

COMMISSION OF INQUIRY INTO STATE CAPTURE

HELD AT

PARKTOWN, JOHANNESBURG

10

05 MARCH 2019

DAY 61

20

HEARING RESUMES

CHAIRPERSON: Good morning Mr Mokoena, good morning everybody.

ADV PHILLIP MOKOENA SC: Good morning Chair.

CHAIRPERSON: Thank you.

ADV PHILLIP MOKOENA SC: Chair today we will be hearing the testimony of Mr Snehal Nagar he is an employee from Eskom. The Rule 3.3 Notices were dispatched. Even though Mr Nagar is his testimony...

CHAIRPERSON: I noticed that you said Snelah is that how it is pronounced? I see it is...

10 **ADV PHILLIP MOKOENA SC**: Mr Snehal Nagar.

CHAIRPERSON: Oh okay.

ADV PHILLIP MOKOENA SC: Snehal is the first name. Nagar is the surname.

CHAIRPERSON: Oh okay. No I just wanted to make sure I pronounced it the right way.

ADV PHILLIP MOKOENA SC: That is the right way Snehal Chair.

CHAIRPERSON: Okay. No thank you.

ADV PHILLIP MOKOENA SC: Even though that in his statement he is mentioning a number of individuals but in the main in his statement he is implicating only one person and that is Ms Naidoo and I am informed that his legal team is here today. Subject to
20 your directions Mr Chair they may place themselves on record?

CHAIRPERSON: Ja let us do that. Thank you. Mr Nagar lawyers are they or is their leader not here? I saw you looking elsewhere and I wondered whether you were expecting somebody else not yourself to rise.

ADV ROZANIA NAIDOO: Good morning Deputy Chief Justice.

CHAIRPERSON: Good morning.

ADV ROZANIA NAIDOO: My name is Rozania Naidoo

CHAIRPERSON: Yes.

ADV ROZANIA NAIDOO: And I appear together with my learned senior Pule Seleka SC. We appear on behalf of Ms Maya Naidoo who received a Rule .3 Notice of today's proceedings. Thank you.

CHAIRPERSON: I am sorry you appear on behalf of?

ADV ROZANIA NAIDOO: Miss Maya Naidoo.

CHAIRPERSON: Oh okay I thought the surname was different from what I – what – okay no that is fine thank you very much.

10 **ADV ROZANIA NAIDOO:** Thank you Chair.

CHAIRPERSON: Okay now I know why you were looking – you were looking for your leader. Okay thank you.

ADV PHILLIP MOKOENA SC: Mr Chair in order to meaningfully traverse a testimony of Mr Nagar we will be relying and referring on an Exhibit which we have already taken the liberty of marking it as Exhibit U2. I was also reliably informed Mr Chair that it was placed before you and to assist you to navigate through.

CHAIRPERSON: Yes.

ADV PHILLIP MOKOENA SC: The file. May I request the Chair to turn to Exhibit U2.

You will see that at the beginning of the file there must be an index and from that index

20 Mr Chair...

CHAIRPERSON: Okay I have marked it Exhibit U2.

ADV PHILLIP MOKOENA SC: U2 yes.

CHAIRPERSON: And the there is an index.

ADV PHILLIP MOKOENA SC: And then in that index Mr Chair just to assist you to navigate through the file the statement of Mr Nagar commences from page 1 up until

page 17 and thereafter you will find different annexures.

CHAIRPERSON: Yes.

ADV PHILLIP MOKOENA SC: Which commences from page 18.

CHAIRPERSON: Yes.

ADV PHILLIP MOKOENA SC: And they run up until page 100

CHAIRPERSON: Yes.

ADV PHILLIP MOKOENA SC: Those would be the annexures that we will be referring to from time to time.

CHAIRPERSON: Yes.

10 **ADV PHILLIP MOKOENA SC**: Mr Chair.

CHAIRPERSON: Are some of them in the same file as his statement and others in the separate file that I see in front of me or is that [indistinct].

ADV PHILLIP MOKOENA SC: You must be only having U2 contains Mr Chair...

CHAIRPERSON: Everything that I need for today.

ADV PHILLIP MOKOENA SC: Everything that we need for now.

CHAIRPERSON: Oh okay.

ADV PHILLIP MOKOENA SC: And the rest you might – you may simply ignore.

CHAIRPERSON: Okay.

20 **ADV PHILLIP MOKOENA SC**: And it is when they become necessary for us to refer to them we will bring that to you attention Mr Chair.

CHAIRPERSON: Okay thank you.

ADV PHILLIP MOKOENA SC: Mr Chair a question might be posed as to where does one locate the evidence of Mr Nagar? The issues which he will testifying upon where its subject matter of a number of investigations that were conducted by different bodies and institutions. You will recall Mr Chair that at the commencement of this commission

my learned colleague Ms Norman did place certain documents before you and reports. Equally so my learned colleague Mr Maleka during his opening address for this stream the Eskom stream he did place some of those documents and reports before you. The issues which will be ventilated by Mr Nagar received the attention of the Public Protector, National Treasury and Fundudzi which is a forensic investigation [indistinct]. All those reports Mr Chair were placed before you. Mr Nagar's evidence Mr Chair focusses on three main things. Firstly he will testify on an advance payment in an amount of R659 558 079.00. In short Mr Chair we can refer to it as the R659 million advance payment which was made to Tegeta Exploration Resources by Eskom. You

10 will be told the extraordinary circumstances which this advance payment was made and this includes a board meeting that took place at nine o'clock at night and Mr Nagar and his team were afforded less than three hours to make sure that payment is made before two o'clock the next day. Secondly Mr Chair he will be testifying on the calculation of the penalty amount which ultimately led to the settlement agreement which was concluded between Eskom and the Optimum Coal Mine and Tegeta. He will inform you that according to his computation which he undertook together with his colleagues the penalty amount which was supposed to be payable per his computation it is in the amount of R2.1 billion and he will take you through various other computations up until the settlement. He will tell you that however the settlement agreement despite those

20 computation it was ultimately – the matter was ultimately settled at – in an amount of R255 million meaning that there is huge sum of money which was not paid to Eskom as per his computation. He will tell you Mr Chair that his computation you know took into account penalties such as the abrasive index which we know that from time to time it must escalate. It took into account sizing and it took into account CV and Ash penalties. And those concepts we will explore with him through his testimony for him to

elaborate on and to explain exactly his computation. And lastly he will testify on a very unique and a bizarre ABSA guarantee which was made in favour of the same company Tegeta and ordinarily Mr Chair we know that a supplier is the one that must submit a guarantee to Eskom but in this instance it was the other way around. Eskom furnished a guarantee – an ABSA guarantee in favour of the same company Tegeta. He will then give you more details around that Mr Chair. Mr Chair the Public Protector in her report does give us a sense as to when we talk about Tegeta what are we referring to and she does that – you do not have to go to her report Mr Chair I am just mentioning it in passing you may simply note the relevant page is a tagged page 111 and at paragraph
 10 5.42 – 5.42 of the report she then explains to us as to when we refer to Tegeta whom are we referring to? She says that the ownership structure of Tegeta it is comprised as follows: 25 – 29.5 shares are held by a company known as Oakbay Investments. And in turn she explained to us as to who owns Oakbay. She tells us that 79.99 it is owned by Oak Bay Resources and Energy and 64% it is owned by Atul Gupta and ...

CHAIRPERSON: I am sorry.

ADV PHILLIP MOKOENA SC: Sorry Mr Chair.

CHAIRPERSON: The first one Oak Bay is what 25%?

ADV PHILLIP MOKOENA SC: She ...

CHAIRPERSON: Are there – are the sums – do the sums add up.

20 **ADV PHILLIP MOKOENA SC:** No they do not add up.

CHAIRPERSON: [indistinct] I know 79.99%.

ADV PHILLIP MOKOENA SC: I went ahead of myself. Let us start first as to who owns Tegeta.

CHAIRPERSON: Yes.

ADV PHILLIP MOKOENA SC: Tegeta is owned 29.05% by Oakbay. And then 28.53%

of Tegeta it is owned by Mabengele Investment and Mabengela Investment it is owned by Duduzania Zuma, Rajesh Guma Gupta, [indistinct] [indistinct] Trading, Fidelity Investment and Fuzz Investment and Ashu Chawla and other shares of Tegeta 12.91 are owned by Fidelity a company known as Fidelity and 8.0 – 8.01 are owned by Accurate Investment NTD and 21.5 are owned by a company called Elgasolve those shares Mr Chair then constitute the 100% ownership – shares held in Tegeta. And in paragraph 5.43 she summarises those shares Mr Chair. And the National Treasury engaged the services of a company which we have referred to as Fundudzi Forensic which also was called upon to conduct a forensic investigation into the affairs of Eskom

10 with reference to specific conduct and transaction. May I refer to it because it was also placed before you by Mr Maleka and my learned colleague Ms Norman if I may refer Mr Chair to page 2 thereof with specific reference to paragraph 1.10.1. The heading of that paragraph it is [indistinct] as follows: Detailed Allegations Relating to Eskom. And the scope is – they say that we understand that the scope of our investigation will be independently investigate the following 1.10.1 investigate why Eskom gave and continued to give preferential treatment to Tegeta Exploration and Resources by not enforcing key conditions of the CSA and whether it amounted to the abuse of position of authority, breach of trust or violation of legal duty or a set of rules in the prevention of Combatting Of Corruptions Activities Act. I find paragraph 1.10.7 also to be relevant.

20 They say they were called upon to investigate whether the directives of Eskom board tender committee relating to advance payment were unlawful and whether it amounted to abuse of position of authority, a breach of trust or violation of legal duty or set of rules in terms of PRECCA. Those are the issues which also were interrogated as per the Fundudzi Report Mr Chair. Mr Chair Mr Nagar then is here to give you a full account of his experiences pertaining to those three main topics. May the witness be

sworn in we are ready to proceed with his evidence.

CHAIRPERSON: Thank you Mr Mokoena.

REGISTRAR: Please state your full names for the record?

MR SNEHAL NAGAR: My name is Snehal Nagar.

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

MR SNEHAL NAGAR: No.

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

MR SNEHAL NAGAR: Yes.

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

MR SNEHAL NAGAR: So help me God.

REGISTRAR: Thank you.

CHAIRPERSON: Thank you.

ADV PHILLIP MOKOENA SC: Mr Nagar may I refer you to an exhibit before you. You
will see it is already marked as Exhibit U2, do you have it before you?

MR SNEHAL NAGAR: Yes I do.

ADV PHILLIP MOKOENA SC: If you may turn to page 1 immediately after the index.

Are you there?

20 **MR SNEHAL NAGAR:** Yes I am.

ADV PHILLIP MOKOENA SC: Is that your statement?

MR SNEHAL NAGAR: Yes it is.

ADV PHILLIP MOKOENA SC: May I request you to please turn to page 17.

MR SNEHAL NAGAR: I am there.

ADV PHILLIP MOKOENA SC: Is that your signature appearing there

MR SNEHAL NAGAR: Yes it is.

ADV PHILLIP MOKOENA SC: Do you confirm the contents of your statement to be both true and correct?

MR SNEHAL NAGAR: I do.

CHAIRPERSON: Do you confirm that your statement is in the form of an affidavit?

MR SNEHAL NAGAR: Yes I do Chair.

CHAIRPERSON: Thank you.

ADV PHILLIP MOKOENA SC: You are currently employed at Eskom, am I correct?

MR SNEHAL NAGAR: Yes.

10 **ADV PHILLIP MOKOENA SC:** When did you join Eskom?

MR SNEHAL NAGAR: I joined Eskom in late October 2004.

ADV PHILLIP MOKOENA SC: Can you please share with us your employment history with Eskom from 2004 to date?

MR SNEHAL NAGAR: I joined Eskom in the Primary Energy Division.

ADV PHILLIP MOKOENA SC: Yes.

MR SNEHAL NAGAR: As a junior finance advisor assisting on the contracts in – from a finance perspective. I then progressed to – I progressed through the division to now where I ultimately head the finance area for the division.

20 **ADV PHILLIP MOKOENA SC:** Yes and in your current capacity what are your functions and responsibilities?

MR SNEHAL NAGAR: I look after the full finance function of the division. I guess to simplify it my colleague Dan Mashego Chair gave you an organogram of the division and the various functions that division performs. I look at that entire division from a finance perspective. So all the finance related activities are under my responsibilities.

ADV PHILLIP MOKOENA SC: And what are your qualifications?

MR SNEHAL NAGAR: Chair I am a Chartered Accountant.

CHAIRPERSON: Just say that again?

MR SNEHAL NAGAR: I am a Chartered Accountant.

CHAIRPERSON: Thank you.

ADV PHILLIP MOKOENA SC: Now because we will be dealing with different mandates can you explain to the Chair where does one locate that department which you are heading within Eskom? You know if you are looking at the structure of Eskom and where does one locate it?

MR SNEHAL NAGAR: Chair the division itself has over the last three, four, five years
10 changed quite a bit in terms of the Eskom organics – organogram but currently as it sits it is sitting under the Generation Division and it – ja under the Generation Division.

ADV PHILLIP MOKOENA SC: Now who report – do you have members of the team that are reporting to you?

MR SNEHAL NAGAR: Yes I do.

ADV PHILLIP MOKOENA SC: And in turn do you report to someone else?

MR SNEHAL NAGAR: Currently I report to a person by the name Mr Martin Buys.

ADV PHILLIP MOKOENA SC: And around 2016 who did you report to?

MR SNEHAL NAGAR: Around 2016 I either reported a gentleman by the name of Stephan Cronje who reported to Ms Maya Naidoo or I reported directly to Ms Naidoo.
20 There was a transitional change in the structure and I just cannot remember when that transition occurred.

ADV PHILLIP MOKOENA SC: Yes now do you recall that around that time 2016 as to who was CFO?

MR SNEHAL NAGAR: It was Mr Anoj Singh.

ADV PHILLIP MOKOENA SC: Yes. And who was the group chief executive officer

around that time?

MR SNEHAL NAGAR: I think it was Mr Brian Molefe.

ADV PHILLIP MOKOENA SC: Ja. Now you have told us about your division. Having that in regard could you also please explain to us that approval processes in Eskom?

MR SNEHAL NAGAR: Sure Chair. The essentially there are essentially two main approval processes within Eskom. We got what we call an investment process. So and then you have got a procurement process. The investment process is largely if I had to simplify it should I do something or should I not do something? As an example should I build Medupi Power Station, should I not build Medupi Power Station? And for what
10 should I build it for? The amount quantum. So that is largely your investment approval process. The other approval the main stream approval process is your procurement approval process. So it is with who do I build Medupi Power Station? If I simplify that example. So those are your two big approval structures within the organisation. That guide the organisation in terms of what needs to be done.

ADV PHILLIP MOKOENA SC: Yes. Do you know if there are different committees, tender committees within those structures that they in fact the procurement structure itself? Do you have various other sub-committees that are dealing with tender processes?

MR SNEHAL NAGAR: Ja Chair so what you have is the investment process and
20 procurement process have different committees. The different committees have different approval limits. So you would start at a divisional level at about R300 million and you would work your way up to the excel committees which normally have I think between about a R500 and R750 million limit. Then goes to a board investment and finance committee on the investment side or a board tender committee and then ultimately the board. Each committee has a terms of reference and approval limits

within what they can operation. I might not know that off hand.

ADV PHILLIP MOKOENA SC: Yes. Yes.

MR SNEHAL NAGAR: Okay.

ADV PHILLIP MOKOENA SC: No that helps.

CHAIRPERSON: The first committee I thought you were saying R300 billion I guess you meant R300 million?

MR SNEHAL NAGAR: R300 million.

CHAIRPERSON: Ja okay.

MR SNEHAL NAGAR: Yes. Ja.

10 **CHAIRPERSON:** Alright.

MR SNEHAL NAGAR: It is not necessarily the first I just started with R300.

CHAIRPERSON: Oh.

MR SNEHAL NAGAR: Depending on the operations of the division.

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: They might necessitate a lower approval limit.

CHAIRPERSON: Okay.

ADV PHILLIP MOKOENA SC: Now may I refer you to page 2 of your statement. In paragraph – from paragraph 4 you begin to introduce the topic in relation to the payment which was made to Tegeta in an amount of R659 million, am I right?

20 **MR SNEHAL NAGAR:** Yes.

ADV PHILLIP MOKOENA SC: Now I just want to clarify that heading because it says: Payment to Tegeta Exploration and Resources in the amount of R659 558 079.38. Now I what I want to understand from you is that was this an advance payment or was this a payment which was made for goods already received?

MR SNEHAL NAGAR: This was an advance payment. It was for goods that was still

to be received at that time.

ADV PHILLIP MOKOENA SC: So when this amount was paid to Tegeta no services at that time were rendered by Tegeta?

MR SNEHAL NAGAR: Chair that is correct.

ADV PHILLIP MOKOENA SC: And paragraph 4.1 you will see that it is divided into two paragraphs, can you see that?

MR SNEHAL NAGAR: Yes.

ADV PHILLIP MOKOENA SC: Now in the first paragraph of 4.1 you say that on the 12 April 2016 at 2.45 pm I received an email from Ayanda Ntete subject [indistinct] FW Eskom pro-forma invoice attached as annexure SNO. The contents of this email stayed
10 as discussed I cannot recall a discussion taking place on this matter with Ms Ayanda Nteta the attachment to the email was a pro-forma invoice of R659 million, am I correct?

MR SNEHAL NAGAR: That is correct Chair.

ADV PHILLIP MOKOENA SC: Yes. Now who is Ayanda Nteta?

MR SNEHAL NAGAR: Ayanda Nteta was...

ADV PHILLIP MOKOENA SC: And what was her role at the time? His – her responsibilities at the time.

MR SNEHAL NAGAR: Ayanda – so Chairperson the exact role at the time I just need
20 to find out.

ADV PHILLIP MOKOENA SC: That is fine.

MR SNEHAL NAGAR: But there was a...

ADV PHILLIP MOKOENA SC: But tell us from where you can – where in as far as you can remember who was ...

MR SNEHAL NAGAR: Ja.

ADV PHILLIP MOKOENA SC: Who was Ayanda Nteta?

MR SNEHAL NAGAR: Ayanda Nteta used to at one point head the fuel procurement side of the fuel sourcing part of the primary energy division. That is the team that contracts or does the procurement of you coal contracts. She then progressed to head the division, the primary energy division or area within Eskom. So at that time it could been I am not too sure where exactly she was but ultimately she then was the head of the division.

ADV PHILLIP MOKOENA SC: Yes. May I refer you to annexure SN0 on page 19.

MR SNEHAL NAGAR: Yes.

10 **ADV PHILLIP MOKOENA SC:** Is this the email that you refer that you received from Ayanda Nteta as per paragraph 4. 1?

MR SNEHAL NAGAR: Chairperson that is correct.

ADV PHILLIP MOKOENA SC: And what is the date of that email?

MR SNEHAL NAGAR: It is the 12 April 2016.It is the 12 April 2016.

ADV PHILLIP MOKOENA SC: You will see from that email it says: As discussed?

MR SNEHAL NAGAR: That is correct Chair.

ADV PHILLIP MOKOENA SC: Now what I want to know from you is that did you discuss with Ms Nteta an advance payment of R659 million on the 12 April 2016?

MR SNEHAL NAGAR: Chairperson like I said in my affidavit I cannot recall a
20 discussion taking place especially a discussion around a R659 million pre-payment.

ADV PHILLIP MOKOENA SC: If it has taken place would you remember?

MR SNEHAL NAGAR: Most probably yes Chair.

ADV PHILLIP MOKOENA SC: Now I am posing this question Mr Nagar because when you say to the Chair that I do not recall that can be subject to a number of interpretation. It may that the discussion took place but you simply do not recall or you

do not recall the discussion happening at all on that day. So could you please clarify that answer so that at least we know whether she discussed it with you or she did not discuss it with you?

MR SNEHAL NAGAR: Chairperson like I said I cannot recall a discussion with Ayanda Nteta on this issue. The point of this email I think more was the point of the email was that if you look at the date of the transaction which is – I mean the date of this email which is a pro-forma invoice on April the 12th when we proceed to the next discussion on the events that happened on the 13th you will see that the contract was only signed on the 13th April. So I have received an invoice, a pro-forma invoice on the 12 April
10 when the actual contract was only signed on the 13th and just putting the evidence in front of you Chair. But I have not had a discussion – I cannot recall a discussion with her and I cannot certainly recall a R659 million pre-payment with Ayanda.

ADV PHILLIP MOKOENA SC: Ja. We will...

CHAIRPERSON: Well just one second. When you received the email you must have reacted in a certain way upon seeing that the email was saying as discussed. You might not recall now but at that time it must be that it was clear in your mind that there had been no such discussion or that had been or even at that time when you received the email are you saying you could not recall as opposed to saying yes we did have some discussion but maybe not in this detail or we never had any discussion about the
20 subject matter of this email.

MR SNEHAL NAGAR: Chairperson we could have had a discussion not about the details – not a R659 million pre-payment detail.

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: Had we had that I would have probably remembered.

CHAIRPERSON: Yes, yes.

MR SNEHAL NAGAR: Chairperson we could have had a discussion not about the, not a R659 million prepayment detail.

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: Had we had that I would have probably remembered.

CHAIRPERSON: Yes, yes.

MR SNEHAL NAGAR: We could have had a discussion and I am now using an example as we could have had a discussion and said is it possible to pay on a *pro forma* invoice where I said no. Hence I did not look at this attachment at that time.

CHAIRPERSON: Yes.

- 10 **MR SNEHAL NAGAR:** And when I seem the email as discussed I probably figured we had closed this issue and there was no need to delve into the email further.

CHAIRPERSON: Hm.

MR SNEHAL NAGAR: The substance of the and this evidence came out when I, when the Hawks approached me last year to give some evidence or information with regards to this and while going through my documents I had seen and I presented it to them.

CHAIRPERSON: Okay, alright.

MR SNEHAL NAGAR: Yes.

CHAIRPERSON: Thank you.

- 20 **ADV PHILLIP MOKOENA SC:** I understand the examples that you proffered to the Chair, but what I want to understand from you I mean we are dealing here with a very significant amount and I do not want you know to leave you with that ambiguity around your evidence. I need to understand that if indeed there was that discussion as the Chair has put to you would you be able to recall that on that day you discussed this advance payment or you did not discuss this advance payment?

MR SNEHAL NAGAR: Chairperson if I had had a discussion with her about a R659

million prepayment I would have most probably remembered.

ADV PHILLIP MOKOENA SC: Oh yes.

MR SNEHAL NAGAR: That discussion.

ADV PHILLIP MOKOENA SC: Okay. Now.

CHAIRPERSON: So what you are clear about, let me just confirm, what you are clear about is that you never had any discussion with her that mentioned this figure?

MR SNEHAL NAGAR: That mentioned the R659 million?

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: Prepayment, no I had not.

10 **CHAIRPERSON:** *Ja*, about that you are clear?

MR SNEHAL NAGAR: Yes. Otherwise [intervenes].

CHAIRPERSON: Whatever discussion you might have had with her might have touched whatever, but certainly this figure was not mentioned? You know you never had any discussion involving the mentioning of this amount?

MR SNEHAL NAGAR: No Chair. Otherwise it would have stuck out.

CHAIRPERSON: Yes okay.

MR SNEHAL NAGAR: *Ja*.

CHAIRPERSON: Is that because of the high amount, the big amount that the figure is why it would, you would have remembered?

20 **MR SNEHAL NAGAR:** Chairperson.

CHAIRPERSON: Or why would you have remembered if the amount had been mentioned?

MR SNEHAL NAGAR: I do not in the context of what we do, a R659 million is not necessarily a high amount.

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: We spend between 50 and R70 billion a year on coal.

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: So R659 million is not necessarily a high figure.

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: What would have stuck out is if there was a prepayment issue.

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: Which is the unusual part.

CHAIRPERSON: *Ja*, okay.

MR SNEHAL NAGAR: So maybe that is.

10 **CHAIRPERSON:** Okay.

MR SNEHAL NAGAR: Put that into context.

CHAIRPERSON: Okay. So any discussion that would have involved discussing a prepayment that you would have remembered?

