

COMMISSION OF INQUIRY INTO STATE CAPTURE

HELD AT

PARKTOWN, JOHANNESBURG

10

27 FEBRUARY 2019

DAY 57

20

PROCEEDINGS HELD ON 27 FEBRUARY 2019

CHAIRPERSON: Good morning Mr Maleka, good morning everybody.

ADV VINCENT MALEKA SC: Good morning Deputy Chief Justice.

CHAIRPERSON: Thank you are you ready?

ADV VINCENT MALEKA SC: I am ready. Chair before we start may I make sure that we will be talking from the same bundle of documents.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: The statement of Ms – the next witness whose evidence you will hear shortly is included of the bundle of Eskom witness statements and it is
10 marked U5.A.

CHAIRPERSON: I have a file marked U5.A and I have got the statement of the next witness in terms of the index as the last statement in that file.

ADV VINCENT MALEKA SC: Yes. We can assure that to the extent the evidence contained in that statement implicates persons the [indistinct] has taken the liberty to send notices to those persons.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: And we quite comfortable that those notices comply with Rule 33 of the rules.

CHAIRPERSON: Yes.

20 **ADV VINCENT MALEKA SC**: And perhaps in due course there may well be responses to them. But for now we have not received any indication of what potential responses might be.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: That is a bundle of documents that – of documents that I will be working through for the rest of Mr Ephron's evidence. Unless his evidence take

us to some bundles out of caution I asked your Registrar to bring copies of the Parliamentary Reports that have now been placed you.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: In Volume 3.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: Chair I understand that yesterday you...

CHAIRPERSON: Well before we move on I said to you in terms of the index here I have got the next witness statement as the last statement on the – in the file marked U5. But I see that the index I was looking at does not tell me the page number, it tells
10 me the section but the file itself does not tell me where the different sections start. It is – there is U5 at the beginning so when I want to see what page the statement of the next witness starts the index does not tell me that. I must just look for it. I should be able to find it.

ADV VINCENT MALEKA SC: Chair mine is separated by a file divider.

CHAIRPERSON: Your one is better than mine. Mine has no file divider.

ADV VINCENT MALEKA SC: I understand from Ms Hofmeyr that that is the only statement you have you ought not to look at any other document. The thickness of the bundle including the statement is as a result of the annexures to the statement.

CHAIRPERSON: So would the statement be at the top?

20 **ADV VINCENT MALEKA SC**: Right at the beginning yes.

CHAIRPERSON: Oh okay. Okay I think there are two indices.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: And...

ADV VINCENT MALEKA SC: You can ignore the first and work from the second the one which is...

CHAIRPERSON: Ja.

ADV VINCENT MALEKA SC: Index to statement.

CHAIRPERSON: Ja okay. No I think I have got it.

ADV VINCENT MALEKA SC: And you will see that Item 1 is the statement of Mr Clinton Martin Ephron. It begins from page 1 to 28. What follows thereafter are annexures to the statement.

CHAIRPERSON: Yes, no I have got it now thank you.

ADV VINCENT MALEKA SC: Yes, yes. Chair I believe that yesterday you heard evidence relating to the scientific operation from coal from mining, transportation to the
10 various places where coal will be required to produce electricity. And that by now...

CHAIRPERSON: Yes I did.

ADV VINCENT MALEKA SC: You have some idea about how coal works and why Eskom needs it in its various power stations. The next witness.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: You are going to hear has had some practical workings around the business of coal.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: And to the extent that there are outstanding questions he might well be able to assist us in regard to making business out of mining of coal.

20 **CHAIRPERSON:** Yes.

ADV VINCENT MALEKA SC: His name is Mr Clinton Martin Ephron. He is represented by our colleagues and maybe before I ask Mr Ephron to take the oath or affirmation I should ask those who represent him to place their names on record.

CHAIRPERSON: Ja no that is in order.

MR ARNOLD SUBEL: Thank you Deputy Chief Justice appearing for the witness

Arnold Subel from the Johannesburg bar to together with my learned friend Carol Steinberg. Instructed by Attorneys Werksmens to my right and the representatives of Glencore also present at the hearing. Thank you.

CHAIRPERSON: Thank you very much. Thank you.

ADV VINCENT MALEKA SC: I think time has now arrived for Mr Ephron to take the oath or affirmation.

CHAIRPERSON: Yes Registrar.

REGISTRAR: Please state your full names for the record?

MR CLINTON MARTIN EPHRON: Clinton Martin Ephron.

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

MR CLINTON MARTIN EPHRON: No.

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

MR CLINTON MARTIN EPHRON: Yes.

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

MR CLINTON MARTIN EPHRON: So help me God.

CHAIRPERSON: Thank you very much.

ADV VINCENT MALEKA SC: Mr Ephron good morning.

20 **MR CLINTON MARTIN EPHRON**: Good morning.

ADV VINCENT MALEKA SC: You have had an occasion to consult with your legal representatives and some members of the legal team about the – your evidence and thereafter you have formulated a statement which is now before you.

MR CLINTON MARTIN EPHRON: That is correct.

ADV VINCENT MALEKA SC: And I take it that you have read the contents of that

statement and accompanying annexures in order to familiarise yourself once again with their contents, correct?

MR CLINTON MARTIN EPHRON: Correct.

ADV VINCENT MALEKA SC: Before we get to the substance of your evidence there are matters of background that I would like to raise with you. Some relate to your qualification and expertise especially in the business of coal mining and coal purchase and sale. Others relate to how the commission decided to procure your evidence and let me start with the latter. You know that allegations of state capture involving the sale of a mine previously owned by Glencore it is a matter that was previously investigated

10 by the Public Protector. You know about that factor?

MR CLINTON MARTIN EPHRON: I am aware.

ADV VINCENT MALEKA SC: Yes. And you know that the Public Protector is...

CHAIRPERSON: I am sorry. Mr Ephron please try and speak up a little bit.

MR CLINTON MARTIN EPHRON: Of course.

CHAIRPERSON: So that the mic can capture what you say. Thank you.

ADV VINCENT MALEKA SC: And part of [indistinct] articulation and capturing is by looking in the direction of the Chairperson.

MR CLINTON MARTIN EPHRON: Got it.

20 **ADV VINCENT MALEKA SC:** Yes. The Public Protector prepared a report flowing from her investigation and in it she references the extent of interface [indistinct] with Glencore regarding Optimum Coal Holdings and the mine it owned. What is your knowledge about the extent and the degree of engagement the Public Protector had with Glencore?

MR CLINTON MARTIN EPHRON: If I may so Deputy Chief Justice we met with the Public Protector before her report came out I think it was a few months before and we

gave her evidence very similar to what is being presented today in terms of my statement and it was only on one occasion that we met with – we did not meet directly with the Public Protector herself but we did meet with members of her team.

ADV VINCENT MALEKA SC: How did that engagement proceed? Did you hold any interview with her or any member of her staff?

MR CLINTON MARTIN EPHRON: We did.

ADV VINCENT MALEKA SC: Okay. You know that the Portfolio Committee on state owned enterprises of our National Assembly also conducted investigation relating to those allegations. You know about that fact I take it?

10 **MR CLINTON MARTIN EPHRON:** I am aware.

ADV VINCENT MALEKA SC: Did Glencore make an input insofar as the work of the committee is concerned?

MR CLINTON MARTIN EPHRON: No we were not asked to and I think it was on the basis that the information from the Public Protector was clear and part of the evidence that was put forward. My understanding.

ADV VINCENT MALEKA SC: Did you ever testify before any other body of inquiry into these allegations?

MR CLINTON MARTIN EPHRON: No I did not.

20 **ADV VINCENT MALEKA SC:** So this is the first time you present Glencore's version in a public forum?

MR CLINTON MARTIN EPHRON: That is correct.

ADV VINCENT MALEKA SC: Firstly beginning with the statement that we will look at in due course.

MR CLINTON MARTIN EPHRON: Correct.

ADV VINCENT MALEKA SC: Can I get to some details relating to your personal –

maybe not personal but professional qualifications and business experience. I note that in paragraph 1 if you can go to U5A and in paragraph 1 you tell us about your qualifications and you say in that regard that you are a Chartered Accountant. You confirm that?

MR CLINTON MARTIN EPHRON: Correct.

ADV VINCENT MALEKA SC: When did you qualify as a CA?

MR CLINTON MARTIN EPHRON: 1993.

ADV VINCENT MALEKA SC: 1993. And like all other CA's I take it that you served articles in some firm?

10 **MR CLINTON MARTIN EPHRON:** With Grant Thornton.

ADV VINCENT MALEKA SC: Grant Thornton?

MR CLINTON MARTIN EPHRON: Correct.

ADV VINCENT MALEKA SC: You begin your work experience as described in that paragraph from 2013 but there is a gap of ten years between your qualification date as a CA and your assumption of office as the Chief Executive Officer of Optimum Coal Mine PTY Limited. I wonder whether you will be willing to fill up that gap for us.

MR CLINTON MARTIN EPHRON: Sure. Firstly just to correct you Mr Maleka it is 20 years.

20 **ADV VINCENT MALEKA SC:** 20 years. I am sorry to understate the degree and extent of your experience.

MR CLINTON MARTIN EPHRON: No problem.

ADV VINCENT MALEKA SC: My apologies.

MR CLINTON MARTIN EPHRON: My entire professional career after I finished my articles was with Glencore in various roles commodity trading, managing of assets, mainly involved in the business around South Africa and specifically around the

commodity coal.

ADV VINCENT MALEKA SC: How did you rise through up the ranks of ultimately becoming the CEO of Optimum Coal Mine?

MR CLINTON MARTIN EPHRON: So it was a long period like I say it was 20 odd years and with the company we grew the asset base not only in South Africa but around the world and I grew within the company hopefully through hard work and dedication and got to the point where in and around the early 2000' and even the late 90's we started procuring coal mines in South Africa and I was actively involved in that process and in the background continuing to buy and sell the commodity of coal. Glencore as
10 you know is a multi-commodity company not only coal but I specialised only in the coal department.

ADV VINCENT MALEKA SC: Yes. I wonder whether you can give us an appreciation of Glencore's coal business profile in South Africa?

MR CLINTON MARTIN EPHRON: Yes it is...

ADV VINCENT MALEKA SC: It will become relevant later when we deal with what you refer in your statement as the so called Section 54 Notices. But for now please give us a picture of the coal business of Glencore in this country?

MR CLINTON MARTIN EPHRON: So I think it important to give you some background around the pre Xstrata days and the post Xstrata days. Glencore was in its own rights
20 a large multi-national and still is procuring commodities from various suppliers and also became an industrial player in terms of buying the mines that secured the source of supply which entails getting involved in the actual production of the commodity. In South Africa we started procuring mines and becoming shareholders in mines as in the 90's, in the early 90's and that progressed and until the formation of Xstrata in 2002. And then in 2002 I hope my years are correct Deputy Chief Justice but it is some time

ago.

CHAIRPERSON: Well I would expect them to be correct with a Chartered Accountant.

MR CLINTON MARTIN EPHRON: True but with age things do change.

CHAIRPERSON: Yes.

MR CLINTON MARTIN EPHRON: So in 2002 Xstrata purchased the mining assets that Glencore had in South Africa and Glencore still retained a significant portion of the equity of Xtrata and from 2002 to around 2013 Xstrata built a relatively large mining house in South Africa. And then in 2013 Glencore and Xstrata merged and all the – I skipped a little bit is that there was a period in from around 2005 where Glencore
10 started procuring assets in its own rights. Xstrata was in existence. So Glencore started procuring certain mines together with various partners and in 2013 it was the worldwide merger between Glencore and Xstrata and all the assets in South Africa were put together under one banner called Glencore Coal South Africa which was in 2013 and it was at that point that I was made CEO of that group which represented at that point Glencore's Coal Assets and Xstrata's Coal Assets. I must remind you Judge that we – this was a worldwide merger. It was not specific to South Africa and South Africa was part of the merger.

ADV VINCENT MALEKA SC: Thank you.

MR CLINTON MARTIN EPHRON: And if I may interrupt I am sorry.

20 **ADV VINCENT MALEKA SC**: Yes.

MR CLINTON MARTIN EPHRON: That is – continues into an existence today. So the merger in 2013 and all those mining assets are now held under the Glencore Coal South Africa banner.

ADV VINCENT MALEKA SC: Alright. Can I close off the topic by asking you to tell us where else in the world does Glencore have coal mine presence?

MR CLINTON MARTIN EPHRON: Glencore has coal mine presence in the production in specifically Columbia and Australia.

ADV VINCENT MALEKA SC: Can I move then to paragraph 4 of your statement. And it talks about the history of the Optimum Coal Mine and the process through which its ownership moved from one to other owners. The first thing that I would like to ask you there is to confirm that Optimum Coal Mine was operated primarily to support Eskom with coal for its requirement at a specific power station. What was that power station?

MR CLINTON MARTIN EPHRON: So that power station was Hendrina and if I may to please the commission I would like to set the context of what I am about to say not only
10 with regard to the history of Optimum but also the – my recollection in terms of this statement. This statement has been prepared without the luxury and benefit of hindsight. It was what we felt – what I felt and my understanding of the events of the time they occurred and I think that is important as we sit here today many years later I think it is important that we know that from the outset. Also in terms of the history of Optimum again it is from my understanding and information that I have gained from my experience but I cannot vouch for the absolute accuracy of the paragraph starting from paragraph 5 onwards before Glencore became involved.

ADV VINCENT MALEKA SC: Ja we will get there because there are some questions that I would like you to clarify.

20 **MR CLINTON MARTIN EPHRON:** Sure.

ADV VINCENT MALEKA SC: To the extent that from recollection and documentation at your disposal may provide you with some understanding. But what I want to start with is the contractual basis between Eskom and Optimum Coal Mine for the supply of coal. You say that it was on a cost plus margin basis.

MR CLINTON MARTIN EPHRON: Yes. So initially when the mine was formed this

mine was formed specifically to supply coal to the Hendrina Power Station back in the 70's. That was the purpose of this mine and it was – there was a contract that was entered into at the time which was very common in terms of the way Eskom procured that was on a cost plus basis. So what does that mean a cost plus basis?

ADV VINCENT MALEKA SC: Yes.

MR CLINTON MARTIN EPHRON: That means that Eskom was wholly responsible for all the costs associated with mining the coal and the return the mining house would receive a fixed margin. So there was very little risk that the mining house had. The mining house obviously had to account for its cost but Eskom was directly responsible
10 an there is still many of those contracts in place today. That is how Optimum – the Optimum/Hendrina relationship started back in the even 70's and also into the 80's. It was only later in the late 80's and early 90's when the export market and Richard Bay Coal Terminal had just been built that the owners of Optimum Coal Mine decided to start the export market and to start exporting coal from Optimum Coal Mine because there was significant reserves at Optimum Coal Mine.

CHAIRPERSON: We will get to the export leg of that business but for now we would like to understand the significance of this pricing regime called cost plus model.

MR CLINTON MARTIN EPHRON: Right.

ADV VINCENT MALEKA SC: You have just elaborated on the advantages of that
20 model insofar as the mine owner and operator are concerned. Does it have any benefits for an owner of a power station such as Eskom specifically Hendrina in this case?

MR CLINTON MARTIN EPHRON: Yes.

ADV VINCENT MALEKA SC: Can you just elaborate for us what would be the advantage of Eskom assuming the primary and prior obligation of carrying the cost of

establishing a mine of that sort?

MR CLINTON MARTIN EPHRON: Judge I think that the cost plus operations or the cost plus contracts were the best contracts for Eskom. Because Eskom if they controlled the costs correctly and there was mechanisms in the contract to do so they would always be paying a fair price for coal. They were not subject to the market. And considering the size of Eskom and the reliance that it places on coal that for me was the by far the best contractual basis. That being said many contracts were entered into after this period on a fixed price basis which specifically at the time that Hendrina – that Optimum started to export Eskom and the owners of Optimum at that time entered into
10 a different type of contract. And that contract is a fixed price contract. That means your price is fixed without change. What happens on an annual basis is there is an inflationary adjustment and that inflationary adjustment is supposed to represent the genuine costs that the mine would incur as a result of inflation. Now various baskets of indices that would be used to incorporate that inflationary adjustment. In 1993 if I may that is when Optimum entered into a long term agreement on a fixed cost basis – fixed price basis with Hendrina Power Station – Eskom at the time. And that was for a period of 25 years. So at that point in time they entered into a 25 year agreement on the basis of the reserves that were held at Optimum Coal Mine.

CHAIRPERSON: So what was the difference between the cost plus arrangement and
20 the fixed price arrangement if you can deal with that?

MR CLINTON MARTIN EPHRON: Yes so it is specifically and in the simplest of terms cost plus Eskom are responsible for all the costs regardless of what they are plus an agreed upon margin for the mining house. A fixed price the mine is wholly responsible for all the costs and will sell to Eskom at a price regardless of its cost and margin. So it is set at a specific price at R100,00 a tonne Optimum would sell coal at R100,00 a

tonne to Hendrina for a period of 25 years escalated at an inflationary adjustment. So it is a fixed price contract. If the costs blow out that is the responsibility of the mine.

CHAIRPERSON: So the fixed price arrangement is what would be a normal business transaction as opposed to the cost plus arrangement which does not seem to be a normal arrangement or not really?

MR CLINTON MARTIN EPHRON: No so if we talk about a cost plus it was a normal arrangement for Eskom at the time and it made sense and still does I believe at the time. Because of the reliance that Eskom places on the mine and the coal is right next door so a cost plus keeps everyone honest in terms of the genuine costs and ensures
10 the sustainability and this is critical – it ensures the sustainability of ...

CHAIRPERSON: No, no.

MR CLINTON MARTIN EPHRON: The sustainability of the mine.

CHAIRPERSON: Okay I am sorry to interrupt you. I am sure there were reasons for it and they may have been good reasons what I am asking you is whether in normal business transaction it does not appear to me to be normal that the client would be responsible for your costs you know. You would take into account what your costs are in fixing your fee or what you will charge for your services or for your products is it not?

MR CLINTON MARTIN EPHRON: Correct.

CHAIRPERSON: So that is why I am saying it does not seem to me that that is a
20 normal business arrangement but it may have been normal to Eskom or to the coal industry at a particular time, is that right? Is that more or less what you would agree with as well?

MR CLINTON MARTIN EPHRON: You – that is exactly right. You are correct in your summation. It is not a normal transaction.

CHAIRPERSON: Yes, yes.

MR CLINTON MARTIN EPHRON: It is not a normal transaction.

CHAIRPERSON: Yes.

MR CLINTON MARTIN EPHRON: But if managed correctly I believe that it is – that it makes sense because you are building the power station because the resource...

CHAIRPERSON: For the specific client?

MR CLINTON MARTIN EPHRON: Because the coal is there.

CHAIRPERSON: Yes.

MR CLINTON MARTIN EPHRON: You building the power station right on the resource.

CHAIRPERSON: Yes.

10 **MR CLINTON MARTIN EPHRON:** So that is why it made sense at the time.

CHAIRPERSON: Yes. So the fixed price arrangement if I understood you correctly which I think you said started in 1993 is that right?

MR CLINTON MARTIN EPHRON: Yes.

CHAIRPERSON: So you were then moving or Glencore was moving away from the previous arrangement now?

MR CLINTON MARTIN EPHRON: So it was not Glencore to correct you.

CHAIRPERSON: Oh.

MR CLINTON MARTIN EPHRON: At the time.

CHAIRPERSON: Yes.

20 **MR CLINTON MARTIN EPHRON:** It was the owners of the Optimum.

CHAIRPERSON: Of the predecessors.

MR CLINTON MARTIN EPHRON: At the time.

CHAIRPERSON: Ja.

MR CLINTON MARTIN EPHRON: They decided to...

CHAIRPERSON: Yes.

MR CLINTON MARTIN EPHRON: To Trans Natal.

CHAIRPERSON: Okay.

MR CLINTON MARTIN EPHRON: Entered into this agreement on a cost plus basis.

CHAIRPERSON: Yes.

MR CLINTON MARTIN EPHRON: This had – this was long before Glencore got involved. Glencore only got involved in this mine.

CHAIRPERSON: Yes.

MR CLINTON MARTIN EPHRON: 20 years later.

CHAIRPERSON: Yes. Okay.

10 **MR CLINTON MARTIN EPHRON:** This same contract was continuing.

CHAIRPERSON: Yes under different.

MR CLINTON MARTIN EPHRON: Under different management.

CHAIRPERSON: Yes. So but basically whoever it was they were now together with Eskom moving away from the previous arrangement?

MR CLINTON MARTIN EPHRON: Correct.

CHAIRPERSON: And if I understood you correctly this appears to have been influenced by the availability of the option of exporting coal?

MR CLINTON MARTIN EPHRON: Yes.

CHAIRPERSON: Is that right?

20 **MR CLINTON MARTIN EPHRON:** Yes.

CHAIRPERSON: Okay alright.

MR CLINTON MARTIN EPHRON: Because it became cumbersome.

CHAIRPERSON: Yes.

MR CLINTON MARTIN EPHRON: To calculate the costs when you are exporting and you are supplying to Eskom. So Eskom and the mine at that point decided it would just

be easier to do it on a fixed price basis.

CHAIRPERSON: Okay, alright, thank you. Mr Maleka.

ADV VINCENT MALEKA SC: Thank you Chair.

CHAIRPERSON: You may proceed.

ADV VINCENT MALEKA SC: There is one issue that I would like to explore with you relating to the different pricing regimes you have indicated. We have read a lot about a business strategy called Security of Supply. And I take it that you know what that means in your business?

MR CLINTON MARTIN EPHRON: Yes.

- 10 **ADV VINCENT MALEKA SC**: What role did that business strategy play in relation to the Cost Plus pricing regime that Eskom resorted to in the early phase of this mine?

MR CLINTON MARTIN EPHRON: If I understand the question correctly it is normally these Cost Plus arrangements were on the basis of the life of a mine. So the security of supply for Eskom was insured and secured. So it was done on a basis where all the resources that belonged to the mine were ceded or pledged or bonded basically to Eskom. Eskom did not necessarily own them but they were part of the transaction that all the resources that belonged to the mining house at that point were dedicated for the power station.

ADV VINCENT MALEKA SC: And how?

- 20 **MR CLINTON MARTIN EPHRON**: I hope I have answered your question correctly.

ADV VINCENT MALEKA SC: I think you did and I would like to press ahead on it to make sure that I understand the implication of security of supply, but from your answer you do indicate that it was an assurance extended to Eskom that for as long as the mine has coal in it Eskom will be the primary recipient of that coal. Correct?

MR CLINTON MARTIN EPHRON: Correct.

ADV VINCENT MALEKA SC: How in terms of the contractual relationship was that security of supply achieved?

MR CLINTON MARTIN EPHRON: It was only contractual. So it was contractual wherein the, in the specific CSA or the Coal Supply Agreement they make reference to all the tonnages. This, there was a very long agreement which is marked, if I can take you to CE1 [intervenes].

ADV VINCENT MALEKA SC: It is on page 29 here.

MR CLINTON MARTIN EPHRON: Which starts on page 29.

CHAIRPERSON: Thank you.

10 **ADV VINCENT MALEKA SC:** I know you will take me out there, but I would like if you do not mind to lead the discussion bearing in mind that you are free to direct attention to parts of the CSA that you conceive to be important, but for now can I ask you to go to page 33?

MR CLINTON MARTIN EPHRON: 30?

ADV VINCENT MALEKA SC: 3-3.

MR CLINTON MARTIN EPHRON: Okay.

ADV VINCENT MALEKA SC: You will see that there is a reference to the definition of the maximum tonnage.

MR CLINTON MARTIN EPHRON: Huh-uh.

20 **ADV VINCENT MALEKA SC:** You will see that it is referenced as 6.5 million tons which may be required to be supplied in each year in terms of this CSA plus a further 3 million tons of coal per annum which may be required to be supplied. So there is a minimum amount plus an additional amount. I know that you were not party to this agreement.

MR CLINTON MARTIN EPHRON: Huh-uh.

ADV VINCENT MALEKA SC: At the time when it was formulated, but do you confirm that this was the type of tonnage which was expected in terms of this agreement?

MR CLINTON MARTIN EPHRON: That is correct. It was, they refer to contractually as the maximum tonnages, but 6.5 million tons was the contractual amount that needed to be supplied for a period of 25 years.

ADV VINCENT MALEKA SC: And then if you go to [intervenes].

CHAIRPERSON: Sorry just one second. Is the point you are making there with your last statement that in practice it might not have been the maximum, but it was what was required by the contract which I would understand to mean you may have at some
10 stage provided more than what they call the maximum here?

MR CLINTON MARTIN EPHRON: Yes that was by agreement but for the, for the main part and I was not party to this agreement Deputy Chief Justice but it is, it is 6.5 million tons per annum and there was mechanisms where it was slightly lower or potentially slightly higher.

CHAIRPERSON: Yes.

MR CLINTON MARTIN EPHRON: And that was written into the contract.

CHAIRPERSON: Okay. No that is alright.

ADV VINCENT MALEKA SC: And Chair to answer your question may I direct Mr Ephron to go to page 34.

20 **CHAIRPERSON:** Yes.

ADV VINCENT MALEKA SC: And look at the definition of minimum tonnage. Are you there?

MR CLINTON MARTIN EPHRON: Yes.

ADV VINCENT MALEKA SC: What is the minimum tonnage?

MR CLINTON MARTIN EPHRON: So.

ADV VINCENT MALEKA SC: Originally required in terms of this contract?

MR CLINTON MARTIN EPHRON: The minimum tonnage in this contract was 3 million tons per annum.

ADV VINCENT MALEKA SC: Yes. So there is a minimum which is 3 million. There is a maximum which is 6.5 million and there is a discretionary amount of a further 3 million tonnage per month?

MR CLINTON MARTIN EPHRON: That is correct.

ADV VINCENT MALEKA SC: Yes.

MR CLINTON MARTIN EPHRON: I just, just to add there is, there is something in this
10 contract which I have not studied intricately. It is a 100 page contract.

ADV VINCENT MALEKA SC: Yes.

MR CLINTON MARTIN EPHRON: Where it talks of that additional 3 million. In other words the amount above the 3 million minimum that it would be supplied and my understanding and I would need a little bit of time to go back and, and go into this, but my understanding and I think for the purposes of the Commission I think it is important that it was 6.5 million tons was, became the annual contractual tonnage that was required to supplied from Optimum to Hendrina Power Station.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: So, so would I be correct to say since the agreement provided both
20 for a maximum, annual maximum and then annual minimum that those the, the annual minimum provided there would be the annual minimum in terms of the agreement and the annual maximum would be the annual maximum in terms of the agreement, but based on what you said a few minutes ago the parties sometimes arrange for a little more than the maximum stipulated in the agreement. Is that right?

MR CLINTON MARTIN EPHRON: You are correct.

CHAIRPERSON: Yes.

MR CLINTON MARTIN EPHRON: I would.

CHAIRPERSON: Okay.

MR CLINTON MARTIN EPHRON: I would say for the most period not for.

CHAIRPERSON: For the most, oh.

MR CLINTON MARTIN EPHRON: Various.

CHAIRPERSON: Okay.

MR CLINTON MARTIN EPHRON: For the majority of the time.

CHAIRPERSON: You provided more than the maximum [intervenes]?

10 **MR CLINTON MARTIN EPHRON:** No, for the majority of the time we provided the, the mine provided more than the minimum and closer to the maximum.

CHAIRPERSON: Oh, okay, okay, but you.

MR CLINTON MARTIN EPHRON: For the majority of the time.

CHAIRPERSON: *Ja*, but you did sometimes provide more than the contractual maximum?

MR CLINTON MARTIN EPHRON: That I would have to check.

CHAIRPERSON: Oh, okay. No, I am sorry. It just that.

MR CLINTON MARTIN EPHRON: That I would have to check.

20 **CHAIRPERSON:** I, I thought that is what you said earlier on. So I must have misunderstood.

MR CLINTON MARTIN EPHRON: No.

CHAIRPERSON: Okay.

MR CLINTON MARTIN EPHRON: So according to just under the definitions which is pages 33 and 34.

CHAIRPERSON: Yes.

MR CLINTON MARTIN EPHRON: It talks about maximum of 6.5 million.

CHAIRPERSON: Yes.

MR CLINTON MARTIN EPHRON: And a minimum of 3 million.

CHAIRPERSON: Yes, yes.

MR CLINTON MARTIN EPHRON: But there, there are clauses in the contract.

CHAIRPERSON: Yes.

MR CLINTON MARTIN EPHRON: That talk to providing for the 6 million.

CHAIRPERSON: Yes.

10 **MR CLINTON MARTIN EPHRON:** I would have to go and, and look at it perhaps when
we break.

CHAIRPERSON: No that is fine.

ADV VINCENT MALEKA SC: No, we understand.

[Intervenes]

MR CLINTON MARTIN EPHRON: But for the, for the most part.

CHAIRPERSON: Hm.

MR CLINTON MARTIN EPHRON: The mine supplied and this is back 20 years.

CHAIRPERSON: Hm.

MR CLINTON MARTIN EPHRON: The mine supplied 6.5 million tons per annum.

ADV VINCENT MALEKA SC: Yes.

20 **CHAIRPERSON:** Okay. No that is all [intervenes].

ADV VINCENT MALEKA SC: Mr Ephron can I accept that my questions are purely
directed at the design of the contractual arrangements?

MR CLINTON MARTIN EPHRON: Correct.

ADV VINCENT MALEKA SC: Not its implementation?

MR CLINTON MARTIN EPHRON: Correct.

ADV VINCENT MALEKA SC: I am merely talking about the contractual expectation of the tonnages in line with the definition?

MR CLINTON MARTIN EPHRON: You are correct.

ADV VINCENT MALEKA SC: Can I ask you to go to page 35 and I draw your attention to the last definition on this page purely for the sake of completeness? You will see that the definition refers to the previous agreement and it is defined but the important part of the definition is the date of 24 June 1983. Do you see that?

MR CLINTON MARTIN EPHRON: Yes, I do.

ADV VINCENT MALEKA SC: Is it fair to conclude from this definition that the CSA we
10 are looking at was not the first CSA or contractual relationship between Eskom and TransNatal?

MR CLINTON MARTIN EPHRON: Correct.

ADV VINCENT MALEKA SC: That there was a previous one which began in 1983?

MR CLINTON MARTIN EPHRON: That is correct.

ADV VINCENT MALEKA SC: Looking backwards and from your knowledge was Optimum Coal Mine in existence and was it supplying Eskom with coal since the 1983 days?

MR CLINTON MARTIN EPHRON: Yes.

ADV VINCENT MALEKA SC: So it has had some long life?

20 **MR CLINTON MARTIN EPHRON:** It has had a long life.

ADV VINCENT MALEKA SC: Okay.

MR CLINTON MARTIN EPHRON: In fact if you, if I can direct you to, to paragraph 6 of my statement.

ADV VINCENT MALEKA SC: So it is at page 1, yes.

MR CLINTON MARTIN EPHRON: To the best of my knowledge Optimum Collieries

had been supplying coal to Eskom since the 1970s.

ADV VINCENT MALEKA SC: Yes. Thank you for that clarity and again we are looking at the contract and its design. Can I ask you to go to page 38 and look at paragraph 2.3 of the introduction to the substance of the CSA we are looking at? You will see that it records that the owner of Optimum Coal Mine at the time Optimum Collieries (Pty) Ltd. Its operation was subsequently transferred to a holding company called TNC and that we know is TransNatal.

MR CLINTON MARTIN EPHRON: Sorry, I am, I have lost you. Were you looking at page 38, 2.3?

10 **ADV VINCENT MALEKA SC:** 3.2.

MR CLINTON MARTIN EPHRON: 2.3.2?

ADV VINCENT MALEKA SC: 3.2 on page 38.

MR CLINTON MARTIN EPHRON: “A natural person includes an artificial person and vice versa”?

ADV VINCENT MALEKA SC: No.

MR CLINTON MARTIN EPHRON: Why have I got?

ADV VINCENT MALEKA SC: Look at paragraph 3.2 of the agreement on that page.

MR CLINTON MARTIN EPHRON: 3.2?

ADV VINCENT MALEKA SC: Yes.

20 **MR CLINTON MARTIN EPHRON:** Okay.

ADV VINCENT MALEKA SC: On what page of your document does it appear?

MR CLINTON MARTIN EPHRON: Got it.

“The operations of Optimum Collieries Proprietary Limited were subsequently transferred to its holding company TransNatal Collieries.”

Got it.

ADV VINCENT MALEKA SC: You got it?

MR CLINTON MARTIN EPHRON: Yes.

