.

**CHAIRPERSON:** So how much time would be – would have been required for you to... [intervenes]

**ADV SELEKA SC:** For that.

**CHAIRPERSON:** To complete the issues.

**ADV SELEKA SC:** About an hour.

20 **CHAIRPERSON:** About an hour.

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:** Okay. Mr Govender, when are you leaving the country?

**MR GOVENDER:** Chair, I am actually [indistinct] to absolutely hit the road on Thursday.

**CHAIRPERSON:** On Thursday.

**MR GOVENDER:** Yes, they are going to come for me otherwise, Chair.

**CHAIRPERSON:** And would your – you say hit the road.

**MR GOVENDER:** No, no, I mean... [intervenes]

**CHAIRPERSON:** Fly, okay. Would that be in the evening or would that be... [intervenes]

**MR GOVENDER:** Normally it is an evening flight, Chair.

**CHAIRPERSON:** Evening flight.

10 **MR GOVENDER:** Ja.

**CHAIRPERSON:** Okay, because if all you need is an hour, I am wondering whether before you depart if the Commission can find some time, an hour somewhere whether it is on the morning or later or during the day whether that could be squeezed in. Obviously that has got to take into account their situation, but I am just using this opportunity for us to explore whether there is a possibility along those lines. Let me hear what is... [intervenes]

20 **UNKNOWN MALE:** Mr Chair, can I tender what I have got available?

**CHAIRPERSON:** Yes.

**UNKNOWN MALE:** I have got available up until Wednesday afternoon. I just need to be out of Johannesburg to be in Cape Town Wednesday night so that I can be in court on Thursday morning.

**CHAIRPERSON:** Yes.

**UNKNOWN MALE:** So I have therefore got – where are we today, Monday. I have got Tuesday and I have got Wednesday up until say lunchtime, shortly after lunch.

**CHAIRPERSON:** Yes. Okay and from your side, Mr Govender, you would try and fit in within whatever preparations you will be doing?

**MR GOVENDER:** Chair, absolutely. I will try my best, but with COVID there are a number of preparations that need  
10 to be made before you leave. And normally I go for three to four months, so I need at least a couple of days to sort out medication and a whole lot of other things that I need to get done.

**CHAIRPERSON:** Okay. No, that is fine. I think let us leave it at this that Mr Seleka will be in touch with your legal team, but it ought to be possible between now and Wednesday afternoon to find an hour, whether it is nine in the morning up to 10 before the witness for the day starts or sometime in the late afternoon or evening and so it  
20 ought to be possible. And if there are challenges we can take it from there, but I am optimistic that we should find time... [intervenes]

**MR GOVENDER:** Okay, Chair.

**CHAIRPERSON:** ...so that you can finish.

**MR GOVENDER:** Yes, Chair. Can I just ask, although it is

very cold in the evening here, but an evening will be good for me because then it leaves me the day to resolve my other issues.

**CHAIRPERSON:** Yes, yes. No, that will be borne in mind.

**MR GOVENDER:** Okay. Thank you, Chair.

**CHAIRPERSON:** Ja, ja.

**UNKNOWN MALE:** We will fit in with whichever space you can accommodate, Chair.

**CHAIRPERSON:** Yes. Okay, no, thank you. Thank you.

10 Okay, let me thank everybody. Let me thank you, Mr Govender, and your legal team for your cooperation. Mr Seleka and your team and the technicians and the staff. Thank you for giving us your cooperation. We are going to adjourn now. For the benefit of the public, I mention that tomorrow during the day I will be hearing the evidence of Mr Holden in regard to money flows, the money flows work stream.

Okay, we adjourn.

**REGISTRAR:** All rise.

20 **INQUIRY ADJOURNS TO 22 JUNE 2021**