MR SNEHAL NAGAR: Absolutely Chair.

CHAIRPERSON: Okay, alright.

MR SNEHAL NAGAR: *Ja*.

CHAIRPERSON: And there never was such a discussion?

MR SNEHAL NAGAR: No.

CHAIRPERSON: *Ja*, okay.

20 **ADV PHILLIP MOKOENA SC:** May I refer you to page 20?

MR SNEHAL NAGAR: 20.

ADV PHILLIP MOKOENA SC: Can you please identify that document?

MR SNEHAL NAGAR: Chair this is the *pro forma* invoice that we have just been discussing.

ADV PHILLIP MOKOENA SC: Yes.

MR SNEHAL NAGAR: That was the attachment to the email received from Ayanda Ntetha.

ADV PHILLIP MOKOENA SC: And what is the date of that *pro forma* invoice?

MR SNEHAL NAGAR: The date of the *pro forma* invoice is 12 April 2016.

ADV PHILLIP MOKOENA SC: Now from your own experience having been at Eskom for these years is it a normal practice that any payment could be effected on a *pro forma* invoice?

MR SNEHAL NAGAR: No Chair. We do not pay, we do not make any payment on a *pro forma* invoice.

10 **CHAIRPERSON:** Let me just step back a bit to what we discussed about what you remember and what you do not remember a few minutes ago. Was there ever any discussion before you received this email, was there ever a discussion in terms of which the sender of the email may have said to you I am going to send you a certain *pro forma* invoice without mentioning any figure?

MR SNEHAL NAGAR: Chairperson that is possible. Sorry Chair let me just, there was not a discussion about a prepayment. There could have been a discussion about a payment on a *pro forma* invoice.

CHAIRPERSON: Yes, okay.

MR SNEHAL NAGAR: Yes and not mentioning the amount.

20 **CHAIRPERSON:** Okay.

MR SNEHAL NAGAR: Yes.

CHAIRPERSON: Okay, alright. Thank you.

ADV PHILLIP MOKOENA SC: Now while we are still on page 20 you see there on the description of the, you know, after the *pro forma* invoice heading you have what is indicated there as the contract ref. Then a number is being provided. What would be

that? What would that number signify and I am asking, I am posing this question in relation of this being a *pro forma* invoice that was dispatched to you?

MR SNEHAL NAGAR: Chairperson I; this is not an Eskom number. It is probably a Tegeta number. The reason why I say that is normally a contract for an, I mean an Eskom contract number starts with a 46 number not a 45 number. So I would assume this is a Tegeta contract reference. They might label their contracts in a certain way. I cannot, I do not know what it is.

ADV PHILLIP MOKOENA SC: But you also say that normally and under normal Eskom practices and procedures one would not affect any payment be it a prepayment
10 or any payment premised on a *pro forma* invoice?

MR SNEHAL NAGAR: That is correct.

ADV PHILLIP MOKOENA SC: And also when this email was dispatched to you there were no supporting documents?

MR SNEHAL NAGAR: Hm.

ADV PHILLIP MOKOENA SC: As at 12 April 2016? Remember that you are working on the date of this invoice.

MR SNEHAL NAGAR: No. The only attachment to that email was this *pro forma* invoice. There was no contract underpinning this invoice.

ADV PHILLIP MOKOENA SC: Nor any supporting documents?

20 **MR SNEHAL NAGAR:** Or any supporting documentation. That is correct.

ADV PHILLIP MOKOENA SC: Now could you please refer back to page 2 of your statement? In C.

CHAIRPERSON: I am sorry Mr Mokoena. I do not know whether you are moving away from this *pro forma* invoice because you are done or you will still come back.

ADV PHILLIP MOKOENA SC: I am coming back to it.

CHAIRPERSON: Okay.

ADV PHILLIP MOKOENA SC: but we conclude the questions, it is fine.

CHAIRPERSON: No that is fine if you are coming back to it, *ja*. You can continue.

ADV PHILLIP MOKOENA SC: Now I was referring to page 2 of your written statement, the second paragraph thereof.

MR SNEHAL NAGAR: Yes.

ADV PHILLIP MOKOENA SC: You will see in that paragraph you begin now with the events of 13 April 2016?

MR SNEHAL NAGAR: That is correct.

10 **ADV PHILLIP MOKOENA SC:** Yes. Now before I seek clarity on a number of things can you in your own words just tell Mr Chair as to what happened on that day?

MR SNEHAL NAGAR: Chairperson on 13 April 2016 it was around 10/11 o' clock in the morning. I received a call from Ms Naidoo while driving to a client in, I think it was in Pretoria. Ms Naidoo instructed us to make a payment that was approved by the Board Tender Committee to the amount of 659 million. She had also indicated that the payment needs to be made within two to three hours' time or before 02:00 pm. We then had a bit of a discussion where she said that she would form or we requested or I requested her to formalise the instruction via email, to also send us all the supporting documentation around this process so that we could affect it. We also had a discussion
20 about the other legs of this transaction. I am not, the other legs of the value chain that need to come on board to play a part in this payment. When I say the other legs I am referring to as an example like the Treasury Division needs to make the money available. The Shared Services Team who operate the bank account, if I had to put it that way, need to be on board to affect the payment. We would obviously need to process the payment. So everyone needed to be on board to affect this payment and

Ms Naidoo said that, you know, she would chat to whoever she had to if she had not already chatted to them and make sure they were on board. Yes, Chair. That is summarising the events of the 13th and the telephone call.

ADV PHILLIP MOKOENA SC: At the time when you received this call where were you? You were not in the office I take it.

MR SNEHAL NAGAR: No. I was driving. I was on my way to a client in Pretoria.

ADV PHILLIP MOKOENA SC: Yes. Now who is Ms Maya Bhana?

MR SNEHAL NAGAR: Ms Maya Bhana is the, she was the GM; she is a General Manager in the Finance Division and she was in the office of the Chief Financial Officer,

10 Anoj Singh.

ADV PHILLIP MOKOENA SC: She is now Ms Naidoo. Am I correct?

MR SNEHAL NAGAR: Ms Naidoo, yes.

ADV PHILLIP MOKOENA SC: Yes. So we will refer for the purpose of these proceedings we will refer to her as Ms Naidoo so that there is no confusion.

MR SNEHAL NAGAR: Will do.

ADV PHILLIP MOKOENA SC: Now.

CHAIRPERSON: Well I am sorry. At the time of these events she was known as Ms Bhana?

MR SNEHAL NAGAR: Yes.

20 **CHAIRPERSON:** Or was she already known as Ms Naidoo or can you not recall?

MR SNEHAL NAGAR: I cannot recall.

CHAIRPERSON: [Laughter].

MR SNEHAL NAGAR: There was a time when Ms Naidoo changed her surname from her maiden name to her married surname and.

CHAIRPERSON: Yes, okay.

MR SNEHAL NAGAR: I cannot recall exactly when.

CHAIRPERSON: Okay, alright.

ADV PHILLIP MOKOENA SC: Were you given any facts as to why was this prepayment supposed to be done on this urgent basis?

MR SNEHAL NAGAR: Chair from the phone call, no. I think it was just, you know, you have got two to three hours to do this thing. The Board Tender Committee has approved it. We did not get into the details of the transaction itself. It was more about we were going to forward you the details of the transaction and then you would affect it. So at that time no Chair.

10 **ADV PHILLIP MOKOENA SC:** I am posing this question because it is not as if you were expecting to get quotes immediately. This was an advance payment for coal that will be delivered sometime in the future and why was the payment so urgent to be affected on that specific day?

MR SNEHAL NAGAR: Chairperson when on the phone call that we had if I can recall we did not have a discussion about a prepayment. It was a discussion about there needs to be a payment made. It needs to be done in three hours and we will send you the documentation. The details of the transaction unfolded later.

ADV PHILLIP MOKOENA SC: And did you.

20 **CHAIRPERSON:** Before that you have been at Eskom since 2004 as I recall what you said?

MR SNEHAL NAGAR: Yes Chair.

CHAIRPERSON: And as at 2015 you were about, what nine years at Eskom?

MR SNEHAL NAGAR: Ja, roughly 10.

CHAIRPERSON: Oh 10/11 years?

MR SNEHAL NAGAR: Yes.

CHAIRPERSON: *Ja.* My arithmetic is not so good. Had you ever had an occasion where payment was required to be made so urgently? Was that something that happened from time to time? You know, payment must be made within a few hours with two or three hours, a few hours of an instruction being given to pay?

MR SNEHAL NAGAR: No Chair.

CHAIRPERSON: It had never happened?

MR SNEHAL NAGAR: No, not in that timeframe.

CHAIRPERSON: *Ja.* What is your recollection of the shortest time within which you were instructed to make payment? When I say you, you or your colleagues in your
10 department in terms of your experience over all the years that you had been at Eskom. What is the shortest time that you were asked to affect a payment?

MR SNEHAL NAGAR: Chair if I can put your question in context.

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: When; you could have possibly requested to make an urgent payment for something that was owed but where a transaction was quite far down the line.

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: So what I mean by that is where you already have an order.

CHAIRPERSON: *Ja.*

20 **MR SNEHAL NAGAR:** You have a dispute.

CHAIRPERSON: *Ja.*

MR SNEHAL NAGAR: And the dispute is outstanding and now it is just a matter of.

CHAIRPERSON: *Ja.*

MR SNEHAL NAGAR: We have come to an agreement. It is now to settle it.

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: That could have been done within a couple of hours, because the system was already set up and geared up for that.

CHAIRPERSON: Oh, okay.

MR SNEHAL NAGAR: In this particular transaction you were still at sort of, I want to say, contracting stage where you got a signed contract.

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: It is a little bit far back. So.

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: So we have had instances where you had probably made a
10 payment quite quickly.

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: But not on a transaction.

CHAIRPERSON: Not.

MR SNEHAL NAGAR: So far back.

CHAIRPERSON: Yes, okay.

MR SNEHAL NAGAR: And I will explain some of that detail.

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: As to why.

CHAIRPERSON: Yes.

20 **MR SNEHAL NAGAR:** *Ja*.

CHAIRPERSON: Once you knew more about the transaction then you could tell what is different between it and what you normally did?

MR SNEHAL NAGAR: Yes Chair.

CHAIRPERSON: Okay, alright.

ADV PHILLIP MOKOENA SC: Flowing from the Chair's question it is quite clear that in

this instance nothing was owed to any supplier when this transaction was made?

MR SNEHAL NAGAR: That is correct.

ADV PHILLIP MOKOENA SC: Yes and no goods were received? We are moving from that premise.

MR SNEHAL NAGAR: That is correct, yes.

ADV PHILLIP MOKOENA SC: And did you know at this stage the true nature of this transaction or you were simply informed that it must be, a payment must be affected urgently without true facts being disclosed to you?

MR SNEHAL NAGAR: No Chair. When I; at the point where we had a discussion on
10 the telephone we did not have the details to the transaction. It was simply a payment.

CHAIRPERSON: And you were told that documentation would be sent to you shortly?

MR SNEHAL NAGAR: Yes, I had requested the documentation to be sent.

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: And I had requested the instruction to be put.

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: To be put formally.

CHAIRPERSON: Yes, okay.

ADV PHILLIP MOKOENA SC: Now may I clarify another thing? Was this a request or
any instruction to you to affect this payment on this urgent basis?

20 **MR SNEHAL NAGAR:** Chair it is an instruction.

ADV PHILLIP MOKOENA SC: Instruction, okay. Now also if you can assist us under normal circumstances where all processes are followed how long would it take for such an amount to be properly paid to a supplier and what documents you would have to scrutinise for you to be comfortable that you can affect that payment?

MR SNEHAL NAGAR: Chairperson so if you; I am going to mention roles, I am going

to mention processes. Understand when I mention a role and a process there is inherently a segregation of duties meaning it is normally a different person who does it. So if you want to do a transaction like this you need all the parties present at that point in time with access to the system that are clicking yes and no and approving for something to go through. So if this process, if this transaction was at the start of its process what you would generally do is you would get a, you would get a, call it a; the person who has the need for the product to raise what we would call a purchase requisition.

ADV PHILLIP MOKOENA SC: Hm.

- 10 **MR SNEHAL NAGAR:** So they would; that is almost like the step one of your procurement process raised.

CHAIRPERSON: That is like a request for payment?

MR SNEHAL NAGAR: No. That is like a request for goods.

CHAIRPERSON: Oh for goods?

MR SNEHAL NAGAR: Yes.

CHAIRPERSON: Okay.

MR SNEHAL NAGAR: So you would first start off the very start of the process is I need something and when you need that something you would load a purchase request. Now generally in our.

- 20 **CHAIRPERSON:** So you are in other words asking for approval that you can go ahead and purchase something?

MR SNEHAL NAGAR: Yes.

CHAIRPERSON: Yes, okay.

MR SNEHAL NAGAR: So that is the starting point.

CHAIRPERSON: Yes, okay.

MR SNEHAL NAGAR: And generally in our environment it is the, call it the Cooperation's Team or the Contract Managers who would ask. I need coal. I am short of it and can I load a purchase request. That purchase request then goes to that requestor's Manager and normally that Manager would be a Cost Centre Manager or Cost Centre Owner and he would approve the request saying your request is valid. Once that is done it then, the transaction would go from the, call it the Head of the Procurement to a different person called the Management Accountant who would look at one, is the request correctly accounted for from an accounting perspective and two, he would also look at whether it is budgeted for. So are there funds. Once that is done

10 Chair it then goes from a Management Accountant to a.

CHAIRPERSON: Okay. Do not forget what you wanted to say. One, there is the purchase requestor if we can all it that.

MR SNEHAL NAGAR: Yes.

CHAIRPERSON: Okay. Then it goes to the purchase requestor's superior. Is that right?

MR SNEHAL NAGAR: Yes.

CHAIRPERSON: The Manager who then approves if.

MR SNEHAL NAGAR: Yes.

CHAIRPERSON: If he or she approves. That is stage two. Then it goes to stage three
20 where somebody checks whether the purchase request has been done properly and whether there are funds.

MR SNEHAL NAGAR: Correct.

CHAIRPERSON: That is stage three?

MR SNEHAL NAGAR: Stage three.

CHAIRPERSON: Okay, alright. Then you can continue. I just want to follow.

MR SNEHAL NAGAR: Stage.

CHAIRPERSON: The stages, *ja*.

MR SNEHAL NAGAR: Stage four. It then goes to a Procurement Manager and the Procurement Manager, so that is stage 4. So the Procurement Manager looks at the procurement, excuse me, and he allocates it to a buyer which is stage 5.

CHAIRPERSON: You say the Procurement Manager looks at the procurement. What do you mean when you say he looks at procurement? He and what is he having now in front of him?

MR SNEHAL NAGAR: All he has is.

10 **CHAIRPERSON:** Or her.

MR SNEHAL NAGAR: He or her sorry, he or her has this request in; so remember you have got a Contract Manager who has a need. It has now gone to the Buying Department who will execute this need and stage one, two, three which is the requestor, Manager and Management Accountant that leg is only the request part. Then you have now gone to the Procurement Team and the Procurement Team now gets this instruction and the Manager then has a whole lot of procurement people and he needs to allocate this to somebody. So he will allocate it to a buyer. Now this procurement buyer now has call it a PR in the system, but Chairperson when you look at this transaction that is step one that should have been done even before the contract
20 was actually signed. So when you go to the Tender Committee for approval. When you say I want to buy coal. I want to do something, you take this request that has been loaded on the system saying I have loaded this request and you go to the Committee and you say I need to buy. Now that part of the leg was not done at the time we requested to make this payment. So there is a pre leg that was not done. Now there is a leg after that that I am going to explain that had to still be done and even that would

have taken time had all this been in place at the time we were requested to make the transaction. So after the Procurement Manager issues this to the buyer the buyer has a PR number. Now in this particular case if an approval, sorry.

CHAIRPERSON: PR number is what? Procurement number or what is it?

MR SNEHAL NAGAR: Procurement, a procurement reference number yes.

CHAIRPERSON: Okay, alright.

MR SNEHAL NAGAR: So once this buyer has this reference number you would go to the Tender Committee. You would seek approval to negotiate a contract. You would then conclude the contract depending on what the outcome of the Procurement Tender
10 Committee would have been and you would then hand this signed contract to the buyer. It is normally the buyer that would have affected the process. The buyer then creates a contract number for that particular contract and the buyer will link that procurement request number to the contract number and it becomes the start of this process. Now that should have been in place if the system was normal.

ADV PHILLIP MOKOENA SC: Hm.

MR SNEHAL NAGAR: So now you get to a point where if that was in place and this instruction came we would have asked the Contract Manager, because for every contract that gets approved at Eskom and there is a specific person who gets appointed to manage the contract and I think they called the form a DCF form, a delegated
20 consent form. So one person is accountable for that for managing that contract. So that Contract Manager would have drawn a purchase order. So he would have ordered goods from this particular contract or entity that underpins that contract. When that order comes in it would have then had to be settled. So it would have gone to another Management Account, not the same one to say I have received these goods. Once you settle those goods the order and that then goes to a Shared Services Team who

captures an invoice. So it is almost like a three way chain. Now you have got the operator of the bank account who is checking whether the invoice matches to the order matches to the goods received.

ADV PHILLIP MOKOENA SC: But throughout that process Mr Nagar there will be documents that must be scrutinised and verified?

MR SNEHAL NAGAR: Absolutely.

ADV PHILLIP MOKOENA SC: In order for you to be satisfied that whatever amount that you will be leaving Eskom will be accounted for?

MR SNEHAL NAGAR: Absolutely.

- 10 **CHAIRPERSON:** And I assume that each person who has had to deal with this in that chain that you have explained would sign or make some indication that he or she has seen what was before him or her and if she thought everything was in order there will be some indication given that he or she has no problem?

MR SNEHAL NAGAR: Yes Chair and

CHAIRPERSON: *Ja.*

MR SNEHAL NAGAR: And that will be evidence by the approval system.

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: What is on the system.

CHAIRPERSON: Yes.

- 20 **MR SNEHAL NAGAR:** *Ja.*

CHAIRPERSON: So that if you are at stage number five in the chain or in the sequence you would look whether all the other people involved in stages two, three, four whether they have no queries or if there are queries whether those queries have been sorted out?

MR SNEHAL NAGAR: Correct.

CHAIRPERSON: Before you can say okay it can go ahead?

MR SNEHAL NAGAR: *Ja.*

CHAIRPERSON: Okay, alright. Then before you proceed at a certain stage I think it may have been stage five you say or maybe even stage 6 you might not have mentioned stage 6 by name, but at a certain stage you say somebody must I think issue a contract number?

MR SNEHAL NAGAR: Yes.

CHAIRPERSON: Am I right? That is what you said.

MR SNEHAL NAGAR: So every contract.

10 **CHAIRPERSON:** *Ja.*

MR SNEHAL NAGAR: That is loaded onto the system.

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: Will have a unique contract number.

CHAIRPERSON: *Ja.*

MR SNEHAL NAGAR: And they link the contract number to the purchase request.

20 **CHAIRPERSON:** Yes, but what I want to ask now is when you refer to a contract or contract number at that stage that mean necessarily that there must be a contract a formal contract in existence relating to the goods that are sought to be purchased or services of whatever or that is just for convenience because it is known that at some stage in this whole chain a contract will be concluded?

MR SNEHAL NAGAR: No Chair. The contract number is only issued when the contract is in place.

CHAIRPERSON: When there is a formal contract?

MR SNEHAL NAGAR: Formal contract yes.

CHAIRPERSON: *Ja.*

MR SNEHAL NAGAR: *Ja.*

CHAIRPERSON: *Ja.*

MR SNEHAL NAGAR: So you are at a stage where you are now capturing the signed contract onto the system.

CHAIRPERSON: Yes. This system that you have described to us it would not apply would it to a situation where Eskom was to buy something, but really does not need to have a contract for that. One can think of all kinds of things. Not big things, you know. Is that right? That would be subject to a different process.

MR SNEHAL NAGAR: It is. So the procurement processes are specifically mentioned
10 so you got sort of what we call one time purchasers which are low value items.

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: And they will not necessarily have a specific contract number.

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: But they have a specific unique identifier in any event.

CHAIRPERSON: Okay. Not that is.

MR SNEHAL NAGAR: *Ja.*

CHAIRPERSON: That is what, *ja* okay. Thank you.

ADV PHILLIP MOKOENA SC: But let us clarify that. I know that we, I have intervened at the time when you are talking about the short services. We will return to that. What I
20 want to clarify from the questions of the Chair is that for one to have a contract of this magnitude there must have been a preceding procurement process?

MR SNEHAL NAGAR: That is correct.

ADV PHILLIP MOKOENA SC: Yes. So there must be; one can never assume by assessing, looking at that *pro forma* invoice that there was a procurement process that was taking place when there is a number that has been indicated that there must be in

fact; when you satisfied you said that there must have been procurement?

MR SNEHAL NAGAR: Chair no, I.

ADV PHILLIP MOKOENA SC: Processes.

MR SNEHAL NAGAR: Mr Mokoena I might be a little confused with your question.

The contract number that is reflected on that invoice.

CHAIRPERSON: I am sorry I think come closer to your mic.

MR SNEHAL NAGAR: Sure.

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: The contract number that is reflected on that pro forma invoice.

10 **ADV PHILLIP MOKOENA SC:** Is.

MR SNEHAL NAGAR: Is not an Eskom contract number.

ADV PHILLIP MOKOENA SC: No I understand, I am asking a different question, what I want to know from you is that from all those levels, the stages that you've mentioned to the Chair and when the Chair asked you about the contract number, for one to create the contract number there must have been a preceding procurement process held within Eskom itself.

MR SNEHAL NAGAR: Yes, correct.

ADV PHILLIP MOKOENA SC: And you mentioned that one of the stages that you mention is that the process would also go to shared services.

20 **MR SNEHAL NAGAR:** The shared services team yes.

ADV PHILLIP MOKOENA SC: Now we can take it from there and complete the entire process, what then happens?

MR SNEHAL NAGAR: So ...(intervention)

CHAIRPERSON: Ja, and maybe connected with that question just clarify at what stage does it go to shared services?

MR SNEHAL NAGAR: No so Chairperson I had – maybe if I can just take one step back and I said there is a buyer with this procurement reference number and it also has a contract number so once the contract, and those two are linked, the contract is now given way if I can to a contract manager who manages the contract. The contract, now if I was receiving goods and services the system is normally set up to receive goods and then pay for it, so what the contract manager would do is order the goods so he would place an order on the system, the order when the goods are received the goods receipt note if I can call it that, is matched against the order and settled, so I ordered something, I have now received it and it's matched. When that is done by – so there's

10 a person that orders, there's a different person that matches the goods, I mean that receives the goods or creates the goods received once those two are put together it is then sent that transaction is sent to the shared services team. Now what the shared services team does Chair is captures the invoice and they match that invoice to the order and the goods receipt, and when all three tie the payment is ready for payment in line with the contract and they then effect the payment. So that's roughly the process Chair.

CHAIRPERSON: So the shared services are the ones who effect the payment or they just check that everything matches and then they send an email or something to somebody to say now you can pay?

20 **MR SNEHAL NAGAR:** Chair they are the operators of the bank account so they effect the payment.

CHAIRPERSON: Oh okay, okay, so they effect the payment?

MR SNEHAL NAGAR: Absolutely yes.

CHAIRPERSON: And the contract manager that you talked about is he or she different from the buyer that the procurement manager would have given the contract?

MR SNEHAL NAGAR: Yes they are different.

CHAIRPERSON: They are different?

MR SNEHAL NAGAR: Yes.

CHAIRPERSON: From the buyer it goes to the contract manager?

MR SNEHAL NAGAR: Ja the buyer effects the procurement part of it.

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: Meaning they do the contracting, and the contract manager then gets this once it is contracted so he gets his signed contract to operate.

CHAIRPERSON: Yes, okay thank you.

10 **ADV PHILLIP MOKOENA SC:** I was pausing at this question in order to direct you back to the pro-forma invoice on page 20. When it was received by yourself this elaborate process that you have taken the Chair through did not happen at all.