ADV VINCENT MALEKA SC: Yes. So it seems to me when I look at this that there was some arrangement where TransNatal took over the operation of the mine previously controlled by Optimum Collieries. Do you see that?

MR CLINTON MARTIN EPHRON: Yes.

ADV VINCENT MALEKA SC: And that was the purpose of the agreement?

MR CLINTON MARTIN EPHRON: Yes.

10 **ADV VINCENT MALEKA SC:** The key part though for the purposes of the earlier questions I asked you about security of supply begin at page 39 paragraph 3.4 and I hope that your paragraph 3.4 is.

MR CLINTON MARTIN EPHRON: *Ja.*

ADV VINCENT MALEKA SC: At page 39.

MR CLINTON MARTIN EPHRON: I have got it.

ADV VINCENT MALEKA SC: Can you read it for us?

MR CLINTON MARTIN EPHRON: Of course.

20 “As Eskom is Optimum’s primary customer it is the intention of the parties that the coal requirements of Eskom will enjoy preference over other customers of Optimum and accordingly Eskom will be entitled to first call on any coal produced by Optimum including if necessary export quality coal upon the terms and conditions contained in this agreement.”

ADV VINCENT MALEKA SC: Yes. If I look at that part, you are not a lawyer I accept that but you are a businessman, if I look at that part of the agreement which gives

Eskom the right of preference it means in the contractual design of this agreement that Eskom has a right to call you to deliver the 6.5 million tons per month and you will be obliged to do so.

MR CLINTON MARTIN EPHRON: Correct.

ADV VINCENT MALEKA SC: It also means that to the extent necessary and assuming Eskom requires the additional 3 million tons per month you will also be required to do so. Even if it means that you are going to get that additional 3 million from coal intended for export market consumption.

MR CLINTON MARTIN EPHRON: That appears to be correct from my reading.

- 10 **ADV VINCENT MALEKA SC:** Yes. Then there is a duration clause. We are going to talk about it, but for the present purposes can I ask you to confirm the duration of this agreement as is set out in paragraph 4.1?

MR CLINTON MARTIN EPHRON: Yes. So the duration Deputy Chief Justice was from 1993 until 2008 which is 15 years.

ADV VINCENT MALEKA SC: Yes. I think I am.

MR CLINTON MARTIN EPHRON: And then there was a mechanism to extend it. That was at the option of Eskom to extend it for a further 10 years. I think that is in 4.2 on page 40.

ADV VINCENT MALEKA SC: And 4.3.

- 20 **MR CLINTON MARTIN EPHRON:** And 4.3 [intervenes].

ADV VINCENT MALEKA SC: Which gives us the express date of the extension.

MR CLINTON MARTIN EPHRON: So essentially at the time in 2008 Eskom did extend it. So the entire duration I point out again if I may jump around to my statement page 2 number 7 it was for a 25 year period.

ADV VINCENT MALEKA SC: Yes.

MR CLINTON MARTIN EPHRON: From 1993 until 2018.

ADV VINCENT MALEKA SC: 25 years is a long time. It is a generation.

MR CLINTON MARTIN EPHRON: It is a very long time.

ADV VINCENT MALEKA SC: It is a generation. It seems to me that there is a reason why Eskom would go into such a long term contract originally on a Cost Plus basis that you have explained. What I would like to explore with you for now is the other side of the pricing regime with this long term contract.

MR CLINTON MARTIN EPHRON: So this contract was no longer a Cost Plus Contract. This contract was a Fixed Price Contract for a period of 25 years and if I may
10 direct the Commission to Clause 27.1 of the agreement and I am going to give you the page in a second. Page 71.

CHAIRPERSON: Yes.

MR CLINTON MARTIN EPHRON: I am, I am highlighting this Hardship Clause because what is important to understand is when you are entering into a 25 year agreement with a Fixed Price there is absolutely no way that you can know in the uncertain environment of mining what is going to happen in terms of the mine, its geographical location, its quality of coal. So at the time the people who signed this agreement had the foresight to include a Hardship Clause. It forms quite a big basis of the statement and I think it is worth pointing out and if I may read 27.1. It is very short.

20 **ADV VINCENT MALEKA SC:** Yes.

MR CLINTON MARTIN EPHRON: “In entering into this agreement the parties declare to be the intention that this agreement shall operate between them with fairness and without undue hardship.”

The importance of that Deputy Chief Justice is that there was a point in time and we are

going to read it further on in the statement that Optimum was enduring severe financial hardship and it was at that point in time that Optimum went to Eskom in the hope that we could try and alleviate the losses in some form in terms of 27.1, because in a 25 year agreement there is no way that one would be able to account for all the possibilities of what could go wrong and what came to the realisation in 2013 and also in 2011 for that matter is that the inflationary adjustment that was being used in the contract was no longer representative of the genuine costs that the mine was incurring on an annual basis. So there was what we called a margin creep. A margin creep meant that every year the, the price was being adjusted by the inflationary adjustment as per the contract, but because the costs were, the real costs were higher than the inflationary adjustment the margin was being eroded. The margin that was envisaged and eventually there was a point where the costs exceeded the selling price to Eskom and the, the idea at the time and the intention of my understanding was under 27.1 was that this Hardship Clause was, was created to avoid this and other issues, but it was certainly created to try and alleviate the problems that would be incurred when the mine does or if the mine does incur hardship.

ADV VINCENT MALEKA SC: Mr Ephron we will get to that issue, but now that you have started with the contractual structure relating to the Hardship Clause do you mind if we complete the implementation of those hardship provisions, because the agreement contemplates how the Hardship Clause can be invoked?

MR CLINTON MARTIN EPHRON: Yes.

ADV VINCENT MALEKA SC: If you look at paragraph 27.3 on page 72.

MR CLINTON MARTIN EPHRON: [Intervenes].

ADV VINCENT MALEKA SC: There is a contractual process to invoke those circumstances of hardship. Correct?

MR CLINTON MARTIN EPHRON: That is correct. So it goes from 27.2 and it; that is on page 72 and there is a, a long legal all the way up to page 74, 27.6 of the mechanism that the, the parties would have to follow in order to, to go down the route of proving.

ADV VINCENT MALEKA SC: Ja.

MR CLINTON MARTIN EPHRON: Hardship or not.

ADV VINCENT MALEKA SC: Sure. The substance of it is that if and when a dispute arises about whether there exists in truth and fact a hardship within the meaning of the agreement that dispute will be resolved via arbitration. Correct?

10 **MR CLINTON MARTIN EPHRON:** Correct.

ADV VINCENT MALEKA SC: We will get to what happened in the circumstances of the present issue and case. So let us not rush to them yet, because.

MR CLINTON MARTIN EPHRON: No problem.

ADV VINCENT MALEKA SC: They may not properly sequence your evidence.

MR CLINTON MARTIN EPHRON: No problem.

ADV VINCENT MALEKA SC: But you have dealt with the provision and the implementation of the provision.

MR CLINTON MARTIN EPHRON: No problem.

20 **ADV VINCENT MALEKA SC:** And of course that arises because there is a question of penalties and I would like to take you to certain specific provisions of the agreement. First of all can I ask you to go to page 42 and I draw your attention to this to underscore that principle of security of supply. You will see that paragraph 6.1 deals with the obligation to exclusively coal for Eskom at a specific power station. Do you mind to deal with it to the best of your knowledge? Are you at page 42 paragraph 6.1?

MR CLINTON MARTIN EPHRON: Sure. I am, I am, I am just reading it if I may.

ADV VINCENT MALEKA SC: You can read it out loudly if you want to.

MR CLINTON MARTIN EPHRON: So allow me. So 6.1:

“Eskom shall with effect from the commencement date and thereafter for a duration of this agreement purchase subject to 6.3 its entire requirements of coal for Hendrina exclusively from TNC and no other sources provided that Eskom shall not, shall purchase not less than the minimum tonnages in each year in accordance with the provisions of 14 read with Schedule 7 hereto.”

- 10 **ADV VINCENT MALEKA SC:** Alright and you confirm that its obligation to exclusively procure and it is the obligation to exclusively supply the minimum tonnage?

MR CLINTON MARTIN EPHRON: That is correct.

ADV VINCENT MALEKA SC: Correct. Now there is a clause which is going to become relevant later especially when you deal with the difficulties that Optimum Coal Mine began to experience and it is about coal quality and penalties.

MR CLINTON MARTIN EPHRON: Huh-uh.

ADV VINCENT MALEKA SC: As I pick it up it is on page 46 paragraph 9 and if you do not mind for my purposes you can read paragraph 2.9.

MR CLINTON MARTIN EPHRON: 9.2?

- 20 **ADV VINCENT MALEKA SC:** 9.2, I am sorry.

MR CLINTON MARTIN EPHRON: “TNC shall be obliged to pay to Eskom the penalties relating to any coal delivered to Eskom which does not comply with the specifications in respect of calorific value, moisture content, volatiles or abrasiveness on the basis set out in Schedule 1 hereto.”

ADV VINCENT MALEKA SC: And the rest of the clause deals with what constitutes coal that does not comply with specifications including how you could remedy the affected coal. Correct?

MR CLINTON MARTIN EPHRON: Correct.

ADV VINCENT MALEKA SC: And then if you go to 9.4 on page 48 you will see that there is a reference to the fact that penalties will be the only remedy that Eskom has in terms of this agreement arising from non-compliant coal. Do you see that?

MR CLINTON MARTIN EPHRON: Correct. In other words no consequential losses.

ADV VINCENT MALEKA SC: Yes. It seems to me when I read this contract and
10 please confirm whether my understanding of it is in line with your business expectation having operated under the CSA that:

“It contemplated a continued contractual arrangement for the supply of coal and the fact that coal that is supplied may not be consistent with the agreed specification would not result in the termination of the agreement. Instead Eskom will enjoy a specific contractual remedy and that is the imposition of penalties.”

So the design of this agreement is to keep alive the contractual relationship in terms of this agreement for its duration which you said was 25 years.

20 **MR CLINTON MARTIN EPHRON:** That is correct.

ADV VINCENT MALEKA SC: And again that is another indicator of the security of supply.

MR CLINTON MARTIN EPHRON: Hm.

ADV VINCENT MALEKA SC: Do you agree?

MR CLINTON MARTIN EPHRON: That is correct.

ADV VINCENT MALEKA SC: And lastly in paragraph 9.5:

“During the days of TransNatal it was entitled to payment of bonuses of two forms. You will find them in 9.5.1 general bonuses, 9.5.2 consistency bonuses.”

What I would like to understand from you is when Glencore ultimately took over this mine and the pricing regime became different which is Fixed Price method of pricing were you entitled to these forms of bonuses?

MR CLINTON MARTIN EPHRON: No, because the coal that was being supplied was not, was not, did not justify the bonuses that are reflected in 9.5.1.

10 **ADV VINCENT MALEKA SC:** Yes. There is a sampling and analysis provision and I am not going to ask you to go through it. It is up to you if you want to do it. You have dealt with the Hardship Clause. I am not going to ask you to repeat it and I would like to draw your attention to a Cession Clause which you will find on page 75 paragraph 29.2 and it is a clause that becomes important in the light of the historic evolution of the ownership of the mine up to and when Glencore acquired ownership. Do you see that?

MR CLINTON MARTIN EPHRON: Correct. I see it.

ADV VINCENT MALEKA SC: Yes. My understanding of that clause if I may be quick on it is that the owner and/or operator of that mine is entitled to cede its or, *ja* its rights and obligations to a third party. Do you see that?

20 **MR CLINTON MARTIN EPHRON:** Yes.

ADV VINCENT MALEKA SC: Would Eskom be entitled to or does the agreement require Eskom to consent to that cession?

MR CLINTON MARTIN EPHRON: It does.

ADV VINCENT MALEKA SC: Okay. Can you show me where it does?

MR CLINTON MARTIN EPHRON: In 29.1.

ADV VINCENT MALEKA SC: 29.1.

MR CLINTON MARTIN EPHRON: If I may read it?

ADV VINCENT MALEKA SC: Yes.

MR CLINTON MARTIN EPHRON: “Save as contemplated in 29.2 no party
may cede or assign the whole or any part of its right or
obligation under this agreement to any other party without the
prior consent in writing of the other parties.”

ADV VINCENT MALEKA SC: Yes. That issue of cession and Eskom’s entitlement to
consent to it would become important when we deal with the question of ownership of
10 coal mine after Glencore had acquired ownership of it. Do you see that?

MR CLINTON MARTIN EPHRON: Yes, I do.

ADV VINCENT MALEKA SC: We will get back to it and see how Eskom sought to
exercise the rights it had later on. So that in the final analysis Clause 29.2 that I had
previously referred you to is an exception to the rule that Eskom is entitled to consent
to a cession.

MR CLINTON MARTIN EPHRON: Correct.

ADV VINCENT MALEKA SC: Mr Ephron I have taken you to these elaborate
provisions of the CSA in order to get some kind of understanding from you about how it
previously operated and I would like to get quickly through the evolution of the
20 ownership of this mine which you explain in paragraph 8.

MR CLINTON MARTIN EPHRON: Yes.

ADV VINCENT MALEKA SC: What is interesting in that paragraph is that you
introduce a new owner called BHP.

MR CLINTON MARTIN EPHRON: Yes.

ADV VINCENT MALEKA SC: Are you able to indicate to us the relationship if any

between TransNatal which was the owner or operator of this mine under the CSA we have looked at and BHP which you now record as the new owner who took over the mine around or before May 2008?

MR CLINTON MARTIN EPHRON: Only by recollection.

ADV VINCENT MALEKA SC: Yes.

MR CLINTON MARTIN EPHRON: Mr Maleka.

ADV VINCENT MALEKA SC: Yes.

MR CLINTON MARTIN EPHRON: And if the Commission allows. It is, there was a merger between TransNatal and Rand Coal at the time and it became BHP and so
10 TransNatal essentially it did change ownership but it was through a large merger that occurred at the time if my recollection is correct.

ADV VINCENT MALEKA SC: Yes, what is interesting about this paragraph is that it refers to two forms of proprietary acquisition by BHP, first is the mine itself, but second is an interest in a separate entity called the Richards Bay Coal Terminal, do you see that?

MR CLINTON MARTIN EPHRON: That's correct.

ADV VINCENT MALEKA SC: And you say BHP at the time acquired 9.5% interest in that coal terminal operating entity, that issue is going to become important later on in your evidence. What I want you to explain to us as a matter of context is what is this
20 Richards Bay Coal Terminal?

MR CLINTON MARTIN EPHRON: Richards Bay Coal Terminal is the terminal that was established in the seventies, major exporters of South Africa in order to exploit and explore the export market and there was a coal, there was a rail line that was built between Witbank in those days and Richards Bay in order to export coal. This 9.5% was a direct shareholding in the Richards Bay Coal Terminal and which was owned at

that stage in the structure of OCM, my understanding. Again this is the Deputy Chief Justice will allow this is before Glencore took control of the mine.

ADV VINCENT MALEKA SC: I understand but Glencore ultimately took over including the Coal Terminal interests.

MR CLINTON MARTIN EPHRON: The same assets yes. So it was the same assets, so in the Group of assets there were essentially if I may it's jumping a little bit ahead but there was OCH which was the holding company, Optimum Coal Holdings and there were for the main part three subsidiaries under that. One was Optimum Coal Mines, one was the shareholding in Richards Bay under Optimum Coal Terminal and one was
10 Koorfontein Mines and those were the three main subsidiaries, there were other ones but those were the three. I hope that gives you a picture of the structure of the mine, of let's say of the organisation.

ADV VINCENT MALEKA SC: Chair those three subsidiaries are going to become important.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: Because although they appear on the face of it to be separate entities they were all held together by a holding company, Optimum Holding Company Limited as I understand, correct?

MR CLINTON MARTIN EPHRON: That's correct yes.

20 **ADV VINCENT MALEKA SC:** And they become vital in the course of the debate which took place later on between Glencore and the various suitors who wanted to buy Optimum Coal together with or without those two other subsidiaries.

CHAIRPERSON: Yes, okay.

ADV VINCENT MALEKA SC: And it's going to become important to see how the debate is introduced on those negotiations but I will ask you to bear in mind those three

separate subsidiaries.

CHAIRPERSON: Okay.

ADV VINCENT MALEKA SC: Mr Ephron I wonder whether you would forgive me if I would like to get some more details on the Optimum Coal Terminal, because it seems to be an asset of value for the various mining companies who were involved in coal exportation.

MR CLINTON MARTIN EPHRON: It is an asset of value, it is the rights to utilise a private terminal, a very efficient private terminal in Richards Bay, one of the biggest in the world today, Richards Bay Coal Terminal was and still is one of the biggest and this
10 9.5% right gave the Optimum Coal Mine the right to export coal through that – through the terminal.

ADV VINCENT MALEKA SC: Yes, I mean as I understand most of the mining operations are inland.

MR CLINTON MARTIN EPHRON: Yes.

ADV VINCENT MALEKA SC: And if you're going to become involved in the export business you will have to transport your commodity via rail or road?

MR CLINTON MARTIN EPHRON: Correct, mainly rail.

ADV VINCENT MALEKA SC: Mainly rail.

MR CLINTON MARTIN EPHRON: Mainly rail but there are other alternatives, there's
20 Durban Coal Terminal, there's Matola and Maputo Coal Terminal, there's another terminal in Richards Bay that also deals with coal, but primarily Richards Bay Coal Terminal represents 90% of the exports today out of South Africa.

ADV VINCENT MALEKA SC: Yes, and Chair the very, very interesting way to see how cargoes of coal are offloaded from these rail wagons into these vessels and tankers for export market and ...(intervention)

MR CLINTON MARTIN EPHRON: It's extremely efficient and modern.

CHAIRPERSON: Yes, thank you.

ADV VINCENT MALEKA SC: But as far as you are concerned when you took over as the CEO I mean unless it's a matter that is confidential, are you able to tell us what was the rand value of that 9.5% of Glencore's interest in the coal terminal?

MR CLINTON MARTIN EPHRON: I'm sorry to disappoint you but it's not possible to put a value on that, it depends on the coal price.

ADV VINCENT MALEKA SC: No but how do you account for it?

MR CLINTON MARTIN EPHRON: You don't account for it in terms of value, when you
10 buy it, it's what it's worth to you, so it honestly depends, it's very difficult to value Richards Bay shareholding, it's possible but it's – the key thing is that it's inextricably linked to the mine so if you have Richards Bay Coal allocation and you don't have a mine it's worth a lot less, so if you do have a mine that has export coal and you can export from that mine then it's worth a significant amount of money but again just to be realistic if the coal price is very low Richards Bay Coal Terminal value is very low too. If the coal price is very high the Richards Bay Coal Terminal value is high as well, it's – I can't give you an exact number.

ADV VINCENT MALEKA SC: I suppose you anticipate what I was going to ask you when I come to the negotiations between you and Oak Bay involving Eskom around the
20 sale of these three separate assets.

MR CLINTON MARTIN EPHRON: I do and if you like I can answer that right now, if you would allow.

ADV VINCENT MALEKA SC: Yes.

MR CLINTON MARTIN EPHRON: So at the point in time when it came to selling the assets of Optimal Coal Holding which was Optimal Coal Mine, Optimal Coal Terminal

and Koorfontein we placed a value as we as in Glencore placed a value on the Richards Bay allocation at that point in time, which was a reasonable value not very high, because coal prices were very depressed and we were also of the view at that point in time that there would be significant amount of trains and that Richards Bay would not be constrained by shareholding only because Richards Bay has opened up significantly in the last few years, not only to Richards Bay shareholders but to many other participants through various methods in order to ensure that it's more encompassing and that Richards Bay Coal Terminal is open to all exporters, not only to the shareholders.

- 10 **ADV VINCENT MALEKA SC:** Chair I see it's 9:50 and I wanted to conclude one topic on background before we adjourn.

CHAIRPERSON: Okay.

ADV VINCENT MALEKA SC: Subject to your guidance.

CHAIRPERSON: Okay, you may conclude it.

ADV VINCENT MALEKA SC: Thank you. We will get to the value that you put up for the purposes of the discussion and I invite you to disclose it unless it is confidential, but when we get to that point please bear in mind that there is a request I extended to you. We now know that at some point around June 2011 Glencore enters the picture, correct?

- 20 **MR CLINTON MARTIN EPHRON:** Correct.

ADV VINCENT MALEKA SC: And it acquires these assets.

MR CLINTON MARTIN EPHRON: That's correct.

ADV VINCENT MALEKA SC: And Glencore was not the only shareholder who acquired these assets, you mentioned by name other shareholders and unless it is confidential you can tell us who those shareholders are.

MR CLINTON MARTIN EPHRON: Sure, so there was Glencore represented by Perruto which was 67%, there was Lensex Holding which was 9.64%, there was approximately 2.92% of various minority groups and then there was the mines – the community trust, the community trust was a trust created for communities around the mine and in addition there was an employees' trust and the community trust and the employees trust together held almost 20%, 19.86% of the equity of the mine.

ADV VINCENT MALEKA SC: And then you tell us that Lensex disposed of its shareholding sometime on the 22nd of May 2014, which is a special day for some people present here, but for your purposes?

10 **MR CLINTON MARTIN EPHRON:** Yes that's correct.

ADV VINCENT MALEKA SC: Can you tell us why there was that disposal?

MR CLINTON MARTIN EPHRON: Yes so President Ramaphosa was the shareholder and when his re-entry into politics he exited the company, I think it was some months before the intention to exit but I think the actual dates of exit was the 22nd of May 2014.

ADV VINCENT MALEKA SC: And what happened to his shares?

MR CLINTON MARTIN EPHRON: He sold his shares to a company called Thembane.

ADV VINCENT MALEKA SC: Thembane, so Thembane became the minority shareholder in Optimum Coal Holdings.

MR CLINTON MARTIN EPHRON: That's correct.

20 **ADV VINCENT MALEKA SC:** Chair I think this is an appropriate time to adjourn.

CHAIRPERSON: Yes, no that's fine. We will take the short adjournment and we will resume at twenty five to.

ADV VINCENT MALEKA SC: Thank you Chair.

CHAIRPERSON: We will adjourn.

INQUIRY ADJOURNS

INQUIRY RESUMES

CHAIRPERSON: Yes you may proceed Mr Maleka.

ADV VINCENT MALEKA SC: Thank you Chair. Chair we have now progressed up to paragraph 15.

CHAIRPERSON: Yes.15?

ADV VINCENT MALEKA SC: 15 of Mr Ephron's statement. And I am not going to take you through the details of paragraphs 15 and 16 but you are at liberty to summarise the contents of those paragraphs for us and elaborate on them of course if you believe that they are crucial to your evidence.

- 10 **MR CLINTON MARTIN EPHRON**: Thank you. So if we go to page 3 which is Clause 15 and it starts talking about this is one year after Glencore's in control of the mine in April 2013. What we would like to highlight Deputy Chief Justice again apart from the Hardship Clause there was also a clause that envisaged because you are talking about a vast resource of reserves in the ground there is no way of knowing besides continuous sampling and analysis of knowing exactly what those – the qualities of that coal was going to come out as. What happened to Optimum is it's geographically expanded over a period 20 years. Of course the resources that were very close to the beneficiation and washing plants were mined first and then it continued to expand geographically today it is approximately 30 square kilometres. It is a vast area. And
- 20 there is a massive conveyer belt system that links the mining to the beneficiation plants and then straight from the beneficiation plants to the washing plants to Hendrina Power Station. Or exports and it is also right in the same vicinity in the complex. What was envisaged at the time of entering into the contract was that some of the qualities of the coal may vary. Because of the information that was had the time of entering into the contract. One of those was the sizing and we specifically refer in Clause 15 to the

sizing of the coal. Basically what we were saying at this point in time was that because the mine had expanded so significantly and there was so many change over points on the conveyer belt this massive conveyer belt system the coal was naturally de-gradating. The naturally breaking down and there was more smaller pieces. It does not refrain from the quality the intrinsic quality of the coal but the sizing of it was a concern for Eskom. And it was also a concern for the mine. So what the mine did and this is – was when we were involved in the mine is we and I would like to take you to page 129 CE2.

ADV VINCENT MALEKA SC: Yes.

10 **CHAIRPERSON:** Yes.

MR CLINTON MARTIN EPHRON: This is a letter to Eskom dated 23 April 2013 from the then operator Chief Operating Officer of the Colliery at that time Riaan Du Plooy. And I would like to direct you to Clause 3 or point 3 if I may read?

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: Yes.

MR CLINTON MARTIN EPHRON: It says: Optimum OCH has now reached the conclusion that the sizing specification set out in Clause 3.4.3 of the first addendum are no longer realistically representative of the coal which OCM can reasonably be expected to achieve from the exploitation of the coal deposits constituting the Optimum
20 Colliery. It being OCM's view that OCM is conducting its operations in a proper manner and in accordance with best industry standards. This clause allowed us to open negotiations with Eskom in order to address the sizing issue.

ADV VINCENT MALEKA SC: Yes.

MR CLINTON MARTIN EPHRON: And I think it is important to mention at this stage that Eskom at that point explicitly refrained from imposing penalties on sizing on the

mine because they accepted our explanation subject to various tests that would have done or will – over the period and that that – this letter started off a process at that point where we would investigate what was occurring on the mine. So we were being paid for the coal. Eskom was using the coal. The sizing only affects the hand liability of the coal. It does not affect the intrinsic value of the coal and as long as the sizing was – as long as the coal could be transported over the conveyer belt everyone was happy and that was the case at this point in time.

ADV VINCENT MALEKA SC: Mr Ephron I – can I ask you this? We have looked at the CSA and have looked at the different clauses what Glencore is doing April 2013 is
10 to invoke negotiations under Clause 3.4.3 of the first addendum.

MR CLINTON MARTIN EPHRON: That is correct.

ADV VINCENT MALEKA SC: I have looked at the bundle of the documentation I could not locate the first, the second and third addendum.

MR CLINTON MARTIN EPHRON: In fact my legal representors we were amiss in including it in the bundle of documents. If I may can that be – can that be inserted.

ADV VINCENT MALEKA SC: Yes.

MR CLINTON MARTIN EPHRON: Subsequent.

ADV VINCENT MALEKA SC: Can you please in time ask well they hear the discussion and hopefully in time they will make available.

20 **MR CLINTON MARTIN EPHRON:** Yes of courses.

ADV VINCENT MALEKA SC: Those addenda as they amend.

MR CLINTON MARTIN EPHRON: Will do.

ADV VINCENT MALEKA SC: The CSA.

MR CLINTON MARTIN EPHRON: Will do.

ADV VINCENT MALEKA SC: But for the present purposes we assume that the CSA

we are looking at was in its original form as casted before the amendments?

MR CLINTON MARTIN EPHRON: This specific clause was 3.4.3 of the first addendum of the CSA.

ADV VINCENT MALEKA SC: Yes.

MR CLINTON MARTIN EPHRON: So that can be subsequently included in the bundle of documents.

ADV VINCENT MALEKA SC: Yes.

MR CLINTON MARTIN EPHRON: And when we look at addendums we look at them as part of the contracts.

10 **ADV VINCENT MALEKA SC**: I understand that yes.

MR CLINTON MARTIN EPHRON: So that is why we were refer – that is why perhaps we were erroneous in including it but for the purposes of this we are happy to include that.

ADV VINCENT MALEKA SC: Thank you very much.

CHAIRPERSON: Well maybe if at all possible that could be fixed during lunch and during the lunch break if at all possible I am sure with all the technology that is available enough copies should be available by that time.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: Okay thank you.

20 **MR CLINTON MARTIN EPHRON**: So I see that is – my colleague's representing Glencore nod.

CHAIRPERSON: Yes, yes.

ADV VINCENT MALEKA SC: In confirmation that that will be done.

CHAIRPERSON: Yes. Thank you.

ADV VINCENT MALEKA SC: You have drawn our attention to page 129 of U5.A. You

have read it, what I want to ask you is this. Was this the first formal way of raising the sizing issue of the Optimum coal stock or were there other prior discussions before this letter as far as you can remember?

MR CLINTON MARTIN EPHRON: As far as I can recall this was the first interaction with Eskom formally.

ADV VINCENT MALEKA SC: Yes.

MR CLINTON MARTIN EPHRON: There was various discussions around the sizing before this formal letter in – on page 129 marked CE2.

ADV VINCENT MALEKA SC: Yes.

- 10 **CHAIRPERSON:** The sizing problem had you had it before or was it starting only around April 2013 or thereabout between yourselves and Eskom?

MR CLINTON MARTIN EPHRON: From my recollection I would have to check but I think it started before. It started maybe a year before.

CHAIRPERSON: About a year or so but prior to that as far as you know it had never been a problem?

MR CLINTON MARTIN EPHRON: As far as I recall it was not – it was not – it was always an issue but it was not a major issue and I think it coincides with the opening of the very north reserves of Optimum which is the furthest point from the beneficiation facility at Optimum.

- 20 **CHAIRPERSON:** Yes.

MR CLINTON MARTIN EPHRON: It was the furthest point. I think it coincides with that I cannot recall the exact details of when it started.

CHAIRPERSON: Yes. Well I know you will deal with the issue of penalties in due course but when you do I would be interested to know whether it had happened prior in previous years when there was this sizing problem that penalties were imposed. Okay,

alright. Thank you.

MR CLINTON MARTIN EPHRON: We can check that.

CHAIRPERSON: Ja. You can deal with that in due course. Thank you.

MR CLINTON MARTIN EPHRON: Yes.

ADV VINCENT MALEKA SC: Thank you. Mr Ephron we will in due course hopefully get the version of Eskom but I would like to make sure that I understand this part of your evidence. You say that there would have been informal discussions before the letter of April 2013?

MR CLINTON MARTIN EPHRON: Yes.

10 **ADV VINCENT MALEKA SC:** But formally when you begin to address it contractually in terms of the relevant provisions of the first addendum this is the first time you invoked the clause?

MR CLINTON MARTIN EPHRON: That is correct yes. And if I can direct you to page 130 which is of the same letter Clause 4 at the top. We therefore hereby formal notify Eskom that we wish to renegotiate the specifications set out in Clause 3.4.3 with the first addendum as contemplated in Clause 3.4.4, 3.4.5 of the first addendum.

ADV VINCENT MALEKA SC: Yes.

MR CLINTON MARTIN EPHRON: So that sets the tone and I think it is important like I said that they refrained from exercising their right in terms of the penalty on the
20 understanding that we were correct in our interpretation of the addendum.

ADV VINCENT MALEKA SC: Yes. Thank you for that. We know that the penalties come later almost a year or so after this letter was sent to Eskom. But we will get to that point. Now insofar as the coal quality is concerned you have identified the question of sizing. How did that issue affect the mine in relation to the question of pricing of that coal?

MR CLINTON MARTIN EPHRON: At this point in time?

ADV VINCENT MALEKA SC: Yes.

MR CLINTON MARTIN EPHRON: There were no penalties that were being incurred or setoff as per the contract by Eskom. Eskom were taking all the material and they were using 100% of the material at that point in time.

ADV VINCENT MALEKA SC: Yes.

MR CLINTON MARTIN EPHRON: And to our – to the best of my knowledge there were no major effects on the power station at that point as a result of what was seen to believe to be excessive sizing, excessive undersize let us say of the coal that was
10 being delivered.

ADV VINCENT MALEKA SC: And on the assumption that the coal load delivery was in terms of the CSA we have looked at it may have changed via the addenda we have not looked at them. But on that assumption we can fairly assume from your evidence that you were still delivering the minimum and the maximum that we have looked at?

MR CLINTON MARTIN EPHRON: That is correct.

CHAIRPERSON: At this stage when you wrote that letter of I think April 13 or April 2013 I do not know if the date was 13 but April 2013 to Eskom was the issue only the sizing and not the quality or intrinsic value of the coal that you were delivering?

MR CLINTON MARTIN EPHRON: At this point Deputy Chief Justice it was only the
20 sizing.

CHAIRPERSON: Okay and also from Eskom's point of view you will – both of you were one that that was the issue and nothing else?

MR CLINTON MARTIN EPHRON: Yes.

CHAIRPERSON: Okay thank you.

ADV VINCENT MALEKA SC: Chair if yesterday there was evidence presented before

you about sizing [problem with audio] of the various components of the power stations.

CHAIRPERSON: Ja.

ADV VINCENT MALEKA SC: I can ask the witness to highlight how the sizing becomes important and how...

CHAIRPERSON: Ja maybe he could do that. That is fine that will not harm.

ADV VINCENT MALEKA SC: Oh thank you.

CHAIRPERSON: Ja.

ADV VINCENT MALEKA SC: You know how sizing affects the various components of the power stations?

10 **MR CLINTON MARTIN EPHRON**: Mr Maleka I am not a technical expert but from my knowledge.

ADV VINCENT MALEKA SC: Yes.

MR CLINTON MARTIN EPHRON: Sizing affects the handle ability of the coal. So if it rains and there is too much [indistinct] there is too much very small sizing the coal becomes very difficult to handle and when you inject it into the power station before you inject it you need to crush the coal and if it is very wet and there is a large amount of small size the crushes do not work well and therefore the injection of coal into the power station [indistinct].

20 **ADV VINCENT MALEKA SC**: Do you know that the sizing may impact on the output capacity of the power station?

MR CLINTON MARTIN EPHRON: I am not aware of that.

ADV VINCENT MALEKA SC: You are not aware of that. Okay. Let us leave it at that. You say in paragraph 16 that after you raise the question of sizing with Eskom you then begin to pick up issues relating to the viability of Optimum Coal Mine, correct?

MR CLINTON MARTIN EPHRON: That is correct.

ADV VINCENT MALEKA SC: That is almost two months thereafter because you peg the date as July 2013.

MR CLINTON MARTIN EPHRON: Yes I specifically refer to by July 2013.

ADV VINCENT MALEKA SC: Yes.

MR CLINTON MARTIN EPHRON: Which means it was in – these were happening in tandem.

CHAIRPERSON: It has started?

MR CLINTON MARTIN EPHRON: We had already identified that long before this point.

10 **ADV VINCENT MALEKA SC:** I understand but by July you begin to mark the issue as a concern for you?

MR CLINTON MARTIN EPHRON: The reason why we raised July was because we had started feeling the pinch of lower export prices and the exports could no longer subsidise the supply of coal to Eskom and the mines were starting to lose significant money.

CHAIRPERSON: Let me just ask this question. You may or may not be able to deal with it. Probably you may – you will be able to deal with it. The problem that the issues that were leading to you concluding that this was or CSA was becoming commercially not viable. To what extent do you think that if the price regime that we talked about
20 earlier on had not been changed maybe that might not have – that might have protected you from this situation or is that something that ...

MR CLINTON MARTIN EPHRON: Are you referring Chief Justice to the price regime being the cost plus?

CHAIRPERSON: Yes, yes. Yes I am referring to that.

MR CLINTON MARTIN EPHRON: So if it was a cost plus situation going back to that

there would have been no risk for the mine.

CHAIRPERSON: Yes, yes.

MR CLINTON MARTIN EPHRON: Because Eskom would be responsible for paying the direct costs attributable.

CHAIRPERSON: Yes, yes.

MR CLINTON MARTIN EPHRON: I think it is worth mentioning that the cost plus contract is not an anomaly.

CHAIRPERSON: Yes.

MR CLINTON MARTIN EPHRON: Rather look at it as a partnership.

- 10 **CHAIRPERSON:** Yes. No, no I am sure – I am sure it is a partnership. I was just thinking that because my perception from what you have told us about that regime, price regime my perception is that it was quite protective of the – of the supplier of the mine but I accept to that there were certain reasons that made it in the interest or that may have made it in the interest of Eskom to enter into that kind of arrangement and pay the kinds of costs that one would normally expect the supplier to take care of. But I was just wondering whether with that protection which that regime provided to the supplier whether you would had this problem?

MR CLINTON MARTIN EPHRON: We would not have had this problem.

CHAIRPERSON: Okay.

- 20 **MR CLINTON MARTIN EPHRON:** There are – if I may?

CHAIRPERSON: Yes, yes.

MR CLINTON MARTIN EPHRON: There are large advantages there are a lot of advantages for Eskom under the cost plus arrangement.

CHAIRPERSON: Yes, yes.

MR CLINTON MARTIN EPHRON: They – we see that today that Eskom is paying a

significant amount more for coal.

CHAIRPERSON: Yes, yes.

MR CLINTON MARTIN EPHRON: Than what they would be had they stuck to the cost plus agreements.

CHAIRPERSON: Yes. Yes. But I had – I had got the impression when you talked to us about those two price regimes I had got the impression that the change may have been initiated by your side rather than by Eskom but you did not say so expressly but I got that impression because you wanted to export coal as well?

MR CLINTON MARTIN EPHRON: Yes it was before my time. I cannot comment
10 exactly.

CHAIRPERSON: Yes okay.

MR CLINTON MARTIN EPHRON: But if you look today.

CHAIRPERSON: Yes.

MR CLINTON MARTIN EPHRON: The cost plus mines are the best option for Eskom.

CHAIRPERSON: Yes, okay. Okay.

MR CLINTON MARTIN EPHRON: Because Eskom is not subject when they buy coal today they are subject to the – to the market.

CHAIRPERSON: Yes, yes. No thank you.

ADV VINCENT MALEKA SC: You know Mr Ephron these are some of the issues
20 which were highlighted by an investigation initiated the request of Eskom's board and Chair those are the issues that were highlighted in the Dentons Report and you seem to suggest that Eskom is suffering the financial ill effects of the shift in the pricing regime. Because cost plus mine and pricing is beneficial to Eskom.

MR CLINTON MARTIN EPHRON: That is correct that is my opinion.

ADV VINCENT MALEKA SC: Okay.

MR CLINTON MARTIN EPHRON: That is my opinion.

ADV VINCENT MALEKA SC: Chair you have at least evidence that confirms that.

CHAIRPERSON: Thank you.

ADV VINCENT MALEKA SC: But we will take it further.

CHAIRPERSON: Ja.

ADV VINCENT MALEKA SC: If I can move quite quickly you explained to us in paragraph 17 how much Optimum coal was losing under that CSA.

MR CLINTON MARTIN EPHRON: That is correct that is only in 2013.

ADV VINCENT MALEKA SC: Yes.

10 **MR CLINTON MARTIN EPHRON:** So in 2000 and to 13 on the basis of the sales to Eskom alone.

ADV VINCENT MALEKA SC: Yes.

MR CLINTON MARTIN EPHRON: We calculated that Optimum lost R829 million in that year alone.

ADV VINCENT MALEKA SC: Yes. You give us the mathematics in globular amounts and we do not have the benefit of your calculation I wonder whether you are able to do it to us confidentially if it is necessary?

MR CLINTON MARTIN EPHRON: I do not think it is confidential Mr Maleka. The calculation would simply have been the number of tonnes that was supplied in that
20 particular year times R150.00 – sorry am I on the wrong track?

ADV VINCENT MALEKA SC: No, no you are on the right track. If you can give it to us.

MR CLINTON MARTIN EPHRON: Yes of course.

ADV VINCENT MALEKA SC: On a month to month basis that will be helpful.

MR CLINTON MARTIN EPHRON: We can do that.

ADV VINCENT MALEKA SC: I want to look at the granularity of that clause because going forward the issue becomes important.

MR CLINTON MARTIN EPHRON: I can – I can see if we have that kind of detail.

ADV VINCENT MALEKA SC: The numbers are on your fingers as an accountant.

MR CLINTON MARTIN EPHRON: That number is on my fingers but month by month may not be.

ADV VINCENT MALEKA SC: Yes if I can get it on a monthly spreadsheet of some sort that may well be helpful.

MR CLINTON MARTIN EPHRON: I am sure that can be achieved.

10 **ADV VINCENT MALEKA SC:** Yes.

CHAIRPERSON: I would imagine that by [indistinct] that that was a huge loss for Glencore or not really?

MR CLINTON MARTIN EPHRON: No that is – that is a huge loss for anybody and remember Deputy Chief Justice it was not only Glencore there were significant other shareholders in the company.

CHAIRPERSON: Yes. Yes. Yes. Thank you.

ADV VINCENT MALEKA SC: Yes. And then in paragraph 18 you begin the discussion about the Hardship Clause that we have looked at. And you do with reference to annex CE3. Chair that you will find from page 131. It is a standard arbitration agreement
20 unless there is anything arising from it I would simply want you to confirm but as a result of your invocation of the Hardship Clause the parties agreed to go to arbitration. You confirm that?

MR CLINTON MARTIN EPHRON: That is correct.

ADV VINCENT MALEKA SC: Alright. And then you deal with what happens thereafter. I am not going to lead you in that regard. I would like you to explain to us in your own

words what happens after the arbitration process was commenced?

MR CLINTON MARTIN EPHRON: So I will refer to Clause 19 that there was various discussions with Eskom at the time but then it – we then go to Clause 20 that by early 2014 which was a number of months after we invoked the Hardship provision Eskom approached us in the hope that we could establish a new agreement and I think it is very important that we spend a little bit of time on this cooperation agreement which was meant to be we hoped was a win win scenario for a mine that was losing significant money. We went – the idea of the cooperation agreement and there is some clauses further on that talk explicitly about what it was meant to achieve.

10 **CHAIRPERSON:** It might be a small matter but if once you say clause I am thinking of the contracts CSA so maybe you just say paragraph on the statement.

MR CLINTON MARTIN EPHRON: Yes I – sorry I will get that.

CHAIRPERSON: Ja.

MR CLINTON MARTIN EPHRON: To you saying clause 20 of the – of my statement?

CHAIRPERSON: Paragraph for the statement and clause for the contracts.

MR CLINTON MARTIN EPHRON: Ah paragraph for the statement, clause for the contract I got it.

CHAIRPERSON: Ja.

20 **ADV VINCENT MALEKA SC:** I will take you to elements of the cooperation agreement.

MR CLINTON MARTIN EPHRON: Okay.

ADV VINCENT MALEKA SC: That are important. By this time you were already the CEO of Optimum Coal Mine and I take it you were also the CEO – director of Optimum Coal Holdings, correct?

MR CLINTON MARTIN EPHRON: Correct.

ADV VINCENT MALEKA SC: Yes. And you say Eskom approached you, do you recall who precisely on behalf of Eskom.

MR CLINTON MARTIN EPHRON: Johan Bester.

ADV VINCENT MALEKA SC: Johan Bester.

CHAIRPERSON: I am sorry can I take you a step back going back to your invoking the arbitration clause. Can I take it that the arbitrator would have power to effectively try and make sure that the Hardship which brought about invoking of the arbitration clause how it was remedied? He would have power to see how it was remedied roughly speaking?

10 **MR CLINTON MARTIN EPHRON:** Yes I ...

ADV VINCENT MALEKA SC: Chair I will take you to the elements of the corporation agreement.

CHAIRPERSON: Ja to the relevant...

ADV VINCENT MALEKA SC: Which begin to answer all of those concerns.

CHAIRPERSON: Yes that question.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: Okay okay.

ADV VINCENT MALEKA SC: Yes. But for now you say that Mr Johan Bester approach Glencore in order to explore the possibility of a settlement?

20 **MR CLINTON MARTIN EPHRON:** Yes.

ADV VINCENT MALEKA SC: Yes. And who on behalf of Glencore did he speak to about that possibility?

MR CLINTON MARTIN EPHRON: Myself.

ADV VINCENT MALEKA SC: Yourself. Chair the name Johan Bester is becoming important and you are going to hear his evidence in due course.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: Now on that score and in order to answer the concerns the Chair has raised with you about the progression of the dispute or debate on Hardship can I ask you to turn to annex CE4 which is to be found Chair from page 138. And there Mr Ephron I am going to deal not only with the actual text of this cooperation agreement but the spirit of it insofar as you are able to analyse it for us. The heading is Self-Evident and the definition clauses in paragraphs 2.1 to 2.6 are self-evident. I am not going to ask you to comment on them unless you want to do so.

CHAIRPERSON: I am sorry Mr Maleka did you say 138?

10 **ADV VINCENT MALEKA SC**: 138 Chair.

CHAIRPERSON: Okay.

ADV VINCENT MALEKA SC: You will see it is in bold and CE4.

CHAIRPERSON: Ja okay I have got it.

ADV VINCENT MALEKA SC: Paragraphs 1 and 2 are not material for the purposes of dealing with the issues that you raise with Mr Ephron Chair.

CHAIRPERSON: Okay.

ADV VINCENT MALEKA SC: The first one that is important Mr Ephron is paragraph 3. Can you deal with it if necessary you can read it?

20 **MR CLINTON MARTIN EPHRON**: I think it is best if the commission allows that I read this.

ADV VINCENT MALEKA SC: Yes.

MR CLINTON MARTIN EPHRON: Because it encapsulates everything that is in the rest of the agreement.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: That is fine do that.

MR CLINTON MARTIN EPHRON: I am reading from Clause 3 on CE4 page 138 at the bottom. The parties each believe that they have various accrued rights and claims arising out of the issue including in respect of Optimum Mine and accrued right of cancellation in respect of the CSA. The parties however recognise that they have a mutual interest in ensuring that their commercial relationship is sustained for the duration of the CSA and potentially extended beyond the duration of the CSA. Accordingly without waiving or compromising such rights and claims in any way and without acknowledging any liability or wrongdoing relating to any of the issues the parties would like to engage in a negotiated process, settlement process in order to attempt to reach a compensate agreement which attempts to address each of the issues and results in extension of the supplier relationship between Eskom and Optimum Mine. If I may?

ADV VINCENT MALEKA SC: Yes.

MR CLINTON MARTIN EPHRON: What is critical to read into this was that this cooperation agreement had two important aspects. One historical and two the future. Historical being settling of the Hardship, the sizing, other penalties had arisen and in addition what is critical – what we thought was critical was that there would be an extension of the CSA. The 25 year CSA would be extended by a further 5 years. At that point in time coincided with the useful life of Hendrina Power Station from 2018 to 2023. And that they would continue to get supply from Optimum for that period. Significant tonnage I think it was 4 or 5 million tonnes per annum. So there were two aspects. In order to settle historical disputes and also to find a way forward to start the negotiation in a way that could extend this contract which was very, very important for Hendrina Power Station and Eskom. And that is what this cooperation agreement was meant to achieve.

ADV VINCENT MALEKA SC: Yes. You mentioned that some of the dispute related to possible penalties. My recollection is that no-one sought to raise penalties and penalties were not part and parcel of the arbitration which the parties were engaged in at that point in time, correct?

MR CLINTON MARTIN EPHRON: Correct. Penalties were not part of the arbitration.

ADV VINCENT MALEKA SC: Yes.

MR CLINTON MARTIN EPHRON: But the Cooperation Agreement in, was supposed to encapsulate all the difficulties that were being experienced on the mine, not only the hardship.

10 **ADV VINCENT MALEKA SC:** Yes.

MR CLINTON MARTIN EPHRON: Hardship was specifically around, excuse me, arbitration was specifically around hardship.

ADV VINCENT MALEKA SC: You have identified the two major broad streams of the negotiations, the historical and the future, okay. Now can I ask you to go to Clause 5 on page 139?

CHAIRPERSON: I am sorry Mr Maleka. Before you move to that point, I just want to have clarification on something.

ADV VINCENT MALEKA SC: Yes.

20 **CHAIRPERSON:** Both arising from one of your questions and from Mr Ephron's answer. From what you say I get the impression that although the penalties appeared to have been based on Eskom's complaint that what you were delivering was not in accordance with the, with the agreement, but they were being kept out that is the penalties out of, out of the issues that were subjected to the arbitration. Is, is, is my understanding correct?

MR CLINTON MARTIN EPHRON: That is correct.

CHAIRPERSON: Yes.

MR CLINTON MARTIN EPHRON: The arbitration only dealt with the hardship.

CHAIRPERSON: Hardship.

MR CLINTON MARTIN EPHRON: Being endured by the mine.

CHAIRPERSON: Yes and the hardship was separated from the issues that related to the penalties?

MR CLINTON MARTIN EPHRON: That is correct because the hardship was all about the fact that Optimum was selling coal at significant loss for each ton of coal delivered.

CHAIRPERSON: Okay, thank you.

10 **ADV VINCENT MALEKA SC:** And Chair just to make sure that.

CHAIRPERSON: Hm.

ADV VINCENT MALEKA SC: Mr Ephron there is foundation for your evidence can you go to page 132 which is the arbitration reference agreement and Chair you know that arbitration a dispute must be defined. The Arbitrator has no right to resolve the dispute which is not defined.

CHAIRPERSON: Yes, yes.

ADV VINCENT MALEKA SC: Are you at page 132?

MR CLINTON MARTIN EPHRON: I am.

20 **ADV VINCENT MALEKA SC:** Can you scope the dispute as is defined in that agreement?

MR CLINTON MARTIN EPHRON: Are you reading 1.2?

ADV VINCENT MALEKA SC: 1.1.

MR CLINTON MARTIN EPHRON: 1.1?

ADV VINCENT MALEKA SC: Yes.

MR CLINTON MARTIN EPHRON: "A dispute, it is recorded that 1.1, a

dispute the hardship dispute has arisen between the Claimants and the Defendant in respect of Claimants claim that they have suffered hardship as contemplated in Clause 27 of the Hendrina Coal Supply Agreement between the Claimants and the Defendant as amended from time to time.”

ADV VINCENT MALEKA SC: 1.2.

MR CLINTON MARTIN EPHRON: “The Claimants and the Defendant have agreed to refer the hardship dispute to arbitration on the terms as set out in Clause 27.4 and 30 of the Hendrina Coal Supply Agreement read with this agreement.”

10

ADV VINCENT MALEKA SC: *Ja.* There was nothing further beyond this issue?

MR CLINTON MARTIN EPHRON: No.

ADV VINCENT MALEKA SC: Which required arbitration?

MR CLINTON MARTIN EPHRON: No.

ADV VINCENT MALEKA SC: And there was nothing further was an issue before the Arbitrator when the parties decided that there should be some sort of negotiations via the Cooperation Agreement we are looking at?

MR CLINTON MARTIN EPHRON: No.

ADV VINCENT MALEKA SC: Where do you get the issue of the penalties from?

20 **MR CLINTON MARTIN EPHRON:** The penalties were an ongoing thing with Optimum. So there were two, if I may elaborate, there were two parties of the penalty. The one was the sizing and I have described that in detail. The other one was an interpretation by Eskom of the calculation of the penalties regarding ash which is a constituent of the coal and calorific value which is the heating value of the coal and there was an ongoing interpretation dispute between Optimum and, and the, and Hendrina and Eskom with

respect to ash and, and calorific value penalty.

ADV VINCENT MALEKA SC: Alright. I had directed your attention to Clause 5 on page 139. As a clause that sets out a road map of the negotiations which the parties agreed to undertake when the arbitration was going on and I would like to highlight what I consider to be the essential features of the road map. 5.1 is important as far as I am concerned.

MR CLINTON MARTIN EPHRON: May I read?

ADV VINCENT MALEKA SC: Yes.

MR CLINTON MARTIN EPHRON: 5.1:

10 “The discussions will be conducted on a without prejudice basis
and each party fully reserves all of its rights in respect of the
accrued rights and claims as at the date of this agreement on
the basis that if the settlement process terminates at any time
then each party shall be fully entitled to exercise any of its
accrued rights and bring any of its accrued claims. In other
words...”

5.2:

 “...the parties will instruct the attorneys to suspend the
hardship arbitration on the following basis by no longer than
20 23 May 2014.”

So essentially we were putting aside in terms of cooperation we were putting aside hardship, penalty issues in order to find a way forward for the mine.

ADV VINCENT MALEKA SC: Ja. You freezed the litigation? You.

MR CLINTON MARTIN EPHRON: We freezed the arbitration proceeds.

ADV VINCENT MALEKA SC: And you initiate the discussion, the negotiations?

MR CLINTON MARTIN EPHRON: Exactly.

ADV VINCENT MALEKA SC: Chair someone told me that when client, clients do not trust the lawyers they send them to litigation.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: So you have frozen the litigation, you begin the negotiations on the basis that.

CHAIRPERSON: Well, well I can just say Mr Maleka that my own experience both in private practice and on the bench is that it is not always unhelpful for the parties to deal with each other and forget about the lawyers for the time being. Sometimes it can
10 produce good results.

ADV VINCENT MALEKA SC: Good results.

CHAIRPERSON: *Ja*.

ADV VINCENT MALEKA SC: Yes. Those are the clients who have faith in the lawyers Chair and the negotiating scales.

CHAIRPERSON: [Laughing].

ADV VINCENT MALEKA SC: *Ja*.

CHAIRPERSON: But also sometimes lawyers help a lot.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: Because sometimes there is too much acrimony between the parties
20 and you need people to bring some sense.

ADV VINCENT MALEKA SC: Yes Chair.

CHAIRPERSON: To the discussions, *ja*.

ADV VINCENT MALEKA SC: Yes. Then you outline what will happen during the suspension period and you do so from paragraph 5.2.1 going forward. You see that?

MR CLINTON MARTIN EPHRON: Yes.

ADV VINCENT MALEKA SC: Can I ask you to take us through what the parties contemplated would happen during the suspension period and you are at liberty to read if you can from paragraph 5.2.2?

MR CLINTON MARTIN EPHRON: If I may, thank you.

“Notwithstanding...”

5.2.2:

“Notwithstanding the suspension of the arbitration the parties will arrange with the Arbitrator and the parties Counsel to reserve dates required for a hearing in March 2015...”

10 This was some months ahead.

“...on the basis that if the parties agree the terms of reference on or prior to the validation date then such dates can be released. If the settlement process is terminated on or before the validation date then Optimum Mine may by notice in writing to Eskom immediately reinstate the hardship arbitration and the parties within two weeks agree to revise timetable for the hardship arbitration with a March 2015 hearing date.”

I think it is worthwhile at this stage to, to, the reason why we did this was because arbitration is a very long process. The mine was losing a significant amount of money
20 in the end and the idea was we are entering into this Cooperation Agreement. We could go to our shareholders who were funding the mine to say we need funding, we need to continue funding this mine even though it is loss making because we have this cooperation agreement which allowed it to, allowed the mine to continue while we were negotiating, but we did not want to lose time on the hardship arbitration and that is why we included 5.2.2 and 5.2.3.

ADV VINCENT MALEKA SC: Yes.

MR CLINTON MARTIN EPHRON: 5.2.4:

“If the settlement process terminates at any other time then
Optimum may by notice reinstate the...”

I do not know if I read that or not.

“...reinstates the hardship arbitration on the basis that the
parties will as soon as possible thereafter meet in order to
agree a new timetable and hearing date for the hardship
arbitration.”

- 10 **ADV VINCENT MALEKA SC:** *Ja.* It seems to me when I hear you reading these clauses that there was some urgency between the parties to resolve the issue either via the negotiations or through arbitration should the negotiations fail.

MR CLINTON MARTIN EPHRON: That is.

ADV VINCENT MALEKA SC: Because it is for that reason that you kept the lawyers on their hunches and the Arbitrator you kept him available for.

MR CLINTON MARTIN EPHRON: That is correct.

ADV VINCENT MALEKA SC: May 2015?

MR CLINTON MARTIN EPHRON: That is correct and in addition in 5.3 from Eskom’s perspective:

- 20 “Eskom will with retrospective effect to 1 May 2014 until the termination of the settlement process suspend the implementation of all penalties including ARCV, ash sizing and short supply in relation to the CSA on the condition that Optimum Mine continues delivering coal in accordance with the specification to be agreed in term, in the term of reference.”

And then the specifications are a little bit further ahead. So they, there, there was quid pro quo. There was from both sides.

ADV VINCENT MALEKA SC: This is the first time I see that penalties are introduced in terms and they are introduced by way of a suspension retrospectively to 1 May 2014. Can I ask you about that date? What was the magic about that date?

MR CLINTON MARTIN EPHRON: I cannot recollect exactly what the importance of that date; the only thing I can say is that this was the month that we signed this agreement. So Eskom was saying any penalties that had been deducted prior to this would, would continue to apply but going forward during the period of the Cooperation
10 Agreement penalties, all penalties were suspended because we had a, a difference of opinion on the methodology and interpretation of the penalties.

ADV VINCENT MALEKA SC: And then you agree to set up the parties or.

MR CLINTON MARTIN EPHRON: 5.4 deals with the parties and specifically names the people who were involved from Eskom.

ADV VINCENT MALEKA SC: And I would like you to deal with the names from Eskom's side.

MR CLINTON MARTIN EPHRON: "The parties will establish negotiation
teams who will be responsible for representing the parties in
the settlement process. The Eskom Team will comprise
20 Kieran Maharaj, Johan Bester, Andre Williams, Gert Opperman,
Ayanda Ntshanga; the Optimum Team will comprise
Clinton Ephron, Shaun Tushna, Riaan Du Plooy and
Dimitri Atopolis. The parties may supplement their teams from
time to time."

ADV VINCENT MALEKA SC: Yes. Chair as I indicated Mr Bester and also

Mr Opperman will testify in due course. Alright, we now understand who the negotiating team members are. You can continue to tell us about the details of how the negotiations were to take place. I see in paragraph 5.5 there is reference to something called validation date. Do you see that?

MR CLINTON MARTIN EPHRON: Yes, I do.

ADV VINCENT MALEKA SC: What, what does that supposed to mean?

MR CLINTON MARTIN EPHRON: We, we set up a validation date and if I may read again? It is quite self-explanatory.

“The parties will before 13 June 2014...”

10 The validation date.

“...meet for two days in order to agree terms of reference which shall contain a detailed description of each of the issues to be negotiated technical, commercial and contractual. It being agreed that the terms of reference will include as an issue for negotiation the refund to Optimum Mine of penalties deducted by Eskom in respect of the period of 1 September 2013 to 30 April 2014 as well as Eskom's historic claims in relation to qualities which include amongst others sizing. The parameters for the negotiation in respect of each of the issues including in
20 respect of price for the remainder of the term of the CSA and any supply thereafter the pricing philosophy that will be utilised to agree such prices and the time period within which the negotiated process should be completed in respect of each of the issues.”

So it, it just set the framework.

ADV VINCENT MALEKA SC: Yes.

MR CLINTON MARTIN EPHRON: That what we needed to do but before the validation date. It, it, it highlighted exactly what needs to be discussed by the validation date and then we had time to go into each issue involving the parties, the power station, the mine. Everybody was involved in this process.

ADV VINCENT MALEKA SC: Can I highlight one issue that was going to become a subject matter of investigation, of negotiations and ask you something about it at a factual level?

MR CLINTON MARTIN EPHRON: Yes.

- 10 **ADV VINCENT MALEKA SC:** You will see that one of the items identified for negotiations is a possible refund of penalties for a specific period 1 September 2013 to 30 April 2014. Do you see that?

MR CLINTON MARTIN EPHRON: Yes.

ADV VINCENT MALEKA SC: It is more or less a seven month period.

MR CLINTON MARTIN EPHRON: Yes.

ADV VINCENT MALEKA SC: And what I want to ask you is this. From your knowledge did Eskom levy any penalties for that period?

MR CLINTON MARTIN EPHRON: Yes, they did.

ADV VINCENT MALEKA SC: Did Optimum Coal Mine pay those penalties?

- 20 **MR CLINTON MARTIN EPHRON:** The penalties, the penalty mechanism is a set off mechanism. So.

ADV VINCENT MALEKA SC: By way of set off or otherwise you pay for them?

MR CLINTON MARTIN EPHRON: You pay for them.

ADV VINCENT MALEKA SC: Yes.

MR CLINTON MARTIN EPHRON: So you immediately pay for the penalties when they

are incurred.

ADV VINCENT MALEKA SC: Yes.

MR CLINTON MARTIN EPHRON: The reason why we include the refund of these penalties was because this was where we started with the, the, the difference in interpretation of the way in which the penalties were calculated at that point.

ADV VINCENT MALEKA SC: Yes.

MR CLINTON MARTIN EPHRON: But it was part and parcel of operating a big mine and operating a big power station. There was all, there would always be issues and this was one of them.

10 **ADV VINCENT MALEKA SC:** Yes. Alright, we have established factual matters.

MR CLINTON MARTIN EPHRON: Right.

ADV VINCENT MALEKA SC: And that will be a subject matter of a discussion for a possible refund. Correct?

MR CLINTON MARTIN EPHRON: Correct.

ADV VINCENT MALEKA SC: Yes. Let us proceed and you talk about what might happen in the event certain things were not successfully negotiated after the validation date. You do so from paragraph 5.6.

MR CLINTON MARTIN EPHRON: Yes. In 5.6:

20 “If the parties are unable by the validation date to agree and
 execute the terms of reference each of the parties shall be
 entitled to advise the other that it no longer wishes to
 participate in the settlement process in which case the
 settlement process shall terminate.”

ADV VINCENT MALEKA SC: And then 5.8.

MR CLINTON MARTIN EPHRON: And then 5.8:

“The parties agree that it is their current intention to conclude a new Coal Supply Agreement which will govern the supply of, from Optimum Mine to Eskom from 1 January 2015.”

ADV VINCENT MALEKA SC: Yes. You remember at that point in time you are in May 2014?

MR CLINTON MARTIN EPHRON: Correct.

ADV VINCENT MALEKA SC: And you mark out 1 January 2015 as a date by which a new CSA ought to be concluded?

MR CLINTON MARTIN EPHRON: Correct.

10 **ADV VINCENT MALEKA SC:** If the negotiations were successful?

MR CLINTON MARTIN EPHRON: Correct.

ADV VINCENT MALEKA SC: That tells me that you had set aside almost.

MR CLINTON MARTIN EPHRON: Six months.

ADV VINCENT MALEKA SC: Six months to explore negotiations during which you had suspended the dispute?

MR CLINTON MARTIN EPHRON: That is correct.

ADV VINCENT MALEKA SC: Did you believe that the period of six months was good enough to achieve an outcome one way or the other?

MR CLINTON MARTIN EPHRON: We did.

20 **ADV VINCENT MALEKA SC:** If the parties negotiated in good faith?

MR CLINTON MARTIN EPHRON: We did.

ADV VINCENT MALEKA SC: Alright. I then ask you to look at paragraph 5.9 which uses commercial terminology around so called term sheet.

MR CLINTON MARTIN EPHRON: It specifically says that:

“If by 31 December 2014 a term sheet or new Coal Supply

Agreement has not been executed then unless the parties either agree otherwise in writing each of the parties shall be entitled to advise the other that it no longer wishes to participate in the settlement process. In which case the settlement process shall terminate.”

ADV VINCENT MALEKA SC: Yes and then there is another timeline in paragraph 5.10. I will ask you to deal with it together with the extras timeline set out in the table on page 141.

MR CLINTON MARTIN EPHRON: Yes. So 5.10 specifically makes mention there:

10 “If a term sheet is executed by 31 December 2014, but the new Coal Supply Agreement is not ready for signature then the parties shall execute the Coal Supply Agreement as soon as possible thereafter and making another drop dead date of 31 March 2015.”

ADV VINCENT MALEKA SC: I asked about the day by which the parties contemplated the execution of a new CSA which is recorded in 5.8, but when I look at the table of the timelines on page 141 a totally different timeline is placed on the date. It is no longer 1 January, but it is 31 March 2015.

MR CLINTON MARTIN EPHRON: 31 March 2015?

20 **ADV VINCENT MALEKA SC:** Yes.

MR CLINTON MARTIN EPHRON: I think, I think what was envisaged at the time was that we would, we would have a term sheet or a Coal Supply Agreement done by 31 December 2014, but because these contracts are cumbersome we felt what we would, we would give ourselves a further three months in, in terms of actually signing a document and that is why it says:

“Agree the new Coal Supply Agreement by 31 March 2015.”

So for all intents and purposes it was a nine month period.

ADV VINCENT MALEKA SC: Yes.

MR CLINTON MARTIN EPHRON: Not a six month period.

ADV VINCENT MALEKA SC: Thank you for that clarification. Is there any other aspect of significance that we should look at in regard to this Cooperation Agreement?

MR CLINTON MARTIN EPHRON: No. Besides the fact that there was seriously a common desire by both parties to resolve the issues.

ADV VINCENT MALEKA SC: And my understanding is that it is Eskom who
10 approached you and not the other way around although you had the desire to resolve the issue?

MR CLINTON MARTIN EPHRON: That is correct.

ADV VINCENT MALEKA SC: Do you know why Eskom took the initiative?

MR CLINTON MARTIN EPHRON: I think Eskom realised and I read this earlier, I think Eskom realised at that point that they needed to secure their supply. They knew, they, they realised that there was a hardship problem. They wanted to justify to themselves that there would be a hardship; that there was in fact hardship being endured and once they had justified it to themselves that there was genuine hardship they thought it was a very good opportunity to secure the supply that was required for Hendrina Power
20 Station till the end of its useful life. It made a lot of sense. Remember the, the, the mine supplies coal over a conveyor belt over a fence into the power station.

ADV VINCENT MALEKA SC: Chair I do not know whether you were given the graphic depiction of how this coal moves from one point to the other.

CHAIRPERSON: Yes. I think a certain amount was given.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: But if you think I, I.