MR SNEHAL NAGAR: No.

CHAIRPERSON: Was it normal for you or your section or department to receive an instruction from Ms Naidoo or Ms Bhana to make any payment, was that a normal thing for such an instruction to come from her? Not an instruction relating to a payment that has got the features that we are dealing with, but just a normal – would it have been normal for her to have asked you or instructed you to make any payment?

MR SNEHAL NAGAR: Chairperson I don't think it's normal, so if I had to call normal,
20 normal would be us in the ordinary course of the business buying stuff and paying for it following a proper process.

CHAIRPERSON: Following this chain, yes, yes.

MR SNEHAL NAGAR: Maya does however work in the office of the CFO and to the extent that there was a transaction or something that needed to be done which specifically I guess stemmed from the CFO or there was a dispute or some issue which

generally would not have been closed by the team, the prior mentioned team, that would have probably come from Maya to our team.

CHAIRPERSON: Okay.

MR SNEHAL NAGAR: It could be various forms, not necessarily just a payment.

CHAIRPERSON: Okay thank you. The Maya you refer to being Ms Maya Bhana or Naidoo

MR SNEHAL NAGAR: Ms Naidoo yes.

CHAIRPERSON: Okay thank you.

ADV PHILLIP MOKOENA SC: Now in relation to this specific contract, I mean having
10 regard to the processes and the short time that you had to get out the instruction who do you ascertain whether with this specific contract there was budget for R659million, for this specific contract?

MR SNEHAL NAGAR: Chairperson for this specific contract, we don't budget for a pre-payment but we budget to buy coal and like I said we spend anywhere between R40billion and R70billion a year depending on which year you're looking at, so there was budget to buy the coal, there wasn't budget to pay a prepayment, but it's one and the same thing, it's not one and the same thing, we budget to buy coal, let me put it that way and leave it there.

ADV PHILLIP MOKOENA SC: Yes.

20 **CHAIRPERSON**: Well this pro-forma, the email and the pro-forma invoice is that all the documentation that Ms Bhana or Naidoo sent to you in accordance with the telephone conversation which she had had with you?

MR SNEHAL NAGAR: No Chair we ...(intervention)

CHAIRPERSON: Or did she send you more documents?

MR SNEHAL NAGAR: No, no, no the pro-forma invoice was sent to me on the 12th of

April, so that was the day before, by Ms Ayanda Nteta.

CHAIRPERSON: Okay yes, yes.

MR SNEHAL NAGAR: On the 13th of April, so that's a separate issue now.

CHAIRPERSON: Yes, yes.

MR SNEHAL NAGAR: On the 13th of April is when I got a telephone call from Ms Naidoo at around 10/11am in the morning and then we received a formal instruction from Ms Naidoo to a few players at 12:38pm and that email, that formal instruction had quite a bit of the supporting documentation that was required for this instruction.

CHAIRPERSON: Okay, no thank you.

- 10 **ADV PHILLIP MOKOENA SC**: Back to the question that I posed to you, can one be able to generate a purchase order if you know there's no budget for that specific contract, how should that happen?

MR SNEHAL NAGAR: Chairperson the way you would do that is so like I said the system is set-up where you order goods, when you receive the goods you pay for it, in this case you almost I want to call it fooling the system if that's the right word to use, but you are using, what you're doing is you're creating an order and you're settling that order as if you've received the goods immediately to effect the prepayment.

- ADV PHILLIP MOKOENA SC**: Yes. When in fact those goods are not received, as you correctly said that you will be fooling the system or doing something outside the
20 processes, the normal processes of Eskom?

MR SNEHAL NAGAR: It's outside of the way the system is set up to buy and receive goods, the contract was an approved contract that said please pre-pay which is something from a construct point of view different.

ADV PHILLIP MOKOENA SC: Now you were told by Ms Naidoo that this payment was also approved by the Board, am I correct, as per paragraph 1.

MR SNEHAL NAGAR: By a Board Tender Committee.

ADV PHILLIP MOKOENA SC: Yes, a Board Tender Committee, but however at the time when you had to carry out this instruction you were not aware of such an approval from the Board?

MR SNEHAL NAGAR: No Chair.

ADV PHILLIP MOKOENA SC: And Ms Naidoo also assured you that Treasury and the Shared Services were also on board in order to carry out this instruction, that's what you said in your earlier statement.

MR SNEHAL NAGAR: They were on board or would be on board.

10 **ADV PHILLIP MOKOENA SC:** Yes.

MR SNEHAL NAGAR: Yes.

ADV PHILLIP MOKOENA SC: Yes, now can you explain to the Chair before we deal with other questions the respective responsibilities of the two, the Treasury and Shared Services in relation to effecting normal payment, I'm not talking about the pre-payment.

MR SNEHAL NAGAR: Chair the Treasury team would draw on their banking facilities to make the money available and they would make that money available in a certain bank account. The Shared Services team like I said earlier is the operator of the bank account, they would physically then, all the invoices for Eskom that require or all the payments that need to be effected they would then effect that bank account or operate
20 the bank account to pay it. So ja.

ADV PHILLIP MOKOENA SC: While you were driving – there's only one document that you said you requested from Ms Naidoo, and that was the BTC resolution, am I correct.

MR SNEHAL NAGAR: No Chair we had requested all the supporting documentation related to this transaction, one of those documents that we had requested was also the

Board Tender Committee resolution, but I understand that at the time when we requested we weren't sure what this transaction looked like, so it's please give me all the supporting documentation that would be required around this transaction.

CHAIRPERSON: And now you are basically emphasizing what you said to her on the phone on the 13th of April when she mentioned that there was this urgent payment to be made?

MR SNEHAL NAGAR: That is correct.

CHAIRPERSON: Yes. And she would have known what documentation you were talking about, because she would know what documentation is normally required before
10 payment is made, is that right? When you said please give me, send me all, send me the documentation she would have known what you were expecting.

MR SNEHAL NAGAR: Chair I think the conversation was around give me all the supporting documentation and we mention some of the supporting documentation so the documentation we would asked her on the phone as well would have been well please give me first the invoice, give me the contract, give me the Board Tender Committee document and because I don't know the construct of this agreement give me whatever else I need that's necessary to effect this transaction. That would have been the line of discussion.

CHAIRPERSON: Okay.

20 **ADV PHILLIP MOKOENA SC:** And the time we understand that you were driving did you request assistance of any other people from your office to help you to effect this urgent payment?

MR SNEHAL NAGAR: Yes Chair, because I was not in the office I had requested my – one of the senior members of my team, Christo Kruger, to help me effect this transaction.

ADV PHILLIP MOKOENA SC: Christo who?

MR SNEHAL NAGAR: Mr Christo Kruger.

ADV PHILLIP MOKOENA SC: Okay. Now do you know when this request was made to you whether any financial evaluation was done, did you seek that information from Ms Naidoo, or from anyone else, before the payment was effected?

MR SNEHAL NAGAR: Chairperson no normally when you – I assume you're talking about a financial evaluation of the supplier?

ADV PHILLIP MOKOENA SC: Yes.

MR SNEHAL NAGAR: Chairperson that ...(intervention)

10 **ADV PHILLIP MOKOENA SC:** Taking into account that – I know that you said that in Eskom terms this is not such a huge amount, but 659 by all accounts is quite a huge amount.

MR SNEHAL NAGAR: Chairperson on all of our contracts we generally tend to do a financial evaluation of some sort, but from a process perspective the financial evaluation is done when you're requesting a mandate to negotiate and conclude so before the conclusion of the contract, depending on what you are requesting the financial evaluation of a supplier is done at that stage. At this particular stage of the transaction it's here's a signed contract, please effect the payment, there's no financial evaluation done at that stage, so to answer the question no we have not done a
20 financial evaluation or did not do one on Tegeta Resources at this point in time.

ADV PHILLIP MOKOENA SC: Chair unless my watch is fast it is now about quarter past, would this be convenient to adjourn, I want to move into another point.

CHAIRPERSON: Yes, we will take the short adjournment and resume at half past eleven. We adjourn.

INQUIRY ADJOURNS

INQUIRY RESUMES

CHAIRPERSON: You may proceed Mr Mokoena.

ADV PHILLIP MOKOENA SC: Thank you Chair. Mr Nagar may I refer you to page 22. You will see it is Annexure SN1. Can you please take us through those emails, identify them first and take us through starting with the one from the bottom.

MR SNEHAL NAGAR: Chairperson this an email from Ms Maya Naidoo at this stage you can see she was still Ms Maya Bhana on the system. But this is an email from Ms Maya Bhana to quite a few role players in this value chain that we just discussed earlier. The value you can see Muvenda is the shared services person, Christo is in my
10 team. It is myself, it is Andre Pillay who is the treasurer for Eskom so the treasury function value chain that needed to play a part. Rajen and – Rajen is from the - or was from the shared services team and Charl is from the treasury team. So the submit of the email is Payment to be made before 2:00 pm today.

ADV PHILLIP MOKOENA SC: Importantly the date is?

MR SNEHAL NAGAR: The date is the – is April 13th 2016 and the very important thing is the time which is 12:38 pm.

ADV PHILLIP MOKOENA SC: Yes. So this instruction had to be carried almost within an hour or so?

MR SNEHAL NAGAR: Yes 1 hour and 22 minutes.

20 **ADV PHILLIP MOKOENA SC:** Yes. And take us through the contents?

MR SNEHAL NAGAR: If I can – if I can read it Chair? So it basically says:

“Hello All. Please can we fast track payment today before 2:00 pm.”

It then references to two things:

1. “Two invoices as requested and approved for payment

approximately R60 million today subject to early settlement discount of 1%.

2. Attached invoice for R659 million”

And it has two further sub-references it says:

“See attached contract addendum”

Which was the contract that was signed effect – for the effecting of that R659 pre-payment. And...

10 “b. Copy of the extract of the BTC meeting on Monday and this morning will be forwarded by Suzanne during the course of today. Please let me know if you require any additional information. Kind Regard Maya.”

ADV PHILLIP MOKOENA SC: Yes. Would I be correct that one of the documents which was attached to this email is to be found on page 25?

MR SNEHAL NAGAR: That is correct.

ADV PHILLIP MOKOENA SC: And on page 25 Annexure SN2 it is a resolution by Tegeta, am I correct?

MR SNEHAL NAGAR: That is correct.

ADV PHILLIP MOKOENA SC: And we also see the different shareholders of Tegeta who have appended their signatures on the resolution?

20 **MR SNEHAL NAGAR:** That is correct.

ADV PHILLIP MOKOENA SC: Now if you look at the date of that meeting it was held on the 13 April 2016, am I correct?

MR SNEHAL NAGAR: That is correct.

ADV PHILLIP MOKOENA SC: This is the same day you received an instruction to effect payment?

MR SNEHAL NAGAR: That is correct.

ADV PHILLIP MOKOENA SC: And this is the same day when Tegeta itself received this payment?

MR SNEHAL NAGAR: That is correct.

ADV PHILLIP MOKOENA SC: There is something else that I need you – you know to clarify if you can keep page 25 open and also page 20. Keep page 20 and page 25 open. Now the date on the pro-forma invoice is the 12 April 2016, am I correct?

MR SNEHAL NAGAR: That is correct.

ADV PHILLIP MOKOENA SC: How was it possible I mean you may answer if you are
10 able to that Tegeta before its meeting on the 13 April 2016 already dispatches a pro-forma invoice on the 12 April 2016, does that make sense? What did they know which you did not know at the time?

MR SNEHAL NAGAR: Chairperson it does not make sense and I cannot answer that question.

ADV PHILLIP MOKOENA SC: Yes. So flowing from this chronology we know that as per Annexure SN2 on page 25 Tegeta could have only made a resolution about the advance payment on the 13 April yet when you look at Annexure SN20 which was sent to you it was done a day before the meeting took place. Would that be a correct summary of what we see?

20 **MR SNEHAL NAGAR:** Chairperson that is correct.

ADV PHILLIP MOKOENA SC: Yes.

CHAIRPERSON: Do you know whether this was an ordinary meeting of the board referred to which produced this resolution? When I say ordinary in I mean a scheduled meeting that is part of the normal planning of the board, is that something you would know or is that something you would not know?

MR SNEHAL NAGAR: Chair I would firstly not know and secondly Chair this is a Tegeta board resolution.

CHAIRPERSON: Oh okay.

MR SNEHAL NAGAR: It is not an Eskom board, yes.

CHAIRPERSON: Okay. No, no thanks, thanks. Yes.

ADV PHILLIP MOKOENA SC: Yes.

CHAIRPERSON: [indistinct] that.

ADV PHILLIP MOKOENA SC: Now there is something else which appears to be strange but you might be able to assist the Chair. If you may turn to page 32 and
10 please also keep page 25 open. Now on page 25 we know you have identified the document as the resolution of Tegeta and on page 32 this is one of the documents I take it which were annexed to your email that is now the resolution of the board of Transnet, am I right? Of Eskom?

MR SNEHAL NAGAR: Of the board tender committee Chair yes.

ADV PHILLIP MOKOENA SC: Yes of the board tender committee?

MR SNEHAL NAGAR: Yes that is correct.

ADV PHILLIP MOKOENA SC: Now let us spend some time on page – the document on page 32. The resolution of Eskom's board committee – board tender committee. According to this document the meeting was held on the 11 April 2016. Do you
20 confirm?

MR SNEHAL NAGAR: Yes I do that is correct.

ADV PHILLIP MOKOENA SC: It was held at nine o'clock between 1:00 hours at night and you also confirm?

MR SNEHAL NAGAR: That is correct.

ADV PHILLIP MOKOENA SC: It was held by means of a telecom?

MR SNEHAL NAGAR: That is correct.

ADV PHILLIP MOKOENA SC: Now can you please for the importance of this resolution read paragraph 2.1.2 and 2.1.3 – if you can read them please?

MR SNEHAL NAGAR: Chair 2.1.2 states as follows:

“The chief financial officer is hereby authorised to approve the basis for pre-payment to secure the fixed coal price for the period of extension provided that there is a discount in the price. The suppliers offers a guarantee in favour of Eskom and that the CFO can provide assurance to the committee that the transactions are economically viable for Eskom.”

10

2.1.3 states:

“The group executive generations hereby authorise to take all the necessary steps to give effect to the above including the signing of any consents or any documentation necessary or related thereto.”

ADV PHILLIP MOKOENA SC: Yes. Now if we deal with the chronology of events it would mean that on the 11 April 2016 even before the supplier that is now Tegeta could approach Eskom about the advance payment Eskom board has already resolved to do that. Now you are contrasting the document on page 32 with the one on page 25.

20 **MR SNEHAL NAGAR:** That is...

ADV PHILLIP MOKOENA SC: The one on page 25.

MR SNEHAL NAGAR: Yes.

ADV PHILLIP MOKOENA SC: That meeting took place only on the 13 April 2016 and the one on page 32 took place on the 11 April 2016. So the one of – on page 32 precedes the one on page 25, am I correct?

MR SNEHAL NAGAR: Chair you are correct.

ADV PHILLIP MOKOENA SC: So this is not a case whereby Tegeta could have approach Eskom to say that they maybe in distress or they are unable to fulfil their contractual obligations and as a result they request an assistance by having to avail themselves to a pre-advanced payment?

MR SNEHAL NAGAR: Yes Chair I can – I can speculate about something if you want me to speculate otherwise I cannot confirm the facts to these minutes in any way.

ADV PHILLIP MOKOENA SC: I understand.

MR SNEHAL NAGAR: Both Eskom's and Tegeta's.

10 **ADV PHILLIP MOKOENA SC:** Tegeta one.

MR SNEHAL NAGAR: Yes.

ADV PHILLIP MOKOENA SC: But what you can confirm for the Chair is the following: That the meeting of Eskom took place on the 11 April 2016 and the one of Tegeta on 13 April 2016?

MR SNEHAL NAGAR: With these documents I can confirm that Chair.

ADV PHILLIP MOKOENA SC: Yes. Now as part of the resolution that you have read on page 32 were you provided any guarantee in favour of Eskom from Tegeta before the payment was advanced at two o'clock?

20 **MR SNEHAL NAGAR:** No Chair I personally or our team was not provided with this guarantee.

ADV PHILLIP MOKOENA SC: Despite what the resolution said?

MR SNEHAL NAGAR: Chair the guarantee – so the resolution states that the CFO needs to make sure.

ADV PHILLIP MOKOENA SC: Yes.

MR SNEHAL NAGAR: That the guarantee is in place.

ADV PHILLIP MOKOENA SC: Yes. Yes

MR SNEHAL NAGAR: The CFO does not need to give me that guarantee.

ADV PHILLIP MOKOENA SC: But I am saying that the people that are giving instructions and I am talking about the chain that you elaborately – you did you know inform the Chair about and the different stages. At this time when you effected the payment you did not see any guarantee that was received from Tegeta?

MR SNEHAL NAGAR: Chair I confirm. When we did the transaction or effected this transaction and to date we have never as a team received these guarantees. But I need to confirm one more thing is that I do not – we do not need the guarantees to
10 effect the transaction. The guarantee is a security and you would only call on the security if the need arises.

ADV PHILLIP MOKOENA SC: Yes but the question it still stands that at the time when you effected this payment you have never seen these guarantees?

MR SNEHAL NAGAR: That is correct.

ADV PHILLIP MOKOENA SC: That the money that is leaving Eskom would be secured by any form of guarantees?

MR SNEHAL NAGAR: That is correct. We have never seen them.

CHAIRPERSON: The resolution of the special board tender committee that appears at page 32 says in paragraph 2.1.2:

20 “The chief financial officers hereby authorise to approve the
basis for pre-payment to secure the fixed coal price.”

Do you know what it is intended to mean when it says: He was authorised to approve the basis for the pre-payment as opposed to he was authorised to approve the pre-payment, do you – what is your understanding of what the tender that would be special board tender committee was meant to say there?

MR SNEHAL NAGAR: Chair I would be absolutely speculating.

CHAIRPERSON: Ja.

MR SNEHAL NAGAR: To be frank.

CHAIRPERSON: I – you...

MR SNEHAL NAGAR: I would not know. I mean my understanding is this would be what he needed to effect the pre-payment agreement that was in front of me.

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: But that is as far as I can really speculate on this thing.

CHAIRPERSON: Yes okay alright.

10 **ADV PHILLIP MOKOENA SC:** And if you look at paragraph 2.1.2 and 2.1.3 there were individuals who were given certain authorities who are those?

MR SNEHAL NAGAR: It is the 2.1.2 is the CFO and 2.1.3 is the Group Executive Generation.

ADV PHILLIP MOKOENA SC: Can you remind us their names by the way?

MR SNEHAL NAGAR: So the Chief Financial Officer was Mr Anoj Singh and the Group Executive Generation at that time was Mr Matshela Koko.

ADV PHILLIP MOKOENA SC: Yes. May I refer you to page 26.

CHAIRPERSON: Maybe before you do so.

ADV PHILLIP MOKOENA SC: Yes.

20 **CHAIRPERSON:** This special – this board tender committee meeting was held by way of a telephone conference that is at page 32. Is it something you would know or is it something you would not know whether it was normal for them to hold meetings by way of a telephone conference?

MR SNEHAL NAGAR: Chair I would not be able to answer that.

CHAIRPERSON: You would not know?

MR SNEHAL NAGAR: No.

CHAIRPERSON: Okay alright. And then your answer would apply also to whether it was normal for them to hold meetings so late in the night, 21:00 hours you would not know either whether that was normal for them?

MR SNEHAL NAGAR: That is correct I would not be able to answer that.

CHAIRPERSON: Okay alright.

ADV PHILLIP MOKOENA SC: Page 26 Mr Nagar.

CHAIRPERSON: Did you say 26 Mr Mokoena?

ADV PHILLIP MOKOENA SC: 26 yes Mr Chair.

10 **CHAIRPERSON:** Thank you.

ADV PHILLIP MOKOENA SC: This is one of the document which were furnished to yourself at the time when the instruction was given to you, am I correct?

MR SNEHAL NAGAR: That is correct.

ADV PHILLIP MOKOENA SC: Can you identify the document?

MR SNEHAL NAGAR: This is the – if I had to call it the pre-payment contract or the contract to buy the coal under the pre-payment condition.

ADV PHILLIP MOKOENA SC: Yes and then if you turn to page 29. Who signs on behalf of Eskom?

20 **MR SNEHAL NAGAR:** It is Mr Matshela Koko I mean I cannot attest for his signature but the name here is Mr Matshela Koko and it is witnesses by it seems Mr Anoj Singh.

ADV PHILLIP MOKOENA SC: Okay are you able to at least recognise the signature of the witness? You know it?

MR SNEHAL NAGAR: This seems like Anoj's signature, Matshela's I cannot confirm right now. This seems like Anoj's signature, Matshela's I cannot confirm right now.

ADV PHILLIP MOKOENA SC: Yes. Okay. And what date was this document signed?

MR SNEHAL NAGAR: It was signed on the 13 April 2016.

ADV PHILLIP MOKOENA SC: The same day when a request was made for an urgent payment?

MR SNEHAL NAGAR: That is correct Chair.

ADV PHILLIP MOKOENA SC: Now if you may refer back to page 26. You will see that paragraph 1 deals with the mandate of the board – the board tender committee and paragraph 2 the following is recorded:

10 “In order to enable Tegeta to undertake the required supply and
 delivery of coal to [indistinct] or any other power station as
 Eskom may direct Eskom has agreed to advance funds to Tegeta
 in order for Tegeta to continue to supply and deliver coal to
 Eskom in terms of the existing coal supply agreement.”

You confirm that is what recorded therein?

MR SNEHAL NAGAR: That is correct.

ADV PHILLIP MOKOENA SC: Now in terms of the chronology we know that the meeting of Eskom board tender committee was held on the 11 April 2016?

MR SNEHAL NAGAR: That is correct.

ADV PHILLIP MOKOENA SC: And we know that the one of the board of Tegeta as we have already stated it was held on the 13 April 2016?

20 **MR SNEHAL NAGAR:** Correct.

ADV PHILLIP MOKOENA SC: We do not have anything which shows that Tegeta did approach Eskom to advance payment to it in that sum of money? Anything coming from Tegeta as a request to Eskom?

MR SNEHAL NAGAR: I mean maybe I am not understanding your question. So this is the contract that underpins that request. If that is the request or are you asking me did

we receive an email saying please give me R659 million pre-payment?

ADV PHILLIP MOKOENA SC: Yes or anything that – that could have actually made Eskom to assist Tegeta to advance that amount?

MR SNEHAL NAGAR: I am not aware of any request Chair.

ADV PHILLIP MOKOENA SC: Now may I refer you to paragraph open 2.1 and I am asking those questions in the light of what is recorded in this agreement. It says that:

10 “Tegeta will procure that for supply to Eskom from Optimum Mine in terms of the existing coal supply agreement for five months period commencing from 16 April 2016 to 30 September 2016 a 3.5 discount shall be applied to the agreed price of 20.41 by gigajoule accordingly the price payable for supply from the OC Mine shall be R19.69 per gigajoule.”

And you will see also on paragraph 4.2.2 it says that:

“In lieu of the advanced payment in respect of all invoices issued by Tegeta to Eskom relating to supply of coal from Optimum Colliery total invoices at the end of each month commencing 16 April 2016 Tegeta shall procure that it issues a credit note to Eskom equally of R659 million in advance – sorry – and until the full amount of the advanced payment has been recovered in full.”

20 These were the terms – when did you see these terms of this agreement? On the same day or subsequent to the payment having been advanced?

MR SNEHAL NAGAR: When did I see it?

ADV PHILLIP MOKOENA SC: Yes.

MR SNEHAL NAGAR: I – so Chair I seen it after the payment was already processed. Remember I said I was driving to a client and I was at a client meeting. So my team

that assisted me in effecting this transaction would have seen it after 12:38 pm on the email that was sent from Ms Naidoo. That is the time we would have first seen this agreement and the terms and conditions underpinning it. I if you ask the questions when did I see it? I seen it after the transaction was done when I returned to the office on that day.

ADV PHILLIP MOKOENA SC: Yes. Now may I refer you to page 3 paragraph 4.3 of your statement?