ADV VINCENT MALEKA SC: No, no, no I do not want to repeat.

CHAIRPERSON: Ja. No, no, no.

ADV VINCENT MALEKA SC: Ground previously covered.

CHAIRPERSON: I think, I think it was given.

ADV VINCENT MALEKA SC: Yes. Well Mr Ephron I was going to take you to the next level of the development after this CSA, sorry after this Cooperation Agreement was executed, but on your statement you interpose prior historical events which happened before the Cooperation Agreement was concluded and you do so with events relating to
10 2012 from page 5 paragraph 22 of your statement. If they are important you can run through them as quickly as you can.

MR CLINTON MARTIN EPHRON: I will run through them very quickly. I am referring now on page 5 paragraph 22 and, and what we are referring to here is that that Optimum Coal Mine was a multiple product mine which supplied Eskom and exports and while the Cooperation Agreement was being negotiated we because there was such a significant amount of money being lost by the mine we felt it prudent to close the open cars which were very capital heavy in terms of its requirements of funding. We decided to at that stage initiate a process to close the open car section of the mine and only to continue supplying to Eskom in the hope that it would reduce costs overall of the
20 mine and that process which is described in, in paragraph 22, paragraphs 23 and 24 speaks specifically about that process. There are two things I would like to quickly highlight and that that is:

“By 2014...”

I am now reading paragraph 23.

“By 2014 i.e. around the time the Cooperation Agreement came

into effect Optimum OCM was losing cash of approximately 80
to R100 million per month.”

ADV VINCENT MALEKA SC: Yes. Again I would ask you to give us the mathematics of the same kind we asked in regards to paragraph 17 of your statement. In other words giving us a monthly spreadsheet.

MR CLINTON MARTIN EPHRON: No problem.

ADV VINCENT MALEKA SC: If you could.

MR CLINTON MARTIN EPHRON: No problem.

ADV VINCENT MALEKA SC: Are you happy with that?

10 **MR CLINTON MARTIN EPHRON:** Yes, I am happy with that.

ADV VINCENT MALEKA SC: Okay.

MR CLINTON MARTIN EPHRON: The Clause 25 [intervenes].

ADV VINCENT MALEKA SC: Paragraph.

MR CLINTON MARTIN EPHRON: Sorry, paragraph 25 specifically refers to the closure of the open cars mine of:

“The open car section of the mine enabled Optimum to reduce its losses but it remained loss making and OCM was accordingly required to raise additional funding to which Glencore as the majority shareholder contributed.”

20 And then on the next page, top of page 6.

ADV VINCENT MALEKA SC: Yes.

MR CLINTON MARTIN EPHRON: It is the same paragraph.

“In January and February 2015 alone...”

This is this particular time.

“...Glencore made approximately 480 million available to OCM

by way of a shareholder funding.”

ADV VINCENT MALEKA SC: Yes.

MR CLINTON MARTIN EPHRON: And at that point we started the process of closing the open car section which effectively shut down the export option for Optimum and it would become a mine producing only coal, coal only for Eskom.

ADV VINCENT MALEKA SC: Mr Ephron can I interrupt you there? Elsewhere in your statement you indicate that Optimum Coal had its own banking facility on the strength of which it accessed loans from the banks to fund its own operation.

MR CLINTON MARTIN EPHRON: Yes.

10 **ADV VINCENT MALEKA SC:** Correct?

MR CLINTON MARTIN EPHRON: That is correct.

ADV VINCENT MALEKA SC: And I think at some point you indicate that the facility was in the order of 2.5 billion?

MR CLINTON MARTIN EPHRON: That is correct.

ADV VINCENT MALEKA SC: By the time the Oakbay Agreement was executed. Correct?

MR CLINTON MARTIN EPHRON: That is correct.

20 **ADV VINCENT MALEKA SC:** But here you reference a shareholder cash injection of 480 million. Was it a decision taken by Glencore as a shareholder to put that amount of cash resource to one of its own subsidiaries, subsidiaries even in the face of that facility?

MR CLINTON MARTIN EPHRON: The facility had been exhausted at that point in my recollection. So the 2.5 billion facility had been utilised with the consortium of three banks. There were no other facilities available to Optimum at the point that Glencore started to inject cash into the mine. Glencore and shareholders.

ADV VINCENT MALEKA SC: Yes. So without this cash injection the financial condition of the mine was seriously impaired?

MR CLINTON MARTIN EPHRON: Without the, without the financial cash injection from Glencore the mine would not have survived.

ADV VINCENT MALEKA SC: Alright. You then resume the question of the negotiations in paragraph 26.

MR CLINTON MARTIN EPHRON: Yes. So we made some very good progress on the Cooperation Agreement after Eskom utilised the services of Nedbank and Basis Points Capital in order to do an audit to substantiate the costs regarding, regarding Optimum

10 and to and I read on 26:

“To satisfy Eskom that it was indeed in a precarious financial position and suffering hardship.”

ADV VINCENT MALEKA SC: So from your perspective there was full disclosure of the costs lines and cost items of the mine to Eskom and those costs were interrogated by Eskom’s advisors. You mentioned two of them, Nedbank and Basis Points Capital. I understand who Nedbank is, but I do not understand who Basis Points Capital is.

MR CLINTON MARTIN EPHRON: Basis Points Capital from my recollection was a, a small company that did analysis, financial analysis. I do not have much more detail than that. They were appointed by Eskom, appointed and paid for by Eskom.

20 **ADV VINCENT MALEKA SC:** I understand, but do you know the figures, the persons who were involved?

MR CLINTON MARTIN EPHRON: I do not.

ADV VINCENT MALEKA SC: You do not?

MR CLINTON MARTIN EPHRON: No.

ADV VINCENT MALEKA SC: And then you express a belief in the last sentence of

that paragraph concerning the success of the negotiations. Do you see that?

MR CLINTON MARTIN EPHRON: Yes, I do.

ADV VINCENT MALEKA SC: What led you to that belief?

MR CLINTON MARTIN EPHRON: Well we agreed on a fourth addendum. It, it was felt at the time that a new CSA at that point in time was too cumbersome to, to prepare. So we prepared a fourth addendum to the original 1993 CSA Agreement and that fourth addendum specifically spoke about the supply until 2023 which was what I have previously raised and in addition it gave Optimum an increase in its existing price from about R150 a ton to its costs of production and it negotiated a price for the period 2019,
10 1 January 2019 to 31 December 2023 if my memory serves me correctly.

ADV VINCENT MALEKA SC: I am going to take you to some features of this draft fourth addendum and I put it no higher than that. It was a draft. Chair you will find it from page 144.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: And if you go to page 145 you will see that it records historical amendments to the CSA during its life span via the first addendum that is identified in 113 on page 145. Correct? Are you there Mr Ephron?

MR CLINTON MARTIN EPHRON: Oh, yes I am with you.

ADV VINCENT MALEKA SC: Yes and it tells us that the second addendum was
20 executed on the 20th, on 12 April 2011, 115. Correct?

MR CLINTON MARTIN EPHRON: Correct.

ADV VINCENT MALEKA SC: And then the third addendum comes into being on 11 February 2013. Correct?

MR CLINTON MARTIN EPHRON: That is correct.

ADV VINCENT MALEKA SC: Alright. We now have a history of where this fourth

addendum in draft will fit in once it is executed by the parties. Do you see that?

MR CLINTON MARTIN EPHRON: Yes, I do.

ADV VINCENT MALEKA SC: And like all legal documents they give you the introduction about the purpose of the agreement. Correct?

MR CLINTON MARTIN EPHRON: Yes.

ADV VINCENT MALEKA SC: And I would like you to deal if you can with paragraph 2.1.2 unless you conceive 2.1.1 to be important.

MR CLINTON MARTIN EPHRON: No, I think we have dealt with 2.1.1 most of the issues there. I think 2.1.2 is important. I agree.

10 “The parties have reached a settlement in relation to the issues
subject to the settlement process which settlement comprises
and amendment to the CSA including an extension and various
reciprocal waivers and releases by the parties.”

ADV VINCENT MALEKA SC: Yes. I would like to explore a bit from your business, business perspective and certainly from my legal perspective. The significance of that part of the parties’ outcome of the negotiations relating to the reciprocal waiver.

MR CLINTON MARTIN EPHRON: I think the reciprocal waiver refers to the penalties and hardship. I stand to be corrected.

20 **ADV VINCENT MALEKA SC:** Yes. In my understanding of this phrase, reciprocal
waiver, it suggests that whatever rights and/or obligations the parties may have
accepted asserted against each other they now abandon them in the light of the new
settlement agreement they have reached.

MR CLINTON MARTIN EPHRON: That’s correct.

ADV VINCENT MALEKA SC: So for your part if this fourth addendum was
successfully concluded you would have abandoned the hardship clause you involved in

these consequences?

MR CLINTON MARTIN EPHRON: That's correct.

ADV VINCENT MALEKA SC: And Eskom for its part, and we will hear from them, they would have abandoned the question of penalties.

MR CLINTON MARTIN EPHRON: That's correct.

ADV VINCENT MALEKA SC: What I wanted to flag and tell me where I will find it is that you remember I highlighted for you one item of possible negotiations relating to the historical penalties in 2014, for that six month period, I can go back to it.

MR CLINTON MARTIN EPHRON: Yes.

10 **ADV VINCENT MALEKA SC:** In the Cooperation Agreement.

MR CLINTON MARTIN EPHRON: Yes.

ADV VINCENT MALEKA SC: Do you remember that?

MR CLINTON MARTIN EPHRON: Yes I do.

ADV VINCENT MALEKA SC: And the possibility of negotiations on it was that there may well have been a repayment which Eskom would make to Optimum Coal Mine, I have read this 4th Addendum and unless I have misread it I have not picked up that issue. Is it captured in the 4th Addendum?

MR CLINTON MARTIN EPHRON: From my recollection it would have been a negotiated process, so one of the negotiations, one of the clauses or one of the issues
20 that we may have agreed to was to waive the penalties that was set off against the price for the period prior to July or prior to December of 2014, if my memory serves me correct, that's why you may not find it in the 4th Addendum. Because it was the whole negotiation from the Cooperation Agreement which led to the 4th Amendment was a negotiated process.

ADV VINCENT MALEKA SC: I understand so are you saying that the issue may have

been negotiated but you decided to waive a refund on that score.

MR CLINTON MARTIN EPHRON: It would have been part of the negotiation, I can't recall exactly how that was ...(intervention)

ADV VINCENT MALEKA SC: Well we were not there, that's why we're asking you these questions.

MR CLINTON MARTIN EPHRON: I can't recall sorry exactly how that – the refund of the penalties for that six month period was addressed but if it's no longer in the 4th Addendum then it would have been waived as part of the negotiation, remember the 4th Addendum was calling for Eskom to pay a significant more per ton with immediate
10 effect so there would have been *quid pro quo*'s on that entire negotiation in getting to this draft addendum.

ADV VINCENT MALEKA SC: Alright, can we proceed then on the premise that the draft 4th Addendum does not specifically deal with that issue?

MR CLINTON MARTIN EPHRON: Yes.

ADV VINCENT MALEKA SC: Okay, now let's go to page 147 and see how the 4th Addendum seeks to regulate the contractual relationship of the parties going forward. You did in fairness indicate that one of the issues you're going to explore was the possible amendment of the CSA to extend its lifespan, correct?

MR CLINTON MARTIN EPHRON: Correct.

20 **ADV VINCENT MALEKA SC:** And paragraph 3.1.1 deals with that question, correct?

MR CLINTON MARTIN EPHRON: Correct.

ADV VINCENT MALEKA SC: Can you just summarise it for us.

MR CLINTON MARTIN EPHRON: If I may read it?

ADV VINCENT MALEKA SC: Yes.

MR CLINTON MARTIN EPHRON: 3.1.1.1 on page 147:

“The CSA shall subject to Clause 3.1.6 continue until a total quantity of 39 375 000 tons of coal, other than coal which is rejected in accordance with Clause 3.1.4.4 total contract quantity has been supplied by OCM to Eskom after 1 April 2015, it being recorded for the sake of clarity that based on the current estimated annual tonnage of 4 500 000 tons it is expected that the CSA will endure until approximately 31 December 2023.”

ADV VINCENT MALEKA SC: Thank you, it seems to me when I look at that clause that the parties now begin to amend the quantities of the minimum and maximum as defined in the original CSA to 4.5million estimate a month.

10 **MR CLINTON MARTIN EPHRON:** That’s correct.

ADV VINCENT MALEKA SC: And the obligation to deliver begins from 1 April 2015, correct?

MR CLINTON MARTIN EPHRON: Correct.

ADV VINCENT MALEKA SC: That was three years before the expiry of the CSA?

MR CLINTON MARTIN EPHRON: Correct.

ADV VINCENT MALEKA SC: Then you extend the lifespan, correct?

MR CLINTON MARTIN EPHRON: Correct.

ADV VINCENT MALEKA SC: To 2023?

MR CLINTON MARTIN EPHRON: Correct.

20 **ADV VINCENT MALEKA SC:** Which is another additional 15 years.

MR CLINTON MARTIN EPHRON: Five years.

ADV VINCENT MALEKA SC: Five years, I’m sorry, mathematics is so bad, my teacher won’t be proud of me, sorry. Five years. And then you begin to set out the contract price and its adjustment under the 4th Addendum, can I ask you to identify the amount that the parties contemplated would be the contract price for the supply of that quantity

of coal.

MR CLINTON MARTIN EPHRON: Yes, so it's split up into two parts, 3.1.2.1.1 during the first period from 1 January 2015 to 31 December 2018, first period the base price will be R18.85 per gigajoule, moisture free, excluding VAT and 3.1.2.1.2 during the period from 1 January 2019 to the base of termination of the CSA the base price, second base price will be 24.31 per gigajoule excluding VAT.

ADV VINCENT MALEKA SC: Yes, so it's still a fixed price contract?

MR CLINTON MARTIN EPHRON: Yes.

ADV VINCENT MALEKA SC: Okay. And then you give the details on page 148,
10 unless you want to elaborate on them I would like to skip them.

MR CLINTON MARTIN EPHRON: That's fine.

ADV VINCENT MALEKA SC: Then paragraph 3.1.4 on page 151 ...(intervention)

MR CLINTON MARTIN EPHRON: The only relevance if I may Mr Melaka, Deputy Chief Justice is that on 148 there is a table which we believe accurately reflected the inflationary costs as an inflationary adjustment to the fixed price, and it's different to the mechanism in the original CSA, that's the important point of page 148.

ADV VINCENT MALEKA SC: Yes, and the cost components that would be affected by questions of inflation are identified in – on that page?

MR CLINTON MARTIN EPHRON: That's correct.

20 **ADV VINCENT MALEKA SC:** It's labelled diesel, electricity, materials, they are there and I mean then it gives us the percentage, I mean I don't see anything of significant ...(intervention)

MR CLINTON MARTIN EPHRON: No, the significance of this is that this was an accurate assessment of the breakdown of the costs per ton and the amount in each cost that is broken up into labour, diesel, electricity, mechanical engineering materials

etcetera, and that the contract would then be escalated on an annual basis in according with the indexes which is a far more representative inflationary adjustment than what was put into the 1993 agreement.

ADV VINCENT MALEKA SC: In other words you're telling us that in the light of this scientific estimation you are not likely to declare hardship in the five years?

MR CLINTON MARTIN EPHRON: No.

ADV VINCENT MALEKA SC: Okay.

MR CLINTON MARTIN EPHRON: That's correct.

ADV VINCENT MALEKA SC: Okay, I understand that. Any matter before we ask you
10 to deal with coal quality on page 151.

MR CLINTON MARTIN EPHRON: No.

ADV VINCENT MALEKA SC: And page 154 paragraph 3.1.5 it's a confirmation of the quantity that you have dealt with, correct?

MR CLINTON MARTIN EPHRON: Sorry can you just repeat that please?

ADV VINCENT MALEKA SC: Page 154 Clause 3.1.5.

MR CLINTON MARTIN EPHRON: Yes.

ADV VINCENT MALEKA SC: You've dealt with it?

MR CLINTON MARTIN EPHRON: Yes.

ADV VINCENT MALEKA SC: And it gives the breakdown on page 155?

20 **MR CLINTON MARTIN EPHRON:** Yes.

ADV VINCENT MALEKA SC: Okay. Let's see if there's any other thing that I should raise with you in relation to this.

MR CLINTON MARTIN EPHRON: There's one last thing, if I may lead you.

ADV VINCENT MALEKA SC: Yes.

MR CLINTON MARTIN EPHRON: And that is the 3.1.4.1 on page 151.

ADV VINCENT MALEKA SC: 151?

MR CLINTON MARTIN EPHRON: 151.

ADV VINCENT MALEKA SC: Yes?

MR CLINTON MARTIN EPHRON: These specifications differ from the original CSA and they are more realistic specifications. Remember at this point in time there was only nine years to go and it was with clear certainty that these specifications would be achieved from the mine, on the information that we had at that point in time.

ADV VINCENT MALEKA SC: Okay, no thanks for that input. Chair?

CHAIRPERSON: Ja, no I was saying thank you.

10 **ADV VINCENT MALEKA SC:** Then we go to the waiver aspect which is page 161, again you have dealt with this but you know if there is any aspect of it that you would like to raise with us please tell us.

MR CLINTON MARTIN EPHRON: No I think that deals with that. I think there was – just there's one thing that I wanted to mention, allow me to come back to it at some point, I will ...(intervention)

ADV VINCENT MALEKA SC: There is (indistinct) on page 161, if you want to reflect on it.

MR CLINTON MARTIN EPHRON: No I think we're done.

ADV VINCENT MALEKA SC: You're done?

20 **MR CLINTON MARTIN EPHRON:** Ja.

ADV VINCENT MALEKA SC: Alright. So it seems to me that you provided for this interim period of five years but you made it quite clear that you will in good faith undertake further negotiations for the conclusion of a new CSA. That appears in paragraph – sorry clause 4 on page 161.

MR CLINTON MARTIN EPHRON: Yes, sorry, I didn't know where you were, yes that is

correct, so we – the idea was that this would be an addendum but we would attempt to redraft the original CSA which was written in 1993 and has a lot of complicated tedious terms to it, so the intention was that the parties to – this would have been final and binding but the idea was to redraft a CSA which would have better encapsulated the ...(intervention)

ADV VINCENT MALEKA SC: Yes, update it, modernise it to your new requirements.

MR CLINTON MARTIN EPHRON: That's correct.

ADV VINCENT MALEKA SC: And that would have been the subject matter of negotiations.

10 **MR CLINTON MARTIN EPHRON:** That's correct yes. But the 4th Addendum would have been sufficient had we not managed to redraft the CSA.

ADV VINCENT MALEKA SC: No I understand, it's for a period of five years you indicated.

MR CLINTON MARTIN EPHRON: Ja, ja.

ADV VINCENT MALEKA SC: Mr Ephron that gives a sense of what the parties agreed on during negotiations the next ...(intervention)

MR CLINTON MARTIN EPHRON: Sorry Mr Maleka it doesn't say five years, it says that the parties in clause 4 the parties shall as soon as possible after the signature negotiate in good faith to agree the terms of the written coal supply agreement.

20 **ADV VINCENT MALEKA SC:** I understand, but that means that the 4th Addendum is binding.

MR CLINTON MARTIN EPHRON: That's correct.

ADV VINCENT MALEKA SC: And for as long as it's binding the duration set out in Clause 3 thereof would become binding.

MR CLINTON MARTIN EPHRON: That's correct yes.

ADV VINCENT MALEKA SC: That's the period of five years we talked about.

MR CLINTON MARTIN EPHRON: It's a total of nine years if I recall.

ADV VINCENT MALEKA SC: Nine years, you could be correct.

MR CLINTON MARTIN EPHRON: Up until 2023 so it would have been from 1 April 2015 up until December 2023, I'm reading clause 3.1.1

ADV VINCENT MALEKA SC: Yes.

MR CLINTON MARTIN EPHRON: Okay.

ADV VINCENT MALEKA SC: So my understanding of this, and tell me if I'm wrong, that the SCA as amended by the 4th Addendum will continue to govern the contractual
10 relationship between the parties.

MR CLINTON MARTIN EPHRON: That's correct.

ADV VINCENT MALEKA SC: But the parties contemplated to update it in due course.

MR CLINTON MARTIN EPHRON: That's correct yes.

ADV VINCENT MALEKA SC: We have exhausted what the parties had negotiated and agreed upon. There remained an issue of giving effect to that agreement in terms of the 4th Addendum.

MR CLINTON MARTIN EPHRON: That's correct.

ADV VINCENT MALEKA SC: And there were certain governance processes that had to be completed to give some legal validity to it, correct?

20 **MR CLINTON MARTIN EPHRON:** That's correct.

ADV VINCENT MALEKA SC: Right, from the side of Optimum Coal Mine with its holding company what did you do to give effect to the 4th Addendum?

MR CLINTON MARTIN EPHRON: We didn't do anything, oh in terms of regulatory?

ADV VINCENT MALEKA SC: Did you sign it?

MR CLINTON MARTIN EPHRON: No.

ADV VINCENT MALEKA SC: Okay. What happened to it after it was drafted?

MR CLINTON MARTIN EPHRON: It couldn't be signed at that point in time, it needed to go through the Eskom Procurement Committees and various regulatory committees within Eskom.

ADV VINCENT MALEKA SC: So you waited for Eskom firstly to follow through its governance process.

MR CLINTON MARTIN EPHRON: That's correct.

ADV VINCENT MALEKA SC: And hopefully sign it.

MR CLINTON MARTIN EPHRON: That's correct.

10 **ADV VINCENT MALEKA SC:** Send it back to you and you would review it and sign it?

MR CLINTON MARTIN EPHRON: That's correct, that was the idea.

ADV VINCENT MALEKA SC: Okay. Then you talk about that process from paragraph 27 of your statement on page 6. You have dealt with the terms of it in paragraph 27 and you talk about a development which happens from the 25th of March 2015, I am at paragraph 28, correct?

MR CLINTON MARTIN EPHRON: I'm with you, it's correct.

ADV VINCENT MALEKA SC: You confirm that on the 25th of March 2015 you were advised by someone in Eskom, we will get to the details, that the Executive Procurement Committee of Eskom had approved that 4th Addendum?

20 **MR CLINTON MARTIN EPHRON:** Correct.

ADV VINCENT MALEKA SC: Chair we heard from Mr Mabuza that the appropriate description of that committee was Excop and later called Executive Tender Committee.

CHAIRPERSON: I do recall that mentioned that they used a certain name that appeared to be different from ...(intervention)

ADV VINCENT MALEKA SC: From this one.

CHAIRPERSON: Ja, I can't remember what.

ADV VINCENT MALEKA: And then I would like to clear that up with you Mr Ephron, you're talking and indirect from (indistinct) who advised you?

MR CLINTON MARTIN EPHRON: Mr Johan Bester advised me.

ADV VINCENT MALEKA SC: Okay, that the first governance leg of approval has gone through?

MR CLINTON MARTIN EPHRON: Yes.

ADV VINCENT MALEKA SC: How did he advise you?

MR CLINTON MARTIN EPHRON: It may have been telephonically, I don't recall.

10 **ADV VINCENT MALEKA SC:** Okay and then you say that he advised you that that Executive Committee had approved it subject to further approval by what you call the Eskom Board Procurement Committee, is that what he told you?

MR CLINTON MARTIN EPHRON: That's correct yes.

ADV VINCENT MALEKA SC: Chair you will recall again that Mr Mabuza told us th at it was a Board Tender Committee, the BTC.

CHAIRPERSON: Mmm.

ADV VINCENT MALEKA SC: Yes, and you say he told you that the meeting of that Board Tender Committee would take place somewhere on the 15th of April 2015, correct?

20 **MR CLINTON MARTIN EPHRON:** Correct.

ADV VINCENT MALEKA SC: It seems to me that there was some optimism from his side and from your side at that point in time.

MR CLINTON MARTIN EPHRON: Correct.

ADV VINCENT MALEKA SC: And you say something I would like to explore with you because I don't get a sense of where you get all of this information from. You say my

understanding is that on 15 April 2015 the 4th Addendum was presented to the Eskom Board Tender Committee, which in turn referred the matter to the Main Board for consideration, correct?

MR CLINTON MARTIN EPHRON: Correct.

ADV VINCENT MALEKA SC: Where did you get that understanding from?

MR CLINTON MARTIN EPHRON: Well that we knew it was – I think it was common knowledge or public knowledge that the Eskom Board was sitting at that point or Mr Bester could have given me the information as to when the Board was sitting or when the procure – the sub-committee of the Board was sitting, but it was important because
10 remember we're at a critical point, we're still continuing to fund the mine so each and every day was critical in terms of understanding the timeframe to get to the point of the finalisation of the 4th Addendum.

ADV VINCENT MALEKA SC: Yes, in the normal course of events Mr Ephron you would have had some anxiety because remember you had set out the timeline for the execution of this agreement?

MR CLINTON MARTIN EPHRON: That's correct.

ADV VINCENT MALEKA SC: And as far as I remember it was March, that's a nine months period that you had set yourself out to achieve this.

MR CLINTON MARTIN EPHRON: That is correct.

20 **ADV VINCENT MALEKA SC:** You have now exceeded the timeline.

MR CLINTON MARTIN EPHRON: That's correct.

ADV VINCENT MALEKA SC: Yes, there must have been a level of anxiety on your part?

MR CLINTON MARTIN EPHRON: There was.

ADV VINCENT MALEKA SC: Did you make any enquiries about what was happening

from the side of Eskom?

MR CLINTON MARTIN EPHRON: No besides what we had been told that it was going through the governance processes of Eskom there was nothing further.

ADV VINCENT MALEKA SC: Alright, as a matter of fact do you know whether the main Eskom Board met and conceded the 4th Addendum?

MR CLINTON MARTIN EPHRON: I was told yes.

ADV VINCENT MALEKA SC: By who?

MR CLINTON MARTIN EPHRON: That would have been Mr Johan Bester again.

ADV VINCENT MALEKA SC: Okay. And then in paragraph 29 you talk about an event
10 which has become common knowledge, and that is the reconstitution of the Eskom Board, correct?

MR CLINTON MARTIN EPHRON: Correct.

ADV VINCENT MALEKA SC: You also talk about the change in the Executive Leadership of Eskom, do you see that?

MR CLINTON MARTIN EPHRON: Yes.

ADV VINCENT MALEKA SC: Just take us through the changes that happened as far as you know him.

MR CLINTON MARTIN EPHRON: I think this is in the public domain that there were a number of executives that were suspended from Eskom, there were four main
20 executives and some Board members and there was a new Board constituted, I think the Board was constituted before this but Mr Molefe was put in as CEO of Eskom, as Acting CEO at that point.

ADV VINCENT MALEKA SC: And then you say that someone else also told you that the new Acting CEO would contact you to discuss the issue of the 4th Addendum further, do you see that?

MR CLINTON MARTIN EPHRON: Yes I do, that's correct.

ADV VINCENT MALEKA SC: Okay. Of course you must have had some discussions with Mr Molefe thereafter?

MR CLINTON MARTIN EPHRON: No, at that point we had no discussions. Mr Bester told us at the time that it had been taken to the Board and that the Board had said that the new Acting Chief Executive Officer, Mr Brian Molefe, would be in contact with us to discuss the 4th Addendum.

ADV VINCENT MALEKA SC: Yes, Chair the Board Minutes that we've looked at and they indicate how the Board itself decided to kick out this 4th Addendum back to Mr
10 Molefe for further I won't say implementation.

CHAIRPERSON: For is consideration.

ADV VINCENT MALEKA SC: For his consideration, whatever that may mean.

CHAIRPERSON: Ja.

ADV VINCENT MALEKA SC: Yes, now Mr Bester told you what would happen to that 4th Addendum insofar as Mr Molefe is concerned. I would like to get quite quickly to the question whether or not you had any discussion with Mr Molefe after Mr Bester told you those facts?

MR CLINTON MARTIN EPHRON: There was no contact by Mr Molefe between the time of late April 2015 when it was taken to the Board, and the 18th of May 2015 after
20 numerous attempts I managed to arrange a meeting with Mr Molefe at Eskom's offices.

ADV VINCENT MALEKA SC: You took the initiative to arrange the meeting?

MR CLINTON MARTIN EPHRON: Yes.

ADV VINCENT MALEKA SC: Alright and did the meeting take place?

MR CLINTON MARTIN EPHRON: Yes it did.

ADV VINCENT MALEKA SC: When?

MR CLINTON MARTIN EPHRON: Excuse me?

ADV VINCENT MALEKA SC: When?

MR CLINTON MARTIN EPHRON: On the 18th of May 2015.

ADV VINCENT MALEKA SC: Is that the meeting you referred to at paragraph 31?

MR CLINTON MARTIN EPHRON: Paragraph 31 on page 7.

ADV VINCENT MALEKA SC: Yes, can you quickly take us through the discussions you had with him on the day?

MR CLINTON MARTIN EPHRON: Yes, it was a very brief meeting, and at that meeting in Mr Molefe's office he said to me that Eskom would not be amending the terms of the
10 CSA and that it would continue to enforce its rights in terms of the contract and that no amendments would be considered until the end of the contract at that time was December 2018, and that was the end of the discussion at that point.

CHAIRPERSON: Was it just the two of you only in the meeting?

MR CLINTON MARTIN EPHRON: Only the two of us in his office at Megawatt Park.

CHAIRPERSON: Okay thank you.

ADV VINCENT MALEKA SC: How did you feel when he conveyed that position as Eskom's position?

MR CLINTON MARTIN EPHRON: Devastated.

CHAIRPERSON: Prior to this meeting the as I understand your statement and your
20 evidence it appears that there was quite a high degree of optimism on the part of yourselves that this would be approved.

MR CLINTON MARTIN EPHRON: There was optimism, Chief Justice, there was optimism from both sides, from Eskom's side and our side that would be approved.

CHAIRPERSON: Yes, yes, okay.

ADV VINCENT MALEKA SC: Before we go for the lunch adjournment can I ask you to

consider this question, and if necessary deal with it, the history of this 4th Addendum reflects a serious negotiation between representatives of the parties, some of whom were technical individuals.

MR CLINTON MARTIN EPHRON: That's correct.

ADV VINCENT MALEKA SC: And those technical individuals negotiated an agreement that they were willing and prepared to support and they did.

MR CLINTON MARTIN EPHRON: That's correct.

ADV VINCENT MALEKA SC: The Executive Leadership of Eskom before Mr Malefe came in supported that agreement.

10 **MR CLINTON MARTIN EPHRON:** Or primary energy that's correct.

ADV VINCENT MALEKA SC: Yes. And that's why they took it to the BTC and the full board for consideration and if necessary approval.

MR CLINTON MARTIN EPHRON: That is correct.

ADV VINCENT MALEKA SC: Did you ask Mr Molefe why such a sudden change of attitude in the light of the serious negotiations that you have dealt with.

MR CLINTON MARTIN EPHRON: I did.

ADV VINCENT MALEKA SC: And what did he tell you?

MR CLINTON MARTIN EPHRON: He said Eskom can't change the contract.

ADV VINCENT MALEKA SC: Right.

20 **CHAIRPERSON:** And do you know whether or not his predecessor was supportive of this agreement or is that something you didn't know?

MR CLINTON MARTIN EPHRON: I wasn't aware of it and – but it appeared through discussions with Mr Bester, maybe he would be best to explain that it was supported.

CHAIRPERSON: Yes, but the management level that you are sure about was supportive was the PED Management?

MR CLINTON MARTIN EPHRON: Yes.

CHAIRPERSON: Okay thank you.

ADV VINCENT MALEKA SC: Chair I see that it's one o'clock.

CHAIRPERSON: Okay, we will take the lunch adjournment and we will resume at two o'clock, we adjourn.

INQUIRY ADJOURNS

INQUIRY RESUMES

CHAIRPERSON: Yes Mr Maleka you may proceed.

ADV VINCENT MALEKA SC: Thank you Chair. Mr Ephron we were at page 7
10 paragraph 31 of your statement and you had set out the position expressed by Mr Molefe. And in paragraph 32 you talk about how the turn of events arising from that position was unfortunate, correct?

MR CLINTON MARTIN EPHRON: Correct.

ADV VINCENT MALEKA SC: And why do you think that – that was unfortunate?

MR CLINTON MARTIN EPHRON: Well we had been down a long period of negotiation with Eskom and there was a significant amount of history regarding the negotiation. We ...

CHAIRPERSON: I am sorry. There seems to be some sound of people speaking that comes from my right I do not know whether – somebody's cell phone or what. Okay let
20 us proceed hopefully.