MR SNEHAL NAGAR: Page 3. Am I correct that the contents of that paragraph records what transpired on the 13 April 2016?

10 **MR SNEHAL NAGAR:** That is correct.

ADV PHILLIP MOKOENA SC: And we know that in terms of your paragraph 4.2 you requested Ms Naidoo to furnish you with the necessary document and the one that is specified there is the BTC Resolution, am I correct?

MR SNEHAL NAGAR: That is correct.

ADV PHILLIP MOKOENA SC: Now the BTC Resolution is contained on page 32 but the email attaching it is on page 31 if you may turn there. Are you there on page 31?

MR SNEHAL NAGAR: I am Chair.

ADV PHILLIP MOKOENA SC: And correct so it is from Mr Maya Bhana?

MR SNEHAL NAGAR: That is correct.

20 **ADV PHILLIP MOKOENA SC:** And directed – it is addressed to you?

MR SNEHAL NAGAR: Correct.

ADV PHILLIP MOKOENA SC: And it says; “Extract of the BTC minutes.”

MR SNEHAL NAGAR: Correct.

ADV PHILLIP MOKOENA SC: Tegeta Transaction. But what I fail to understand is that the date – the date it is on the 19 April 2016. Was this the first time that it was

dispatched to you and the team, this extract?

MR SNEHAL NAGAR: No Chair I believe we got this thing a little bit earlier than the 19 April. So we had two copies. There was formal copy sent to us from Maya. There was also a physical copy delivered to us from Suzanne Daniels of this extract.

ADV PHILLIP MOKOENA SC: When were they delivered to you?

MR SNEHAL NAGAR: Chair I cannot exactly remember but it had to have been after the date she signed this extract.

ADV PHILLIP MOKOENA SC: Yes. So what I am trying to say is that you see that this extract – let us go to the extract it is on page 32. The date is the 15 April 2016.

10 **MR SNEHAL NAGAR:** That is correct.

ADV PHILLIP MOKOENA SC: So that is the only time when she certified as a true extract of the meeting?

MR SNEHAL NAGAR: That is correct Chair.

ADV PHILLIP MOKOENA SC: Yes. So you could not have actually received it much more earlier than this date?

MR SNEHAL NAGAR: That is correct Chair. What we could have possibly received which I cannot confirm is we could have received an unsigned extract. There is probably a process that Suzanne needs to follow in getting this extract signed off and thereafter we might have then received this copy but I cannot confirm whether we
20 exactly received the extract or not.

ADV PHILLIP MOKOENA SC: Yes. I am trying to clarify your evidence in line with what we – is contained in the statement.

MR SNEHAL NAGAR: Okay.

ADV PHILLIP MOKOENA SC: In all fairness to you. If you have received an unsigned copy on the 13 or earlier than that surely you would reflected that in the statement, am I

correct?

MR SNEHAL NAGAR: Yes Chair yes. Yes.

ADV PHILLIP MOKOENA SC: I want to be fair to you I mean you are talking about these documents on as I indicated to you from paragraphs – in – from paragraph 34.1 to 4.3 and what you are saying in paragraph 4.3 you say that you were referring to the events of the 13th and you annex the copies of what one assumes must be the copies of what you have received as per what is stated in that paragraph, am I correct?

MR SNEHAL NAGAR: That is correct.

ADV PHILLIP MOKOENA SC: Yes. And I am posing those questions in light of what
10 you have stated that you have received those copies on the 13th. But when you look at these the Resolution or the extract the date of the extract is the 15 April 2016 long after the payment was made, am I correct?

MR SNEHAL NAGAR: That is correct.

ADV PHILLIP MOKOENA SC: When you look at the email on page 31 Annexure SN3 it is even way beyond that period because it is on the 13th – on the 19 April 2016 and she says: "Please see attached as promised." And I take it this is the time when she then sent you this relevant document?

MR SNEHAL NAGAR: That is correct. Can I add some context to that?

ADV PHILLIP MOKOENA SC: Yes please.

20 **MR SNEHAL NAGAR:** So if I read the 4.3 I did not say I received – we received the extract – the BTC minutes on the 13th. We said we also received a copy of the extract from Ms Naidoo attached as Annexure SN3. So I confirming that we received the extract I am not confirming that it came on the 13 April but Mr Mokoena you are correct. In the initial request from Ms Naidoo on the 13th the discussion that we had on the - the telephonic discussion I had requested the BT – I mean the board tender committee

resolutions an extract of the resolutions. So we had requested it from her. If you look at the email that she sent us on the 13 April she also states there that the board – the minutes of the resolution will be forwarded by Suzanne Daniels later that day. The extracts – the formal extract or the signed off extract could not have been sent at the day it could only have been sent on the 15th after the day. So I do not know if that answers your question?

ADV PHILLIP MOKOENA SC: No, no it brings much more confusion.

MR SNEHAL NAGAR: Okay.

ADV PHILLIP MOKOENA SC: Because I thought that the documents that we are
10 having here are the documents which you say were received as per what we read in paragraph 4.3 and I am posing those questions in the light of what is stated there. But it appears that you are referring to other documents which are not annexed to this statement which might have received on the same day of the 13th. Did you receive an extract of the BTC on the 13th?

MR SNEHAL NAGAR: No Chair.

ADV PHILLIP MOKOENA SC: Yes. And that is the reason why I am posing those questions.

MR SNEHAL NAGAR: Okay.

ADV PHILLIP MOKOENA SC: And would it be fair that from reading the documents
20 that supports your statement the extract of the minute was only certified as true on the 15 April?

MR SNEHAL NAGAR: That is correct Chair.

ADV PHILLIP MOKOENA SC: And this was sent to you as per your documents only on the 19 April as per Annexure SN3?

MR SNEHAL NAGAR: So as per Annexure SN3 that I confirm, but I had even said we

were provided with a copy of the resolution by Ms Daniels of our Legal Department.

ADV PHILLIP MOKOENA SC: Yes.

MR SNEHAL NAGAR: So I am confirming that we have received a physical copy of the extract earlier than the 19th sent from Ms Naidoo, but I cannot confirm exactly what time and date that physical copy was received.

ADV PHILLIP MOKOENA SC: Could it be before the payment or after the payment?

MR SNEHAL NAGAR: It would have been after the payment Chair.

ADV PHILLIP MOKOENA SC: Yes.

MR SNEHAL NAGAR: And to give context to that as well I did not need the Board
10 Tender Committee Minutes to affect the payment, because I had a signed contract in front of me.

ADV PHILLIP MOKOENA SC: Yes. No, below the documents that you are having. I understand. Now if I may refer you to paragraph 4.4 of your statement. You are now in that paragraph telling us how this prepayment was processed. Am I correct?

MR SNEHAL NAGAR: That is correct.

ADV PHILLIP MOKOENA SC: Can you please summarise the contents of that paragraph for us? Now you are talking at this stage when it is.

MR SNEHAL NAGAR: *Ja.*

ADV PHILLIP MOKOENA SC: Now processed.

20 **MR SNEHAL NAGAR:** Chairperson so we had spoken about us receiving the formal instructions and the contracts at 12:38 pm. So we had assuming immediately if the email was open. We had one hour and about 22 minutes to affect this transaction. I explained to you the process if it had to occur in the manner, so in a normal course of business how a process should have occurred and that did not occur. We also had to affect this payment to Tegeta like I said before 02:00 pm. Chairperson if I can just give

one more context. So you could have a vendor, a particular supplier that has multiple contracts with Eskom. So in this particular case Tegeta had a contract with, so they had this prepayment contract which was not loaded on the system and to affect the payment we needed it loaded on the system. Tegeta also had another contract with Eskom and I think you have been exposed to it throughout this hearings, but we had a contract called the Brakfontein Contract, the Brakfontein Coal Supply Agreement. So same vendor just two separate contracts. So in order to affect this payment what we did there was no time within this one hour 22 minutes to follow that process that I had described earlier to you. So what the team did and Chairperson before they did this

10 there was an approval sought. So I will get to the approval a little later, but what they did was they amended a purchase order on the Brakfontein Contract to reflect a, call it, an order of 659 million and the payment to Tegeta was affected against the Brakfontein Contract. So the same vendor getting the same money, but just via the Brakfontein Agreement and then subsequent to that the correct process that I explained to you earlier was followed and this transaction against the Brakfontein Contract was reversed and was then processed against this 659 million prepayment contract. So effectively that is how this contract is, this Clause 4.4 is basically explaining how that payment was affected. It is important to note Chair that before this was done a payment control form was prepared and we do that for every payment and the payment control form and I

20 think it is on.

ADV PHILLIP MOKOENA SC: We will deal with it in due course.

MR SNEHAL NAGAR: Okay.

ADV PHILLIP MOKOENA SC: But it is SN4A. Is it the one that was signed by?

MR SNEHAL NAGAR: Ms Naidoo.

ADV PHILLIP MOKOENA SC: Ms Naidoo?

MR SNEHAL NAGAR: Yes. So the payment control form reflects who you are paying, contracts, those kind of details and that was approved and then the payment was affected against the Brakfontein Agreement and later corrected. So that is how the 659 million payment was affected.

ADV PHILLIP MOKOENA SC: So in short the normal processes and procedures were not followed [intervenes]?

MR SNEHAL NAGAR: Chairperson given the time it could not be followed.

ADV PHILLIP MOKOENA SC: Yes and also we now know that this payment was effected against another contract not the one which was initially in the agreement?

10 **MR SNEHAL NAGAR:** That is correct.

CHAIRPERSON: Do you know why that was done?

MR SNEHAL NAGAR: Chairperson like I said.

CHAIRPERSON: Hm.

MR SNEHAL NAGAR: If we had to load, so you have got the signed agreement in front of you. Now the signed agreement needs to be loaded onto the SAP System. Now in order to load the SAP System I need to then follow this process we described before.

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: Which was pre the contract even being signed.

20 **CHAIRPERSON:** Ja.

MR SNEHAL NAGAR: And post the contract being signed.

CHAIRPERSON: Hm.

MR SNEHAL NAGAR: Now you could not, in order to have followed that process you needed all the different [intervenes].

CHAIRPERSON: You needed to have had all the documentation that would have been

produced by that process?

MR SNEHAL NAGAR: Not only the documentation. Also the people at that point in time available.

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: And ready and available to execute the transaction that I described.

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: So that time was not available and hence it had to be done this way.

10 **CHAIRPERSON:** What made it easier to do it using the Brakfontein Contract as opposed to in the place of the one that should have been followed? In other words.

MR SNEHAL NAGAR: Ja. It is a function of time.

CHAIRPERSON: Were there certain people who were immediately available in regard to Brakfontein who were not available in regard to this one? Exactly what was the difference? So you had; you are faced with a contract where payment must be made within a very short space of time and, but the system in order for the payment to be effected requires certain people to play their respective roles and certain documentation to be available. I assume. Now that documentation is not available because that process was not followed in regard to this contract that in respect of which

20 payment must be made. Is that right?

MR SNEHAL NAGAR: Chair let me clarify.

CHAIRPERSON: Ja.

MR SNEHAL NAGAR: So at 12:38 pm you now have documentation available, because you have got the signed agreement.

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: And the signed agreement says please effect this agreement.

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: The issue from 12:38 pm to 02:00 pm is that process I explained to you, so we, the first time you actually see the construct of this agreement is after 12:38 pm.

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: When you see that. Now that process I explained earlier not everyone is seeing that agreement. Not everyone is possibly or potentially at the office to effect this agreement and it is not as if go get any Contract Manager and go and get
10 any buyer. There are certain people who can process transactions in certain sort of environments. There are segregated duties for control. So what I am saying is that the documentation is there. Now it is an issue of time and it is a question of availability of people and to process a payment within that required time that was not available on 13 April to effect this payment at 02:00 pm.

CHAIRPERSON: So are you saying that in terms of documentation you had all the documentation that was necessary. The difficulty was certain people who needed to be available?

MR SNEHAL NAGAR: Chair again I explained earlier that said before this contract was signed.

20 **CHAIRPERSON:** Hm.

MR SNEHAL NAGAR: What should have happened.

CHAIRPERSON: Hm.

MR SNEHAL NAGAR: Was that this purchase requisition process should have been loaded.

CHAIRPERSON: Hm.

ADV PHILLIP MOKOENA SC:

MR SNEHAL NAGAR: That was not done.

CHAIRPERSON: Hm.

ADV PHILLIP MOKOENA SC:

MR SNEHAL NAGAR: So already there is a process missing.

CHAIRPERSON: Hm.

ADV PHILLIP MOKOENA SC:

MR SNEHAL NAGAR: And there is an agreement in front of you.

CHAIRPERSON: Hm.

10 **ADV PHILLIP MOKOENA SC:**

MR SNEHAL NAGAR: Now I am saying on top of that, so you first got to go do this process. Then post the contract there is another process you still need to follow and by various people, so I am talking various Contract Managers now, to effect that to get those people within that one hour and 22 minutes to all play a part in this role would have been impossible and to give you an idea we had strongly pushed; so once the payment was done against the Brakfontein Contract we had strongly pushed to correct the entry against the correct contract. So what I am saying is the payment is done under the Brakfontein Contract of the same vendor. We then reverse the transaction against the Brakfontein Contract and process it against the prepayment contract. Now
20 that process took a couple of days to get done. It did not happen immediately on the same day which kind of gives you an idea of how long it takes people to actually [intervene].

CHAIRPERSON: Ja. No, I accept that given the time constraints you could not get the normal process that should have been followed to be followed, but my question is why was it easier or what was the need to use Brakfontein? I would imagine that if you are

unable to use what let us call it the normal procedure that you would have followed because people are, cannot be brought together within an hour. Will that requirement not apply when you use Brakfontein? Will you not; how does it come about that you will not be faced with the same problem? Will not be, will it not be necessary to bring a certain number of people together to effect payment even using Brakfontein? That is what I want you to clarify.

MR SNEHAL NAGAR: The reason why the Brakfontein Contract was used because the vendor, the supplier was the same supplier. So the banking details, bank accounts were all the same. So it was Tegeta. So Tegeta had the Brakfontein Contract where
10 the bank accounts and the people you will be paying is the same person as the 659 million contract. So why it is easier to use the Brakfontein Agreement is because the Brakfontein Contract had tenure meaning period of the agreement. It also had value. So it could accommodate the R659 million payment and it will be paid to the same party that we wanted to pay under the 659 million agreement. So Brakfontein was an easier process to, easier contract to use. I could not use an Optimum Contract or a, you know, call it any other contract to pay, because it would have paid a different vendor.

CHAIRPERSON: So for purposes of effecting payment if you used the Brakfontein Contract you did not need the people who you would have needed if you used this new contract?

20 **MR SNEHAL NAGAR:** That is correct.

CHAIRPERSON: And.

MR SNEHAL NAGAR: That is correct.

CHAIRPERSON: And is that because in regard to the Brakfontein Contract all information that you would have needed was already in the system?

MR SNEHAL NAGAR: That is correct.

CHAIRPERSON: And you did not need any particular person or official to okay anything if you used Brakfontein?

MR SNEHAL NAGAR: No, Chair. There was a transaction process.

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: So on the Brakfontein Contract there was an order for coal already in the system.

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: That order for the coal was amended and it was amended for R659 million.

10 **CHAIRPERSON:** Oh.

MR SNEHAL NAGAR: It was then effected as received.

CHAIRPERSON: Oh.

MR SNEHAL NAGAR: With the transaction paid.

CHAIRPERSON: So that it now, it now, the documentation now reflected that there was an order this R659 million related to an order coming from Brakfontein?

MR SNEHAL NAGAR: Yes.

CHAIRPERSON: That is how it looked like?

MR SNEHAL NAGAR: On the system, yes.

CHAIRPERSON: On the system, *ja*.

20 **MR SNEHAL NAGAR:** Absolutely yes.

CHAIRPERSON: Okay, alright.

MR SNEHAL NAGAR: And then subsequent to that it was corrected and changed to the right order or the right contract.

CHAIRPERSON: Hm, but this whole process now of using Brakfontein, the Brakfontein Contract for actually another contract and later on correcting, those procedures were

they acceptable procedures or were you all people doing something wrong in order to effect this payment?

MR SNEHAL NAGAR: Chair it was, it is not an ideal or correct procedure to follow. It was the only procedure we could do to effect the transaction and hence we via this payment control form got it approved before we affected it.

CHAIRPERSON: But do you accept or do you not that it was a wrong procedure?

MR SNEHAL NAGAR: I accept.

CHAIRPERSON: Yes and you all resorted to it because you needed to comply with this instruction to effect payment before 2 o' clock?

10 **MR SNEHAL NAGAR:** That is correct.

CHAIRPERSON: But it was not part of Eskom procedures?

MR SNEHAL NAGAR: That is correct.

CHAIRPERSON: Okay.

ADV PHILLIP MOKOENA SC: Why the rush? Did you ask as to why the rush? Why are you placed under this extreme pressure to effect that payment and to do the wrong things?

MR SNEHAL NAGAR: Chairperson I mean I thought, so the first thing is that there is this contract that is approved by the Board to which we have no context to the discussion or why the Board is, Board and the Committee is approving such a contract.

20 There is an instruction from the CFO's office and that is not a light office. That is the CFO of Eskom, requesting us to pay this thing before 02:00 pm and I mean as intriguing or as startling as this request was it was also there is a request from the highest office or one of the highest offices in Eskom to please effect. So let us effect this transaction. Yes, I accept that the incorrect process was followed, but before we did that we sought approval for that as well to ensure; now if we understood at a

transactional level the context of why this prepayment was so important then maybe a different decision also would have been followed, but at that point in time it was one hour and 22 minutes. The team had to effect this transaction and did not understand the context of it except please do it and do it now.

ADV PHILLIP MOKOENA SC: So you merely carrying out the instructions?

MR SNEHAL NAGAR: Absolutely.

ADV PHILLIP MOKOENA SC: Incorrect as they maybe/

MR SNEHAL NAGAR: Absolutely.

CHAIRPERSON: Now did you just say a few seconds ago that you sought approval
10 even to use this wrong procedure in order to effect the payment?

MR SNEHAL NAGAR: That is correct.

CHAIRPERSON: From whom did you seek approval?

MR SNEHAL NAGAR: From Ms Naidoo.

CHAIRPERSON: And is she the one who provided approval or did she go higher up to the Board or Tender Committee to get approval for the use of this whole procedure as far as you know?

MR SNEHAL NAGAR: Chairperson my understanding of the events and I was not there. My colleague carried it out.

CHAIRPERSON: Yes.

20 **MR SNEHAL NAGAR:** But before he effected the transaction.

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: He had this payment control form.

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: In the form of SN4A prepared.

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: And that was then taken to Maya for signature.

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: My understanding is the signature and if you look at the contents of this payment control form.

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: Approved that you are doing what you are doing.

CHAIRPERSON: Okay.

MR SNEHAL NAGAR: The discussion between Chris, my colleague, and Ms Naidoo.

CHAIRPERSON: Hm.

10 **MR SNEHAL NAGAR:** I cannot confirm exactly what the discussion was and whether Maya followed a different process.

CHAIRPERSON: Ja.

MR SNEHAL NAGAR: Before she signed.

CHAIRPERSON: Ja.

MR SNEHAL NAGAR: I cannot confirm that.

CHAIRPERSON: And you came back from your meeting with a client after the payment had been effected?

MR SNEHAL NAGAR: That is correct.

20 **CHAIRPERSON:** So all of this was happening in your absence. The last thing that you did was you asked your colleague I think you said is it.

MR SNEHAL NAGAR: Mr Christo Kruger.

CHAIRPERSON: Mr Christo Kruger to basically carry out what, do what was needed to be done and you told him about the instruction from Mr Naidoo, from Ms Naidoo?

MR SNEHAL NAGAR: Chairperson, yes. After the telephone call, the initial telephone call I had instructed Christo to assist me in getting it out.

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: There were conversations between Christo and I.

CHAIRPERSON: Between.

MR SNEHAL NAGAR: Either WhatsApp, telephone calls.

CHAIRPERSON: Ja.

MR SNEHAL NAGAR: During that period.

CHAIRPERSON: Okay.

MR SNEHAL NAGAR: To say are we covered here.

CHAIRPERSON: Yes, okay.

10 **MR SNEHAL NAGAR:** So there was that conversation.

CHAIRPERSON: Okay.

MR SNEHAL NAGAR: It was not just please do it.

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: And I will see you later, no.

CHAIRPERSON: Okay, alright. So somewhere he consulted you on some of the challenges.

MR SNEHAL NAGAR: That is correct.

CHAIRPERSON: And you made your input and then you came back after payment had been effected?

20 **MR SNEHAL NAGAR:** Yes, when I got back to the office.

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: And really started looking at the detail.

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: In my personal capacity.

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: This transaction had already been effected. That is correct.

CHAIRPERSON: Yes. Okay, alright. Thank you.

ADV PHILLIP MOKOENA SC: Can I refer you to page 37?

MR SNEHAL NAGAR: I am on 37.

ADV PHILLIP MOKOENA SC: What is that document?

MR SNEHAL NAGAR: That is the payment control form that I have been referring to now.

ADV PHILLIP MOKOENA SC: And this is the document you said, you say to the Chair upon receiving it you then carried the instructions. You were satisfied that there is
10 authority and you may proceed with the prepayment?

MR SNEHAL NAGAR: Chairperson I confirm that this is the document where all the different, the construct of the payment and important elements of the payment is being signed off as okay. For every payment, yes for every payment that occurs within our area you will see this form, what is construct? What are we paying and that the delegated people signing off as?

CHAIRPERSON: Is that 37? Did you say 37?

ADV PHILLIP MOKOENA SC: 37.

CHAIRPERSON: Oh, okay.

ADV PHILLIP MOKOENA SC: Is it Annexure SN4A. So you say that you paid on the
20 strength of this document? Once you saw that it was signed by Ms Maya Bhana you were satisfied, by Ms Naidoo.

MR SNEHAL NAGAR: So this is the approval form. The payment is made on the strength of this approval form plus the invoice plus the supporting contract behind it.

ADV PHILLIP MOKOENA SC: Yes, okay. May I refer you to page 4 paragraph 4.5?

CHAIRPERSON: What is the page?

ADV PHILLIP MOKOENA SC: Page 4, Mr Chair.

CHAIRPERSON: Thank you.

ADV PHILLIP MOKOENA SC: Now in this paragraph you confirm, you say that Mr Kruger confirmed that the money was indeed transferred as per the instruction around 2 o' clock on the same day, on 13 April?

MR SNEHAL NAGAR: Ja. So Mr Kruger confirmed that according to the Treasury Team the funds were in the bank account ready for payment. It is another member of my team, Anthea Cupido, who confirmed that the actual payments were effected.

ADV PHILLIP MOKOENA SC: Ja. How much is effected?

10 **MR SNEHAL NAGAR:** 728 million.

ADV PHILLIP MOKOENA SC: So this was in, I mean this was an amount not initially referred to as 659, but there were other invoices that were paid also?

MR SNEHAL NAGAR: That is correct. So if you go back to the instruction email from Ms Naidoo.

ADV PHILLIP MOKOENA SC: Yes.

MR SNEHAL NAGAR: You will see that it said:

“Please pay the invoice of 659 million and please pay two other invoices that were due to Tegeta Resources. If we could make the payment earlier for the one percent settlement discount.”

20 **ADV PHILLIP MOKOENA SC:** Yes. We will come to those additional amounts. So the total that was paid before 2 o' clock was R728 million odd?

MR SNEHAL NAGAR: That is correct.

ADV PHILLIP MOKOENA SC: Yes and in paragraph 5 you elaborate as to why in your opinion this was an unusual payment.

MR SNEHAL NAGAR: That is correct.

ADV PHILLIP MOKOENA SC: Can you please elaborate why it was unusual?

MR SNEHAL NAGAR: Chairperson the first thing is that we do not normally make prepayments or we do not upfront pay for coal or a service and then only receive the service. You generally tend to receive a service and then pay for it.

ADV PHILLIP MOKOENA SC: Hm.