ADV VINCENT MALEKA SC: No it is the mic.

CHAIRPERSON: Let us proceed hopefully it will not come back.

ADV VINCENT MALEKA SC: Chair does it disturb you I mean can you hear us?

CHAIRPERSON: I can hear you but it was interfering.

ADV VINCENT MALEKA SC: Oh okay.

CHAIRPERSON: But it is quiet now.

ADV VINCENT MALEKA SC: Okay. Thank you Chair.

CHAIRPERSON: Ja thank you.

ADV VINCENT MALEKA SC: You said that you have been down the road on long process of negotiations and?

MR CLINTON MARTIN EPHRON: And we had got to the point where we felt that we had reached some sort of conclusion on the Optimum saga. And only to be stonewalled at that point in time. We further felt it appropriate to write a letter to Mr Molefe I would like to refer you please.

10 **ADV VINCENT MALEKA SC**: Ja the letter appears at page 13 – 173.

MR CLINTON MARTIN EPHRON: 173.

ADV VINCENT MALEKA SC: Yes. And you addressed it to Mr Molefe and Mr Vusi Mboweni acting head of Primary Energy. It was on the 22 May 2015 and we know that this date of 22 May is quite popular in your dealings with Eskom. We have dealt with the 22 May 2014?

MR CLINTON MARTIN EPHRON: Right.

ADV VINCENT MALEKA SC: Yes.

MR CLINTON MARTIN EPHRON: Only by coincidence.

ADV VINCENT MALEKA SC: Only by coincidence.

20 **MR CLINTON MARTIN EPHRON**: Yes.

ADV VINCENT MALEKA SC: Alright. Just take us through the important aspects of this letter.

MR CLINTON MARTIN EPHRON: Thank you. In the first few clauses of the letter on 173 we just deal with the background, the negotiation, progress had been made. We understand the situation that Eskom is also in a difficult financial position. We speak

about efficient cost plus a fair return. We speak about various different things that had arisen during the negotiation and then on page 174 second clause they unfortunately not numbered

ADV VINCENT MALEKA SC: Yes.

MR CLINTON MARTIN EPHRON: Deputy Chief Justice but it is the second paragraph.

CHAIRPERSON: Yes.

MR CLINTON MARTIN EPHRON: Eskom's negotiating team advised OCM that the terms of the deal were subject to the approval by the executive procurement committee and then the Eskom board – the Eskom board procurement sub-committee on the 25
10 March 2015. Eskom was later advised that the executive procurement committee had approved the terms of the deal. And it just talks about the fact that it needs to ...

CHAIRPERSON: I heard like you said Eskom where it should be OCM or did I not hear you properly? It is according to the letter it is OCM that was advised.

MR CLINTON MARTIN EPHRON: OCM yes third line OCM was advised that the executive procurement committee had approved the terms of the deal.

ADV VINCENT MALEKA SC: Yes.

MR CLINTON MARTIN EPHRON: And then I would like to read from the next paragraph – the next clause onwards this outcome. Middle of the page. This outcome is obviously very damaging for OCM because it was on the back of such potential deal
20 that OCM has been able to persuade its shareholders to continue advancing funds to the mine in order to enable it to continue operating. As previously indicated OCM has exhausted all of its available banking facilities in the amount of 2.5 billion and requires approximately R100 million per month in order to continue operating. The shareholders of OCM have advanced approximately R1 billion to OCM since October 2014. If I may continue?

ADV VINCENT MALEKA SC: Yes

MR CLINTON MARTIN EPHRON: In the circumstances the directors of OCM feel it compelled to write to Eskom regarding the position in which they find themselves. As things stand OCM does not have sufficient funds to continue operating without shareholders support. As indicated above the shareholders of OCM committed to fund OCM on the basis that the negotiations with Eskom were ongoing and that a deal would be concluded with Eskom which would in some way improve the unsustainable financial position of OCM. The shareholders of OCM have however indicated that if no progress is made in the negotiations with Eskom by the end of May 2015 the shareholders will

10 have to reconsider their support for OCM and may withdraw all such funding. If this occurs the directors of OCM will in accordance with their legal duties have no choice but to place OCM in business rescue or liquidation which would be very harmful for all stakeholders. In the next paragraph I am reading from the second last line of the page. It is clear that the only possible method of rescuing OCM would be through an amendment to the Hendrina supply agreement because the agreement is so onerous that it precludes any other alternative solution. And then in the final paragraph I am now reading almost from the third line down. OCM does not want Eskom to feel that it is negotiating under duress but the negotiations with Eskom have been ongoing for two years and the directors have legal duties which they cannot ignore. It is with this in

20 mind that we as the directors of OCM implore Eskom to reconsider its position and to provide Eskom – and to provide confirmation that Eskom is willing to conclude a deal with OCM.

ADV VINCENT MALEKA SC: Yes. Are you aware whether Mr Molefe received this letter?

MR CLINTON MARTIN EPHRON: Yes he did.

ADV VINCENT MALEKA SC: What was his response if any of course?

MR CLINTON MARTIN EPHRON: Initially he did not respond. Paragraph 34 of page 8 of my statement. So up until the 11 June he did not – Eskom did not respond.

ADV VINCENT MALEKA SC: And what happened on the 11 June?

MR CLINTON MARTIN EPHRON: We arranged a meeting..

CHAIRPERSON: Well I am sorry before the end of June you – the last sentence that you were reading you did not read the whole of it obviously because you understood that what you had read had made the point but I see that when one looks at the balance of that sentence it does make the point that you or the directors of OCM were
10 not rigid in terms of saying Eskom must go ahead or confirm the agreement as it was that had been – that was supposed to have been approved. But you say your – there can be another basis as long as it was meaningful that it could be looked at.

MR CLINTON MARTIN EPHRON: That is correct Deputy Chief Justice that is...

CHAIRPERSON: Ja. So you were not rigid to say.

MR CLINTON MARTIN EPHRON: We were not.

CHAIRPERSON: That or nothing else.

MR CLINTON MARTIN EPHRON: We were not.

CHAIRPERSON: You were prepared to look at any other meaningful option.

MR CLINTON MARTIN EPHRON: On the understanding that perhaps the new board
20 felt that this was not appropriate maybe there was something else.

CHAIRPERSON: Yes.

MR CLINTON MARTIN EPHRON: That could have been done that could have been more appropriate at the time.

CHAIRPERSON: Yes, okay. Thank you.

ADV VINCENT MALEKA SC: Thank you Chair. Can I take you back to the events of

11 June 2015.

MR CLINTON MARTIN EPHRON: Yes.

ADV VINCENT MALEKA SC: Which you begin to describe from paragraph 34.

MR CLINTON MARTIN EPHRON: Yes. So we had a meeting which was – it was myself, it was Glencore's group CEO Mr Ivan Glasenberg and Mr Molefe who was accompanied by a number of representatives of Eskom. This meeting was held at Eskom and again we went to try and discuss and see if there was a way forward in terms of what we could do. Remember we were now on the 11 June so we had already passed the deadline of the 31 May which in our minds was going to be the latest date
10 for continue to fund and the 11 June we were still continuing to fund the mine but we thought let us have another meeting in which perhaps we could pave the way for either new negotiation or anything of the sort. But once again it was the same response that we had always got was that Eskom is not willing to negotiate and the contract is in full force and we must continue to perform the contract.

CHAIRPERSON: Before your first meeting with Mr Molefe the arrangement had been that the agreement or proposed agreement was going to be tabled or referred to tabled before the board or referred to the board for their consideration, is that correct?

MR CLINTON MARTIN EPHRON: Correct.

CHAIRPERSON: But then you had a meeting with Mr Molefe and you heard what he
20 articulated what he said was Eskom's position?

MR CLINTON MARTIN EPHRON: Correct.

CHAIRPERSON: Now did you ever get to know whether the board had discussed the agreement before it was referred to him or whether the board discussed it any stage after or was it just that he took – he articulated Eskom's position and that was that?

MR CLINTON MARTIN EPHRON: My understanding of the events was that at the

board meeting the board – it was discussed that Mr Molefe would take charge of the discussions with Optimum at that point.

CHAIRPERSON: Oh okay thank you.

ADV VINCENT MALEKA SC: Thank you Chair. You have now referred to two meetings you have held with Mr Molefe. The first being your one to one meeting with him on the 18 May and the next being your meeting with the Glencore Group CEO on the 11 June. And you were trying to impress upon him the importance of the fourth addendum.

MR CLINTON MARTIN EPHRON: That is correct.

10 **ADV VINCENT MALEKA SC:** My sense of what you recollect as his response was simply to say look Eskom wants you to fulfil your obligations under the CSA?

MR CLINTON MARTIN EPHRON: That is correct.

ADV VINCENT MALEKA SC: Beyond that stance did he say it to you why he did not consider it to be in the interest of Eskom to consider and if necessary negotiate further terms of the fourth addendum?

MR CLINTON MARTIN EPHRON: Yes in very brief terms he said that Eskom cannot renegotiate this contract.

ADV VINCENT MALEKA SC: No but I understand that is an expression of a negotiating position. What I want to understand is what were the reasons? Why was
20 he not prepared to engage on the substance of what was before him under the fourth addendum?

MR CLINTON MARTIN EPHRON: I do not know I cannot speculate.

ADV VINCENT MALEKA SC: Did you ask him?

MR CLINTON MARTIN EPHRON: We did.

ADV VINCENT MALEKA SC: And what did he say?

MR CLINTON MARTIN EPHRON: He just simply said Eskom cannot renegotiate this contract.

CHAIRPERSON: And you obviously had articulated to him your own motivation of why you believed that that agreement was good for both Eskom and yourselves?

MR CLINTON MARTIN EPHRON: Yes.

CHAIRPERSON: You had motivated that?

MR CLINTON MARTIN EPHRON: Yes of course and we made reference to – we would have made reference to the letter of 22 May which clearly articulates our position.

10 **CHAIRPERSON:** Yes. And did he – did he dispute any of the reasons that you were advancing that in your view showed why this agreement would be good for both Eskom and yourselves?

MR CLINTON MARTIN EPHRON: No.

CHAIRPERSON: Yes.

MR CLINTON MARTIN EPHRON: No.

ADV VINCENT MALEKA SC: You know we asking you these questions for your assistance because Eskom it is a public entity. Its officials exercise public power for the benefit of public institutions. It is not private power. And there has to be good reasons why those powers are not exercised in the interest of Eskom. From what you have told
20 us senior managers were satisfied that the fourth addendum is in the interest of Eskom. You are telling us that the incoming acting CEO simply put negotiating stunts without giving reasons other than to express the view that Eskom is not prepared to negotiate the CSA.

MR CLINTON MARTIN EPHRON: That is correct.

ADV VINCENT MALEKA SC: Was it that – I mean was that not surprising for you?

MR CLINTON MARTIN EPHRON: Of course it was surprising.

ADV VINCENT MALEKA SC: Did you tell him that that was surprising for you?

MR CLINTON MARTIN EPHRON: We did. It was a stonewall negotiation Deputy Chief Justice it was not a discussion. It was a position.

ADV VINCENT MALEKA SC: Hopefully when he comes we will ask him why that was the case.

CHAIRPERSON: And this was his attitude or was this his attitude not just at the meeting that he had with you the two of you only but also at the meeting that he and other people from Eskom had with you on the 11 June?

10 **MR CLINTON MARTIN EPHRON**: Identical.

CHAIRPERSON: H'm.

MR CLINTON MARTIN EPHRON: It was the same theme all the way along. Eskom's stance was they are not negotiating this contract.

CHAIRPERSON: You might or might not be able to assist here with regard to the meeting that you had with him just the two of you how long do you recall that meeting took – how long did it take?

MR CLINTON MARTIN EPHRON: Not more than ten minutes.

CHAIRPERSON: Yes and the second meeting on the 11 June do you recall about how long it took?

20 **MR CLINTON MARTIN EPHRON**: Maybe 45 minutes.

CHAIRPERSON: Yes. Okay thank you.

ADV VINCENT MALEKA SC: Alright we have dealt with paragraph 35 and in paragraph 36 I am at page 9 of your statement you say finally there arrived a formal response from Eskom which is CE7 of your statement. Chair you will find that at page 176. And I would like to take you to the terms of that response. What is the date...

CHAIRPERSON: 1;76 you said?

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: Okay thank you.

ADV VINCENT MALEKA SC: Thank you Chair.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: Are you there Mr Ephron?

MR CLINTON MARTIN EPHRON: I am.

ADV VINCENT MALEKA SC: What is the date of that response?

MR CLINTON MARTIN EPHRON: 10 June.

10 **ADV VINCENT MALEKA SC:** Who is the author of that response?

MR CLINTON MARTIN EPHRON: Mr Molefe.

ADV VINCENT MALEKA SC: And can you take us through the essence of that response? If it is necessary you can read it.

MR CLINTON MARTIN EPHRON: Sure. It is directed to me Optimum Coal Mine. It was only received on the 22 June. So it was received only after we had had the meeting of the 11 June. Acknowledgment of Receipt Hendrina Coal Supply Agreement. We acknowledge receipt of your letter dated 22 May and the issues you raise in it however considering Eskom's current financial position which is public knowledge we unfortunately cannot afford to reset the contract price to that proposed by Optimum

20 Coal Mine. It remains a priority for Eskom to ensure the security of coal supply to Hendrina Power Station not only for the remainder of the current coal supply agreement but also for the remaining life of the Hendrina Power Station. Therefore it remains critical to all stakeholders that Optimum Coal Mine continues to deliver coal as per the current contract. Eskom to the extent that the cooperation agreement still regulates the settlement process hereby notifies Optimum Coal Mine in terms of Clause 5.6 of the

agreement that it no longer wishes to participate in the settlement process. Eskom accordingly hereby terminates the settlement process and confirms that the provisions of the CSA and addenda are forthwith applicable in respect of inter alia coal qualities, quantity requirements of the Hendrina Power Station. However the negotiation teams should continue to negotiate a new CSA for after 2018 in respect of the remaining life of Hendrina Power Station.

ADV VINCENT MALEKA SC: Yes. Two things arising from that response for your comment. It seems to me that the termination of the cooperation agreement retriggered the arbitration process which was suspended.

10 **MR CLINTON MARTIN EPHRON:** That is correct. Only subsequently to this letter.

ADV VINCENT MALEKA SC: Yes. It also seems to me that the Eskom position was that there would be a negotiations and the parties can begin to negotiate a new CSA but only after the end of life span of the one that was subsisting at the time which was going to end sometime in December 2018.

MR CLINTON MARTIN EPHRON: That is correct.

ADV VINCENT MALEKA SC: What was your response after you received this letter from Mr Molefe? Because it raises questions of lack of affordability. Do you see that?

MR CLINTON MARTIN EPHRON: Lack of?

ADV VINCENT MALEKA SC: Affordability, the price? Eskom says that it does not
20 have the financial resources.

MR CLINTON MARTIN EPHRON: Yes. So I think the answer to your question if I may is encapsulated well in paragraph 37 page 9.

ADV VINCENT MALEKA SC: Paragraph 37 of your statement?

MR CLINTON MARTIN EPHRON: That is correct.

ADV VINCENT MALEKA SC: Yes.

MR CLINTON MARTIN EPHRON: While Glencore and OCM understood that Mr Molefe was entitled to his position and how that position might benefit Eskom in the very short term Eskom would continue to receive at low prices we felt that Mr Molefe's position did not necessarily appreciate the risk that Eskom faced after 2018. Where they would have no security of coal supply from the mine which was located very close to Hendrina and therefore it would be left in a very weak negotiating position. Not to mention the fact that business rescue and liquidation were possibilities that had been raised in the letter of 22 May.

ADV VINCENT MALEKA SC: Yes. Can I ride on ahead of myself and ask you this?

10 **MR CLINTON MARTIN EPHRON:** Yes.

ADV VINCENT MALEKA SC: You indicated that Eskom may well have faced risk after the termination of this CSA in December 2018. We are now almost what 3 months, 4 months after the contemplated end of the life span of this year say. Do you know what was – is happening to that mine – to Optimum Coal Mine as we speak today?

MR CLINTON MARTIN EPHRON: My understanding is that there is no coal being supplied from Optimum to Hendrina Power Station, zero.

ADV VINCENT MALEKA SC: Do you know why?

MR CLINTON MARTIN EPHRON: My understanding is that the mine is in business rescue and does not have the funds to operate.

20 **ADV VINCENT MALEKA SC:** Do you know where Hendrina gets its coal supply?

MR CLINTON MARTIN EPHRON: I am not aware. The only – they can only be road transporting it from other mines.

CHAIRPERSON: Subsequent to your meeting with Mr Molefe, the two of you alone and subsequent to the meeting of 11 June did you ever have occasion to interact with some of the PED management personalities who had been involved in the proposed

agreement that you knew supported it? Did you ever have a chance to interact with them and ask them what has changed now, why is Eskom so much against this agreement and if you did what did they say to you?

MR CLINTON MARTIN EPHRON: We did this was informally of course Deputy Chief Justice.

CHAIRPERSON: Yes.

MR CLINTON MARTIN EPHRON: They were as perplexed as we were. But then a lot of them became – were suspended. I do not think any of them are still working at Eskom to this day.

10 **CHAIRPERSON:** Yes. Thank you.

ADV VINCENT MALEKA SC: Thank you Chair. You wanted to respond to the question that I raised you – I raised with you concerning Mr Molefe's response about the financial precarious position of Eskom. And you said that I will find the answer in paragraph 38 of your statement.

MR CLINTON MARTIN EPHRON: 37.

CHAIRPERSON: You said 37.

ADV VINCENT MALEKA SC: 37.

CHAIRPERSON: Ja 37.

20 **ADV VINCENT MALEKA SC:** I am sorry yes. I am sorry. Can you just take us through what the answer is all about?

MR CLINTON MARTIN EPHRON: So if we go back to the background once again and I think we have explored this extensively. Hendrina Power Station is wholly reliant on Optimum Coal Mine for a number of reasons. Logistical, specifications, convenience, the power station was designed for this coal. So when we say in the middle of that paragraph that did not appreciate the risk that Eskom faced after 2018 we knew that it

was a – it would be a huge problem if the mine did not continue and the mine could not continue after 2018 or a contract could not be negotiated. It was not unusual to start negotiations or to discuss extensions of contract years in advance. Eskom does that all the time. It is not – it is never and never should be a just in time situation for Eskom. Primary Energy should be well aware of the resources, the capability of the mine, what it is capable of producing after the end of the contract and they should be in a position to start negotiating well in advance so that it is – you do not negotiate it on the 31 December 2018 when the coal stops the very next day. It is absolutely critical to the power station.

10 **ADV VINCENT MALEKA SC:** You use a very interesting phrase just in time.

MR CLINTON MARTIN EPHRON: Should never be just in time. Purchasing for coal should never be just in time. There is no excuse for that.

ADV VINCENT MALEKA SC: Chair just in time is you produce and supply it as and when it is needed. You do not carry available stock. I would like to raise something Chair which arises from the evidence of then Minister Ramatlhodi who you heard.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: Because in the context of what Mr Ephron is telling us now....

CHAIRPERSON: Yes.

20 **ADV VINCENT MALEKA SC:** Minister Ramatlhodi said something about Mr Molefe and then...

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: The chairperson of Eskom Doctor Ngobane I wonder whether you recall that evidence?

CHAIRPERSON: Well I certainly recall that he mentioned them – he mentioned that

meeting which he had with the two of them.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: Is that what you want to raise?

ADV VINCENT MALEKA SC: And ask for the witness comment.

CHAIRPERSON: Ja.

ADV VINCENT MALEKA SC: And ask him whether or not he can corroborate or say something about that version?

CHAIRPERSON: Ja.

ADV VINCENT MALEKA SC: And Chair just to make sure that I do not misquote or
10 mischaracterise his version.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: I am going to read from paragraph 21 of well maybe let me start at paragraph 19 of his statement.

CHAIRPERSON: That is Mr Ramathodi's statement?

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: Ja okay.

ADV VINCENT MALEKA SC: He says the following: You were not here when he testified now the Chairperson receives evidence from different persons and one of them was Minister Ramathodi. I will read from paragraph 19. The next event had to do with
20 Mr Brian Molefe who had suspended the Optimum contract to supply Hendrina station with coal. 20. The reason as provided by Mr Molefe then Eskom chief executive officer was that Eskom was owed R2 billion by Glencore. Mr Molefe was refusing to meet with Glencore to resolve the issue. I had a meeting with Mr Molefe to persuade him to meet with Glencore to resolve the matter. 21. The same evening Mr Molefe called me to say Doctor Baldwin Ben Ngobane his chairperson wanted to meet with me. We then met in

the office in the presence of some of officials. At that meeting Doctor Ngobane basically instructed me to shut down all Glencore owned mines. He said that he needed a decision to be made in the meeting so that he could report to the president who was leaving on a foreign mission on that day. I informed him that I was unable to take a decision like that without due process being followed as these processes would enable me to make an informed decision. For purposes of your comment do you know Mr Ramatlhodi?

MR CLINTON MARTIN EPHRON: Yes I do.

ADV VINCENT MALEKA SC: Have you had any interaction with him in his capacity as
10 the Minister of Minerals and Energy?

MR CLINTON MARTIN EPHRON: Yes I did.

ADV VINCENT MALEKA SC: What role if any did he play in relation to the problem that Glencore through Optimum Coal Mine was experiencing?

MR CLINTON MARTIN EPHRON: We had an issue when we were – when the – the process to close down the open cast mine. We were retrenching a number of people and the concern from the DMR they wanted to make sure that we were doing everything by the book and we subsequently proved to them that we were. That was the brief encounter that I think we had with Minister Ramatlhodi.

ADV VINCENT MALEKA SC: Do you know anything about the fact that he was
20 approached by the persons he mentioned with a view to shut down Glencore's operations?

MR CLINTON MARTIN EPHRON: No. No.

CHAIRPERSON: It might be important Mr Maleka if that statement does reveal to place a date to that meeting and see how it connects – it may connect with the dates of the – of the meetings that Mr Molefe had with the witness and subsequently with other

people on the 11 June.

ADV VINCENT MALEKA SC: Chair I am trying to look for a date.

CHAIRPERSON: But if you cannot see it now maybe it can be looked at for later just to see in relation to these events how far that date is.

ADV VINCENT MALEKA SC: Yes. I will look at it.

CHAIRPERSON: *Ja*.

ADV VINCENT MALEKA SC: But from the paragraphs that I have read and those preceding them.

CHAIRPERSON: Hm.

10 **ADV VINCENT MALEKA SC:** I could not pick up a date.

CHAIRPERSON: *Ja*.

ADV VINCENT MALEKA SC: Unless in the course of his oral testimony he was asked and he put down the date.

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

ADV VINCENT MALEKA SC: But I will look at it. All that I wanted to find out from Mr Ephron at this stage is whether or not there was a talk of shutting down Glencore's operations in the country and your evidence is that you do not know?

MR CLINTON MARTIN EPHRON: We were not aware of that.

ADV VINCENT MALEKA SC: No one told you about this?

20 **MR CLINTON MARTIN EPHRON:** No.

ADV VINCENT MALEKA SC: Okay.

CHAIRPERSON: Do you know Mr Maleka as of now because Mr Ramathodi's statement would have been served in terms of Rule 3.3 or the relevant portions.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: On Mr Brian Molefe as well as on.

ADV VINCENT MALEKA SC: Dr Ngubane.

CHAIRPERSON: Dr Ngubane.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: A long time ago.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: Do you know whether they have responded to say they want to [intervenes]?

ADV VINCENT MALEKA SC: Not as far as I am aware.

CHAIRPERSON: Hm.

10 **ADV VINCENT MALEKA SC:** But I know that Dr Ngubane was legally represented by one of our colleagues who came to make an appearance.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: When I think it was Ms Hogan.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: Testified.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: I am not too sure about the testimony of Mr.

CHAIRPERSON: Mr Ramatlhodi.

ADV VINCENT MALEKA SC: Ramatlhodi, but I can confirm that.

20 **CHAIRPERSON:** *Ja*.

ADV VINCENT MALEKA SC: And come back to you about it.

CHAIRPERSON: Okay. No that is fine.

ADV VINCENT MALEKA SC: I want to make a note.

CHAIRPERSON: Yes, you may proceed.

ADV VINCENT MALEKA SC: Chair I have already confirmed that the arbitration

processes relating to the Hardship Clause resumed and you confirm Mr Ephron that a hearing was scheduled for those proceedings for the 16th to 27 May 2016. You do so in paragraph 39. Correct?

MR CLINTON MARTIN EPHRON: Correct.

ADV VINCENT MALEKA SC: And then you start a new topic. You call the first Oakbay Offer from paragraph 40. You see that?

MR CLINTON MARTIN EPHRON: Yes.

ADV VINCENT MALEKA SC: Do you want to deal with it quite quickly? One thing that strikes me is you say that:

10 “The offer was received from KPMG from one of its clients
 whom it described as anonymous.”

You see that?

MR CLINTON MARTIN EPHRON: Yes, I do.

ADV VINCENT MALEKA SC: Do you know why KPMG would approach you?

MR CLINTON MARTIN EPHRON: I have no idea why they would do it anonymously. They approached us and then we, we responded saying that we are not dealing with anyone anonymous and that is when they advised that the interested offer was Oakbay.

ADV VINCENT MALEKA SC: We will go to the offer, but you say subsequently when you told them that you do not deal with anonymous offerors you then were told who
20 their client was. First things first. Do you know how KPMG came to make this unsolicited offer for the acquisition of Optimum Coal Mine?

MR CLINTON MARTIN EPHRON: No.

ADV VINCENT MALEKA SC: You did not ask them?

MR CLINTON MARTIN EPHRON: I do not recall. Optimum was very much in the press and the media at that point. There was a lot of, there was a lot of stuff going on

in terms of media. So perhaps.

CHAIRPERSON: So.

MR CLINTON MARTIN EPHRON: They were opportunistic.

CHAIRPERSON: So were some of the challenges that Optimum was facing public knowledge?

MR CLINTON MARTIN EPHRON: Very much so.

CHAIRPERSON: Hm, okay.

ADV VINCENT MALEKA SC: Can I take you to the author which is at page 180?

CHAIRPERSON: What is the page number again?

10 **ADV VINCENT MALEKA SC:** 180.

CHAIRPERSON: Thank you.

ADV VINCENT MALEKA SC: It is dated 1 July 2015 and it is addressed to Shaun Blankfield at his email address. Do you see that?

MR CLINTON MARTIN EPHRON: Yes.

ADV VINCENT MALEKA SC: Just for our own orientation who is Mr Blankfield?

MR CLINTON MARTIN EPHRON: So Mr Blankfield was the Head of our Corporate Finance at Glencore here in Johannesburg.

20 **ADV VINCENT MALEKA SC:** Yes and you see that paragraph 1 is numbered that is on page 180. It is the first paragraph. Refers to “Commercially Sensitive Information” relating to their client’s operation. Do you see that?

MR CLINTON MARTIN EPHRON: Yes, I do.

ADV VINCENT MALEKA SC: When ultimately you got to know who the client was and began negotiate, negotiations with them did you ask them to explain what the commercial sensitive nature of their client’s operation was?

MR CLINTON MARTIN EPHRON: I really do not recall.

ADV VINCENT MALEKA SC: And then in paragraph 1 now numbered, “Background to Our Client”. You see that they refer to diverse operations of their client and they say that it is a black empowered company both in terms of the Mining Charter and in terms of Eskom’s procurement requirements and is already a successful supplier of coal to Eskom and it is familiar with Optimum Coal’s operations. Do you see that?

MR CLINTON MARTIN EPHRON: Yes.

ADV VINCENT MALEKA SC: So that it seems to me when I read this that whoever the client was at the time was quite aware and had some knowledge of your operations. You see that?

10 **MR CLINTON MARTIN EPHRON:** Yes.

ADV VINCENT MALEKA SC: So whoever was making the offer at that point in time did so from some level of understanding what the operations were. What I want to ask you this, is this how a third party such as the client of KPMG have acquired knowledge of the operation of your entity? Was this a matter that was publically available for interested parties?

MR CLINTON MARTIN EPHRON: Up until 2013 sometime Optimum was a listed company. So there was information up until 2013. I am not sure of the exact date or delisting, but between 2013 and this point they would not have had detailed information on the mine at all.

20 **ADV VINCENT MALEKA SC:** Yes.

MR CLINTON MARTIN EPHRON: It would have been reported through the Glencore structures, but it would not have, but it would, there would not have been a lot of detail around the mine.

ADV VINCENT MALEKA SC: But it is fair to assume that it is 2015 and from open source material you gain some sense of what the operations of Optimum are?

MR CLINTON MARTIN EPHRON: You gain a very general background of Optimum sure.

ADV VINCENT MALEKA SC: Yes. Then on page 181 there is an indication of what is the amount of the non-binding offer which was proposed at that point in time. Do you see that?

MR CLINTON MARTIN EPHRON: Yes.

ADV VINCENT MALEKA SC: How much was it?

MR CLINTON MARTIN EPHRON: R2 billion.

ADV VINCENT MALEKA SC: Are you able to explain to us how that client would have
10 proposed that non-binding offer in that amount?

MR CLINTON MARTIN EPHRON: I have no idea.

ADV VINCENT MALEKA SC: At that point in time?

MR CLINTON MARTIN EPHRON: I have no idea.

ADV VINCENT MALEKA SC: And then there is a next part that I would like to raise with you, because it is going to become important as we talk about the financing of the last offer of Tegeta and/or Oakbay. At that point in time there was a financing structure that was proposed in paragraph 4. Do you see that?

MR CLINTON MARTIN EPHRON: Yes.

ADV VINCENT MALEKA SC: On page 181. Can you just deal with it for our benefit?

20 **MR CLINTON MARTIN EPHRON:** Sure.

“Our client has held discussion with its bankers regarding their capacity to fund the acquisition of Optimum Coal. Based on the existing business operations and assets i.e. without recourse to the assets of Optimum Coal they have received written letters of support for the required funding which together

with cash resources would allow them to fund the proposed purchase price of two billion without recourse to the assets of Optimum Coal.”

ADV VINCENT MALEKA SC: Yes. I mean Mr Ephron subject to questions of anonymity of a client this appears to be a serious offer on the face of it and someone who comes to you and says do not worry about funding. I have finances and I have funding to support the deal seems to suggest that it is someone who is serious in making the offer.

MR CLINTON MARTIN EPHRON: Perhaps serious in making the offer, but we did not
10 take it very seriously at that point.

ADV VINCENT MALEKA SC: Why did you not take it seriously?

MR CLINTON MARTIN EPHRON: Because it just, it lacked detail and, and understanding of Optimum and of course it was a, it is an opening gambit, it is an opening letter. It is not a, not a serious document that one can really consider at that point in time.

ADV VINCENT MALEKA SC: Alright.

MR CLINTON MARTIN EPHRON: We were far more preoccupied with trying to resolve issues with Eskom than worry about this offer.

CHAIRPERSON: When you say you did not regard it as a serious offer does that mean
20 or is that separate from whether it, it was genuine or not? Was that based on maybe the price that they were offering the offer or it was just other details in the letter that they were; that they, they had included in the letter that made you think it was not a serious offer?

MR CLINTON MARTIN EPHRON: Allow me to elaborate Deputy Chief Justice.

CHAIRPERSON: Yes.

MR CLINTON MARTIN EPHRON: This kind of letter that is subject to a due diligence cannot be taken as anything serious. It just, all it is, is an indication to commence discussions.

CHAIRPERSON: Yes, yes.

MR CLINTON MARTIN EPHRON: That is why I say.

CHAIRPERSON: Yes.

MR CLINTON MARTIN EPHRON: I am not saying that they were not seriously buyers.

CHAIRPERSON: Okay, oh.

10 **MR CLINTON MARTIN EPHRON:** But in terms of the way in which the letter was structured.

CHAIRPERSON: Hm.

MR CLINTON MARTIN EPHRON: And in the way we read into it.

CHAIRPERSON: Hm.

MR CLINTON MARTIN EPHRON: Anything subject to a due diligence means it can change at any opportune.

CHAIRPERSON: Yes.

MR CLINTON MARTIN EPHRON: Moment.

CHAIRPERSON: Yes, yes.

MR CLINTON MARTIN EPHRON: And approvals and all the necessary things.

20 **CHAIRPERSON:** Hm and of, and maybe the anonymity of the offeror.

MR CLINTON MARTIN EPHRON: That too.

CHAIRPERSON: Ja, okay.

MR CLINTON MARTIN EPHRON: That too.

CHAIRPERSON: Okay.