MR SNEHAL NAGAR: So already one that was unusual. The second unusual part about this thing is the timing to have this contract and a payment made in the time the one hour and 22 minutes that we refer to was unusual for the amount, the people involved, being started and you know with all the processes that possibly were not followed that was unusual. The other unusual part about this transaction Chair is that a prepayment generally lends to additional risk. So what I mean is if I upfront pay and I have received the services there is an additional credit risk if I had to put it against me receiving these goods which I have not and should I not receive those services then I have got to follow a process be it a litigation process or whatever process to recover this money and it is just additional risk that one does not want. Yes, to an extent it was covered by shares in the contract, but you know why would I want shares of a company that cannot pay me and agreement refers to pledge shares. So what are the pledge shares? So it just brings an additional risk. It is unusual and it is not normally what you would want to, normally a, it is not normally a transaction you would want to enter into or that we normally do enter into.

CHAIRPERSON: Would it have been or whose responsibility would it have been to check what Tegeta's shares were worth at the time to the extent that it was the agreement said that security would be provided by way of shares?

MR SNEHAL NAGAR: Chairperson.

CHAIRPERSON: In other words, I mean I, I imagine that Eskom should not place any

reliance in terms of whatever transaction they make on shares unless they knew what those shares were worth.

MR SNEHAL NAGAR: Chairperson if I refer you back to the Board Tender Committee Resolution and I think it was at point two of the resolution. It said that the CFO needs to make sure. So I assume that the CFO and the legal person who drafted this agreement took into account that.

CHAIRPERSON: Those things.

MR SNEHAL NAGAR: Very concept.

CHAIRPERSON: *Ja*.

10 **MR SNEHAL NAGAR:** That you have just brought up.

CHAIRPERSON: Hm, okay.

MR SNEHAL NAGAR: But I am speculating.

CHAIRPERSON: *Ja*, okay.

ADV PHILLIP MOKOENA SC: But we know that that agreement was signed on 13 April. The same day when the payment was effected.

MR SNEHAL NAGAR: I.

ADV PHILLIP MOKOENA SC: When could due diligence having been confirmed, been done by any person?

MR SNEHAL NAGAR: I cannot confirm the due diligence, but I.

20 **CHAIRPERSON:** Did you ever get to know why this rush, rush in terms of this payment?

MR SNEHAL NAGAR: No Chair. I do not.

CHAIRPERSON: You never got to know?

MR SNEHAL NAGAR: No.

CHAIRPERSON: Okay.

ADV PHILLIP MOKOENA SC: But I am, you held quite a senior position at the time of this transaction and you are a CA. Did you question what was happening? Did you ask someone that why are we advising such money to Tegeta, such huge money within this short space of time with wrong processes and procedures, others being corrupted, corrected post to the payment?

MR SNEHAL NAGAR: Absolutely Chair. This Chair, I mean a payment like this the process, the company involved. It was certainly startling, but here comes an instruction from your Board and I do not get to see the Board minutes. I do not know what the Board discussion is. I do not know what the reference point of the Board is, except you
10 have got an extra that says please, you know, do these one, two or three things. So you are right. I mean at every level of the organisation those questions were being asked, but to get context I mean we are not privy to that and I do not know it and I never received a conclusive answer to that question.

CHAIRPERSON: But did you ask the question?

MR SNEHAL NAGAR: Chairperson, yes and I am saying I never received.

CHAIRPERSON: To whom and what did they say?

MR SNEHAL NAGAR: Except that the Board approved this thing or a discussion happened at the Board Chair. We have, I certainly never received a, I call it an adequate response or a good response in anyway.

20 **CHAIRPERSON:** To whom did you ask the question?

ADV PHILLIP MOKOENA SC:

MR SNEHAL NAGAR: Chairperson I cannot confirm right now, but I think we asked a lot of people. I would have certainly asked Maya at that time. I would have certainly asked my other superiors and principles in the organisation, but I mean I do not think we ever, I do not think know that they also knew the answer to be frank. I do not know

except that this is the discussion that took place at the Board and at that time I think also there was a lot of leakage of information in Eskom. So there was this added call it protection and security around whatever discussions took place. So it was even harder to get context to certain transactions.

CHAIRPERSON: But would it be fair to say everyone who dealt with this transaction ought to have found it suspicious without the features that it has and how it was dealt with?

MR SNEHAL NAGAR: Chairperson there.

CHAIRPERSON: Would it surprise you if somebody did not see anything suspicious
10 about it?

MR SNEHAL NAGAR: Chairperson it was certainly this transaction was certainly startling so I mean I am not going to deny it wasn't startling, the question you're asking is did you raise questions. There was a response given, and I think some of those responses were even on TV by some of our executives about – and I'm scant on exactly what was said but it was something about Optimum needed to restart its operations, we couldn't find the coal anywhere else, we needed to procure coal from them and they were the only available supplier, they had to restart their ...(intervention)

CHAIRPERSON: No I take it that that's much later, after the payment, I'm talking more around the day that payment had to be made that whoever had something to do with it
20 to try and make get the payment effected must have found that there was something suspicious about this payment. Or would you say that would be unfair, there may be people who didn't think there was something suspicious about this?

MR SNEHAL NAGAR: No Chair like I said the transaction was certainly startling and intriguing but the issue is that at the time when the teams received this to the time they effected payment I think it was more about let's carry out the instruction. Yes there's a

concern, it's intriguing, but there's also an instruction so let's carry that out, we can worry about the – call it the story later, and that was certainly the view on the 13th of April of April date.

CHAIRPERSON: Okay.

ADV PHILLIP MOKOENA SC: You keep on using the words startling and intriguing, I mean governance issues were at stake in this transaction, am I correct?

MR SNEHAL NAGAR: Chair governance issues were at stake and I thought we had followed them by getting the approvals and necessary supporting documentation and stuff like that.

10 **ADV PHILLIP MOKOENA SC**: And dealing with the matter by means of incorrect procedures as well?

MR SNEHAL NAGAR: I thought we had gotten approval for that, hence I'm saying I thought the governance and stuff was covered.

ADV PHILLIP MOKOENA SC: Now can we move ...(intervention)

CHAIRPERSON: Probably governance issues were not covered if you used the wrong procedures, but you may have – that is when I say you and your team may have covered yourselves by making sure that there was approval for the wrong procedure to be used, you may have covered yourself against your – anybody senior saying but why did you follow a procedure that is not part of Eskom, then you would say well we were –
20 we got approval from Ms Naidoo or somebody.

MR SNEHAL NAGAR: Chair it's covering yourself against an instruction to pay something at a certain time.

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: Yes, yes.

CHAIRPERSON: Yes, no what I'm saying is your answer seems to suggest that you

were covered in terms of doing something that you and I'm talking about you and your team, that you could see was wrong in terms of the procedure, you covered yourself but there's nothing based on your own evidence that suggest that this whole transaction was done in a manner that showed respect for issues of proper governance and so on,

MR SNEHAL NAGAR: Yes sir we certainly didn't follow the correct procedure in the way it should have been normally done.

CHAIRPERSON: Ja, ja, okay.

ADV PHILLIP MOKOENA SC: What could have happened with another, if you told whoever that instructed you to say that I am a Chartered Accountant, I am here at
10 Eskom to ensure that you know Eskom respect governance issues. I am not going to append my signature or to agree that such a transaction must actually on with my name being associated with such a transaction, I am not going to support it. Didn't you have that choice at the time? I know that you say it's an instruction.

MR SNEHAL NAGAR: Chair again I think one needs to – I think we need to be a bit careful, so here I've got my Board and like I said the highest office instructing us to do something, there's a fine line – and I don't know the context of their instruction and where it's coming from and I don't know the details behind it except here is it, you know do it. That Chair is one, there is certainly like I used the words startling and intrigued, why am I paying somebody R659million to prepay for coal, and I don't understand the
20 details behind it. On the back of that I think not doing this is also insubordination and Chair if I can give you context I mean we have had experiences where we had had agreements, as an example within our area we had a transporter – we've got coal transporters that transport coal for us. Those transporters have a contract and a rate associated with the contract. We through one of our sort of cost saving mechanisms had that contract reduced, meaning the price reduced. Matshela Koko went to the

Board and asked for the Board or for some reason again we don't understand the context to it because we don't know the discussion at the Board, asked them to reverse that price saving proposal. When the Head of the then Primary Energy tried to refuse as you put it she was suspended and later you know sort of exited the organisation. Now that whole process of not following an instruction Chair is ugly if I can say it, and expensive and when you follow that you're on your own from an Eskom perspective, there's no support behind you there, so I think, I'm not trying to use that as an excuse I'm saying but understand that here's an instruction from an entity when you don't follow that's the one leg of how they treat you, so here you're sitting with a transaction I
 10 don't understand the context, I'm making sure that from a transactional/governance point of view we are covered because there's an instruction, make sure you've got it, so I think that was really the mindset on the 13th of April when this transaction was being effected.

CHAIRPERSON: And all of this is supposed to happen within a very short space of time that is not enough time to try and get all the answers?

MR SNEHAL NAGAR: That is correct.

CHAIRPERSON: So you have to think about what you do, do you refuse to be party to it even though you don't have all the answers to whatever questions you might have but at the same time you don't want to be party to something that's not right.

20 **MR SNEHAL NAGAR**: Chairperson I ...(intervention)

CHAIRPERSON: Or that you suspect is not right, if it goes only up to a suspicion.

MR SNEHAL NAGAR: Chairperson the transaction looks startling, it looks intriguing but I'm relying on the ethics and the principles of my superiors and principals, and I'm assuming that that conduct, that ethical conduct, that review, that – I'm missing the right word now but the – not the – the construct of this deal insofar as it meeting the ethics,

morals, values and governance and its value for Eskom was certainly considered by those decision makers and when they instruct us to do something that I assume is a given. Now when I look at this thing and it looks startling and I don't have any other information, besides I am startled, it's very difficult to just push back. Had I known something more, had I known something it would have been certain, I would have probably certainly taken a different course of action, but not knowing anything except please do something and from the highest office in our entity it's very difficult to say no.

ADV PHILLIP MOKOENA SC: Can I refer you – I just want to wrap up on this issue of the 65.

10 **CHAIRPERSON:** What page?

ADV PHILLIP MOKOENA SC: If I can refer you to page 26 and I just want to understand you know your evidence in light of the document that you had time to peruse or maybe subsequent you did peruse. We know from reading on page 26 that what was envisaged in this agreement is for Tegeta to procure you know coal from Optimum and then it will go to Eskom, but at that time what was the contractual relationship between Optimum and Eskom? Was Optimum able to fulfil its obligations?

MR SNEHAL NAGAR: No and I think at that time Optimal was also under business rescue.

20 **ADV PHILLIP MOKOENA SC:** Yes now if this entity was unable to carry out its obligations to Eskom at the time when they had a direct relationship what made Eskom at this stage to believe that if not Tegeta it's in place it will be able to comply I mean it's the same mine.

MR SNEHAL NAGAR: Chairperson I cannot comment on that question, I assume the people that discussed and signed this deal would have that answer.

ADV PHILLIP MOKOENA SC: There's an explanation for this?

MR SNEHAL NAGAR: Ja.

ADV PHILLIP MOKOENA SC: Am I correct?

MR SNEHAL NAGAR: I can't respond to that question Chair.

ADV PHILLIP MOKOENA SC: Yes, I understand, but I'm simply asking it from you know this – remember that this is one of the documents which you say that you did peruse, be it after the money was paid but I mean one of the things that one would have raised your team or anyone else was that but why, why take it, why is it special, we know that they are going to source from Optimum, we are having problems with the very same mine, it is under business rescue, it can't pay us.

10 **MR SNEHAL NAGAR:** Chair you're correct yes.

ADV PHILLIP MOKOENA SC: It doesn't make sense.

MR SNEHAL NAGAR: No, no it doesn't make sense, the question was why, and those questions we also had the same concerns.

ADV PHILLIP MOKOENA SC: Yes. Now I need to deal with a new topic but I will come back to those issues there's just one or two things that I wanted to clarify. Can we go to paragraph 7 of your statement, it's on page 6 Mr Chair, and in that paragraph you are now introducing a new topic pertaining to the calculation of the penalty amount and the settlement agreement which followed thereafter, am I right?

MR SNEHAL NAGAR: Page 6?

20 **ADV PHILLIP MOKOENA SC:** Page 6 yes.

MR SNEHAL NAGAR: Yes correct.

ADV PHILLIP MOKOENA SC: Now before dealing with these contents, you know the contents of or the contents under that topic, maybe to lay down the basis and for you to assist us to understand issues far more better. Would I be correct that the relationship between Eskom and the supplier of coal would be regularised by means of

a coal supply agreement?

MR SNEHAL NAGAR: That is correct.

ADV PHILLIP MOKOENA SC: It's correct, okay. And would such a contract also contain within it the specific quality of coal that must be supplied to Eskom?

MR SNEHAL NAGAR: That is correct.

ADV PHILLIP MOKOENA SC: It will also contain within itself issues of penalty in the event that the coal does not meet the required specifications.

MR SNEHAL NAGAR: That is correct.

ADV PHILLIP MOKOENA SC: Yes, now just to make the Chair to understand at
10 what time of the transaction would a coal supplier you know make the supplier to attract
you know the penalties?

MR SNEHAL NAGAR: What would make the supplier attract penalties?

ADV PHILLIP MOKOENA SC: Yes.

MR SNEHAL NAGAR: So Chairperson like what was said by Mr Mokoena the coal
supply agreement would stipulate what qualities we want to buy and what qualities the
supplier needs to deliver. Normally these qualities are a bit of a range depending on
the qualities that you are referring to. Should be outside of that range there could,
depending on what was agreed to in the contract penalties applied, so for instance if
you had to give me coal with an abrasive index of less than 400 and you give me coal
20 with an abrasive index of 500 then there's potentially a penalty associated with that
supply of coal with the quality parameter that's outside of the parameters that we
wanted to purchase.

CHAIRPERSON: Is there a process of recording such penalties?

MR SNEHAL NAGAR: Is there a process for recording such penalties? The process
that is followed is so it – and it depends on the supplier, we've got nine long-term

agreements and those long term agreements are agreements where the coal is right there, I mean the coal mine is right next to the power station, for those agreements you find coal coming across the belt, it is sampled, and the quality of that coal comes in two/three days later when the labs actually send the results. The quality parameters for the supply of coal whether it's measured hourly, three hourly, daily whatever it is those qualities, that quality is recorded, the quality is agreed normally between Eskom and the mine and it is signed off by the respective geologists. For coal supply that comes in from contracts that are away from the power station, and I'm generally speaking, generally all those contracts are – the coal is first pre-certified, so when we talk about
10 pre-certification we say there's a heap of coal, they measure the qualities first, when that quality is known for that stockpile that stockpile is delivered to Eskom and that's how we – and that quality that is measured is agreed to again between – it is provided by an independent laboratory and agreed to between Eskom and the mine.

ADV PHILLIP MOKOENA SC: Yes. Now let's take it a step further. Would there be a period prescribed pertaining to when these penalties must be paid by a supplier?

MR SNEHAL NAGAR: It would be regulated by the agreement.

ADV PHILLIP MOKOENA SC: By the agreement, yes. Sometimes there's what is referred to as the hardship claim, how does that come into being in these contracts?

MR SNEHAL NAGAR: Hardship claim? If you're specifically referring to the hardship
20 claim is when one party is aggrieved and wants to invoke the terms and conditions of that hardship claim and I think the hardship claim or hardship clauses also vary contract to contract but that's when it would be invoked.

ADV PHILLIP MOKOENA SC: Yes, now within Eskom who would be responsible, I mean which division or person would be responsible to manage the coal contracts?

MR SNEHAL NAGAR: It is the coal operations team within the Primary Energy Team.

ADV PHILLIP MOKOENA SC: And what would the role of the contract manager, would there be a contract manager?

MR SNEHAL NAGAR: They are the contract managers, so when I say coal operations team I am saying they are the contract managers, they manage the coal contracts and the supply of coal that we procure.

ADV PHILLIP MOKOENA SC: Now in your own words just give us brief synopsis of relevant background facts, which led to you being responsible or responsible for the computation of the penalty in this agreement between Eskom and Optima.

MR SNEHAL NAGAR: So Chairperson I think you are aware that there was a coal
10 supply agreement between Eskom and Optimum Colliery for the supply of coal. Around 2014 there was a corporation agreement that was signed between Glencore and Eskom which sort of suspended certain terms and conditions of the contract so that the parties could negotiate a different outcome. That contract or that cooperation agreement ended around May/June 2015. When that contract ended or that cooperation agreement ended the – because the terms ...(intervention)

ADV PHILLIP MOKOENA SC: Mr Nagar did it end or was it cancelled, do you know, or was it terminated?

MR SNEHAL NAGAR: It was certainly stopped, I would have to get the exact legal term whether we – it was certainly stopped or ended by Eskom.

20 **ADV PHILLIP MOKOENA SC:** Do you know by who particularly in Eskom?

MR SNEHAL NAGAR: I think it was Mr Brian Molefe but I would have to confirm the letter suspending it.

ADV PHILLIP MOKOENA SC: Alright, you may proceed it's now terminated.

MR SNEHAL NAGAR: So Eskom had a claim because the terms and conditions of the penalty clauses were suspended Eskom had a retrospective claim towards Optimum

Colliery for the coal they supplied which did not meet the quality specifications as per the agreement. So we were then called in to a meeting and it's important also to note that I think at that point in time we had appointed Cliffe Dekker Hofmeyr as our attorneys to deal with this matter so at that point in time we were called into a meeting and my team or specifically I had been requested to assist the contract – I mean the contract managers or the coal operations team in computing this claim. I had again asked one of my senior members of my team, it happens to be Christo again, Christo Kruger, but Christo Kruger assisted me or assisted the coal operations team in calculating this claim and this claim amounted to this now infamous R2.1billion claim

10 that Eskom put in towards or claimed from Glencore.

ADV PHILLIP MOKOENA SC: Which year are we talking about here?

MR SNEHAL NAGAR: We are talking June/July 2015.

ADV PHILLIP MOKOENA SC: June/July 2015 that is the first computation that you did.

MR SNEHAL NAGAR: That is the first computation. It is also important that because this was our claim it was my understanding that this was the initial process of a claim and that the claim would always be revised as call it the dispute process unfolds or evolves.

ADV PHILLIP MOKOENA SC: Yes, before you proceed Mr Nagar, Mr Chair I am
20 referring you to Annexure SN5 on page 40, but we realise that those, that document it's not visible enough to follow the evidence of the witness, we have no produced the A3 which I find much more better and one can read them but we have done it so in respect of Annexure SN9A, Annexure SN11A, and Annexure SN11B, we have accordingly marked them so that you are able to place them where they belong Chair, I beg leave to hand them over to you.

CHAIRPERSON: Thank you, no that's fine. Registrar. Yes?

ADV PHILLIP MOKOENA SC: Mr Nagar I then refer you to page 40 is Annexure SN5 but you do have a far much more better copy that has been placed before you if you can look at the A3 version of it, next to the table somewhere there.

MR SNEHAL NAGAR: Yes, I've got it Chair.

ADV PHILLIP MOKOENA SC: Yes, now can you take us through this schedule and explain to us as to how you arrived at the figure of 2.1billion where you can also explain to the Chair what source documents did you have to peruse for you to be able to come to that figure?

- 10 **MR SNEHAL NAGAR:** Chairperson so what you have in front of you is a summary of the calculation, if I can refer you to column 10 of the schedule in the sort of dark grey shaded area at the bottom you will see a payment called 2176, 530 611.99, which is effectively the R2.1billion claim that we speak about. So that is – this is the summary of the computation. Now the question is how do we come out with this thing So we have a contract, the contract regulates what coal qualities, the supplier is expected to deliver and if they deviate from that expected range what are the penalties they would pay. So from the period March 2012 to May 2015 behind this computation sits daily coal deliveries for different parameters of coal that ...(intervention)

CHAIRPERSON: I'm sorry that is from March 2012 to May 2015.

- 20 **MR SNEHAL NAGAR:** March 2012 to May 2015.

CHAIRPERSON: Okay, yes.

MR SNEHAL NAGAR: So behind this calculation, and like I said a summary, there is a daily coal deliveries, so the quantum of coal you received and the qualities associated with that coal, and the qualities that we are referring to is sizing which is how fine a material is, AI, how abrasive the material is, the energy in the coal which is the CV and

your ash content, now that underpins this calculation, so you've got a contract and the contract says like I explained to you earlier where I think I used the AI as an example, if you must give me coal with an AR of less than 3/400 and you give me something on a 500 then there's a possible penalty payable.

Where this calculation gets very complex is that it's got a lot of – so the calculation also works on a rolling average, so if you are three days out of spec on a certain quality your penalty might be nothing, but if you are four days out of a spec on a certain quality then you would have a 25% penalty on the price of that coal, or a – there will be a price – I mean there's a rate that's in the contract, that's determined up
10 front when this contract was negotiated and how you would levy it.

So the contract the calculation of this penalty was derived by comparing what we received and what the contract had said and calculating what the penalty would be.

CHAIRPERSON: Alright.

ADV PHILLIP MOKOENA SC: Chair for your clarity also the ten periods are indicated on the extreme left hand side, you will see that it starts from March 2012 and the last date it's May 2015 yes.

CHAIRPERSON: Yes, no, no I see. Well it looks like the principle on the basis of which you made calculations is simple. You look at what the contract says the supplier
20 must supply in terms of quality and in terms of quantity, and then you look at what was actually supplied by the supplier, in terms of quality and in terms of quantity and to the extent that what the supplier has actually supplied falls short of what is required in terms of quality and quantity by the contract then the penalties kick in, is that right.

MR SNEHAL NAGAR: In theory Chair you are correct.

CHAIRPERSON: Ja.

MR SNEHAL NAGAR: It should be that simple, and it should operate in that manner.

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: But with regards to this agreement there was a difference in the interpretation of the penalties that – the application of the penalties and premiums for the different qualities specifications.

CHAIRPERSON: Yes, it's the application that may have given rise to challenges.

MR SNEHAL NAGAR: Correct.

CHAIRPERSON: The principle itself appears to be simple, but the application may have been problematic in terms of different interpretations.

10 **MR SNEHAL NAGAR:** Correct.

CHAIRPERSON: Okay, alright.

ADV PHILLIP MOKOENA SC: Chair I see that it is one o'clock, would this be an appropriate time to adjourn.

CHAIRPERSON: Yes, let's adjourn until two o'clock. We adjourn.

INQUIRY ADJOURNS

INQUIRY RESUMES

CHAIRPERSON: Yes you may proceed Mr Mokoena.

20 **ADV PHILLIP MOKOENA SC:** Mr Nagar before the lunch adjournment we were dealing with a document on page 40 Annexure SN5. Just to recap. You say this schedule was prepared by you and your team?

MR SNEHAL NAGAR: That is correct.

ADV PHILLIP MOKOENA SC: And the purpose was to compute the penalties in order to – in order for Eskom's attorneys to launch a claim against Optimum?

MR SNEHAL NAGAR: That is correct.

ADV PHILLIP MOKOENA SC: Yes. And at this point you were satisfied that this

computation took into account all relevant documents and applied properly the clauses of the agreement?

MR SNEHAL NAGAR: Chair.

ADV PHILLIP MOKOENA SC: In order to come to this amount of R2.1 billion?

MR SNEHAL NAGAR: Chairperson at that point in time we had calculated this number in accordance with the agreements. In hindsight there were some errors to the spreadsheet which I will explain as we go forward.

ADV PHILLIP MOKOENA SC: Yes.

CHAIRPERSON: You said that there were certain challenges or problems in the particular application of the principle that you stated?

MR SNEHAL NAGAR: Yes.

CHAIRPERSON: Are you able to just highlight some of those practical or what cause the practical challenges?

MR SNEHAL NAGAR: Chair not all of them.

CHAIRPERSON: Ja.

MR SNEHAL NAGAR: But some of them.

CHAIRPERSON: Ja some of them.

MR SNEHAL NAGAR: I think the contract manager for this will probably better be able to explain all of those.

CHAIRPERSON: Oh okay alright okay.

MR SNEHAL NAGAR: But I know one of them was like the – the application of the weighted average. So I mean rolling average. So in the particular case though the penalty like I said says that if you in three days penalty then such percentage applies. Four days a different percentage. Five days a different. And I know there was a different interpretation where if you – and I am just using this as an example. If you

were three days in penalty and the fourth day you were not then they assumed it to be a different way you calculate the rolling average.

CHAIRPERSON: Okay.

MR SNEHAL NAGAR: That was one of the items.

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: But there were a number Chair.

CHAIRPERSON: Okay.

MR SNEHAL NAGAR: And I would not know all of them.

CHAIRPERSON: Okay thank you.

- 10 **ADV PHILLIP MOKOENA SC**: And in paragraph 7.3 if you may turn to page 7 of your statement. You deal or you record the Optimum's failure to comply with the agreement in as far as the quality of the coal is concerned, am I correct?

MR SNEHAL NAGAR: That is correct.

ADV PHILLIP MOKOENA SC: And that is from the period of March 2012 to 31 May 2015? Am I correct that period that you are concerned with in that paragraph?

MR SNEHAL NAGAR: That is correct.

ADV PHILLIP MOKOENA SC: Yes. May I refer you to Annexure SN6. It is on page 42 Mr Chair.

CHAIRPERSON: What page – 32?

- 20 **ADV PHILLIP MOKOENA SC**: Page 42, 42.

CHAIRPERSON: Okay.

ADV PHILLIP MOKOENA SC: Will that be one of the agreements that you referring to?

MR SNEHAL NAGAR: Yes one of the clauses of the agreement.

ADV PHILLIP MOKOENA SC: Yes.

MR SNEHAL NAGAR: Yes.

ADV PHILLIP MOKOENA SC: And the clause that you place reliance on in order to demonstrate how the penalties are computed or what one takes into account when computing the penalties it is clause 3.4 on page 42?

MR SNEHAL NAGAR: That is correct.

ADV PHILLIP MOKOENA SC: Now can I ask you for the importance of this clause simply to read in Clause 3.4.2 up until 3.4.33. It starts on page 42 the Clause 3.4.2 if you can read it.

MR SNEHAL NAGAR: Yes.

10 **ADV PHILLIP MOKOENA SC:** Proceed to read it.

MR SNEHAL NAGAR: You want me to read it?

ADV PHILLIP MOKOENA SC: Yes please.

MR SNEHAL NAGAR:

“All coal to be supplied and delivered by Optimum Colliery to Eskom in terms of this addendum shall have an ash content which shall not exceed 28.8%. It been recorded that it is the intention of the parties that the typical C calorific value of the coal supplied and delivered by Optimum Colliery to Eskom shall not be less than 23 mega joules per kilogram calculated on a moisture free basis.”

20

ADV PHILLIP MOKOENA SC: Before you proceed to another clause can you simplify what is being conveyed in that clause?

MR SNEHAL NAGAR: Sure. What basically it is saying is that the coal supplied should not have an ash content meaning you – the – remember we spoke about the different qualities of the coal. So your ash content shall not be greater than 28.8 and

your – you CV value the energy quantity of the coal on a moisture free basis should not be less than 23 mega joules per kilogram.

ADV PHILLIP MOKOENA SC: And when the coal is being supplied to Eskom this is one of the things that will be taken into account whether does it comply or not with this clause?

MR SNEHAL NAGAR: Yes. Chair so this is not the only thing.

ADV PHILLIP MOKOENA SC: Yes.

MR SNEHAL NAGAR: If and I said this is one of the clauses. The – one of the complexities of this contract is and if I can give some context?

10 **ADV PHILLIP MOKOENA SC:** Please.

MR SNEHAL NAGAR: There is the main coal supply agreement that was signed in 1993 and then there are a few addendums post that contract. I think there are about three or four addendums. Now the – this is I think addendum 1, this 3.4 and it refers to coal qualities that are now amending the original coal supply agreement. But there were coal qualities subsequent to this that were also amended. So when you read this agreement and when you refer to qualities this is the quality corridor in how you would calculate the differential between what you received versus what the contract says. But in understanding what the contract says you actually need to read all four – three or four addendums together with the main agreement to see what quality parameters are
20 there. So this is what this clause says but I just need to make sure.

ADV PHILLIP MOKOENA SC: Definitely.

MR SNEHAL NAGAR: Ja.

ADV PHILLIP MOKOENA SC: I understand so if I understand your evidence correctly you are saying that this is one of the clauses that you looked at 3.4.

MR SNEHAL NAGAR: Yes.

ADV PHILLIP MOKOENA SC: But there are also other addendum which you went through in order to compute the penalties which were – which Eskom – were – was entitled to?

MR SNEHAL NAGAR: That is correct.

ADV PHILLIP MOKOENA SC: And it is your evidence that from having looked at all those documentations Eskom came to the conclusion that Optimum was failing to supply the coal in respect of what was specified in those agreements including the addenda?

MR SNEHAL NAGAR: That is correct.

10 **ADV PHILLIP MOKOENA SC:** Yes.

MR SNEHAL NAGAR: That is correct Chair based on an interpretation of the agreement.

ADV PHILLIP MOKOENA SC: Yes.

MR SNEHAL NAGAR: Yes.

ADV PHILLIP MOKOENA SC: The interpretation of the agreement was done by individuals within Eskom who knew exactly how to compute the penalties and that is the reason – and that is why you produced subsequent schedules reflecting the penalty amount?

MR SNEHAL NAGAR: Chair to clarify that point.

20 **ADV PHILLIP MOKOENA SC:** Yes.

MR SNEHAL NAGAR: The computation as you had earlier stated is the result of an interpretation. The interpretation there was a difference in interpretation between Eskom and Glencore. The settlement of an Eskom interpretation of the agreement was done between call it the Eskom contract management team managing this contract, the legal – our legal counsel being Cliff Decker and my finance team. So they settled on an

interpretation and this computation is based on that interpretation of the agreement.

ADV PHILLIP MOKOENA SC: I understand. I am concentrating for now on the side of Eskom.

MR SNEHAL NAGAR: Okay.

ADV PHILLIP MOKOENA SC: That from the officials of Eskom those who were tasked with computing the penalties you took account all the relevant documentation, applicable clauses, applicable addenda and you arrived at that particular figure?

MR SNEHAL NAGAR: That is correct.

ADV PHILLIP MOKOENA SC: That is what I am saying.

10 **MR SNEHAL NAGAR:** That is correct.

ADV PHILLIP MOKOENA SC: And you were happy premise on what you have done that that amount that you came with was what Eskom was entitled to?

MR SNEHAL NAGAR: At that point yes.

ADV PHILLIP MOKOENA SC: Yes. Now may I refer you to page 8, paragraph 7.4? In this paragraph you refer to the spreadsheet that was prepared by Mr Kruger for the period 1 March 2012 to 21 May 2015. Can you summarise for us the contents of this paragraph and the involvement of Mr Kruger or your team?

MR SNEHAL NAGAR: Chairperson so like I had before lunch given context that there was this corporation agreement. The corporation agreement ended. We were asked to
20 compute this penalty. I had asked Mr Kruger to help me calculate this penalty. In arriving at this calculation we used the agreement as we have said. The computation was done together with the contract managers and our legal team. It was important to stress that because there was a difference in opinion we had to interpret what we thought the agreement said and based on that we arrived at a computation.

ADV PHILLIP MOKOENA SC: And what was the role of Mr Opperman?

MR SNEHAL NAGAR: Mr Opperman was the contract manager for Optimum Colliery [indistinct] the Optimum Colliery Coal Supply Agreement at that point in time. So he would have played an integral part in the interpretation as well as the calculation of this penalty.

ADV PHILLIP MOKOENA SC: Did he do a separate computation or the computation that we are seeing here were done by the entire team including Mr Opperman, Mr Kruger, yourself and other team members?

MR SNEHAL NAGAR: No there was one calculation to my understanding and it was this calculation.

10 **ADV PHILLIP MOKOENA SC:** Thank you.

MR SNEHAL NAGAR: So, so Chairperson it is also important in terms of the clause 74 to point out something And that is if you looking at the schedule SN5 in front of you, this A3 schedule I had shown – I earlier indicated to you there was a 2.176 billion amount that was calculated which is this dark greyish area.

CHAIRPERSON: Yes, ja. Ja I have got that.

MR SNEHAL NAGAR: Just to the left – to the left of that you can see an amount of R158.4 million.

CHAIRPERSON: Yes.

20 **MR SNEHAL NAGAR:** Now if you – so just look up you can see the various months that the penalties were charged. So initially the penalty that was applied by Eskom for the period March 2012 to May 2014 amounted to R158 million.

CHAIRPERSON: And that is the amount on – to the left of ...

MR SNEHAL NAGAR: Of the R2.1 billion.

CHAIRPERSON: The R2.1 billion.

MR SNEHAL NAGAR: Yes.

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: So I am saying what we found when we did the – when we were asked to compute this calculation was that there were penalties that were levied and those penalties like I said or indicate totalled 158 million for the different months. And it is important one that we give you context that as this – as we give evidence here that we take this into account that 158 million was originally deducted.

ADV PHILLIP MOKOENA SC: Yes.

MR SNEHAL NAGAR: Do I just continue or?

ADV PHILLIP MOKOENA SC: No.

10 **MR SNEHAL NAGAR**: Okay.

CHAIRPERSON: Just before you proceed now. Under that column which ends with the R158 million it is reflected that or by a certain number of months I do not know how many maybe six I do not know there was zero penalty for each month, is that right?

MR SNEHAL NAGAR: That is correct Chair and if I...

CHAIRPERSON: If – I do not know if you must have applied your mind also to – or would that have been because at the time of doing the calculation the penalties for those months have not yet been imposed or collected or deducted?

MR SNEHAL NAGAR: No Chair the – for the months that you see zero.

CHAIRPERSON: Ja.

20 **MR SNEHAL NAGAR**: Is the months where there was this corporation agreement.

CHAIRPERSON: Oh.

MR SNEHAL NAGAR: Between Eskom and Glencore that suspended.

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: So that is why there is zero. So zero penalties applied by Eskom.

CHAIRPERSON: Oh okay.

MR SNEHAL NAGAR: During that corporation agreement process.

CHAIRPERSON: Okay.

MR SNEHAL NAGAR: Ja.

ADV PHILLIP MOKOENA SC: But once the corporation agreement was terminated it would – that meant that the entire terms or the agreement became applicable?

MR SNEHAL NAGAR: Absolutely.

ADV PHILLIP MOKOENA SC: And when you compute you look also compute take into account that period when it was suspended?

10 **MR SNEHAL NAGAR:** Well – well the penalties became applicable after the corporation agreement suspended. Like – ended like you had said. So for the period going back you would have to compute what penalties were due and payable.

ADV PHILLIP MOKOENA SC: That is what I am trying to say.,

MR SNEHAL NAGAR: Yes.

ADV PHILLIP MOKOENA SC: Now let us go to page 9 and page 10 and explain to the Chair how did those computations come to be? Page 9 and page 10 of your statement.

MR SNEHAL NAGAR: Sure. So ...

ADV PHILLIP MOKOENA SC: We are now moving away from that SN50 we are trying to understand what then happens subsequently.

20 **MR SNEHAL NAGAR:** Yes. So SN – so the investigating team when we put this affidavit together requested us to look at this R158 million that was paid. The – I mean that was initially deducted from Glencore. And they requested us to give a detail of what was deducted. For what penalties, what – what did – what was applied. So Chairperson if you look at SN009 you will see that and if I can sort of orientate you, you can see right at the bottom on the right hand side corner you will see the total

amounting to R158 386.

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: So that is the 158 million total penalty that was – that was applied.

CHAIRPERSON: And is that the same amount that we were looking at on the spreadsheet?

MR SNEHAL NAGAR: That is correct.

CHAIRPERSON: Ja. Okay.

MR SNEHAL NAGAR: Now the columns before that so the first column on the table
10 deals with AI penalties then the next column is CV penalty and I know it is not that legible. So the first column is AI, the second column is CV, the third column is ash and the fourth column is sizing.

CHAIRPERSON: Please remind me what would be AI again

MR SNEHAL NAGAR: AI would be abrasive index penal – the abrasive index quality.

CHAIRPERSON: Okay.

MR SNEHAL NAGAR: Then it is the CV quality. Then it is your ash, then it is your sizing. So Chairperson you can see that for the period from the period March 2012 all the way down to May 2014 the sizing quality parameter was never applied.

ADV PHILLIP MOKOENA SC: And now if it was going to apply if you back to this table
20 that you have explained to us AI, CV, Ash and Sizing which one carries most penalties in this – in the context of this pattern?

MR SNEHAL NAGAR: In the context of this computation the sizing carries the maximum I mean the most amount of penalties. If you use the interpretation of the agreement.

ADV PHILLIP MOKOENA SC: Alright proceed.

MR SNEHAL NAGAR: Ja if I take you back to...

CHAIRPERSON: Before you do that you just talked to us about the sizing penalties. Does the fact that it is blank under that column until 406 million does it mean that during that period March 2012 to August 2013 there were no issues of sizing that – between the parties? In other words Eskom was not complaining about size – the size and so on?

MR SNEHAL NAGAR: No I would say

CHAIRPERSON: It does not meant that?

MR SNEHAL NAGAR: No.

10 **CHAIRPERSON:** Okay what does it mean?

MR SNEHAL NAGAR: All this table is basically trying to reflect is what penalties were actually applied.

CHAIRPERSON: Oh just that they ..

MR SNEHAL NAGAR: When we...

CHAIRPERSON: They were not applied in regard in sizing?

MR SNEHAL NAGAR: Yes.

CHAIRPERSON: Yes but that does not necessarily mean there were no issues – there were no – there might have been complaints but no penalties were applied?

MR SNEHAL NAGAR: That is correct.

20 **CHAIRPERSON:** Okay.

MR SNEHAL NAGAR: So sizing – so one of the things when you look at this calculation of the penalties that were levied for the period March 2012 to 2014 sizing was never applied. If you just look at to the left of sizing you can see that the CV and ash penalty were also no applied for the period March 2012 all the way to August 2013.

ADV PHILLIP MOKOENA SC: That is where there is now blanks, there is nothing that

is indicated?

MR SNEHAL NAGAR: Yes in the blanks. So the fact that there is a blank it was never applied. And we saying that there were. So if you look at SN5 spreadsheet the orientation you can see there is penalties everyone on all the different quality parameters. But in 20 – during this period those were never applied. And the AI penalty was applied but the AI penalty was applied at a rate which was not escalated. So the contract says that if you have got a R10,00 per tonne penalty for a high and I am just using it for – as an illustrated purposes. The R10,00 escalates with inflation over time. This application in this 158 million the R10,00 was never escalated or the base
10 price for AI was never escalated. So this was just sort of giving an appreciation of what the 158 million that was originally deducted what it comprised of. If I then Chair go to the next page which SN10.

ADV PHILLIP MOKOENA SC: And also this 158 what it did not take into account?

MR SNEHAL NAGAR: Just repeat that please?

ADV PHILLIP MOKOENA SC: I am saying that this 158 you also indicating what it did not take into account also.

I am saying that this 158 you also indicating what it did not take into account also.

MR SNEHAL NAGAR: Yes. So that is correct yes. So Chairperson on SN10 you can see this is the calculation. So we then asked compare the 2.1 billion calculation that
20 you did to this 158 million and explain. This table just merely sets that out. But Chair what this table is basically stating and it is exactly what I have told you now. That you can see sizing was never applied. The ash penalty and the CV penalties were not applied for the period between March 2012 to September 2019 and the AI penalty between March 2012 and September 2013 was applied at a different rate or an incorrect rate. And I – and Chair I summarised that on page

ADV PHILLIP MOKOENA SC: Page 11.

MR SNEHAL NAGAR: Page 11.

ADV PHILLIP MOKOENA SC: So what we see on page 11 is that comparison that you have done between page 9 and page 10.

MR SNEHAL NAGAR: That is correct.

ADV PHILLIP MOKOENA SC: And the summary is to what was missing or what was not done one can find it on page 11?

MR SNEHAL NAGAR: Yes under those A, B and C tabs.

ADV PHILLIP MOKOENA SC: Alright. Now may I refer you to page 53.

10 **MR SNEHAL NAGAR:** Sorry I look at page?

ADV PHILLIP MOKOENA SC: 53. Page 53.

MR SNEHAL NAGAR: 53.

ADV PHILLIP MOKOENA SC: Now can you take us through that identity that document and take us through it?

MR SNEHAL NAGAR: This is an email from Suzanne Daniels and the email is to me and copying Rashelda Moodley from Cliff Decker and the subject of the email is Eskom/Optimum and it basically states:

20 “Hi Snehal can you please look at Annexure A of the attached documents and verify the contents of paragraph 6 for me. We are in the process of settling this matter and I will need assistance that the figures and calculations are correct. Kindly revert soonest. Regards Suzanne.”

And it is important to note that this email is sent on the 2 March 2017 at 6:23 pm.

ADV PHILLIP MOKOENA SC: Yes. Now this will be now the second computation that you are now requested to do. The first one you have already taken the Chair through it

and the amounts of the first one, am I correct?

MR SNEHAL NAGAR: Chair so in 2015 please do a computation, here is the computation for the purposes of a claim.

ADV PHILLIP MOKOENA SC: Yes.

MR SNEHAL NAGAR: In 2017 we – this is an email that says:

“We have settled per this email we are busy”

CHAIRPERSON: We are busy settling...

MR SNEHAL NAGAR:

“We are in the process of settling this matter”

10 **CHAIRPERSON:** Ja.

MR SNEHAL NAGAR:

“And can you please verify the computations of the attached document.”

Now the Annexure A of – I mean the Annexure A they refer to in this email in paragraph 6 is on...

ADV PHILLIP MOKOENA SC: We will come to that but

MR SNEHAL NAGAR: Oh okay.

ADV PHILLIP MOKOENA SC: I just want to capture some of the important facts here.

Now during this time would I be correct that now this – during the Tegeta period where
20 now the mine is being its own by Tegeta. When the settlement is now being reached?

MR SNEHAL NAGAR: Yes that is correct.

ADV PHILLIP MOKOENA SC: Yes. Alright you were saying that you are now referred to Annexure A and that Annexure A you will find it on page 63. 63 Mr Chair and it is marked S Annexure SN9B. Is this the document that you referring to that was annexed to the email of the 2 March 2017?

MR SNEHAL NAGAR: That is correct.

ADV PHILLIP MOKOENA SC: And you were requested to specifically look at paragraph 6, is that correct?

MR SNEHAL NAGAR: That is correct.

ADV PHILLIP MOKOENA SC: Could you please read paragraph 6 into the record?

MR SNEHAL NAGAR: So paragraph 6 is:

10 “The amounts for September and May of the calculation table
submitted by Eskom is incorrect. The agreement is specific that
the penalties will be limited to the amount of the distribution fee
in the event of the penalty amount exceeding the distribution fee.
The amounts should be 66.38 million and 63.45 million
respectively. Be that as it may purely in an attempt to settle the
matter we will not make an issue of these amounts.”

Paragraph 6 then continues to the next page Chair. It says:

 “Our previous offer of 238.9 million was based on the following
calculation”

And they reflect a table of how they get to this 239 million. It then further goes on to
say:

20 “Our final offer now is an amount of R254,9 million in full and
final settlement. The amount is calculated as follows”

And they table a calculation arriving at the 244 million that they refer to.

ADV PHILLIP MOKOENA SC: So this is against the background of the computation
that you – that your team did which reflected at least an amount of R 2.1 billion?

MR SNEHAL NAGAR: That is correct.

ADV PHILLIP MOKOENA SC: Yes. Now in order to address the request from Ms

Daniels you had to look at certain documents in order to recalculate the amounts, am I correct?

MR SNEHAL NAGAR: That is correct.

ADV PHILLIP MOKOENA SC: May I refer you to page 58. Now that is the email which you received from – this is the email that you sent to among others Ms Suzanne Daniels, am I correct?

MR SNEHAL NAGAR: That is correct.

ADV PHILLIP MOKOENA SC: And what documents did you have to consider in the – in terms of that email?

10 **MR SNEHAL NAGAR:** So Chairperson I – before we get to this email. The initial was:

“Please look at paragraph 6 of that document which was a negotiated position.”

CHAIRPERSON: It was Annexure 8 to the email.

MR SNEHAL NAGAR: Annexure A paragraph 6.

CHAIRPERSON: Ja.

MR SNEHAL NAGAR: I then requested for supporting documentation and the documentation came from Ms Ayanda Nteta and that is reflected in Annexure SN8(a). I then reviewed her computations that was sent to us and let me confirm that those computations that were sent were this 2.1 billion penalty that we calculated in 2015
20 which we knew had already some issues to it. And SN9 which is Advocate where you are taking me to now.

ADV PHILLIP MOKOENA SC: Yes.

MR SNEHAL NAGAR: Is the response after looking at this computation over the weekend.

ADV PHILLIP MOKOENA SC: Yes.

MR SNEHAL NAGAR: When we were requested to look at it.

ADV PHILLIP MOKOENA SC: And what do you take into account?

MR SNEHAL NAGAR: So Chairperson maybe for ease of reference ...

ADV PHILLIP MOKOENA SC: You say that I have looked at the following documents and spreadsheet.

MR SNEHAL NAGAR: Yes.

ADV PHILLIP MOKOENA SC: Can you take us through what is contained in that email page 58?

MR SNEHAL NAGAR: Sure. It is:

10 “Hi Suzanne Rashelda, Ayanda and Jacquel. I have looked at
the following docs and spreadsheets PDF a claim. A PDF
document Optimum letter PDF CDH response. I have looked at
the following spreadsheets. The penalties sheet sent to CDH in
July 2015. Penalty sheets split into the period – into the
penalised period March 2012 to May 2014 it is a CDH
spreadsheet derived from the Eskom spreadsheet. Penalty
sheets split into the period June 2014 to May 2015 which is the
CDH spreadsheet derived from the Eskom spreadsheet. We re –
a recalculation and updated version of the penalty sheet taking
20 some errors in the original spreadsheet into account. I have
attached the spreadsheet that summarises the issues. I have
also indicated some concerns that I think we may have in the
settlement agreement. Please note that this was a really short
time to review this calc. I was also not party to the negotiations
and thus I have no understanding of the negotiated position. I

however suggest that maybe Rashelda and Jacquel, Christo, Ayanda and I meet to briefly discuss the above sheet. You guys can take a view of the way forward after that.”

ADV PHILLIP MOKOENA SC: And the sheet that you now annex after having taken into account on those documents is the one to be found on page 61?

MR SNEHAL NAGAR: Correct.

ADV PHILLIP MOKOENA SC: Yes. Now would you take us through that schedule in order to explain to the Chair the amount you ultimately come to as a fair amount for or to be paid, you know, to Eskom in relation to the penalties?

10 **MR SNEHAL NAGAR:** Sure. Chair maybe some context and then maybe some guidance for you.

ADV PHILLIP MOKOENA SC: Yes.

MR SNEHAL NAGAR: So on 2 March 2017 we get this request please review this calculation and the negotiated position and let us know your views. Now between 2 March and 8 March there has been and it is documented in the affidavit, but there has been correspondence about the different versions of the spreadsheet and the positions we arrive at. By the time we got to 8 March we have substantially looked at quite a bit of calculations to arrive at what we do. Would you and per your guidance would you want me to go through every version of the spreadsheet or would you want me to settle
20 on which is effectively SN11B?

ADV PHILLIP MOKOENA SC: If you can tell the Chair the difference between SN9A and ultimately SN11B which is the one you settled upon, because that will help us to understand how you arrived at that computation.

MR SNEHAL NAGAR: So SN9A, so the only difference between SN9A and SN11B is correcting our version of the updated spreadsheet. So we had a computation in

July 2015. We knew there were issues with this computation. In July 2017 all we doing is we are updating this computation to reflect correctly and between 2 March and 8 March we arrive at a call it a final computation and that is the difference between SN9A and 11B.

ADV PHILLIP MOKOENA SC: Now SN11B Mr Chair is to be found on page 75. If you can then take us through that final version and the amount which you would have recommended if you ask as a settlement figure?