ADV VINCENT MALEKA SC: But the cover was revealed later, I mean [intervenes].

MR CLINTON MARTIN EPHRON: Yes, even once the cover was revealed.

ADV VINCENT MALEKA SC: Yes.

MR CLINTON MARTIN EPHRON: It still had the same terms. It still had approvals of their senior management. They had approvals of their senior management. There is, there is a significant amount of, of clauses in this, in this offer document that is that says that it is still subject to various stages of.

ADV VINCENT MALEKA SC: Yes.

MR CLINTON MARTIN EPHRON: Negotiations.

ADV VINCENT MALEKA SC: Now.

10 **CHAIRPERSON:** So there were the, there were still too many variables that could happen?

MR CLINTON MARTIN EPHRON: There were too many variables and to, in order.

CHAIRPERSON: *Ja.*

MR CLINTON MARTIN EPHRON: To take this seriously.

CHAIRPERSON: Okay.

MR CLINTON MARTIN EPHRON: I am not at that point. This is the, it is a big acquisition. It has to go down a long road in terms of negotiation.

ADV VINCENT MALEKA SC: Yes, but it was [indistinct].

MR CLINTON MARTIN EPHRON: It was clearly [intervenes].

20 **ADV VINCENT MALEKA SC:** Of a first step.

MR CLINTON MARTIN EPHRON: It was, it was absolutely clearly an intention to transact.

ADV VINCENT MALEKA SC: Yes, yes. Then you move away from that offer and begin to raise a totally different topic in paragraph 41. It is again the position of SUO, OCM around July 2015. Do you see that?

MR CLINTON MARTIN EPHRON: Yes.

ADV VINCENT MALEKA SC: In paragraph 41 and then you say in paragraph 42 that out of the blue you received a letter from Cliff Dekker Hofmeyr representing Eskom demanding payment of penalties in the order of R2 billion. Do you see that?

MR CLINTON MARTIN EPHRON: Yes, I do.

ADV VINCENT MALEKA SC: I have tried to connect what was happening to you in relation to the first Oakbay Offer and what happened as a result of the letter you received from Cliff Dekker on 16 July 2015 asserting payment of penalty.

MR CLINTON MARTIN EPHRON: I cannot help you join those dots. I can only give
10 you the objective facts of what I have.

ADV VINCENT MALEKA SC: Yes, I understand. It is surprising for me and I would like your comment on it that there is some measure of commonality between the Oakbay Offer of R2 billion and the extent of the penalties which were immediately asserted by Eskom.

MR CLINTON MARTIN EPHRON: At that point in time I would have to say no.

ADV VINCENT MALEKA SC: You.

MR CLINTON MARTIN EPHRON: And I can only comment for that point in time.

ADV VINCENT MALEKA SC: You did not see matters that way at that point in time?

MR CLINTON MARTIN EPHRON: No, we did not.

20 **ADV VINCENT MALEKA SC:** Can I ask you Chair to go to the letter and ask Mr Ephron to comment on its attachment?

MR CLINTON MARTIN EPHRON: Are you referring to CE10 page 184?

ADV VINCENT MALEKA SC: Yes.

MR CLINTON MARTIN EPHRON: Can I take you through this?

ADV VINCENT MALEKA SC: I will do so. I will ask you to do so and I would like you

to go to the attached schedule at, at page 1, is it 187?

MR CLINTON MARTIN EPHRON: That is correct.

ADV VINCENT MALEKA SC: That is the spreadsheet which was attached by Cliff Dekker Hofmeyr as a calculation of the penalties that came to R2.10-odd billion. Correct?

MR CLINTON MARTIN EPHRON: Correct.

ADV VINCENT MALEKA SC: I take it that you received this letter?

MR CLINTON MARTIN EPHRON: Yes.

ADV VINCENT MALEKA SC: I take that you applied your mind to the question of the
10 penalties and how they were calculated.

MR CLINTON MARTIN EPHRON: Yes.

ADV VINCENT MALEKA SC: What was your view of those penalties after you applied your mind to them?

MR CLINTON MARTIN EPHRON: Well the, the penalties were broken down into different parts.

ADV VINCENT MALEKA SC: Yes.

MR CLINTON MARTIN EPHRON: In terms of this, in terms of this spreadsheet. There was sizing. There was calorific value penalties. There were ash penalties. Basically in summary what this, what this spreadsheet did and what the letter from Cliff Dekker
20 Hofmeyr purported to say was that all the coal that had been supplied by Optimum Coal Mines from the period, 187 right in the top left it is very small. All the coal that had been supplied from March 2012.

ADV VINCENT MALEKA SC: Yes.

MR CLINTON MARTIN EPHRON: Deputy Chief Justice are we together?

ADV VINCENT MALEKA SC: Ja.

CHAIRPERSON: Yes, I am with [intervenes].

MR CLINTON MARTIN EPHRON: All the way through to May 2015.

CHAIRPERSON: Huh-uh.

MR CLINTON MARTIN EPHRON: Had been rejected. In other words the value of the penalties that were implied by the letter and calculated to get to the 2.1 represented the full value of the coal that had been supplied for the, for the period 2012 to 2015. So essentially they wanted a refund of all the money that they had paid to Optimum for the supply of the coal and the, the total coal was around 16.5 million tons for that period. A substantial amount of coal.

10 **ADV VINCENT MALEKA SC:** My, my, my question is slightly different, but go ahead.

MR CLINTON MARTIN EPHRON: So the important part we saw this as completely ridiculous in that firstly we had commenced the negotiation process to speak about the sizing which had been on hold during the Cooperation Agreement and that was the, the triggering of 3.4.3 of the addendum if you recall. That was the sizing renegotiation and also we had had numerous discussions regarding the interpretation and the calculation for the ash and CV penalty. Eskom took it as if that was the final penalty and levied this 2.1 billion penalty on the mine at that point. That was not our biggest problem. Our biggest problem was far more severe. We knew that we could defend this, because we knew what our rights were. The bigger problem was the way in which the penalties
20 were paid was via a set off process and the set off process going forward would indicate that if Eskom still took the stance of, of, of imposing these penalties on the mine then the mine would not be paid for any coal that would subsequently be delivered post this letter and it was, was proven that, the very next month in, I am going to jump just a little bit. I think it does have relevance.

ADV VINCENT MALEKA SC: Yes.

MR CLINTON MARTIN EPHRON: To paragraph 47, page 12 or the statement.

ADV VINCENT MALEKA SC: Yes.

MR CLINTON MARTIN EPHRON: It says that:

“At the end of...”

In the second line down.

“At the end of July 2015 Eskom withheld payment for no justifiable reason in an amount of approximately 58 million for coal which OCM had delivered that month. This was despite...”

I am reading.

10 “...a letter addressed to the BOPs dated 14 August 2015 in which Eskom confirmed that it would make payment. Payment was then refused again at the end of August 2015 for coal delivered that month. This time for 34 million.”

I am only jumping to that, we are going to get there, but I am only jumping.

ADV VINCENT MALEKA SC: Yes.

MR CLINTON MARTIN EPHRON: To that to prove the effect of the letter that was sent to us from Cliff Dekker Hofmeyr on 16 July. The effect of the, of the way in which we read that letter and that is articulated clearly in paragraph 43 of page 11 of my statement which says the following:

20 “The manner in which the penalty provisions of the CSA worked meant that penalties could potentially be set off against the price at which coal was supplied to Eskom by OCM with the effect that OCM could be required to coal at R1 a ton. The alleged penalties were therefore a matter of serious concern to OCM and made business rescue proceedings very likely.”

CHAIRPERSON: So is, is the position that at least as you understand the, Eskom's position in terms of the agreement was the position that if they maintained that there were penalties that they had the right to impose they could just help themselves to whatever money you were supposed to be paid for coal that you had supplied or, or there was to be some other forum which would determine first whether they were entitled to that penalty and how much it was?

MR CLINTON MARTIN EPHRON: No.

CHAIRPERSON: Hm.

MR CLINTON MARTIN EPHRON: The first part of your statement is correct.

10 **CHAIRPERSON:** *Ja*.

MR CLINTON MARTIN EPHRON: That they.

CHAIRPERSON: Yes.

MR CLINTON MARTIN EPHRON: Indicated that this, the way in which we read the letter.

CHAIRPERSON: Yes.

MR CLINTON MARTIN EPHRON: And together with the fact that July and August 2015 were not paid for.

CHAIRPERSON: Yes.

MR CLINTON MARTIN EPHRON: It was clear that that was the intention.

20 **CHAIRPERSON:** *Ja*.

MR CLINTON MARTIN EPHRON: That there, this coal would need to be supplied under the CSA.

CHAIRPERSON: Hm.

MR CLINTON MARTIN EPHRON: But it would not be paid for.

CHAIRPERSON: Hm.

MR CLINTON MARTIN EPHRON: If the, if the interpretation of the agreement was as per their understanding.

CHAIRPERSON: Hm, hm, but you had a different view as to how, how that should happen if these are penalties?

MR CLINTON MARTIN EPHRON: We had a completely different view.

CHAIRPERSON: Yes.

MR CLINTON MARTIN EPHRON: We had taken advice at the time.

CHAIRPERSON: Yes, okay.

MR CLINTON MARTIN EPHRON: That the way in which they were calculating it was
10 incorrect.

CHAIRPERSON: Okay, alright. Thank you.

ADV VINCENT MALEKA SC: I think your last statement gives an answer to what I wanted to establish. That you applied yourself to the calculation of the penalties. I am just talking about the question of the calculation. I am not talking about the rights or the obligations arising from it. All I wanted to ask from you is that when you look at that schedule you must have adopted a position and I wanted to establish from you what was your position in relation to the calculation of those penalties?

MR CLINTON MARTIN EPHRON: Our position was that the calculation was wrong.

ADV VINCENT MALEKA SC: Yes. Were you able at that point in time now that you
20 had concluded the calculation was wrong, what was the quantum of the penalties asserted which was wrong? We know the full amount asserted is R2 billion. Had you come to the conclusion that it was wrong because they were claiming so much and they cannot justify so much?

MR CLINTON MARTIN EPHRON: It is not simple to answer that question.

ADV VINCENT MALEKA SC: If you cannot you cannot.

MR CLINTON MARTIN EPHRON: It is not simple to answer that question. There are too many variables if I may in, if I cannot answer that, because there is, there are too many variables. There is sizing, there is CV, there is ash and it would become very complicated for the, for this Commission.

CHAIRPERSON: And, and the, what you regarded as the wrong calculation or method of calculation led them as far as you were concerned to a wrong total?

MR CLINTON MARTIN EPHRON: That is correct.

CHAIRPERSON: Okay, alright.

MR CLINTON MARTIN EPHRON: But I am going to reiterate if I may.

10 **CHAIRPERSON:** Yes, yes.

MR CLINTON MARTIN EPHRON: That we always knew we could defend that.

CHAIRPERSON: Yes, yes.

MR CLINTON MARTIN EPHRON: We always knew in the back of our mind that if that, because that would trigger arbitration.

CHAIRPERSON: *Ja*.

MR CLINTON MARTIN EPHRON: What we could not deal with.

CHAIRPERSON: *Ja*.

20 **MR CLINTON MARTIN EPHRON:** Was the fact that we had to deliver coal going forward and Eskom would apply a set off mechanism. So while you are in arbitration to discuss the very penalties.

CHAIRPERSON: Yes.

MR CLINTON MARTIN EPHRON: No funds would be received by the mine. It would not be.

CHAIRPERSON: *Ja*.

MR CLINTON MARTIN EPHRON: It would not be possible for the mine to survive on

that basis.

CHAIRPERSON: Yes, yes.

MR CLINTON MARTIN EPHRON: We would, we had hit the saturation point I think at that.

CHAIRPERSON: Well did you?

MR CLINTON MARTIN EPHRON: That time.

CHAIRPERSON: Did your, was your position that you were not liable for any penalties at all or was your position that you were liable for some penalties, but not as much as Eskom was saying you were liable for?

10 **MR CLINTON MARTIN EPHRON:** There may have been an amount that that the mine was liable for.

CHAIRPERSON: Yes.

MR CLINTON MARTIN EPHRON: Would, would have to have been determined through an arbitration process.

CHAIRPERSON: Yes, okay.

MR CLINTON MARTIN EPHRON: Yes.

ADV VINCENT MALEKA SC: Do you know whether that claim of penalty became a subject matter of arbitration? Remember you had already told us by now when you received this letter from CDH.

20 **MR CLINTON MARTIN EPHRON:** Yes.

ADV VINCENT MALEKA SC: That the parties had agreed to reschedule the arbitration proceedings for a hearing?

MR CLINTON MARTIN EPHRON: Yes. That [intervenes].

ADV VINCENT MALEKA SC: In May 2015. I think you say so in paragraph 39.

MR CLINTON MARTIN EPHRON: Yes.

ADV VINCENT MALEKA SC: If I may take you backward.

MR CLINTON MARTIN EPHRON: Yes.

ADV VINCENT MALEKA SC: I assume that that would have been a date which was agreed with the lawyers of the parties concerned?

MR CLINTON MARTIN EPHRON: That is correct, but the penalties would not have been discussed. That would have been an initial hearing that would have taken place at that point in time.

ADV VINCENT MALEKA SC: Yes.

MR CLINTON MARTIN EPHRON: So the penalties discussion would not have come
10 about at that point.

ADV VINCENT MALEKA SC: Yes.

MR CLINTON MARTIN EPHRON: Recall that that nothing at that point had been discussed with respect to the penalties.

ADV VINCENT MALEKA SC: What I want to understand is that once Eskom assert these penalties.

MR CLINTON MARTIN EPHRON: Yes.

ADV VINCENT MALEKA SC: There would be a new round of arbitration to determine that question?

MR CLINTON MARTIN EPHRON: That is correct.

20 **ADV VINCENT MALEKA SC:** Yes.

MR CLINTON MARTIN EPHRON: Separate to the arbitration that was referred to in point.

ADV VINCENT MALEKA SC: Yes.

MR CLINTON MARTIN EPHRON: 39.

ADV VINCENT MALEKA SC: Yes. Mr Ephron I am going to get a different topic and

that is the topic you described as the first Oakbay Offer (2). I would come back to the question that you raised in paragraph 43. We will come back to it I can assure you, but I would like to deal with that issue beginning at paragraph 44. You talk about the execution of what you call and I read from the last sentence of paragraph 44.

“A confidentiality and non-binding disclosure agreement.”

Which you annex as CE11, do you see that?

MR CLINTON MARTIN EPHRON: Yes.

ADV VINCENT MALEKA SC: I am not too sure how we should deal with it now. You describe it as a confidentiality non-disclosure agreement. These proceedings are open.

10 **MR CLINTON MARTIN EPHRON:** Yes it is, I think it is very simple to deal with it. What happened is if you look at the sequence of events.

ADV VINCENT MALEKA SC: Yes.

MR CLINTON MARTIN EPHRON: The, we received 16 July letter. We were processing the implications of the letter. While that happened were seriously considering placing the mine in business rescue at that point and all that happened on 25 July was that we knew that the business rescue practitioners would in some way look to entertain any potential suitors at that point, because that is what business rescue does and that is why a confidentiality and non-disclosure agreement was signed with respect to certain information that would be given to, to Oakbay for, for their going
20 forward in their discussions. It was only, it was the, the very next week.

“On 31 July 2015...”

I am reading from paragraph 45 on page 11 at the bottom.

“On 31 July 2015 the Board of Directors of OCH and OCM resolved to commence voluntary business rescue proceedings in respect of each of OCM and OCH.”

And if I may continue?

ADV VINCENT MALEKA SC: Yes.

MR CLINTON MARTIN EPHRON: “The decision to place the business under business rescue was driven by the facts that in addition to OCM being required to sell all coal produced below cost it not had to contend with the alleged R2 billion penalty and the prospect of supplying coal to Eskom for effectively R1 per ton.”

ADV VINCENT MALEKA SC: Yes.

MR CLINTON MARTIN EPHRON: The R1 per ton actually comes originally from the
10 CSA that that, that is the absolute minimum that must be paid by Eskom in the event of a penalty scenario.

ADV VINCENT MALEKA SC: Yes. Thank you for that context, but what I wanted to understand and without revealing confidential information, it seems to me that at that point in time you had begun to disclose information to Oakbay with a view to consider its offer, the first offer, correct?

MR CLINTON MARTIN EPHRON: Correct yes.

ADV VINCENT MALEKA SC: But within that period or shortly thereafter you had executed that NDA you realised that Optimum Coal Mine was now facing serious financial difficulties arising from the fact that it was supplying coal to Eskom below cost
20 and it had to contend with the potential of the penalties.

MR CLINTON MARTIN EPHRON: That is correct.

ADV VINCENT MALEKA SC: And you decided to initiate voluntary business rescue processes.

MR CLINTON MARTIN EPHRON: Correct.

ADV VINCENT MALEKA SC: And that is easy to achieve, you simply file a special

resolution.

MR CLINTON MARTIN EPHRON: That is correct.

ADV VINCENT MALEKA SC: And the proceedings commence.

MR CLINTON MARTIN EPHRON: Correct yes.

ADV VINCENT MALEKA SC: What I want to understand is did that mean at that point in time when you put Optimum Coal Mine into business rescue mean that you are closing the door for the negotiations which were proceeding with Oakbay or you left it up to the business rescue practitioners to take the matter further with Oakbay?

MR CLINTON MARTIN EPHRON: We left it up to the business rescue practitioners.

10 **ADV VINCENT MALEKA SC:** So the offer was still on the table?

MR CLINTON MARTIN EPHRON: Correct.

ADV VINCENT MALEKA SC: Thank you for that. Then you say in paragraph 47 that the relationship between Eskom and Optimum Coal continued further to deteriorate reflecting on paragraph 47 of your statement.

MR CLINTON MARTIN EPHRON: Yes.

ADV VINCENT MALEKA SC: And there you say that Optimum Coal continued to supply its coal to Eskom for July and August and invoiced two separate amounts, correct?

MR CLINTON MARTIN EPHRON: Correct.

20 **ADV VINCENT MALEKA SC:** And that is an issue which I had skipped because you had raised it in paragraph 43, I'm not going to take you back to 43, I made a cross-referencing that paragraph to make it clear that I had not forgotten it and it's in this context that I begin to raise the concern you raised in paragraph 43. Do you know why Eskom withheld?

MR CLINTON MARTIN EPHRON: No.

ADV VINCENT MALEKA SC: Did you raise it with them?

MR CLINTON MARTIN EPHRON: We tried.

ADV VINCENT MALEKA SC: And what did they say?

MR CLINTON MARTIN EPHRON: There was no response from Eskom.

ADV VINCENT MALEKA SC: And then what is true as you say that ultimately the two invoices referred to in paragraph 47 were paid by Eskom but under the new ownership regime of the mine being the proprietary interest of Tegeta and/or Oakbay, correct?

MR CLINTON MARTIN EPHRON: Correct.

ADV VINCENT MALEKA SC: Why would Eskom pay money to an entity which did not
10 supply coal to it and not to Optimum Coal which was then under business rescue and not controlled by Tegeta and/or Oakbay?

MR CLINTON MARTIN EPHRON: Just to correct you Mr Maleka that these payments were made in June 2016 when Optimum was – when Oakbay had control.

ADV VINCENT MALEKA SC: No I understand but the point is different the point is payments in June 2016 are made in respect of coal deliveries not by Tegeta and/or Oakbay, these are the invoices already issued.

MR CLINTON MARTIN EPHRON: Ja, so these payments were made to OCM in June 2016.

ADV VINCENT MALEKA SC: I understand that.

20 **MR CLINTON MARTIN EPHRON:** Not directly to Tegeta and why they were paid a year later I don't know.

ADV VINCENT MALEKA SC: Yes maybe I'm drawing too fine a distinction but the simple point is that Oakbay, OCM at that point in time relied on its parent company for financial support.

MR CLINTON MARTIN EPHRON: Are you referring to July 2015?

ADV VINCENT MALEKA SC: Yes.

MR CLINTON MARTIN EPHRON: Yes, correct.

ADV VINCENT MALEKA SC: Yes. And those were the shareholders who were interested in that payment because it is their asset.

MR CLINTON MARTIN EPHRON: Correct.

ADV VINCENT MALEKA SC: Yes, and they were not paid at that point in time.

MR CLINTON MARTIN EPHRON: No.

ADV VINCENT MALEKA SC: Yes, and the payment is made to the same company but under different ownership.

10 **MR CLINTON MARTIN EPHRON:** That's correct.

ADV VINCENT MALEKA SC: The question is why.

MR CLINTON MARTIN EPHRON: I can't answer that.

CHAIRPERSON: I take it that when you say you can't answer it you mean you don't know the answer?

MR CLINTON MARTIN EPHRON: I don't know the answer to be precise.

CHAIRPERSON: Ja okay, you are not refusing to answer?

MR CLINTON MARTIN EPHRON: No I am not refusing to answer anything.

CHAIRPERSON: Ja okay.

20 **ADV VINCENT MALEKA SC:** Chair for me it sounds a bit difficult but I accept that, I'm not a businessman but if my company is under financial stress and I'm using my resources to fund this operation and a client doesn't pay I mean I would certainly raise that issue seriously, even if it means that I walk to the door of the client and say please pay.

CHAIRPERSON: Yes, yes.

ADV VINCENT MALEKA SC: But it's something that Mr Ephron can help us with, we

can move on. We are at paragraph 48 and you explain quite clear in that paragraph that the objective of the business rescue practitioners was to avoid liquidation, correct?

MR CLINTON MARTIN EPHRON: Correct.

ADV VINCENT MALEKA SC: Yes. What would have happened if liquidation had taken place? Just in brief in terms of the interest of the parties at play, the interest of Eskom and the interest of OCM.

MR CLINTON MARTIN EPHRON: So besides job losses, besides the cessation of deliveries of coal there's numerous factors that would have occurred as a result of liquidation.

10 **ADV VINCENT MALEKA SC:** So it was in the interest of all concerned to avoid that potential?

MR CLINTON MARTIN EPHRON: Absolutely.

ADV VINCENT MALEKA SC: And the business practitioners had that in mind when they addressed the letter of 20 August 2015, Chair you will find that letter at page 197.

CHAIRPERSON: Thank you.

ADV VINCENT MALEKA SC: It is addressed by Werksmans Attorneys on behalf of the BRP's. You will see that it is addressed to two persons, who are they?

MR CLINTON MARTIN EPHRON: It's addressed to Matjila Koko at Eskom and Vusi Mbuwene and also Ayanda Nteta.

20 **ADV VINCENT MALEKA SC:** Yes, and then it proposes a way forward in relation to how the operations of OCM could be saved by making an offer. You will see that on page 198 and unless you think otherwise I direct your attention to paragraph 7 on page 198. Do you see that?

MR CLINTON MARTIN EPHRON: I do thank you.

ADV VINCENT MALEKA SC: And it's an offer to supply coal to Eskom by way of an

interim agreement at a price, do you know what the price was? I mean my reading of this is that what this letter was proposing was what the parties had negotiated under the 4th Addendum.

MR CLINTON MARTIN EPHRON: I think the number would have been similar and the reason why I say that is because it would have been based on the costs to recover the costs of Optimum, keep the mine open, recover the costs of what it produced, coal for Eskom, it's important at this stage to know that the mine was only producing coal for Eskom so all the costs associated with the mine would have then been lumped into the cost to supply Eskom. It was a very easy calculation.

10 **ADV VINCENT MALEKA SC:** Yes, yes, in fact when you look at the middle of paragraph 7 it says the costs in the interim agreement are not materially different from the costs provided to Eskom as part of the Cooperation Agreement process and have only been adjusted to take into account, to take account of the different time period during which the coal is to be supplied, do you see that?

MR CLINTON MARTIN EPHRON: That is correct.

ADV VINCENT MALEKA SC: So they are repeating the historical basis of charging the price.

MR CLINTON MARTIN EPHRON: That is correct.

ADV VINCENT MALEKA SC: Which had been previously expressed in the days o the
20 Cooperation 'Agreement?

MR CLINTON MARTIN EPHRON: That is correct.

ADV VINCENT MALEKA SC: Alright. I wonder whether you will be able to explain to us what was the response of Eskom to this Werksmans proposal? You can pick up an answer to that question from paragraph 50 of your statement.

MR CLINTON MARTIN EPHRON: Paragraph 50 comes a little bit after.

ADV VINCENT MALEKA SC: Okay.

MR CLINTON MARTIN EPHRON: Just give me one second. I can't seem to see the exact date that they responded.

ADV VINCENT MALEKA SC: Can we take it from this perspective that we now know that the BRP's had suspended the supply of coal to Eskom.

MR CLINTON MARTIN EPHRON: Yes, that's better.

ADV VINCENT MALEKA SC: And then Eskom started to engage with them and that's when a meeting was called between them and Mr Koko.

MR CLINTON MARTIN EPHRON: That's correct. Okay I've now got my thoughts back
10 in terms of how – the sequence of events, it was some years ago.

ADV VINCENT MALEKA SC: Yes.

MR CLINTON MARTIN EPHRON: So the business rescue practitioners were appointed on the 4th of August, there was various attempts for a meeting to reach an agreement and this was in 48, however Eskom refused to meet with the BRP's. It was in the last situation, the last moment on the 20th of August the business rescue practitioners and they would be better placed to describe this, but the business rescue practitioners within their right suspended the onerous contract of Optimum to Hendrienna Power Station and with that suspension the indicated that they would be willing to offer an interim arrangement to supply coal at cost while a negotiation could
20 take place for the longer term.

ADV VINCENT MALEKA SC: Yes.

MR CLINTON MARTIN EPHRON: And that went on for until the 3rd of September.

ADV VINCENT MALEKA SC: Yes.

MR CLINTON MARTIN EPHRON: Were Mr Molefe and Mr Koko called the business rescue practitioners and myself to a meeting at Megawatt Park.

ADV VINCENT MALEKA SC: You attended that meeting?

MR CLINTON MARTIN EPHRON: Yes I did.

ADV VINCENT MALEKA SC: Can you tell us what happened?

MR CLINTON MARTIN EPHRON: So when we arrived at Megawatt Park and we went into the meeting room we were told that Mr Molefe and Mr Koko wanted to meet with me alone, which I did, and at that meeting – can I say it wasn't very pleasant, Mr Molefe and Mr Koko advised that we must immediately restore the supply of coal to Hendriena. I said at the time that we were now I'm in a position of purely as Glencore as the let's say still the management of the mine under the business rescue practitioners and as a
10 shareholder as Glencore, so I couldn't make that decision, it's always subject to the business rescue practitioners. I did however say that subject to Glencore agreeing which I would have to double-check with my superiors that then we would continue to fund the mine in order to supply Eskom because supplying Eskom was very onerous and for every ton you supplied you didn't get paid so we had to continue to fund and that was when we undertook a commitment to continue to fund and to turn the conveyer belts back on, but that was clearly on the commitment from Mr Molefe that they would negotiate with OCM in good faith.

ADV VINCENT MALEKA SC: You see Chair what I find surprising is this, that you are not the manager of the business at that point in time and the true and legal managers
20 of the business are shut out of the meeting and you are asked to talk about operational matters relating to that business, that's a funny set of circumstances.

MR CLINTON MARTIN EPHRON: It is strange in one sense but in another sense Glencore was supplying the post-commencement funding so Glencore was supplying the PCF to Optimum for it to continue in the same way as it was before the business rescue proceedings, so if Glencore did not continue that funding business rescue would

end and liquidation proceedings would commence, so speaking to Glencore wasn't as strange as it appears.

ADV VINCENT MALEKA SC: Ja, but you undermined legal processes.

MR CLINTON MARTIN EPHRON: Possibly right, at that point in time it appeared it was strange but it allowed, the business rescue practitioners allowed me to meet with Mr Molefe and Mr Koko alone, so I could only have assumed that they sanctioned it and were happy with me to do that. It wasn't my jurisdiction.

ADV VINCENT MALEKA SC: Yes, well what happened what was the end-point of that meeting?

10 **MR CLINTON MARTIN EPHRON:** The end-point of the meeting succinctly was that Eskom agreed that they would open up negotiations with Optimum in return for restarting the supply of coal.

ADV VINCENT MALEKA SC: Okay, and did it get a sense of what will be the nature of the negotiation?

MR CLINTON MARTIN EPHRON: No, at that point no. We at that point just wanted a foot in the door rather than sitting with the CEO of Eskom discussing the terms of a deal.

ADV VINCENT MALEKA SC: I take it that you reported to the BRP's what the outcome of the meeting was?

20 **MR CLINTON MARTIN EPHRON:** Immediately thereafter yes I called my superiors.

ADV VINCENT MALEKA SC: Yes, and you also say that you reported to Mr Glasenberg?

MR CLINTON MARTIN EPHRON: That's correct.

ADV VINCENT MALEKA SC: Yes, and the BRP's took a view of what should happen in the light of the promise for negotiations, correct?

MR CLINTON MARTIN EPHRON: Correct.

ADV VINCENT MALEKA SC: And you tell the story about that view from paragraph 53?

MR CLINTON MARTIN EPHRON: That's correct, we contacted Mr Molefe again to advise him that we've agreed, Glencore would provide further funding for OCM, I'm reading from paragraph 53 and that the BRP's had agreed that OCM would recommence the supply of coal during a negotiation period and what is important is that it would be at a price of R150 per ton, which was the CSA price at that point and payment needed to be made every seven days. You will appreciate that Eskom had
10 withheld payment the previous month so the business rescue practitioners, the BRP's point of view that because Eskom withheld payment causing further hardship it was agreed that payment would be made every seven days.

ADV VINCENT MALEKA SC: Yes, then what was the response?

MR CLINTON MARTIN EPHRON: Eskom agreed.

ADV VINCENT MALEKA SC: And then in paragraph 54 you say that Eskom did not engage in any further negotiations despite OCM providing significant information to Eskom to demonstrate its precarious financial position, correct?

MR CLINTON MARTIN EPHRON: Correct.

ADV VINCENT MALEKA SC: We will get to paragraph 61 that you cross-reference.
20 You begin to talk about the second Oakbay offer unless there is any further issue you want to raise in relation to the first offer, the introduction of the BRP's and where matters ended after they had assumed management of OCM I would like to deal quickly with the second Oakbay offer.

MR CLINTON MARTIN EPHRON: That's fine.

ADV VINCENT MALEKA SC: Are you happy with that?

MR CLINTON MARTIN EPHRON: Sure.

ADV VINCENT MALEKA SC: You set out the second offer at CE13 Chair it is at page 207.

CHAIRPERSON: Thank you.

ADV VINCENT MALEKA SC: This time the offer is made by Oakbay itself, you will find it at 207.

MR CLINTON MARTIN EPHRON: Correct.

ADV VINCENT MALEKA SC: And it's around September 2015, again it's an unbinding offer, and the purchase price is set out in page 208, paragraph 3. It is a purchase price
10 consideration of R1 for acquisition of shares together with certain financial commitments do you see that?

MR CLINTON MARTIN EPHRON: Yes.

ADV VINCENT MALEKA SC: Alright. What – I see that the offer was addressed to the BRP, did you yourself acquire knowledge of this offer and if so when?

MR CLINTON MARTIN EPHRON: Can you ask the question again please?

ADV VINCENT MALEKA SC: If you look at page 207 the offer was addressed to the BRP's, because they were the managers at the time.

MR CLINTON MARTIN EPHRON: Yes.

ADV VINCENT MALEKA SC: When did you get knowledge of this offer?

20 **MR CLINTON MARTIN EPHRON:** We would have been advised at a similar time.

ADV VINCENT MALEKA SC: More or less a similar time?

MR CLINTON MARTIN EPHRON: Yes.

ADV VINCENT MALEKA SC: Alright. And do you know what was the response of the BRP's to this offer?

MR CLINTON MARTIN EPHRON: Well yes the BRP's wrote back asking for certain

explanations and clarifications around the offer, and that's specified in CE14 on page 212.

ADV VINCENT MALEKA SC: Because mine is 215, I mean you said 212 – ja 212, yes.

MR CLINTON MARTIN EPHRON: It was the normal type of negotiation that we discussed all the different aspects that would be involved in terms of a deal of such a nature and I'm referring to page 213 now, the likes of interim period financing, post-commencement financing, long-term borrowings, environmental liability, contractor, etcetera etcetera, Eskom, all the other stuff that would ordinarily be required for such a

10 transaction.

ADV VINCENT MALEKA SC: Yes, so the BRC were trying to engage in earnest with that offer?

MR CLINTON MARTIN EPHRON: That's correct.