MR SNEHAL NAGAR: Ja. So Chairperson if I can bring you back to this 2.1 billion calc spreadsheet that we refer to [intervenes].

10 **ADV PHILLIP MOKOENA SC:** Mr Chair we have it on the A3 because the copy.

CHAIRPERSON: Ja. Also on SA5, is it not?

ADV PHILLIP MOKOENA SC: Yes.

CHAIRPERSON: Is it SAN5, the one that was on that dark column?

MR SNEHAL NAGAR: Yes.

CHAIRPERSON: Is the same amount?

MR SNEHAL NAGAR: Yes.

CHAIRPERSON: 2.1 billion?

MR SNEHAL NAGAR: Yes.

CHAIRPERSON: Ja, okay.

20 **MR SNEHAL NAGAR:** So Mr Chair in orientating you through the spreadsheet and there is a lot of detail here. So I am going to try my best to summarise what we find, but I need you to think about four concepts. The first concept is that the original calculations, 2.1 billion penalty was a calculation for all the different quality parameters. That is the first thing we need to consider. The second thing is that there is this period between March 2012 and May 2014. It is a period when this R158 million was applied.

So that is one period and the second period is from June 2014 to May 2015. So in assessing this penalty we are actually looking at two periods. They introduce one more concept which is linked to this, to all the penalties being charged and so the R2.1 billion penalty the claim was based on all the penalty parameters including the sizing parameter and when I now go through this computation I am also going to consider the penalty excluding the sizing parameter. So when you look at SN11B and if you look at the first column, so the first column is just describing what you see on your right hand side, but it says there “word pdf documents” and it says:

“Settlement Agreement Optimum Letter CDH Response.”

10 **ADV PHILLIP MOKOENA SC:** Yes.

MR SNEHAL NAGAR: Okay. The second agreement is, it says:

“2015, July the 6th.”

ADV PHILLIP MOKOENA SC: Second column?

MR SNEHAL NAGAR: Second column yes.

“Penalty Master CDH Version.”

Chair the second column is this original 2.1 billion computation.

CHAIRPERSON: Just one second.

MR SNEHAL NAGAR: *Ja*.

CHAIRPERSON: This SN11B is it available on the spreadsheet? No, it is not

20 available.

MR SNEHAL NAGAR: It is.

ADV PHILLIP MOKOENA SC: Yes.

MR SNEHAL NAGAR: Electronically.

CHAIRPERSON: Oh, okay.

MR SNEHAL NAGAR: Yes.

CHAIRPERSON: Okay.

ADV PHILLIP MOKOENA SC: You have it first on page 75.

CHAIRPERSON: Okay.

ADV PHILLIP MOKOENA SC: And you have a copy that we have produced there.

CHAIRPERSON: Yes.

ADV PHILLIP MOKOENA SC: A3 size document.

CHAIRPERSON: Thank you. I have found it.

MR SNEHAL NAGAR: So Chair like I said I must apologise. There is a lot of detail here, but I will get to the punch point in a second. So the settlement agreement that is
10 the first column. The second column is this call it July 2015 calculation. The third and fourth column just splits the July, I mean the 2015 calculation into the March 2014 period and the 2015 period and if you could ignore it for purposes of this.

CHAIRPERSON: Hang on one second. On SN11B when you talk about the first column are you talking about the one which is written at the top Annexure B Settlement Agreement or are you talking about the one written Settlement Agreement/Optimum Letter CHD response letter?

MR SNEHAL NAGAR: The latter Chair.

CHAIRPERSON: Okay, alright.

MR SNEHAL NAGAR: Ja.

20 **CHAIRPERSON:** That is what you regard as the first column?

MR SNEHAL NAGAR: Yes.

CHAIRPERSON: Okay.

MR SNEHAL NAGAR: The second column is the 2.1 billion account that was done in 2015.

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: Ignore for now Chair the third and fourth columns and the fifth column where it says 2017/03/03 updated penalty master.

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: That is the latest.

CHAIRPERSON: So that will be, we will call that what? The fifth column?

MR SNEHAL NAGAR: Ja. One, two, three, four, five the fifth column is the latest version of the calculation.

CHAIRPERSON: Okay.

MR SNEHAL NAGAR: Okay. So Chairperson and the column after that is just
10 comparing the difference between what we originally calculated and this new version.

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: Okay. So if I can get to some punchline points on this finding if you want to call it. The first thing Chair is that on a total basis if you look at the R2.1 billion claim, 2 176 530 611 which was originally calculated in 2015.

CHAIRPERSON: Yes, the original?

MR SNEHAL NAGAR: Yes. You can see that.

CHAIRPERSON: Amount.

MR SNEHAL NAGAR: That changes to 2 175 894. So there is a R600 000 difference there Chair. So largely the R2.1 billion number does not really change.

20 **CHAIRPERSON:** Which number does not change?

MR SNEHAL NAGAR: I am saying there is a 600 000 difference between the 2.1 billion calculated in July 2015.

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: In this updated version. So I am saying the 2.1 billion in essence is still 2.1 billion.

CHAIRPERSON: Yes, *ja*.

MR SNEHAL NAGAR: Yes.

CHAIRPERSON: Okay.

MR SNEHAL NAGAR: Okay. How and now I am going to go to the bottom part under the black shaded area which says:

“Calculations referred from March 2012 to May 2014”.

And the first figure I am referring to, it says:

“Total claim for the period including sizing is 1 590.”

Which is under the original calculation. So second column you will see 1 590.

10 **CHAIRPERSON:** Yes.

MR SNEHAL NAGAR: And you can see the updated calculation is 1 589. So it is still the R600 000 difference.

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: And this is now on a calculation including sizing.

CHAIRPERSON: Including size will now mean including everything?

MR SNEHAL NAGAR: Everything.

CHAIRPERSON: Including size?

MR SNEHAL NAGAR: That is correct, yes.

CHAIRPERSON: Okay, alright.

20 **MR SNEHAL NAGAR:** But Chair the very next row after that you can see that we had paid or we had deducted from Optimum R158 million worth of penalties. So I am looking at the second column, 1 590.

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: 452.

CHAIRPERSON: *Ja*.

MR SNEHAL NAGAR: Less the 158 million which is the penalty we had deducted for the period March 2012 to May 2014.

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: So the net penalty if you really wanted to claim from Optimum.

CHAIRPERSON: Hm.

MR SNEHAL NAGAR: If you include all the penalty parameters should be R1.4 billion.

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: And if you use the updated spreadsheet you can see it is still 1.

CHAIRPERSON: That is the figure under the fifth column?

10 **MR SNEHAL NAGAR:** Yes.

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: So it is 1.432 under the second column. 1.431, under the first column. It is still the same R600 000 difference you see.

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: So the punchline here is that if you had, for this portion of it, the punchline is that if you had applied all the penalty parameters using the calculation in the first 2015 versus the calculation now there is not much of a difference in the computation. We had updated it. This more correctly reflects, but not much. The issue now becomes that if you look at this negotiated settlement it introduces and I do not
20 know when this introduction happened, but it introduces a penalty excluding the sizing parameter. So if you look, so on that 2.1 billion penalty sheet that I showed you, SN5. If you take away the sizing parameter and you just add the others then the total claim on the second column comes to 792 million. It says:

“Total claim for the period excluding sizing 792.8 million.”

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: Okay, but on the latest version you can see that is 883 million.

So there is a R90 million difference Chair if you exclude the sizing.

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: Parameter.

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: Okay. That is a key finding. So if you deduct from those two amounts the 158 million that was paid then you have a claim against Optimum for 634 million on the July spreadsheet for 724 million on this revised spreadsheet.

CHAIRPERSON: Hm.

10 **MR SNEHAL NAGAR:** Chairperson bear with me. I am almost there.

CHAIRPERSON: Ja.

MR SNEHAL NAGAR: If I now take the same calc, the same approach to the period June 2014 to May 2015 you can see that.

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: The total claim including sizing is 744 million for that period and it is still 744 million in the updated spreadsheet.

ADV PHILLIP MOKOENA SC: Hm.

CHAIRPERSON: I am; oh yes I see.

MR SNEHAL NAGAR: Second and fifth column.

20 **CHAIRPERSON:** 744.

MR SNEHAL NAGAR: Ja.

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: But the total claim excluding sizing, so if I remove the sizing parameter comes to 419 452 346.65 on the 2.1 billion spreadsheet, the original spreadsheet, July 2015 and in the latest version that comes to 441 186. So there is a

R21 million jump between the two versions when you correct it.

ADV PHILLIP MOKOENA SC: Hm.

CHAIRPERSON: I am trying to look for the 4 million. Did you say 4 million?

MR SNEHAL NAGAR: No, 419. So it is 419 452. It is the row just below the 744.

CHAIRPERSON: Oh, yes.

MR SNEHAL NAGAR: Yes.

CHAIRPERSON: Ja.

MR SNEHAL NAGAR: So you will see in the difference column there is a R21 million difference.

10 **CHAIRPERSON:** Yes.

MR SNEHAL NAGAR: So.

ADV PHILLIP MOKOENA SC: That is now excluding?

MR SNEHAL NAGAR: That is excluding sizing.

ADV PHILLIP MOKOENA SC: Yes.

MR SNEHAL NAGAR: Ja. So Chairperson disregarding what the negotiating team or settlement team were negotiating for now. If you look at this calculation what we are saying is that if you had included the sizing parameter you would have had a claim based on our interpretation of R2.1 billion. The 2.1 billion has not largely changed.

CHAIRPERSON: Yes.

20 **MR SNEHAL NAGAR:** If you excluding the sizing parameter.

CHAIRPERSON: Hm.

MR SNEHAL NAGAR: Then you have a claim of this R1.4 billion.

CHAIRPERSON: Hm.

MR SNEHAL NAGAR: Sorry Chair. You have a claim of the R724 million plus this R441 million. So if you look at this number which is sort of bolded and in between two

lines it is R1.16 billion.

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: So I am saying including sizing 2.1 billion claim. Excluding sizing R1.1 billion claim. That is the parameters.

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: That you potentially from a value point of view should be claiming. Now if I go back to the first column.

CHAIRPERSON: But size should be included ordinarily. Is it not, sizing?

MR SNEHAL NAGAR: When you read the agreement.

10 **CHAIRPERSON:** *Ja*.

MR SNEHAL NAGAR: The agreement talks about a sizing penalty that should be applied.

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: For some reason the sizing penalty was removed.

CHAIRPERSON: Yes, okay.

MR SNEHAL NAGAR: The reason why I cannot tell you.

CHAIRPERSON: Okay.

MR SNEHAL NAGAR: *Ja*.

CHAIRPERSON: Okay, alright.

20 **ADV PHILLIP MOKOENA SC:** But the question is that according to you and your team sizing must be included?

MR SNEHAL NAGAR: *Ja*, if you read the agreement.

ADV PHILLIP MOKOENA SC: Yes.

MR SNEHAL NAGAR: It talks sizing is applicable. Whether there was a signed agreement or a letter or something that excluded it that I do would not know or cannot

confirm.

ADV PHILLIP MOKOENA SC: Yes.

MR SNEHAL NAGAR: *Ja.*

CHAIRPERSON: In other words your position was that absent a special arrangement or agreement that may have been entered into between the parties was in the agreement should have been applied and that includes sizing?

MR SNEHAL NAGAR: That is correct.

CHAIRPERSON: Okay.

MR SNEHAL NAGAR: *Ja.*

- 10 **CHAIRPERSON:** And what you are saying is you did not know whether there was some special arrangement that was made for excluding sizing?

MR SNEHAL NAGAR: That is correct.

CHAIRPERSON: Okay.

MR SNEHAL NAGAR: *Ja.* So, and so the two principle points for me is that including sizing 2.1 billion, excluding sizing 1.1 billion. That is the value of the claims you should be chasing after. So if you look at the negotiated settlement Chair what the negotiated settlement really refers to. It says for the period 2012 to 2014 and I am now looking at the very first column, they settle on an amount of 158 million and that was the amount that was originally deducted.

- 20 **CHAIRPERSON:** Yes.

MR SNEHAL NAGAR: *Ja.* So that is the settlement they reach. The second settlement is that for the period June 2014 to May 2015 they say the total claim is 419 million. Now this is comparing it to this original Annexure A paragraph 6.

ADV PHILLIP MOKOENA SC: Hm.

MR SNEHAL NAGAR: *Ja.* Sorry Chair.

CHAIRPERSON: Is that the 419 that is under the first column?

MR SNEHAL NAGAR: Yes.

CHAIRPERSON: Okay.

MR SNEHAL NAGAR: So they say it is 419 and actually if you look at the original calculation it says 419 452. So there is R500 000 difference.

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: And if you look at our updated computation it should actually be 441 million, but that is neither here nor there.

CHAIRPERSON: Ja.

- 10 **MR SNEHAL NAGAR:** For now I am just explaining their negotiated position. So they come to a number of 419 million. Then they reduce the CV penalty. Now the CV penalty and I was not part of the negotiations or the negotiation proceedings. So I do not understand the concept, but what they have said is they used the term co-binary score and from my understanding what I think they were trying to say is that when you look at your quality of coal there is a direct correlation between your ash and your CV penalty. So if your, if your CV increases your ash decreases and the other way around. So for some reason they have said that the CV penalty now because of that relationship is not applicable and so if you look at the July 2015 spreadsheet for this period they took the entire applicable CV and they just removed it out of penalty, 126
- 20 million.

ADV PHILLIP MOKOENA SC: Yes.

MR SNEHAL NAGAR: They are saying it is not applicable.

ADV PHILLIP MOKOENA SC: But how can one justify that on a clear interpretation of the agreement as you have been taken the Chair through what was supposed to be taken into account?

MR SNEHAL NAGAR: Chair I do not know and as you can even see in this thing I am not sure. I do not know what the justification was.

ADV PHILLIP MOKOENA SC: But I am saying that having regard to what you say that what is supposed to be taken into account that CV penalty was supposed, one of the factors that you and the team considered when you arrived at the amount of 2.1 billion?

MR SNEHAL NAGAR: Absolutely and if you look at the contract it constructs for both penalties to be applied. So at the late stage you now say that one does not apply was a bit strange.

ADV PHILLIP MOKOENA SC: Yes, proceed.

10 **MR SNEHAL NAGAR:** The third thing is that they deduct this amount of R37 371 688.67 and Chair we just do not know where [intervenes].

ADV PHILLIP MOKOENA SC: And what is that? What is the justification?

MR SNEHAL NAGAR: There is nothing except that it says less GC penalty deduction. So I cannot, in terms of this computation and you can even see. We said I cannot calculate this amount. We do not know what it is about.

ADV PHILLIP MOKOENA SC: Do you know what GC is?

MR SNEHAL NAGAR: No.

ADV PHILLIP MOKOENA SC: Was it explained to you?

20 **MR SNEHAL NAGAR:** No and we had requested this. So this sheet in response to the team, to the negotiating team it says here I cannot calculate this amount. I do not know what it is about. So we had indicated we are not sure. So Chair the net thing is that the settlement amount now comes to 254.9 million. That is what they effectively settle on. That is the cash that Eskom would receive in settlement of this original 2.1 billion claim, okay. So you and the way this is then sort of justified if I had to call it is to say that it is the initial R158 million that was already deducted plus this 419 the figure that I

just remembered about which comes to about 577 million if memory serves me. So those two numbers are the 577 million that Eskom has said they have settled at less these two deductions which I am not too sure about and less the amount that was already claimed for that period comes to a net settlement figure of 254 million and that is what was settled at with Tegeta.

CHAIRPERSON: And what is the point about all that?

MR SNEHAL NAGAR: The point was Chair that when you look at the value that was given up you initially had a claim of 2.1 billion. If you exclude the sizing parameter you still have a value of 1.1 billion, but the negotiating team settled on a net effect cash
10 settlement of 254 million. That is effectively what I am saying.

CHAIRPERSON: Ja. What I am asking is the point that they made, miscalculated, there was an error? Is the point that there was some corruption? What is the point about all of these calculations? We have taken quite some time to get to it.

MR SNEHAL NAGAR: No, the point is just Chair the question was the initial claim was 2.1. You are now only settling at 254 million and some of the items in getting to 251 are question mark as [intervenes].

CHAIRPERSON: Well if they miscalculated it is bad and it is unacceptable because ultimately it is taxpayers money, but if it is, there is no suggestion of corruption having played a role in settling on a much less amount then I am not sure that we should have
20 spent as much time as we have spent on it.

MR SNEHAL NAGAR: Chair [intervenes].

ADV PHILLIP MOKOENA SC: Let us put the following questions to you. You were specifically requested to consider the letter that came from the other side and to compute what could be a fair amount that was supposed to be paid to Eskom. Am I correct?

MR SNEHAL NAGAR: Chair no. We were asked to compute the, we were asked to check the calculations as per paragraph 6 of the Annexure 6. In coming to that we come to a different computation.

ADV PHILLIP MOKOENA SC: Yes.

MR SNEHAL NAGAR: As to what Eskom should claim.

ADV PHILLIP MOKOENA SC: Let me take you back to your testimony earlier on. You remember that you said that you had to prepare a document on page 50 for the purposes of the letter of demand to be sent by the attorneys of Eskom and the amount that you came to was around 2.1 billion. Am I correct?

10 **MR SNEHAL NAGAR:** That is correct.

ADV PHILLIP MOKOENA SC: And in 2017 you are now given a letter to say go to paragraph 6 and let us look at whether what computation can one arrive at in terms of the penalties which must be paid to Eskom. Am I correct?

MR SNEHAL NAGAR: Yes that is correct.

ADV PHILLIP MOKOENA SC: You go through these exercises being requested to do that. You come to an amount yourself and a team to say that whether you look at the 2015 or 2017 computation the difference is 600 000, but the 2 billion remains. Am I correct?

MR SNEHAL NAGAR: That is correct.

20 **ADV PHILLIP MOKOENA SC:** When the matter gets settled it gets settled at a very lower amount than the one that you and your team came to. Am I correct?

MR SNEHAL NAGAR: That is correct.

ADV PHILLIP MOKOENA SC: Yes. Now let us proceed on the request that was.

CHAIRPERSON: Will ultimately my question be answered Mr Mokoena? What is the whole point about these calculations?

ADV PHILLIP MOKOENA SC: Oh. What is the whole point about the calculations?

CHAIRPERSON: Well I asked him he, I do not think he gave me anything near what I am looking for. Why are we spending time on these calculations? So now the question is to you.

ADV PHILLIP MOKOENA SC: No Mr Chair.

CHAIRPERSON: You are leading the witness.

ADV PHILLIP MOKOENA SC: To the witness maybe Mr Chair to say that [intervenes].

CHAIRPERSON: Well the witness has not been able to answer that in any way near to satisfy, because I thought that maybe we were going to a point where I was going to be
10 told that the low amount at which the matter was settled reflects some corruption and if that is not the case I am not sure why we are spending so much time on these calculations.

ADV PHILLIP MOKOENA SC: Mr Nagar there is a question from the Chair.

MR SNEHAL NAGAR: Chair, I am certainly not asserting any corruption. I was asked.

CHAIRPERSON: *Ja*, you were asked by the investigators.

MR SNEHAL NAGAR: Yes.

CHAIRPERSON: And you.

ADV PHILLIP MOKOENA SC: I was asked to play

CHAIRPERSON: *Ja*.

20 **MR SNEHAL NAGAR:** To give evidence.

CHAIRPERSON: *Ja*.

MR SNEHAL NAGAR: On my role.

CHAIRPERSON: *Ja*.

MR SNEHAL NAGAR: And the outcome of it.

CHAIRPERSON: *Ja*.

MR SNEHAL NAGAR: And that is what I am here representing.

CHAIRPERSON: No. I think it is not your fault Mr Nagar. I think.

ADV PHILLIP MOKOENA SC: But are you able to explain Mr Nagar why such a low amount was settled upon?

MR SNEHAL NAGAR: No Chair. I was not part of the negotiating team and therefore I cannot explain the low settlement amount.

ADV PHILLIP MOKOENA SC: Mr Chair the other witnesses will be testifying about the [indistinct] in this entire settlement, but he is giving his version as a person that computed.

10 **CHAIRPERSON:** Ja, but what I am saying is I do not see the relevance of all the calculations.

ADV PHILLIP MOKOENA SC: Okay.

CHAIRPERSON: If it is not going to, if it is not made to support any assertion that people who made those calculations or people who arrived at that settlement did so on the basis of any corrupt intentions.

ADV PHILLIP MOKOENA SC: Yes. May I?

CHAIRPERSON: If it was just some *bona fide* error why do we spend so much time on it?

ADV PHILLIP MOKOENA SC: Mr Nagar could this 2.1 to two [intervenes]?

20 **CHAIRPERSON:** Or even if it was not *bona fide* if it was not corrupt or criminal then I do not see why we should spend a lot of time on it.

ADV PHILLIP MOKOENA SC: This witness [intervenes].

CHAIRPERSON: So I could just, could have been told we calculated that the amount should be two comma whatever. The amount owed to Eskom was R2.1 billion. They settled on a certain amount that we do not understand, but then we could have moved

on after that if there is no assertion that they arrived at the low amount because of corruption.

ADV PHILLIP MOKOENA SC: Mr Chair not this witness, the purpose of this witness is different from the other witnesses.

CHAIRPERSON: Yes.

ADV PHILLIP MOKOENA SC: His [intervenes].

CHAIRPERSON: Ultimately will that be [intervenes].

ADV PHILLIP MOKOENA SC: Yes. His turn, yes.

CHAIRPERSON: Okay.

10 **ADV PHILLIP MOKOENA SC:** By other witnesses.

CHAIRPERSON: Okay.

ADV PHILLIP MOKOENA SC: He is here as a CA.

CHAIRPERSON: Hm.

ADV PHILLIP MOKOEA: Who did the computation.

CHAIRPERSON: Ja.

ADV PHILLIP MOKOENA SC: Who was requested to do it. He says that we did it.

CHAIRPERSON: Hm.

ADV PHILLIP MOKOENA SC: Upon doing it this is what we have recommended to be the fair amount.

20 **CHAIRPERSON:** Well if I am told that this is laying a foundation.

ADV PHILLIP MOKOENA SC: Yes.

CHAIRPERSON: For a witness who will come later on and say that amount was, settlement amount was arrived at because of corruption. Then that I understand. It is just that I did not understand.

ADV PHILLIP MOKOENA SC: Yes.

CHAIRPERSON: I was told that before. You might have told me. I am not sure, but if I know that it is a foundation for a witness who will come and make and make that that is fine.

ADV PHILLIP MOKOENA SC: Yes, Chair. May we complete the picture about, by referring this witness to page 15? On page 15 Mr Nagar at paragraph 7.8. A request is made to you by Ms Daniels that you must sign a memorandum in support of the settlement agreement?

MR SNEHAL NAGAR: That is correct.

ADV PHILLIP MOKOENA SC: Let us wait for the Chair to find the page.

10 **CHAIRPERSON:** Yes, I found it. Thank you.

ADV PHILLIP MOKOENA SC: So you say that a request was made to you that you must sign a memorandum in support of the settlement agreement and your answer is, yes?

MR SNEHAL NAGAR: Yes.

ADV PHILLIP MOKOENA SC: Now may I refer you to page 80, 8-0 Chair and take us through those email correspondence. They still refer to the memo and take the Chair in relation to the stance you took on the request that was made to you, page 8-0.

MR SNEHAL NAGAR: Sure. So.

20 **ADV PHILLIP MOKOENA SC:** Identify the document and where was it coming from, to who.

MR SNEHAL NAGAR: Chairperson the; this is an email from myself on Tuesday March, the 14th 2017 at 09:00 am and it is basically to Suzanne and Ayanda and I am copying Rashelda Moodley and the subject is "The Optimum Settlement Memo". Chairperson if I, actually my apologies. If I take you to the bottom of the email [intervenes].

ADV PHILLIP MOKOENA SC: [Intervenes].

MR SNEHAL NAGAR: And I run you through the thread of the email. It would probably be better. So there is an email from me to Suzanne and Ayanda and Teta on Monday 13 March 2017 at 04:17 pm and I basically say:

“Hi Suzanne and Ayanda, please find attached comment that I prefer would be added in paragraph 1 under financial implications.”