ADV VINCENT MALEKA SC: And then you divert a bit from that second offer and the BRP's response by flagging an event which happens on the 22nd of September 2015, you do so in paragraph 58 and you say the following day, that is the 22nd of September 2015, President Jacob Zuma announced that he would appoint Mr Zwane as the Minister of Mineral Resources from 23 September 2015, correct?

MR CLINTON MARTIN EPHRON: Correct.

20 **ADV VINCENT MALEKA SC:** Ja, is there any significance to your reference to that event?

MR CLINTON MARTIN EPHRON: No I think it just follows the ordinary course in terms of the sequence of the documents to indicate when Minister Zwane was appointed.

ADV VINCENT MALEKA SC: Yes, you simply record a historical fact, correct?

MR CLINTON MARTIN EPHRON: Correct yes.

ADV VINCENT MALEKA SC: And then you deal with matters relating to an engagement that the BRP's were undertaking relating to something you described as the first long-term proposal. You do so from paragraph 59. Can I ask you just in simple summarised format what that proposal was all about, what did it seek to achieve?

MR CLINTON MARTIN EPHRON: So I think it was important to note that whilst there was an offer from Oakbay at the time it was first prize for the shareholders to do a deal or for the business rescue practitioners to do a deal with Eskom directly, and that's what brought rise to the first long-term proposal. Also in line with the discussions that I had had with Mr Molefe at the time that indicated that Eskom was willing to negotiate in
10 good faith, and the long-term proposal is very, very similar to the 4th Addendum.

ADV VINCENT MALEKA SC: Yes, thank you. Chair Ms Molefe has just picked up the date relating to that meeting between then Minister Ramatlhodi, Dr Ngubani and Mr Molefe, and she says that it was around September 2015 when that meeting took place.

CHAIRPERSON: Okay thank you. And can you remember where we were, what months we were when we were talking about the meetings that witness was having with Mr Molefe I think May and June.

ADV VINCENT MALEKA SC: It was in – the first one was in May, the second was in June and there was another one in July.

20 **CHAIRPERSON:** Yes both in the same year as this date ja, okay, thank you, that's very helpful.

ADV VINCENT MALEKA SC: I mean you confirm that you had by now, by September, had the sum total of three separate meetings with Mr Molefe?

MR CLINTON MARTIN EPHRON: That is correct.

ADV VINCENT MALEKA SC: Yes, and you said that that proposal of the BRP's was

submitted to Mr Koko and to Mr Molefe, am I reading your, the contents of your affidavit correctly.

MR CLINTON MARTIN EPHRON: I'm just double-checking.

ADV VINCENT MALEKA SC: I'm at paragraph 59 we will deal with this issue in detail when the BRP's testify.

MR CLINTON MARTIN EPHRON: Yes.

ADV VINCENT MALEKA SC: I just want you to summarise for us your understanding that there was a further engagement that took place between the BRP's and Eskom.

MR CLINTON MARTIN EPHRON: No that is correct a letter was sent on the – it looks
10 like the 17th of September and it was a proposal from Optimum Coal Mine in business rescue, a settlement proposal, it was attention Mr Brian Molefe, Mr Mtjila Koko and Mr Rishaban Moodley of Cliff Decker Hofmeyr.

ADV VINCENT MALEKA SC: Yes and then there was a response to it.

MR CLINTON MARTIN EPHRON: And there is a long letter and it again deals with all the issues and background of Optimum the history, the penalties, the extension of the contract, it's almost identical to the 4th Addendum, it has a few differentiations but it – what was important from our perspective is that we had another objective view from the business rescue practitioners of what we were previously saying made sense in terms of the survival of the mine.

20 **ADV VINCENT MALEKA SC:** Yes. There's a response to that proposal, it comes from Cliff Decker, it is on page 228. The sum total of that response is that Eskom had considered that proposal and it did not accept it, and Eskom was insisting on payment of penalties which had to be made in full and that was not negotiable.

MR CLINTON MARTIN EPHRON: That's correct.

ADV VINCENT MALEKA SC: And then there's an issue which is raised by Cliff Decker

around asset stripping, you will see that on page 228, paragraph 3.

MR CLINTON MARTIN EPHRON: Correct.

ADV VINCENT MALEKA SC: And of course Werksmans response to it on page 230.

MR CLINTON MARTIN EPHRON: Correct.

ADV VINCENT MALEKA SC: And you are aware of that response?

MR CLINTON MARTIN EPHRON: Yes if I may, I think it's worthwhile to read Werksmans response.

ADV VINCENT MALEKA SC: Yes. Chair it's at page 230.

CHAIRPERSON: Yes I found it thank you.

10 **MR CLINTON MARTIN EPHRON:** Werksmans letter is to Cliff Dekker Hofmeyr attention Mr Rishaban Moodley. And there are two paragraphs I would like to read. That is – sorry clauses. There is clause 2 and clause 3. Clause 2.

“We are disappointed that you have made no attempt to engage with the substance of our proposal or to make any counter proposal. Our clients are considering how to proceed and we will revert in due course.”

This is of course on behalf of the business rescue practitioners.

ADV VINCENT MALEKA SC: Yes.

MR CLINTON MARTIN EPHRON: And then in Point 3.

20 “Our client categorically reject the allegation that any assets are being stripped at the Optimum Mine. No assets have been removed from the Optimum Mine except for certain arm length disposals of minor assets that were surplus to requirements which have been approved by the joint business rescue practitioners in accordance with Section 134 of The Companies Act and the secure creditor who has taken possession of all of OCM's movable assets.”

ADV VINCENT MALEKA SC: Yes. It is a serious allegation to make about and concerning the business rescue practitioners.

MR CLINTON MARTIN EPHRON: Correct.

ADV VINCENT MALEKA SC: Yes. Do you know how this issue was resolved ultimately or was it left purely at the matter of making allegations and repudiation of those allegations on behalf of the business rescue practitioners?

MR CLINTON MARTIN EPHRON: From my recollection this never came up again.

ADV VINCENT MALEKA SC: Okay. Alright then the next chapter of your statement deals with the offer by Pembane.

10 **MR CLINTON MARTIN EPHRON:** Yes.

ADV VINCENT MALEKA SC: We now know who Pembane is?

MR CLINTON MARTIN EPHRON: Yes.

ADV VINCENT MALEKA SC: It is the minority shareholder in LCM.

MR CLINTON MARTIN EPHRON: That is correct.

ADV VINCENT MALEKA SC: Alright you deal with that issue from paragraph 62. You can summarise it fairly quickly because we know that no headway was made in relation to that offer for one simple reason. And do you know what was the reason why Pembane could not progress negotiation relating to its offer?

MR CLINTON MARTIN EPHRON: Yes I do.

20 **ADV VINCENT MALEKA SC:** Yes tell us.

MR CLINTON MARTIN EPHRON: That was Pembane thought in their opinion that they would be able to in some way negotiate or renegotiate the CSA in terms of in some way that mirrored the fourth addendum.

ADV VINCENT MALEKA SC: They thought that they would achieve what you failed to achieve?

MR CLINTON MARTIN EPHRON: You never know.

ADV VINCENT MALEKA SC: Okay. And did they succeed?

MR CLINTON MARTIN EPHRON: No they did not.

ADV VINCENT MALEKA SC: Why not to the best of your knowledge?

MR CLINTON MARTIN EPHRON: To the best of my knowledge I do not know why.

ADV VINCENT MALEKA SC: But you say in your statement that Eskom refused to negotiate the CSA as far as Pembane told you?

MR CLINTON MARTIN EPHRON: They – they gave Pembane the same answer that they gave the business rescue practitioners and the same answer that they gave
10 Glencore.

ADV VINCENT MALEKA SC: Alright. And then Pembane finally told you where it stands in relation to that offer by writing a letter to you and the letter was received by the BRP's on the 11 February 2016.

MR CLINTON MARTIN EPHRON: Many months later yes.

ADV VINCENT MALEKA SC: Many months later. Chair it is at page 252.

CHAIRPERSON: 252.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: Thank you.

ADV VINCENT MALEKA SC: Of course by this time when Pembane writes this letter
20 there had been some significant progress relating to the negotiations between Oak Bay and or Tegeta with Optimum Coal Mine through the BRP's, correct?

MR CLINTON MARTIN EPHRON: Correct.

ADV VINCENT MALEKA SC: You begin to talk about the progress late into those negotiations from paragraph 66 of your statement. And you refer to a meeting which was held on the 20 October 2015 which involved representatives of different stake

holders. The BRP's, Glencore and the representatives of Oak Bay.

MR CLINTON MARTIN EPHRON: Correct.

ADV VINCENT MALEKA SC: You give us the names there?

MR CLINTON MARTIN EPHRON: Correct.

ADV VINCENT MALEKA SC: You were present at that meeting?

MR CLINTON MARTIN EPHRON: I was.

ADV VINCENT MALEKA SC: And can you sum up the discussions which took place there and the upshot of those discussions?

MR CLINTON MARTIN EPHRON: The discussions were around the sale of shares of
10 Optimum Coal Mine only and did not include any of the other assets that were owned by Optimum Coal Holdings. It was a relatively brief discussion and it was very much in line with offer number 2 that we had received from Oak Bay.

ADV VINCENT MALEKA SC: Where did the discussion take place?

MR CLINTON MARTIN EPHRON: In Saxonwold at the home of the Gupta's.

ADV VINCENT MALEKA SC: Do you know why it was held there?

MR CLINTON MARTIN EPHRON: No. They requested it and we agreed.

ADV VINCENT MALEKA SC: Alright in paragraph 368 you record a position taken by the BRP's in relation to the discussion relating to Oak Bay's offer and you set out the parameters of that transaction, correct?

20 **MR CLINTON MARTIN EPHRON:** Correct.

ADV VINCENT MALEKA SC: Can you summarise the parameters of the transaction for us because it seems to me that it is no longer around the mine only but also of other assets that were involved in the course of the transactional parameters of the discussion.

MR CLINTON MARTIN EPHRON: No at that point in time it was still only about OCM

and we specifically indicated that OCH's interest in the Richards Bay Coal Terminal would not – it would not – the sale would not include that asset.

ADV VINCENT MALEKA SC: Oh I see so at that time you took the view that the R1 offer related to the mine only, correct?

MR CLINTON MARTIN EPHRON: Correct.

ADV VINCENT MALEKA SC: Thank you for that. And then the BRP imposed some dates by which Oak Bay had to complete a DD, correct?

MR CLINTON MARTIN EPHRON: That is correct.

ADV VINCENT MALEKA SC: And that was the 30 November 2015?

10 **MR CLINTON MARTIN EPHRON:** That is correct.

ADV VINCENT MALEKA SC: Okay. And the DD was done. Do you know when it was completed?

MR CLINTON MARTIN EPHRON: No but it would have been before the 30 November.

ADV VINCENT MALEKA SC: Whenever it was there was some progress relating to the negotiations because you say in paragraph 71 that on November 12 20-15 Oak Bay and OCH and OCM concluded a non-binding time sheet.

MR CLINTON MARTIN EPHRON: That is correct.

ADV VINCENT MALEKA SC: Yes. Chair you will find it on page 253. I am not going to waste time on it unless Mr Ephron would want to raise several issues around it.

20 **CHAIRPERSON:** Thank you.

ADV VINCENT MALEKA SC: I am interested in the next paragraph that follows. You say someone out of the blue contacted you about the proposed acquisition of OCM, who was that?

MR CLINTON MARTIN EPHRON: That was Mr Joel Raphela.

ADV VINCENT MALEKA SC: Who is he?

MR CLINTON MARTIN EPHRON: He was the deputy director general of the DMR.

ADV VINCENT MALEKA SC: Did you know him before he contacted you?

MR CLINTON MARTIN EPHRON: Yes I did.

ADV VINCENT MALEKA SC: And what did he – why did he contact you in relation to this transaction?

MR CLINTON MARTIN EPHRON: He contacted us to indicate that he is aware of the transaction. Of course again to reiterate that Optimum was very high profile in terms of the media.

ADV VINCENT MALEKA SC: Yes.

10 **MR CLINTON MARTIN EPHRON**: And of course the DMR was aware of it.

CHAIRPERSON: DMR again being the Department of Mineral Resources?

MR CLINTON MARTIN EPHRON: That is correct. And he indicated to me that a sale of OCM in other words the mine only would not be sufficient in that all the assets of OCH would need to be included in the sale of any sale process.

ADV VINCENT MALEKA SC: He was a third party to the negotiations?

MR CLINTON MARTIN EPHRON: That is correct.

ADV VINCENT MALEKA SC: Do you know where he got information around the negotiations?

MR CLINTON MARTIN EPHRON: I am not aware.

20 **ADV VINCENT MALEKA SC**: Do you know why he would be interested in expanding the asset base of the transaction?

MR CLINTON MARTIN EPHRON: He did not elaborate. Besides the fact that in his view it made more sense. I did not get the impression at that point that he understood the intricacies of the deal.

ADV VINCENT MALEKA SC: Okay. Chair can I move on?

CHAIRPERSON: Yes you may move on.

ADV VINCENT MALEKA SC: Thank you. And then you refer to a meeting that was called on the 24 November 2015.

MR CLINTON MARTIN EPHRON: That is correct.

ADV VINCENT MALEKA SC: Who called that meeting? You deal with it at paragraph 73.

MR CLINTON MARTIN EPHRON: Yes I see that I am not sure who – it would have been – no sorry Eskom called the meeting.

ADV VINCENT MALEKA SC: Eskom called the meeting?

10 **MR CLINTON MARTIN EPHRON**: Eskom called the meeting.

ADV VINCENT MALEKA SC: Did you attend the meeting?

MR CLINTON MARTIN EPHRON: No.

ADV VINCENT MALEKA SC: You did not. Do you know who attended it?

MR CLINTON MARTIN EPHRON: I do.

ADV VINCENT MALEKA SC: Okay who did?

MR CLINTON MARTIN EPHRON: The meeting was attended by Mr Blankfield on behalf of Glencore.

ADV VINCENT MALEKA SC: Yes.

20 **MR CLINTON MARTIN EPHRON**: The BRP's, Oak Bay who was represented by Mr Howa, Mr Chowla and Ms Raghaven and Eskom was represented by Mr Koko, Suzanne Daniels, Edward Mabalane and Ayanda Ntetha.

ADV VINCENT MALEKA SC: Yes and you refer to a copy of the minutes that you identify in CE23 and I have looked at the minutes Chair they are to be found at page 259.

CHAIRPERSON: Thank you.

ADV VINCENT MALEKA SC: All I would like you to confirm in that regard is that Eskom expressed a view about what it expected OCM to do notwithstanding the fact that there negotiations and notwithstanding the fact that it called for that meeting to provide an update to it of the negotiations?

MR CLINTON MARTIN EPHRON: That is correct.

ADV VINCENT MALEKA SC: Yes. What was the bottom line of Eskom?

MR CLINTON MARTIN EPHRON: It is clearly articulated in paragraph 74 on page 19 if I may?

ADV VINCENT MALEKA SC: Yes.

- 10 **MR CLINTON MARTIN EPHRON:** Mr Koko further stated that Eskom would not provide consent to any transaction with Oak Bay unless the transaction extended beyond OCM to include all assets of the OCH group including OCH interests in the Richards Bay Coal Terminal and Koorfontein.

ADV VINCENT MALEKA SC: You have already told us that this is not the first time that a third party outside the negotiating party raises the question of expanding the assets relating to that transaction? You have indicated that Mr Raphela raised the issue and you were quite surprised why he would raise the issue and you were – you realised that he did not understand the complexity of the transaction, correct?

MR CLINTON MARTIN EPHRON: That is correct.

- 20 **ADV VINCENT MALEKA SC:** That issues again raised by the third party who was not part and parcel of the negotiations and that is Mr Koko.

MR CLINTON MARTIN EPHRON: That is correct.

ADV VINCENT MALEKA SC: Okay. Why would he raise that issue, do you know?

MR CLINTON MARTIN EPHRON: Yes. At the time we considered because there was a guarantee between OCH and OCM in lieu of OCM's requirements to perform the

contract of the CSA that in the event that OCM did not perform that contract Eskom would have a right to claim against that guarantee towards OCH and OCH had other assets which we have discussed, the two other subsidiaries and various other smaller ones. So it was with that in mind I – we assumed at the time that that was the purpose of why they wanted to join the other assets into the sale process.

ADV VINCENT MALEKA SC: So the idea was to protect the interest of Eskom?

MR CLINTON MARTIN EPHRON: That is correct.

ADV VINCENT MALEKA SC: Yes. And the guarantee and the protection of Eskom interests would work to the extent that the guarantee was alive, correct?

10 **MR CLINTON MARTIN EPHRON:** Correct.

ADV VINCENT MALEKA SC: What happens the moment OCM is now owned by a third party? Let us assume for now that OCM is now owned by Tegeta and or Oak Bay. What would happen to protect the interests of Eskom in that regard?

MR CLINTON MARTIN EPHRON: Eskom would need to somehow satisfy themselves that the guarantee has some value. So there would have to be either other assets or a cash collateralized or something to that effect because there already – there was a guarantee that guarantee was in place in the original CSA. So if one bought OCM on its own then something would need to be done in order to protect OCM – to protect Eskom under that guarantee.

20 **ADV VINCENT MALEKA SC:** So you would expect to be the same mirror of the same protection?

MR CLINTON MARTIN EPHRON: That is where we thought that came from that is why we indicated that it may have – that it has some merit.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: Did the two meetings namely the one with Mr Raphela and the one

with Eskom which – both of which were in November did the two meetings take place within days of each other or are you not able to remember?

MR CLINTON MARTIN EPHRON: To be honest I could not recall the exact date that the meeting took place with Mr Raphela.

CHAIRPERSON: Yes.

MR CLINTON MARTIN EPHRON: Besides the fact that it took place during November.

CHAIRPERSON: In November. Yes. Okay alright thank you.

ADV VINCENT MALEKA SC: Thank you Chair. You then reflect on the attitude adopted by Mr Koko in paragraph 74 of your statement about how Eskom may consider
10 consenting to the transaction involving the sale of OCM. Can I ask you just in brief to deal with what were his requirements at that point in time?

MR CLINTON MARTIN EPHRON: I think it is reflected in his – in the minutes.

ADV VINCENT MALEKA SC: Yes.

MR CLINTON MARTIN EPHRON: Which is on page 259.

ADV VINCENT MALEKA SC: Yes. But to summarise the minutes in paragraph 74.

MR CLINTON MARTIN EPHRON: Yes just to summarise the minutes was simply put that Eskom was not willing to renegotiate the contract in any way and that again that the assets – the other assets of OCH needed to be included in the sale process.

ADV VINCENT MALEKA SC: Ja any future transaction which Eskom would be willing
20 to bless must involve also the sale of Glencore's interest in the coal terminal and also the Koornfontein Mine.

MR CLINTON MARTIN EPHRON: To correct you OCH's interest.

ADV VINCENT MALEKA SC: Thank you very much. OCH's interest in the Richards Bay Coal Terminal and Koornfontein Mine.

MR CLINTON MARTIN EPHRON: That is correct.

ADV VINCENT MALEKA SC: Yes. And what is interesting is the matter we have dealt with but you say in the interest of fairness to Mr Koko. You say and I quote “Mr Koko’s position had some merit but I noted it was the same message that I had received from the DMR earlier that month.” Correct?

MR CLINTON MARTIN EPHRON: That is correct.

ADV VINCENT MALEKA SC: Yes. Chair I am going to move to a different topic and it involves the meeting between Mr Glasenberg and Minister Zwane at the time.

CHAIRPERSON: Yes before that you say Mr Koko’s position had merit, is that because of the financial position in which OCM would be if Glencore withdrew its financial support, is that the reason why you say what he said had merit?

MR CLINTON MARTIN EPHRON: To be a little bit more specific.

CHAIRPERSON: Yes.

MR CLINTON MARTIN EPHRON: There was a guarantee between OCM and OCH.

CHAIRPERSON: Yes, yes.

MR CLINTON MARTIN EPHRON: And OCH had other assets.

CHAIRPERSON: Okay. Yes.

MR CLINTON MARTIN EPHRON: So in the event.

CHAIRPERSON: Yes.

MR CLINTON MARTIN EPHRON: Of there being a problem at OCM level.

20 **CHAIRPERSON:** Ja.

MR CLINTON MARTIN EPHRON: They would be entitled to claim against other assets.

CHAIRPERSON: Yes.

MR CLINTON MARTIN EPHRON: From OCH.

CHAIRPERSON: Okay. Okay.

MR CLINTON MARTIN EPHRON: It was not a Glencore guarantee.

CHAIRPERSON: Okay.

MR CLINTON MARTIN EPHRON: This was – this cross-guarantee – this guarantee was in place from the original CSA dated 1993.

CHAIRPERSON: Yes. So the principle is correct it is just the identity of who provided the guarantee OCH instead Glencore?

MR CLINTON MARTIN EPHRON: That is correct.

CHAIRPERSON: Yes. Okay.

ADV VINCENT MALEKA SC: It is security I mean.

10 **MR CLINTON MARTIN EPHRON:** That is correct.

ADV VINCENT MALEKA SC: Yes. If you are happy we can move to the next topic which you begin to deal with from paragraph 75. And it is a matter that had received serious attention from the Public Protector Chair as you remember.

CHAIRPERSON: Yes, yes.

ADV VINCENT MALEKA SC: Mr Ephron can I ask you to deal with that issue?

20 **MR CLINTON MARTIN EPHRON:** So the initial contact was made by Minister Zwane's office directly to Mr Glasenberg's office in Zurich Switzerland to set up a meeting for the 1 December 2015 between the Minister and Mr Glasenberg. At that stage there was no indication of what the Minister wanted to discuss with Mr Glasenberg.

ADV VINCENT MALEKA SC: Yes. Your understanding is that it is Minister Zwane who initiated the meeting?

MR CLINTON MARTIN EPHRON: That is correct.

ADV VINCENT MALEKA SC: Okay. And you make it quite clear in paragraph 16 that the meeting.

CHAIRPERSON: Paragraph?

ADV VINCENT MALEKA SC: Paragraph[h 76 I am sorry that the meeting was scheduled to take place in Switzerland on the 1 December 2015.

MR CLINTON MARTIN EPHRON: That is correct.

ADV VINCENT MALEKA SC: I am happy to follow the sequence of the meeting and skip paragraph 77 which I can come back to or we can deal with the sequence of events as you describe from paragraph 17 and later we will get back to the meeting?

CHAIRPERSON: But before that let us go back to your answer to the question that whether it is your understanding that it was Minister Zwane who initiated that meeting.

10 **How is your level of confidence that is actually the position?**

MR CLINTON MARTIN EPHRON: This is what I am told is a 100% accurate.

CHAIRPERSON: Okay thank you.

ADV VINCENT MALEKA SC: Alright let us follow the sequence of your statement. You then introduce a third offer.

MR CLINTON MARTIN EPHRON: Yes.

ADV VINCENT MALEKA SC: From Oak Bay.

MR CLINTON MARTIN EPHRON: That is correct.

ADV VINCENT MALEKA SC: And you say that it was for the amount of R1 billion, correct?

20 **MR CLINTON MARTIN EPHRON:** That is correct.

ADV VINCENT MALEKA SC: Do you remember what assets were covered by that purchase price?

MR CLINTON MARTIN EPHRON: It was all the assets of OCH which included the other subsidiaries specifically OCT which was the Richards Bay allocation. Richards Bay Coal Terminal shares and Koorfontein.

ADV VINCENT MALEKA SC: And you say that Glencore considered that offer but was not prepared to accept it.

MR CLINTON MARTIN EPHRON: That is correct.

ADV VINCENT MALEKA SC: Yes. I will not ask you why not. Then you refer to a meeting which was held on the 26 November 2015. You do so in paragraph 80 on page 21. Do you see that?

MR CLINTON MARTIN EPHRON: Yes I do.

ADV VINCENT MALEKA SC: You were present at that meeting?

MR CLINTON MARTIN EPHRON: Yes.

10 **ADV VINCENT MALEKA SC:** Who else was present?

MR CLINTON MARTIN EPHRON: Mr Ajay Gupta.

ADV VINCENT MALEKA SC: And what did you tell him at that meeting?

MR CLINTON MARTIN EPHRON: I told him that the offer of R1 billion for all the assets of OCH was declined.

ADV VINCENT MALEKA SC: And at that stage OCM was still in business rescue?

MR CLINTON MARTIN EPHRON: That is correct.

ADV VINCENT MALEKA SC: Yes. And there was again the threat or the potential for liquidation?

MR CLINTON MARTIN EPHRON: That is correct.

20 **ADV VINCENT MALEKA SC:** Yes.

CHAIRPERSON: The – was the offer R1 million or R1 billion? I thought you said R1 million?

MR CLINTON MARTIN EPHRON: R1 billion.

CHAIRPERSON: R1 billion.

CHAIRPERSON: R1 billion.

CHAIRPERSON: Yes okay.

ADV VINCENT MALEKA SC: We go to a different topic and it is a matter that was considered by the Portfolio Committee and also the Public Protector relating to the so called Section 54 Notices. It is Section 54 of the Mine and Health – Mine, Health and Safety Act 29 of 1996 Chair. I am sure you have heard on occasion to deal with these sorts of notices before, correct?

MR CLINTON MARTIN EPHRON: Yes.

ADV VINCENT MALEKA SC: Yes. Then they are issued by Mining – by inspectors of mine whenever they come to the conclusion that there were safety issues relating to the
10 mines?

MR CLINTON MARTIN EPHRON: It is the extreme case.

ADV VINCENT MALEKA SC: Yes.

MR CLINTON MARTIN EPHRON: Section 54 is the most extreme section in terms of safety.

ADV VINCENT MALEKA SC: Yes. You identify for Section 54 Notices which were issued sometime in November and you refer them from page 262. Chair we – I investigated this issue and I have been asked to assure you that once the results of investigations have been made evidence will be presented before you about this.

CHAIRPERSON: Okay.

20 **ADV VINCENT MALEKA SC:** I know that the investigators have arranged for consultation with the inspectors who have issued these notices.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: Yes but for the purposes of your evidence and Ms Hofmeyr asked me to ask you this.

MR CLINTON MARTIN EPHRON: Yes.

ADV VINCENT MALEKA SC: Why would the inspector issue these notices to Glencore mines at that point in time? Did you have any history of non-compliance at those mines?

MR CLINTON MARTIN EPHRON: Section 54's were not a regular occurrence but they do happen in the industry. So Section 54 is aimed at stopping an entire mine in the event that the DMR or the inspector identifies an infringement that could affect people's lives to the extent that it affects people lives the DMR has the right to issue a Section 54 and the mine must down tools and all the workers should go home.

CHAIRPERSON: You say Section 54 Notices are the extreme notices that are used by
10 which I take it you mean it must be a very dangerous safety situation that gives rise to those types of notices being issued.

MR CLINTON MARTIN EPHRON: That is correct.

CHAIRPERSON: Are there other notices that are issued maybe in terms of some other section where it is not an extreme situation in terms of danger or safety?

MR CLINTON MARTIN EPHRON: Yes.

CHAIRPERSON: That are issued and if so are they – what are they called?

MR CLINTON MARTIN EPHRON: So I do not – the one I do know is the Section 55.

CHAIRPERSON: Yes.

MR CLINTON MARTIN EPHRON: Which specifically closes down a section of the
20 mine.

CHAIRPERSON: Yes.

MR CLINTON MARTIN EPHRON: That has the infringement.

CHAIRPERSON: Yes.

MR CLINTON MARTIN EPHRON: Section 54 shuts the entire mine.

CHAIRPERSON: Yes, yes.

MR CLINTON MARTIN EPHRON: Section 55 impacts only on the area where the infringement occurred.

CHAIRPERSON: Okay, okay.

MR CLINTON MARTIN EPHRON: And then there are other sections.

CHAIRPERSON: Ja.

MR CLINTON MARTIN EPHRON: Which do not shut the mine down at all.

CHAIRPERSON: Yes.

MR CLINTON MARTIN EPHRON: But there is an infringement and that they need to be rectified as soon as possible.

10 **CHAIRPERSON:** Okay.

MR CLINTON MARTIN EPHRON: There is a mechanism.

CHAIRPERSON: Okay.

MR CLINTON MARTIN EPHRON: That deals with it.

CHAIRPERSON: So as you understand the position there are different categories of notices that are issued and they are issued according to the seriousness or otherwise of the infringement?

MR CLINTON MARTIN EPHRON: That is correct.

CHAIRPERSON: Okay.

20 **ADV VINCENT MALEKA SC:** Alright. In paragraph 85 you say and let me read this out together with you. You say it is not uncommon for multiple Section 54 Notices to be issued to a single operator so close in time and they were accordingly of a serious concern to Glencore. And you say this in the context of paragraph 84 where you said that these notices were unduly harsh and disproportionate to the contravention identified in the actual text of the notices, correct?

MR CLINTON MARTIN EPHRON: Correct.

ADV VINCENT MALEKA SC: Yes. And I mean I have looked at them and you have looked at them they relate to the operation of a truck which is unrelated to the operation of the underground mining activities and yet they call for the shutdown of the entire mine.

MR CLINTON MARTIN EPHRON: That is correct. They were frivolous Mr Deputy Chair – Deputy Chief Justice.

CHAIRPERSON: Had you ever been served with Section 54 Notices prior to his occasion as a, as a mine?

MR CLINTON MARTIN EPHRON: Yes, we had.

10 **CHAIRPERSON:** And how, how often in the 20 years or so that you had been there maybe a little more than 20 years to the extent that you whatever positions you might have held might have exposed you to that knowledge or might not have exposed, but to your knowledge?

MR CLINTON MARTIN EPHRON: They were quite rare.

CHAIRPERSON: Yes.

MR CLINTON MARTIN EPHRON: They did occur.

CHAIRPERSON: Yes.

MR CLINTON MARTIN EPHRON: And, and in some instances for good reason.

CHAIRPERSON: Okay, okay.

20 **MR CLINTON MARTIN EPHRON:** So it was a, it is a, it is an, it is a very good tool.

CHAIRPERSON: Yes.

MR CLINTON MARTIN EPHRON: And is used by the DMR to ensure compliance.

CHAIRPERSON: Yes.

MR CLINTON MARTIN EPHRON: By the mines.

CHAIRPERSON: Yes.

MR CLINTON MARTIN EPHRON: Safety of life is of paramount importance. So.

CHAIRPERSON: Yes, yes.

MR CLINTON MARTIN EPHRON: It is.

CHAIRPERSON: Ja.

MR CLINTON MARTIN EPHRON: There needs to be a mechanism to.

CHAIRPERSON: Yes.

MR CLINTON MARTIN EPHRON: To manage it.

CHAIRPERSON: Yes.

MR CLINTON MARTIN EPHRON: But they are not common.

10 **CHAIRPERSON:** Yes.

MR CLINTON MARTIN EPHRON: And they, when a Section 54 happens.

CHAIRPERSON: Ja.

MR CLINTON MARTIN EPHRON: It is extremely concerning for the mine and management of the mine and needs to be rectified immediately.

CHAIRPERSON: Yes. So the, the, as you understand the position they are reserved for extreme cases of safety legislation infringement?

MR CLINTON MARTIN EPHRON: That is correct.

CHAIRPERSON: Hm, okay.

20 **ADV VINCENT MALEKA SC:** And you say what unusual about some of these notices is that they were issued over the weekend?

MR CLINTON MARTIN EPHRON: Huh-uh. It is very uncommon that the Inspectors work over a weekend to issue a Section 54.

ADV VINCENT MALEKA SC: Did you raise your concerns about these notices with anyone at the DMR?

MR CLINTON MARTIN EPHRON: Yes. We would have raised it not formally, but

informally we would try to, I mean the relationship between the DMR and the mines are of paramount importance. So we would speak to the, to the DMR all the time with respect to inspections and infringements. So we would immediately have spoken to the DMR with respect to these Section 54s.

ADV VINCENT MALEKA SC: And then you say that the surmise you make is that these notices were issued for a specific purpose and let me leave it to you to describe for us what you think the purpose was.

MR CLINTON MARTIN EPHRON: I think it is important that we reflect at the time.

ADV VINCENT MALEKA SC: Yes.

- 10 **MR CLINTON MARTIN EPHRON:** Of course again I am going to reiterate with the benefit of hindsight. It is always more simple, but at the time we thought that it was a clear warning shot to Glencore from the DMR regarding a potential liquidation of OCM and to our mind that implied that we would need to support an offer for the sale of Optimum in order to ensure its survival.

ADV VINCENT MALEKA SC: Chair I see that it is already 4 o' clock. I have arranged with Mr Ephron that we will continue beyond the normal time of adjournment and I am quite comfortable that I will finish well within 30 minutes. I wonder whether we should not pray.

CHAIRPERSON: Then.

- 20 **ADV VINCENT MALEKA SC:** Take a short, short break.

CHAIRPERSON: [Intervenes].

ADV VINCENT MALEKA SC: For five minutes.

CHAIRPERSON: Let us, well I am happy to continue if we can at least finish by no later than half past four.

ADV VINCENT MALEKA SC: Alright.

CHAIRPERSON: So I can meet my other committee.

ADV VINCENT MALEKA SC: Committee.

CHAIRPERSON: In chambers at 5 o' clock.

ADV VINCENT MALEKA SC: Hm.

CHAIRPERSON: *Ja*.

ADV VINCENT MALEKA SC: Mr.

CHAIRPERSON: But I, I may not have heard did you ask that we proceed immediately or did you speak about a short adjournment?

ADV VINCENT MALEKA SC: No, I thought there was time for a short break.

10 **CHAIRPERSON:** [Intervenes].

ADV VINCENT MALEKA SC: But if there is not time we should.

CHAIRPERSON: No, no. You said you, you, you are confident you will finish well within 30 minutes. So if we take a five minute break it will not be a problem, *ja*.

ADV VINCENT MALEKA SC: *Ja*, we should be finish by 16:35 somewhere there.

CHAIRPERSON: *Ja*, okay.

[Laughing]

ADV VINCENT MALEKA SC: But.

CHAIRPERSON: Are you adding the five minutes for the break? Okay.

ADV VINCENT MALEKA SC: I do not want you to hold me back.

20 **CHAIRPERSON:** No, no.

ADV VINCENT MALEKA SC: About my.

CHAIRPERSON: No. We will, let us take the five minutes break.

ADV VINCENT MALEKA SC: Yes, yes.

CHAIRPERSON: You, you will probably [intervenes].

ADV VINCENT MALEKA SC: I think I can see that Mr Ephron is just getting tired as I

am, but maybe.

CHAIRPERSON: Yes. We will take, let us take a five minutes break.

ADV VINCENT MALEKA SC: [Intervenes].

CHAIRPERSON: We adjourn and we will be back at 25 past.

REGISTRAR: All rise.

UNKNOWN PERSON: 10 past.

CHAIRPERSON: At 10 past [laughing].

HEARING ADJOURNS

HEARING RESUMES

10 **ADV VINCENT MALEKA SC**: Mr Ephron.

CHAIRPERSON: Yes, Mr Maleka.

ADV VINCENT MALEKA SC: Thank you Chair. In order to answer the question that the Chair has put to you about proportionality of the infringement identified in the notices. Can I ask you to go back to page 21 paragraph 83?

MR CLINTON MARTIN EPHRON: Sure.

ADV VINCENT MALEKA SC: And identify the infringement which the Inspectors alleged. Can you deal with them quite quickly from paragraph 83.1?

MR CLINTON MARTIN EPHRON: Yes. So we have picked up from the, from the different mines the reasons for the Section 54s that were issued against the mines and
20 these, I am reading from, from 83 on page 21.

“The reasons provided for the suspensions as set out in the Section 54 Notices included the following representative examples: an excavator for Excavo mining mini truck not having a licence and checklist with him while operating. 83.2, safety belt was not used by the Excavo mining truck operator.

83.3, operator's seat was not adjusted and there were engine oil leaks. 83.4, four dump trucks found without first aid kits. 83.5, wheel loader two with a cracked windscreen since 21 November 2015."

ADV VINCENT MALEKA SC: Yes. I do not want to belabour the point. How would that effect the operation of the minds?

MR CLINTON MARTIN EPHRON: They could not.

ADV VINCENT MALEKA SC: Okay.

CHAIRPERSON: So is my understanding correct that in respect of one Section 54
10 Notice what was being directed is that a particular mine be closed, the operations be closed because the operator's, the operator's seat was not adjusted and there were engine oil leaks? Does that; would that be one incident that was considered by the relevant official at DMR to be sufficient for purposes of closing the whole operation of a mine or that would be one of a number of alleged infringements?

MR CLINTON MARTIN EPHRON: These were examples of one of a number of infringements in each of the 54s, but they were.

CHAIRPERSON: Yes.

MR CLINTON MARTIN EPHRON: All equally as frivolous.

CHAIRPERSON: Yes.

20 **MR CLINTON MARTIN EPHRON:** As these ones that we picked out in terms of examples.

CHAIRPERSON: Is, is, is a Section 54 Notice when it is issued does it necessarily mean the closing down of the operations of the mine?

MR CLINTON MARTIN EPHRON: Immediately.

CHAIRPERSON: Immediately?

MR CLINTON MARTIN EPHRON: Immediately.

CHAIRPERSON: Everything?

MR CLINTON MARTIN EPHRON: Every single operator, every single person.

CHAIRPERSON: So.

MR CLINTON MARTIN EPHRON: Needs to down tools.

CHAIRPERSON: So in other words irrespective of whether there were other alleged infringements if here we may have a situation where there was a Section 54 Notice issued on the basis of the allegation that the operator's seat was not adjusted and there were engine oil leaks for that a Section 44, 54 Notice was issued. Is my understanding

10 correct?

MR CLINTON MARTIN EPHRON: For the entire mine.

CHAIRPERSON: For the entire mine to be closed down?

MR CLINTON MARTIN EPHRON: For the entire mine.

CHAIRPERSON: Just because of that?

MR CLINTON MARTIN EPHRON: The entire mine needs to stop. Section 54, it is illegal to continue mining once a Section 54 issue, notice has been issued.

CHAIRPERSON: Yes.

MR CLINTON MARTIN EPHRON: Then there is due process that follows. You have to make representation to the DMR with respect to the infringements and only thereafter
20 may it be lifted in which case you can then return to start mining.

CHAIRPERSON: So if we go back to paragraph 83 of your statement you say there that you are going to give us a, a, a representative examples of Section 54 Notices that had been issued to different mines as I understand it when I read it together with paragraph 82. So, so 83.3 for example the one about the operator's seat not being adjusted and there been engine oil leaks so that would be a reason attached to a

particular Section 54 Notice?

MR CLINTON MARTIN EPHRON: Yes and there were other reasons as well.

CHAIRPERSON: Yes.

MR CLINTON MARTIN EPHRON: We just pulled out a few of the examples.

CHAIRPERSON: Yes, yes.

MR CLINTON MARTIN EPHRON: In that particular one.

CHAIRPERSON: Ja.

MR CLINTON MARTIN EPHRON: That refers to CE25.

ADV VINCENT MALEKA SC: At page 264?

10 **MR CLINTON MARTIN EPHRON:** On page 264.

CHAIRPERSON: Yes.

MR CLINTON MARTIN EPHRON: So you can see if I allow you, I am now on 264 the middle of the page.

CHAIRPERSON: Yes.

MR CLINTON MARTIN EPHRON: So 264 middle of the page as you can see there are a number of, there are five reasons.

CHAIRPERSON: Yes.

MR CLINTON MARTIN EPHRON: A, B, C, D and E.

CHAIRPERSON: Yes.

20 “Well A is an operator for Excavo mining mini truck was not having licence and checklist with him whilst operating. B, safety belt was not used by the Excavo mining mini truck operator and the operator for CWZ blah, blah, blah had not completed the checklist. C, ADT146 operator's seat was not adjusted and there were engine oil leaks. D, ADT141 and

ADT140 were leaking oil and the hooter was not working and there were no recorded, they were not recorded as such on the checklist. E, HCL blah, blah, blah and tractor operator were not having mine licence and did not complete checklist.”

So in, in regard to that Section 154 Notice those were the reasons given?

MR CLINTON MARTIN EPHRON: That is correct.

CHAIRPERSON: Why the whole operation of the mine had to be closed?

MR CLINTON MARTIN EPHRON: That is correct.

CHAIRPERSON: Hm.

10 **ADV VINCENT MALEKA SC:** Production comes to a halt. You have to lift people out of the chute and bring them to the surface?

MR CLINTON MARTIN EPHRON: That is correct.

ADV VINCENT MALEKA SC: Yes. Well you then explain in paragraph 88 that the Section 54 Notices were ultimately lifted on 30 November and 9 December 2015 at a significant cost to the business. Can I confirm with you that those related to the costs of the affected mine and they do not relate to Optimum Coal Mine?

MR CLINTON MARTIN EPHRON: That is correct.

ADV VINCENT MALEKA SC: Yes and then you talk about the commercial decision taken by Glencore to continue to fund the operations of Optimum Coal Mine under
20 business rescue.

MR CLINTON MARTIN EPHRON: Yes, I think this is an important point.

ADV VINCENT MALEKA SC: Yes. I would like you to deal with it if you can.

MR CLINTON MARTIN EPHRON: So on 29 November we held, we held a conference call and at the conference call, it was an internal Glencore conference call, we decided that we would continue funding the business and take it out of business rescue. That

was quite a tough decision at that point in time Deputy Chief Justice, but we had come to the realisation that liquidation was off the table. The offer that we had on the table from Oakbay at the time of R1 billion was not acceptable and the only other alternative was for Glencore to continue to, to fund the mine. We also at that point got a better understanding of the, the sizing and the penalty situation and we felt comfortable that we could convince Eskom that the, the full value of the penalty should not be deducted from the R150 and the; that Glencore would, would live with the R150 until the end of the CSA which was December 2018.

ADV VINCENT MALEKA SC: Once you take out Optimum Coal Mine from business
10 rescue you clearly express an impression at least to those who deal with it in the market that it is no longer a company in distress to be run by a third party such as a BRP.

MR CLINTON MARTIN EPHRON: Yes that is correct, but there is of course a legal process that you have to go through in order to take it out of business rescue.

ADV VINCENT MALEKA SC: Yes. I understand and so you were quite confident that you will be able to continue to provide shareholder support now that the company is outside the business rescue regime?

MR CLINTON MARTIN EPHRON: That is correct.

ADV VINCENT MALEKA SC: Yes. A tough commercial decision?

20 **MR CLINTON MARTIN EPHRON:** Very tough decision.

ADV VINCENT MALEKA SC: And that also gives an impression that liquidation was no longer on the table as a realistic prospect?

MR CLINTON MARTIN EPHRON: That is correct.

ADV VINCENT MALEKA SC: Okay. Can we deal with the meeting that had been prearranged between Mr Glasenberg and Minister Zwane at the time?

MR CLINTON MARTIN EPHRON: Yes of course.

ADV VINCENT MALEKA SC: You deal with them in two parts. The first is the one of December 2015 and the second is 2 December 2015.

CHAIRPERSON: One, the one is 1 December, the other 2 December as I understand?

ADV VINCENT MALEKA SC: Indeed.

CHAIRPERSON: *Ja.*

ADV VINCENT MALEKA SC: Indeed. I do not want to constrain you. You can give us a lead up to that meeting or you can go straight to the meeting itself.

10 **MR CLINTON MARTIN EPHRON:** I think in the interest of time let us go straight to the meeting.

ADV VINCENT MALEKA SC: Yes.

MR CLINTON MARTIN EPHRON: This was advised to me by Mr Glasenberg. This was the meeting that I was not present at. I was only present at 2 December meeting which was the next day. So I would like to read please.

ADV VINCENT MALEKA SC: Yes.

MR CLINTON MARTIN EPHRON: From paragraph 94 on page 24.

ADV VINCENT MALEKA SC: Yes.

MR CLINTON MARTIN EPHRON: "At or about the same time..."

20 Oh, I think it is just worth very quickly mentioning if I may take you just back two paragraphs to 1 December, paragraph 92.

ADV VINCENT MALEKA SC: Yes.

MR CLINTON MARTIN EPHRON: And in paragraph 92 we met with, when I say we it was myself, Pierce Marsden the business rescue practitioner, Mr Blankfield met with Mr Koko at Eskom's offices to advise them of our decision that had been made on the, I think it was the day before.

CHAIRPERSON: And the telephone conference.

MR CLINTON MARTIN EPHRON: Sorry, 29 November.

CHAIRPERSON: Huh-uh.

ADV VINCENT MALEKA SC: Yes, two days before. You had already conveyed your decision [intervenes].

MR CLINTON MARTIN EPHRON: We had conveyed our decision to Mr Koko on 1 December and he was, he was pleased with that, the decision that Glencore was going to take the company out of business rescue.

ADV VINCENT MALEKA SC: Yes.

10 **MR CLINTON MARTIN EPHRON:** So at that same time of that Eskom meeting a meeting was held I am now reading on page 24 paragraph 94.

20 “At or about the same time as the Eskom meeting the meeting between Mr Zwane and Mr Glasenberg took place at the Dolder Hotel in Zurich. I understand that the meeting was also attended by Mr Salim Essa, Mr Essa. Mr Glasenberg had not met Mr Essa before and did not know who he was. When he asked who Mr Essa was he was told that he was an advisor to the Minister, Zwane. I understand that Mr Glasenberg asked Minister Zwane about the Section 54 Notices, but that Minister Zwane did not engage with him on this issue. Instead noting that he wished to use the meeting to discuss Optimum. I also understand that Mr Glasenberg informed Mr Zwane that Glencore was willing to provide sufficient funding to have OCM and OCH discharged from business rescue that OCM would continue supplying Eskom with coal, but that Glencore would

be open to a sale at an appropriate price as long as it was accepted, acceptable to the BRPs. Minister Zwane responded by saying that he was sure Glencore could reach a deal with the Gupta family.”

That was, I was not present at that meeting. That was that has been told to me by Mr Glasenberg.

ADV VINCENT MALEKA SC: Yes. From what was conveyed to you by Mr Glasenberg that was the sum total of the meeting?

MR CLINTON MARTIN EPHRON: That is correct.

10 **ADV VINCENT MALEKA SC:** So Mr Glasenberg packed up for the first time the purpose of that meeting on 1 December at the Dolder Hotel in Zurich?

MR CLINTON MARTIN EPHRON: That is correct.

ADV VINCENT MALEKA SC: What was his attitude to the extent that you may have asked him?

MR CLINTON MARTIN EPHRON: His attitude was that they discussed the issue. Mr Glasenberg had clearly told the Minister that we were keeping the mine, but that we were willing to consider a sale at the appropriate price and implied that the, the one billion offer that had been given to us had been received by us from Oakbay was not acceptable and that we were keeping the mine at that point in time. There was nothing
20 further.

CHAIRPERSON: I, I do not know if I missed this. You see at the end of paragraph 96 you, you say that Minister Zwane responded to Mr Glasenberg by saying that he was sure Glencore could reach a deal with the Gupta family and you have said that you are telling us what you were told by Mr Glasenberg because you were not there. In terms of what the purpose was of that meeting are, are you able to tell us as conveyed to you

by Mr Glasenberg or are you not able to tell us?

MR CLINTON MARTIN EPHRON: All I can refer to is, is the information that I had been told at the time which was really about, about these three paragraphs.

CHAIRPERSON: Yes.

MR CLINTON MARTIN EPHRON: The call Deputy Chief Justice this was, this meeting was, was set up a week before and there were some, there already some happenings between 24 November and 1 December. So it is very difficult to.

CHAIRPERSON: *Ja*.

MR CLINTON MARTIN EPHRON: Pinpoint exactly.

10 **CHAIRPERSON:** Yes.

MR CLINTON MARTIN EPHRON: The purpose of the meeting, what it was for.

CHAIRPERSON: *Ja*, especially if you are not at the meeting.

MR CLINTON MARTIN EPHRON: That is also true.

CHAIRPERSON: *Ja*, okay alright. Thank you.

ADV VINCENT MALEKA SC: Can we then deal with parts of the meeting where you were present and where you can help the Chairperson? It is a meeting which follows 1 December meeting at the same place in the same country.

20 **MR CLINTON MARTIN EPHRON:** Yes. So after the meeting Mr Glasenberg contacted myself and advised me that he had been told by the Minister, excuse me if I can just double check. That he had been told by the Minister that Mr Tony Gupta wished to meet with Mr Glasenberg on 2 December in Switzerland to discuss a potential transaction and that Mr Glasenberg then wanted me to fly to Switzerland that night in order to be with him during a potential negotiation which is what I did and the meeting was held the very next day.

ADV VINCENT MALEKA SC: I mean at that point in time you yourself had conveyed

to Mr Gupta the position of your companies?

MR CLINTON MARTIN EPHRON: That is correct.

ADV VINCENT MALEKA SC: And I took, I take it that he was in no doubt about where you stand in relation to his previous offers?

MR CLINTON MARTIN EPHRON: That is correct.

ADV VINCENT MALEKA SC: And when Mr Glasenberg tells you that there is a potential for negotiation and calling you to go to Zurich and that Mr Tony Gupta would be there at that meeting. It seems to me that it is clear what would be the starting point of the negotiations as between the Oakbay representatives and yourself.

10 **MR CLINTON MARTIN EPHRON:** Yes.

ADV VINCENT MALEKA SC: Okay.

MR CLINTON MARTIN EPHRON: It would have been clear that they would have been willing to increase their price.

ADV VINCENT MALEKA SC: Yes and then the meeting takes place and you deal with its different components from paragraph 98.1 about who attended that meeting. Can you just help us there understand?

MR CLINTON MARTIN EPHRON: Sure.

20 “The first part of the meeting commenced mid-morning and was
attended by Minister Zwane, Mr Essa, Mr Tony Gupta,
Mr Glasenberg and myself.”

ADV VINCENT MALEKA SC: Did you know Mr Salim Essa at that point in time?

MR CLINTON MARTIN EPHRON: No.

ADV VINCENT MALEKA SC: Was he introduced to you?

MR CLINTON MARTIN EPHRON: Yes.

ADV VINCENT MALEKA SC: As what?

MR CLINTON MARTIN EPHRON: He was not introduced necessarily as anything.

ADV VINCENT MALEKA SC: But when you go to a serious meeting of this sort and you.

MR CLINTON MARTIN EPHRON: He was, he was part of the delegation. I do not know whether he at that point; during the introduction I was not aware whether he was either representing the Guptas or representing the Minister.

ADV VINCENT MALEKA SC: Did you come to know later on who was he representing or why was he at the meeting?

MR CLINTON MARTIN EPHRON: Yes.

10 **ADV VINCENT MALEKA SC:** And?

MR CLINTON MARTIN EPHRON: He was representing the Guptas.

ADV VINCENT MALEKA SC: Okay and then take us through how the meeting or the proceedings of that meeting unfolded.

MR CLINTON MARTIN EPHRON: So.

ADV VINCENT MALEKA SC: You can read if you want to.

MR CLINTON MARTIN EPHRON: Yes. I am, I think that will be best.

“The first part of the meeting...”

As I have mentioned.

20 “It was opened by Minister Zwane who noted the importance of securing employment at the mine. Expressed concern that the mine should not enter liquidation, a liquidation process and stated that the best outcome would be for Glencore and Oakbay to reach a deal. 98.2, Mr Zwane then left the meeting following which Mr T Gupta and Mr Glasenberg discussed the third Oakbay offer. After negotiation of the terms of a potential

transaction and purchase price of 2.15 billion was agreed which
was over double the amount of the third Oakbay offer.”

ADV VINCENT MALEKA SC: Can I just ask you to give us a snapshot of the negotiations? You were present when the toing and froing took place?

MR CLINTON MARTIN EPHRON: I was. It was, it was quite simple at that time in terms of where we were as Glencore. We had done numerous financial evaluations as to the cash flows, the costs, the net present value of the mine and we came to a point where the let us say the lesser of two evils was to sell it or to keep it at a certain price. So in other words we came to a price of 2.15 billion which would have meant, which
10 would have been the same price or the same financial implication to us to either keep it or to sell it. So then the question is, would arise why would you sell it and the only reason that we said we, we would agree to sell it was that there were a number of assumptions that we had made in, in establishing the NPV to get to 2.15 billion which would still have to occur and there was substantial risk associated with that and that is why the agreement was reached that we would sell at 2.15 billion.

ADV VINCENT MALEKA SC: Right. After the parties reached an agreement there was then an issue around the implementation process.

MR CLINTON MARTIN EPHRON: Yes.

ADV VINCENT MALEKA SC: And you talk about it in 98.3.

20 **MR CLINTON MARTIN EPHRON:** Yes.

ADV VINCENT MALEKA SC: And raise a, another issue relating to the sale and I would like you to deal with it from the third sentence of paragraph 98.3, if it is comfortable to you, you can read it.

MR CLINTON MARTIN EPHRON: Is it from Mr T?

ADV VINCENT MALEKA SC: Yes.

MR CLINTON MARTIN EPHRON: Gupta?

ADV VINCENT MALEKA SC: Yes.

MR CLINTON MARTIN EPHRON: “Mr T Gupta also spoke about the rehabilitation trust funds. At that stage the rehabilitation trust funds for OCM were invested in equity instruments. This was the Glencore’s Group Policy at the time on the basis that equity instruments provided the best long term return as a large multinational Glencore could withstand short term volatility. Mr Gupta indicated that the purchasing entity would not
10 assume the volatility risk and therefore he requested that OCM convert the rehabilitation trust funds into cash equivalents prior to signature of the sale agreement in order to mitigate the market risk of holding them in equity instruments. At the time we thought that seemed reasonable and did not raise any concerns because the funds would remain in the trust and be governed by the Trust Deed and relevant DMR Regulations.”

ADV VINCENT MALEKA SC: It was then how about now.

MR CLINTON MARTIN EPHRON: I still agree with it now.

ADV VINCENT MALEKA SC: Okay. Tell us more.

20 **MR CLINTON MARTIN EPHRON:** Because it does not make a lot of sense to, to keep these trust funds in equities when we have seen volatilities of long term even blue chip equities fluctuate over many, many years. Yes, the trend is up in terms of long term equities but it, it made more sense from a risk perspective to keep the, the, the money in cash equivalents which means you are investing in Government Bonds and debt which secures your capital. It is, it is, it is absolutely critical that the, to, to, to make

reference that the cash stays in the trust. It is just the methodology of the investment.

ADV VINCENT MALEKA SC: You know Mr Ephron, you know that there are lots of people in this country who have raised serious concerns about the use of misuse of the trust funds relating to these two minds, Koornfontein and, and, and Optimum Coal Mind. You know that?

MR CLINTON MARTIN EPHRON: I am aware, yes.

ADV VINCENT MALEKA SC: Some even had to go to court to make sure that the money in the accounts for the benefit of the trust funds were not accessed by the owners of the mines concerned. You are aware of that fact?

10 **MR CLINTON MARTIN EPHRON:** I am aware.

ADV VINCENT MALEKA SC: Given what you now know do you still maintain that the investment of the trust fund in cash and cash related accounts is the same in terms of its risk profile with the equity investments for the benefit of the trust funds?

MR CLINTON MARTIN EPHRON: I think the methodology of the investment of the funds in the trust is, is not relevant to where you are headed on your questioning. It is a, it is, it is a, it is a case of the risk.

CHAIRPERSON: Well, do not think about where he is heading [laughing]. Just answer the question.

MR CLINTON MARTIN EPHRON: No, the question [intervenes].

20 **ADV VINCENT MALEKA SC:** My simple question is this. Cash is easier to access.

MR CLINTON MARTIN EPHRON: Cash is, of course is easier to access.

ADV VINCENT MALEKA SC: Equities are difficult to access?

MR CLINTON MARTIN EPHRON: That is correct.

ADV VINCENT MALEKA SC: Yes.

MR CLINTON MARTIN EPHRON: It takes time to, to sell equities. That is correct.

ADV VINCENT MALEKA SC: Yes, yes. The risk of exposure is different. That is all I want you to comment on.

MR CLINTON MARTIN EPHRON: That is correct.

ADV VINCENT MALEKA SC: Yes. Then you begin to make some conclusions about Glencore's business rational for concluding the deal on the basis of the final offer from Oakbay. Can I ask you to sum up your business or strategic rationale for selling these assets and I will get back to precisely what were those assets?

MR CLINTON MARTIN EPHRON: Do you mind if I read?

ADV VINCENT MALEKA SC: Not at all, not at all.

10 **MR CLINTON MARTIN EPHRON:** So I am reading from paragraph 100 on page 26.

“Glencore was satisfied with the purchase price of 2.15 billion of the shares held by OCH which required Glencore *inter alia* to contribute 400 million to release the bank's security. Glencore considered this to be an appropriate price based on its analysis of the OCH Business undertaken at the end of November which indicated that the future cost of continuing to fund OCM was higher than the 400 million. Therefore while it is clear that pressure was brought to bear on Glencore to sell the mine Glencore ultimately entered into a transaction that made commercial sense. Obviously had Eskom engaged with OCM in 2015 the situation could have been avoided and a long term solution for both Eskom and OCM could have been agreed.”

20

ADV VINCENT MALEKA SC: Yes and then you explain the conclusion and execution of the transaction through the BRPs. We will ask them. They are going to come and testify. They have agreed to do so. Do you want to add to your version in relation to

that part of the transaction?

MR CLINTON MARTIN EPHRON: No, I think there is very little further to add.

ADV VINCENT MALEKA SC: Well I am interested in what you say in paragraph 105.

MR CLINTON MARTIN EPHRON: Hm. Paragraph 105, one week before the payment:

“In the week beginning...”

I am reading on 105 on page 27.

10 “In the week beginning 4 April 2016 I received a telephone call
from Mr Essa advising that Tegeta was short of an amount of
600 million for the purposes of payment of the purchase price.
He requested that Glencore fund the shortfall of 600 million and
said that Oakbay would get Eskom to pay the first 600 million of
coal sales to Glencore. Glencore declined this request. Had a
meeting on 11 April 2016. Mr Marsden one of the BRPs was
advised by Mr Howa that Tegeta was 600 million short and
Mr Howa requested that Mr Marsden approach the consortium
of banks requesting a bridging loan in an amount of 600 million
in order to facilitate the short fall on the purchase price.
Mr Marsden arranged a meeting with the consortium of banks
where after Mr Marsden advised Mr Howa that the consortium
20 of banks was...”

Excuse me. One second.

“...consortium of banks was not prepared to finance the
shortfall of the purchase price.”

ADV VINCENT MALEKA SC: This must have come at that point in time as surprising
news for you, because through the various offers that we have seen you were told that

the entity, the acquiring entity had enough cash, cash equivalent and funding from all of its banks.

MR CLINTON MARTIN EPHRON: That is correct.

ADV VINCENT MALEKA SC: Now you are told for the first time here closer to the date for the fulfilment of the CPs of the transaction that they acquiring entity is short of R600 million.

MR CLINTON MARTIN EPHRON: It was a surprise.

ADV VINCENT MALEKA SC: Yes. It seems to me that what you had been told or what was represented to you was not as a matter of fact true in the light of these
10 developments.

MR CLINTON MARTIN EPHRON: That is correct.

ADV VINCENT MALEKA SC: I would like you to sum up, but before you do so can I ask you to confirm and I should have said so in the beginning that you stand by the correctness of the statement which we have now canvassed?

MR CLINTON MARTIN EPHRON: I do.

ADV VINCENT MALEKA SC: Yes. Chair I have come to the conclusion of my questions. There are one or two broad propositions I would like to put to Mr Ephron that I think in fairness we would ask him to make his concluding remarks before I put those two broad propositions.

20 **CHAIRPERSON:** Well I thought you would put your, those first and then when you are done he can.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: Do his concluding remarks if he has any.

ADV VINCENT MALEKA SC: Thank you. From what you have told us it is quite clear that the Optimum Coal transaction reflected an amount of pressure points brought to

bear on Glencore and/or Optimum Coal Holdings. We have reflected on them, the first was the question of penalties, we have dealt with them, the second was the question of Section 24 notices, we have dealt with them. The third was the question of an attempt to enlarge the assets that had to become part and parcel of the transactions. The last was a refusal by Eskom to deal with anyone other than Tegeta and/or Oakbay.

Taking all of those pressure points into account and reflecting on this deal that was ultimately executed what is your view of the role ...(intervention)

CHAIRPERSON: I think they will attend to whatever is happening at the end, let's proceed and conclude.

10 **ADV VINCENT MALEKA SC:** What is your view of the role played by the non-parties to this transaction and by that I mean people who sought to put pressure on you on your version.

MR CLINTON MARTIN EPHRON: We were suspicious of them at the time. Of course with the benefit of hindsight and once we'd read the Public Protector's Report it was quite easy at that point to join the dots. We were shocked by what came out subsequently in the Public Protector's Report.

ADV VINCENT MALEKA SC: The last issue that I would like to you comment on, unless the Chair has ...

CHAIRPERSON: Well I don't know whether you want to leave it at that, but it may be
20 that he might have a view as of now, based on having read the Public Protector's Report and having looked at whatever he looked at in preparation for giving evidence and what he knows now. So he might be able to answer your question based on that, or he might not, depending, so maybe you might wish to let him get that chance.

ADV VINCENT MALEKA SC: Yes, Chair let me see whether I formulate correctly. From what you now know given the public revelations, given the various reports

reflecting on different investigations, including the Public Protector what is your view of things?

MR CLINTON MARTIN EPHRON: I think it's unfair for me to speculate here.

CHAIRPERSON: You must not speculate.

MR CLINTON MARTIN EPHRON: I don't think it's my job to do that.

CHAIRPERSON: No you mustn't speculate.

MR CLINTON MARTIN EPHRON: It's my job to give you objective answers, I prefer to leave it like that.

CHAIRPERSON: No you mustn't speculate and if you feel that you can't offer anything
10 it is legitimate for you to say you prefer not to.

MR CLINTON MARTIN EPHRON: Thank you.

CHAIRPERSON: And I think one could tell from your statement that that seems to be what you prefer, at least I could detach from your statement.

MR CLINTON MARTIN EPHRON: Let's say it's above my pay grade.

CHAIRPERSON: Okay, alright Mr Maleka?

ADV VINCENT MALEKA SC: The last thing relates to matters of factual objectivity in line with your preparedness to give evidence. In the final analysis what was sold to Oakbay?

MR CLINTON MARTIN EPHRON: Oakbay received all the assets, Oakbay bought all
20 the assets of OCH in the end which was all, which was Optimum Coal Mine, Optimum Coal Terminal which had the Richards Bay allocation, Koornfontein and there were a few other subsidiaries of OCH that had some resources and stuff.

ADV VINCENT MALEKA SC: You have now told us the status of the OCM Mine, do you know what is happening to Oakbay's interest in the coal terminal at Richards Bay.

MR CLINTON MARTIN EPHRON: I'm not aware of it, I think it still sits under the Group

entity and it's an asset that's – they still own a shareholding of Richards Bay Coal Terminal.

ADV VINCENT MALEKA SC: Do you know what is happening to the Koornfontein Mine which was sold to Oakbay?

MR CLINTON MARTIN EPHRON: It's from what I understand under business rescue and dormant, it's not producing any coal.

ADV VINCENT MALEKA SC: It's not producing any coal?

MR CLINTON MARTIN EPHRON: It's not producing any coal ja.

ADV VINCENT MALEKA SC: Chair those would be my last questions to Mr Ephron.

10 **CHAIRPERSON:** Okay, thank you very much, thank you very much Mr Ephron, you are released, should a need arise for the Commission to ask you to come back you will be approached through your lawyers and then you could come back, but for now you are excused.

MR CLINTON MARTIN EPHRON: Thank you.

ADV VINCENT MALEKA SC: Chair we have now received copies of Addendum 1 to Addendum 3.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: We will process them through the pagination processes of the Commission and at the right time make them available to you. I have had a
20 discussion with the lawyers of Mr Ephron and they are quite satisfied, as I am, that there's no need for him to deal with them.

CHAIRPERSON: Okay no that's fine, that's fine.

ADV VINCENT MALEKA SC: Lastly Chair it's just a matter of setting the program for tomorrow. I believe that Mr Manuel will be coming tomorrow to testify.

CHAIRPERSON: Yes and as I understand ...(intervention)

ADV VINCENT MALEKA SC: And also General Nyanda, they are coming to share their experience with you, and our colleague Ms Qabashe and the other team members will present that evidence to you.

CHAIRPERSON: Yes looking at their statements their evidence should be – should take a very short time, is there a plan in place to fill up whatever time we will be left after the two have finished or is there something that your colleagues would know and you don't know?

ADV VINCENT MALEKA SC: I will ask them to get in touch with your registrar and confer to you but Chair I was told that Minister Manuel's evidence might be longer,
10 because he might want to share with you matters that ...

CHAIRPERSON: Oh, okay, okay, no that's fine. Okay you are done?

ADV VINCENT MALEKA SC: I am done Chair.

CHAIRPERSON: Okay, we will then adjourn until tomorrow at ten o'clock, the Commission adjourns.

INQUIRY ADJOURNS