So I, to give you context, I had been given a memo to say can I please as support. The memo was for the settlement of this 200 million or the R500 million penalty that is
10 effectively a R200 million cash settlement. The one we were just referring to in all these calculations.

CHAIRPERSON: To say whether you found paragraph 6 in order or not in order?

MR SNEHAL NAGAR: Chairperson there isn't a response as such, the responses are on the actual spreadsheet with all the comments that were written on the spreadsheet itself.

CHAIRPERSON: Yes, yes.

MR SNEHAL NAGAR: And those comments were discussed with the team.

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: The team then went back, took into account what was said, and
20 came then with a settlement offer.

CHAIRPERSON: But now hang on, where is your response to the email that said look at paragraph 6. Mr Mokoena you may be able to assist, I don't know whether I missed it or whether we haven't gone back to it, I just want to connect there because I want to ... (intervention)

ADV PHILLIP MOKOENA SC: If you go to page SSNN9, one of the documents, page

58, will that be one of the series of the documents which led to Annexure 11 SN11B?

MR SNEHAL NAGAR: That is correct Chair, so here is the response, and I detailed the findings are in the spreadsheet.

CHAIRPERSON: Okay I'm sorry your response to that email which among others requested you to look at paragraph 6 is at SN9, is that right? Is that what you are saying?

MR SNEHAL NAGAR: That's the email and the attachment to the email was the different versions, the SN9A, 11A and 11B that I referred to earlier.

CHAIRPERSON: Oh, okay.

10 **MR SNEHAL NAGAR:** Yes.

CHAIRPERSON: Okay effectively you were not happy with the paragraph 6?

MR SNEHAL NAGAR: Exactly.

CHAIRPERSON: Ja, and you indicated why.

MR SNEHAL NAGAR: Exactly.

CHAIRPERSON: Yes and then there was a response to that or not immediately, well here is one response saying thank you for working through the issues so quickly but there was another email which I had, if you look at SN10, Chair, page 66.

CHAIRPERSON: Yes.

20 **MR SNEHAL NAGAR:** And on page 66 the point of this email is that after sending that response out we had via the email sequence on SN10 set up a few telecons and meetings to discuss the findings, and the outcome of that like I said was eventually SN11B.

CHAIRPERSON: Okay, now I understand, okay.

MR SNEHAL NAGAR: So this occurred between 2nd of March and 8th of March.

CHAIRPERSON: Yes, okay.

MR SNEHAL NAGAR: Then we are now on page 80 which is now post 8 March between the 2nd of March and the 8th of March we had given our response to what we thought, was our view on paragraph 6. On the 8th of – I mean on the 14th of March or 13th/14th of March I am now requested to sign a memo in support of this two hundred – call it R577million settlement which was effectively a R254million cash settlement.

ADV PHILLIP MOKOENA SC: Which is contrary to what you ultimate computation of R2.1billion?

MR SNEHAL NAGAR: Which is contrary to our claim yes.

ADV PHILLIP MOKOENA SC: Yes.

10 **MR SNEHAL NAGAR:** And ...(intervention)

CHAIRPERSON: Because on your calculations if you followed what the contract said should happen ultimately you remained with the amount of R2.1billion as the amount that Eskom was entitled to in terms of penalties, is that right?

MR SNEHAL NAGAR: That is correct, based on the contract and based on our interpretation thereof.

CHAIRPERSON: Ja, ja on your interpretation, in other words if you – if it was up to you that's what you would have demanded to be paid to Eskom?

MR SNEHAL NAGAR: Correct yes.

20 **CHAIRPERSON:** Yes and then you are now being given a memorandum and you are asked to support it and that memorandum of you support it would mean that Eskom should get much far less than what you believed Eskom was entitled to?

MR SNEHAL NAGAR: Yes that is correct.

CHAIRPERSON: Yes okay, you may continue.

MR SNEHAL NAGAR: So Chair ...(intervention)

ADV PHILLIP MOKOENA SC: It's important to deal with the contents of page 8 so that

we can lay the context.

MR SNEHAL NAGAR: So Chair initially when I received this document I was asked to support this, the memo and the memo if I can refer to it is in – the final memo is SN14, it's on page 84.

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: So this was the final memo, but the memo before that, that I was asked to sign I uncomfortable to sign it because there was a settlement figure of like I said 577 in the calculation that I've taken you through but there was no reference to the work that we had performed, it was just let's settle. So if you look at page
10 number 92, which is SN13A.

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: At the bottom we had said that – and the context of this email that we were discussing is to say we think this should be as minimum included in this memo before we you know we can consider signing and ultimately what we were trying to do here is to show the – call it the provers of this transaction that by agreeing to the settlement of 500 or 200 however you look at it, you're effectively giving R1.17billion worth of value excluding sizing, and R2.1billion including sizing, so that the memo completes the picture of for those parties that are proving you understand what's at play and I think that's the context of this ...(intervention)

20 **ADV PHILLIP MOKOENA SC:** But let's go back to page 80 and read what you say to Ms Daniels and Ayanda Ntete, at the top what do you say, read it?

MR SNEHAL NAGAR: So initially Suzanne if I follow the thread again, so I read the first part of the thread which was at the bottom, the middle part says Snehal, this is now Suzanne to myself and Ayanda and copying Rashelda in:

“Snehal your preference is noted, not sure what you seek to achieve with this

as the claim was issued for R2.1billion based on Eskom's calculations which we state earlier in the document. Please advise. I took Anoch through the document yesterday and we are expected to finalise this morning. Would like clarity on this as soon as possible."

So my response to her Chair was:

"Hi Suzanne,

If the document I am to sign has no reference to the work we performed then why am I signing the document? I am happy you remove my signature from the document."

10 **ADV PHILLIP MOKOENA SC:** And what is the work you've performed?

MR SNEHAL NAGAR: The work that I have performed was the calculation in agreeing to paragraph 6 and the computation of the penalty.

ADV PHILLIP MOKOENA SC: So you are prepared to sign a memo that does not reflect a true computation according to you?

MR SNEHAL NAGAR: Yes or the work that we have performed yes.

ADV PHILLIP MOKOENA SC: Yes.

CHAIRPERSON: You had conveyed to them that on your calculations and your interpretation of the agreement the amount that should be demanded should be R2.1billion?

20 **MR SNEHAL NAGAR:** That is correct.

CHAIRPERSON: And she seems to say in her email to you that you have just read, that is Ms Daniels, she seems to say we did demand that, you agree with me that's what she says?

MR SNEHAL NAGAR: That is correct.

CHAIRPERSON: Yes, but she seems to say now we are settling, we are settling so

that's my understanding of what you are saying that the amount, the reason why the amount is different is not because they disregarded the amount that you believed should be demanded, they did demand it but now they are settling but maybe the difference between the two of you was that you believed that this settlement one, was too low and two, you didn't understand how they arrived at it, is that right?

MR SNEHAL NAGAR: No Chair, maybe some context to this.

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: So I'll be given a document that says please sign and support, now if you read the settlement memo, the memo that they're requesting to sign it talks
10 about a mandate that was obtained for the Board, from the Board, the Board Tender Committee, I can just confirm which committees exactly in the memo but they obtain a mandate to settle at R500million, which I am not part of, they then enter this negotiation proceedings, which I am not part of, I then get to ask to compute this calculation, which is very different to what we're settling on, and then I'm asked can you please support this payment and I was like but how do you want me to support this payment given that I've got nothing to what you actually have in the document, and I think that's the context where this is going, so her argument in the email was well operationally your calculation was R2.1billion and that's already reflected there so surely the Board should realise that we are giving up R2.1billion value when I say I'm settling at this R577million and
20 that's correct, I mean we don't disagree with her, but the insistence on that I must now sign as support was a question mark then why do you need my support if you already have this, and if you wanted my document, if you wanted my signature there then at least refer something to which I can tie back to except you know I was not party to any of this but just supporting you.

CHAIRPERSON: What did you understand to be the value that she was attaching to

your support for this transaction, for this settlement, in other words was there something in the processes of Eskom that dictated that before they could reach a settlement in regard to a matter such as this they should have your support, or did she have some other reason why your support was necessary according to her. What was the value of your supporting the whole thing, why did she want your support and not somebody else's support?

MR SNEHAL NAGAR: Chair from a process perspective my support is not required, from a delegation.

CHAIRPERSON: Yes.

10 **MR SNEHAL NAGAR:** If I go back to the original email where:

"please check paragraph 6, I'm about to settle a negotiation process and I want to know if my numbers are correct."

Well we won't be disagreeing with those numbers.

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: So I think probably my original intention was I have reached a settlement, whatever the construct of that settlement was and whatever the outcome was and I've also checked with the finance team that the calculations (inaudible) are actually okay, and we were based on this already disagreeing with those computations. So I think her then settlement memo was well it doesn't really matter, irrespective
20 you're still giving a value, do you know you're giving up R2.1billion in value and I think we wanted to be very explicit that if you wanted our – if you wanted my support then at least me show you where I added the support, other than that I have added no value and no support to your process.

CHAIRPERSON: Yes, yes, okay, thank you.

ADV PHILLIP MOKOENA SC: Flowing from there it is quite clear that you were not

part of the negotiations?

MR SNEHAL NAGAR: No Chair.

ADV PHILLIP MOKOENA SC: Yet you were expected to support a memo which arises from a settlement computation that you are a part of?

MR SNEHAL NAGAR: Yes Chair.

ADV PHILLIP MOKOENA SC: Now you are referring Chair to page 82, and that he insisted that something must be added and that's the only time he will be comfortable in signing any memo, is that what you see on page 82 with the handwritten inscription what you wanted to be included.

10 **MR SNEHAL NAGAR:** That is correct.

CHAIRPERSON: Did you ever ask her in the light of you, that is her now accepting that Eskom was entitled to demand R2.1billion how do you justify this settlement that you are asking me to support now. Did you ask her a question to that effect?

MR SNEHAL NAGAR: Chairperson we did so ...(intervention)

CHAIRPERSON: And what was the answer?

MR SNEHAL NAGAR: The answer was and I didn't ask her, I actually asked the attorneys, Rashelda Moodley from Cliffe Dekker.

CHAIRPERSON: Who were guiding her?

20 **MR SNEHAL NAGAR:** Who was guiding her or part of the process or part of the negotiating team?

CHAIRPERSON: Yes.

MR SNEHAL NAGAR: Yes, and essentially there were a couple of reasons and I can't remember all of them offhand but there were a couple of reasons why they could not settle at the R2.1billion penalty. My recollection is that the initial R158million that was originally deducted by Eskom, because Eskom applied the contract in that way, wrong

or right, it doesn't matter, their view was that it was going to be very difficult to argue against that application of the contract, so that was their first part. The second part Chair if I remember was that the people that were in the employ of Eskom when this negotiation agreement, I mean when the Optimum agreement was drafted or some of the versions, are now employed by Glencore, so it would be difficult to call them on as a witness in Eskom's testimony when they actually, or in Eskom's favour when they actually work for the opposing party now. There was also this consideration that said if you apply a R2.1billion penalty to Optimum you will sink them, you will liquidate them they are just not cash flush enough to pay that amount, so those were some of the
10 considerations that were taken into account in then coming to this deal, but that was a discussion between us and them, it was not something that I was part of and I can't intimately or in detail talk about it.

CHAIRPERSON: Okay, thank you. Is it your handwriting at the bottom of page 82 or is it somebody else's handwriting?

MR SNEHAL NAGAR: That is my handwriting Chair.

CHAIRPERSON: Okay.

ADV PHILLIP MOKOENA SC: Now what's interesting from what you are saying ... (intervention)

CHAIRPERSON: Well if your colleague wants to share something with me?

20 **ADV PHILLIP MOKOENA SC**: No Mr Chair.

CHAIRPERSON: Okay alright.

ADV PHILLIP MOKOENA SC: Now you are saying that one of the thinking was that if we are to claim this amount of R2.1billion we might sink this entity, so we know that at the time now it was owned by Tegeta, so it was important not to sink Tegeta, yet others were placed were placed in business rescue.

MR SNEHAL NAGAR: No Chair I am not giving importance to this thing, I'm saying this is the feedback I was given, I am not part of that process and I did not assess that.

ADV PHILLIP MOKOENA SC: But at least you did tell the Chair earlier on that Optimum was placed on business rescue at some point because it did not fulfil its obligations with Eskom?

MR SNEHAL NAGAR: That's correct.

ADV PHILLIP MOKOENA SC: Yes, but you can't sink Tegeta at this time. You don't have to comment about it, it's fine, I just wanted to understand your last statement to the Chair that there was that thinking.

10 **MR SNEHAL NAGAR:** Yes.

ADV PHILLIP MOKOENA SC: Now was your concern ultimately taken into account that there must be this insertion of this paragraph that you insisted upon, was it ultimately, did it eventually find its way to the final memorandum?

MR SNEHAL NAGAR: It did Chair, and it's found its way so not in these words but it found its way ...(intervention)

ADV PHILLIP MOKOENA SC: Go to page 84.

MR SNEHAL NAGAR: 84?

ADV PHILLIP MOKOENA SC: 83, eight four, that's where the document starts am I correct?

20 **MR SNEHAL NAGAR:** Yes.

ADV PHILLIP MOKOENA SC: And then what you might be looking for but you are saying not in so many words was it included, it's on page 86, and

MR SNEHAL NAGAR: Sorry.

ADV PHILLIP MOKOENA SC: Yes proceed.

MR SNEHAL NAGAR: No.

ADV PHILLIP MOKOENA SC: Page 86 paragraph 3.

MR SNEHAL NAGAR: That is correct.

ADV PHILLIP MOKOENA SC: Yes. And now what can you read what paragraph this is?

MR SNEHAL NAGAR: “Subsequent to the issue of summons Eskom recalculated the amount owing of R1.17billion for the period under dispute while the calculations could be verified the basis of the interpretation is still under question.

ADV PHILLIP MOKOENA SC: But it’s not exactly what you wanted to be included.

MR SNEHAL NAGAR: No.

10 **ADV PHILLIP MOKOENA SC:** Did you take the matter any further? Did you take the matter any further to say that I am still not happy about this paragraph three it still doesn’t show the loss that is going to be attributed to Eskom if you were to settle on that lesser amount?

MR SNEHAL NAGAR: No Chair I did not.

ADV PHILLIP MOKOENA SC: Maybe then deal with the last topic which you address ... (intervention)

CHAIRPERSON: Well before I see that Mr Nagar I see that there’s signatories to that memorandum at page 89, Suzanne Daniels, Anoj Singh and Matshela Koko.

ADV PHILLIP MOKOENA SC: Page 89?

20 **CHAIRPERSON:** Ja.

ADV PHILLIP MOKOENA SC: Mr Nagar page 89.

MR SNEHAL NAGAR: Yes got you.

CHAIRPERSON: Ja you say there’s some issues?

MR SNEHAL NAGAR: Yes.

ADV PHILLIP MOKOENA SC: And those are the individuals that signed the document,

the memorandum?

MR SNEHAL NAGAR: Chair there seems to be a page missing if you read the top right hand side it says 19204 and then it jumps to 19206, so I think there's probably a page missing here where ...(intervention)

CHAIRPERSON: Yes but as far as you know who signed that memorandum?

MR SNEHAL NAGAR: It was I mean so 89 you are correct.

CHAIRPERSON: Sorry?

MR SNEHAL NAGAR: Page 89 is this, the memo is now recommended and approved by Matshela Koko and Anoj Singh.

10 **CHAIRPERSON:** Yes ja the fact that there may be a page missing which might be correct because the previous page is reflected as page 5 there is no page 6 then there's that last page with signatures, it's page 7, the fact that there may be a page missing doesn't change the fact that the memorandum was signed by those three, is that right?

MR SNEHAL NAGAR: That is correct.

CHAIRPERSON: Ja, that last page which bears their signatures is the last page of this document ,the missing page is not the last page.

MR SNEHAL NAGAR: That is correct.

CHAIRPERSON: Okay.

20 **ADV PHILLIP MOKOENA SC:** Let's now turn to the last topic. Mr Chair with this evidence Mr Nagar will simply be laying the basis for another witness, Mr Andre Pillay, who will complete the picture.

CHAIRPERSON: Okay.

ADV PHILLIP MOKOENA SC: Now ...(intervention)

CHAIRPERSON: And what page are you going to?

ADV PHILLIP MOKOENA SC: Page 16, paragraph 8.

CHAIRPERSON: Okay thank you.

ADV PHILLIP MOKOENA SC: Now from paragraph 8 Mr Nagar you are dealing with the ABSA guarantee, am I correct?

MR SNEHAL NAGAR: That is correct.

ADV PHILLIP MOKOENA SC: And can you give us context you now pertaining to how you became involved in this guarantee and who are the parties to that guarantee, or who are the parties that were supposed to be the guarantee?

MR SNEHAL NAGAR: Chair on around December 2015, January 2016, it was over
10 the December holiday period so for some reason I was not in the office, I can't remember if I was on leave or just away for a meeting and one of my subordinates, Rihana Moeller was standing in for me and she received this guarantee, this ABSA guarantee.

CHAIRPERSON: Hang on. Will people please sit down and not be roaming around. Thank you, yes you may proceed.

MR SNEHAL NAGAR: So she received this ABSA guarantee and was asked to deal with it. When she read it she didn't know what to really do with it and handed it back to her – to the people that gave it to her, and I can't remember who actually gave it to her but she gave it back to them saying please deal with me on my return. I then received
20 this guarantee early January and it was left on my table and it was said you know – it was given to me, I can't remember how it was given to me but it was given to me and said please deal with it. Chairperson when you read this guarantee it was – let me first upfront state I don't deal with normally bank guarantees and stuff so that normally gets dealt with by the Treasury Team but when I read the Bank Guarantee it was a very badly drafted guarantee in my opinion in that it was difficult to see what were the default

terms and you know what was actually happening there, but it was guarantee guaranteeing Tegeta in some shape or form.

So this I then enquired from Vusi Mbuweni, who was the head of Primary Energy at that time and checked with him whether he knew anything about this guarantee and he also verbally admitted – he verbally confirmed that he knew nothing about this guarantee. Chairperson in asking around for some reason this guarantee issue died when I say died meaning it somehow wasn't raised again.

CHAIRPERSON: Nobody pursued it?

MR SNEHAL NAGAR: No one pursued it. Fast forward to March 2016 ...(intervention)

10 **CHAIRPERSON:** So when was it when you got the ...(intervention)

MR SNEHAL NAGAR: Around January 2016.

CHAIRPERSON: Okay, alright.

MR SNEHAL NAGAR: Around, towards the end of March 2016, which is very close to our financial year end we received a – I received a request from the office of the CFO and particularly a Teresa Michaels from his office, requesting me to draft an accounting position paper on this guarantee. Now ...(intervention)

ADV PHILLIP MOKOENA SC: In whose favour was this guarantee?

MR SNEHAL NAGAR: It was in the favour of Tegeta.

ADV PHILLIP MOKOENA SC: So Eskom was issuing a guarantee in favour of Tegeta?

20 **MR SNEHAL NAGAR:** That's it correct.

ADV PHILLIP MOKOENA SC: Yes?

MR SNEHAL NAGAR: So Chairperson I had then responded to Teresa Michaels and my response is reflected here and if maybe I can ...(intervention)

CHAIRPERSON: I'm sorry, if the guarantee was pursued are you able to tell us what Eskom would be saying what would it have been committed itself to and about.

MR SNEHAL NAGAR: Offhand I can't remember, but I remember it was about a R1.7billion worth of coal payment.

CHAIRPERSON: Yes, okay.

MR SNEHAL NAGAR: I do reflect some of it in my email Chair I can quickly get it.

ADV PHILLIP MOKOENA SC: If you go to one of the emails are on page 99.

MR SNEHAL NAGAR: Page 99, it's actually on page 100, so page 99 is the thread of emails and you can see the different people commenting on this topic and I specifically – my comment to Teresa or my response to Teresa is on page 100, and if I can read Chair it say:

10 “Hi Teresa,

I'm not so worried about the accounting position paper, we can potentially draft on between us and us meaning whether it's the Treasure Team ...”

CHAIRPERSON: I'm sorry, I'm sorry.

ADV PHILLIP MOKOENA SC: Page 100 on top Mr Chair.

CHAIRPERSON: I've got it but what he read is not what I see. What I see is:

“I'm not so worried about the position paper ...”

I think you may have said something else instead of position.

MR SNEHAL NAGAR: Sorry Chair. It says:

20 “Hi Teresa,

I'm not so worried about the position paper. We can potentially draft on between us depending on where the majority transaction activity takes place. More important is where we need to plan for a payment to be made on the 31st. We need some guidance on this please as this transaction seems to be completely off everyone's radar. For payment to be made we need all the PFM approvals, legal confirmations cash to be booked, vendor details

update on SAP, conditions precedent etcetera. Next week everybody is on leave. Depending on how this transaction is done the CFO and CEE might have to sign off on a R1.7billion single payment transaction depending on the Eskom DOA, so I think that's this guarantee contemplated on R1.7billion coal purchased or payment of some sort."

CHAIRPERSON: So as you understood it, it would have been a commitment by Eskom to buy or pay R1.7 for coal.

MR SNEHAL NAGAR: Chair if I can just read the second paragraph and then answer your question, I think

10 **ADV PHILLIP MOKOENA SC**:

MR SNEHAL NAGAR: Chair if I can just read the second paragraph and then answer your question, I think it will give it better context.

CHAIRPERSON: Okay.

MR SNEHAL NAGAR: So I'm saying here that if the approvals are not met then what? I am also not sure and this is the important part to your question, I am also not sure what the defaulting events for the guarantee are, documents do not seem to be clear, guarantee also seems to expire in March so if these pre-conditions are not met then what does everyone do? Do we extend the arrangement or does everything fall away.

What happens to Optimum in the event and the business rescue process, so I think if
20 you read the guarantee those terms for default were not clear, and I think it was difficult to understand what this guarantee was about, and hence this email to them.

CHAIRPERSON: Okay.

MR SNEHAL NAGAR: And Chair beyond this point you know that's my involvement with this guarantee story.

CHAIRPERSON: Okay, ja.

ADV PHILLIP MOKOENA SC: Now I just want to pose you know to take you back to your testimony this part of your evidence will be ventilated through other witnesses. You mentioned earlier on in your testimony something that might also be relevant in due course when we are dealing with witnesses for Eskom, that one of your fears you know in doing whatever that you might have done you feared that you know you might either be punished like that employee who was suspended by Mr Koko, the female employee for supporting reductions on the coal transportation rate. Can you elaborate on that, do you know the facts of what transpired in that situation?

MR SNEHAL NAGAR: Chair I can't elaborate on it, I can give you some contacts but I
10 think – I mean I can give you employee's name, I don't know if you want me to give it
...(intervention)

ADV PHILLIP MOKOENA SC: Yes.

MR SNEHAL NAGAR: Her name is Kiren Maharaj and you can get the facts and details from Kieran Mirage.

ADV PHILLIP MOKOENA SC: How do you spell the name?

MR SNEHAL NAGAR: K-i-r-e-n and M-a-h-a-r-a-j.

ADV PHILLIP MOKOENA SC: Mr Chair that concludes my questions for this witness.

CHAIRPERSON: Okay thank you very much, thank you Mr Nagar, if we need to call you back you will be contacted but thank you very much, you are excused for now.

20 **MR SNEHAL NAGAR:** Thank you.

CHAIRPERSON: Thank you. Mr Mokoena I understand there is another witness?

ADV PHILLIP MOKOENA SC: Not for today Mr Chair, I am told that he was coming on Friday, Mr Irman.

CHAIRPERSON: Oh, we have another one tomorrow?

ADV PHILLIP MOKOENA SC: I am told that we are not sitting morning and Thursday

because we don't have a venue.

CHAIRPERSON: I was told that's Thursday and Friday. So I have been misled.

ADV PHILLIP MOKOENA SC: Unfortunately I can't deal with those issues, I thought it was tomorrow and Thursday, but we can clarify that.

CHAIRPERSON: Ja can that be clarified, which dates are taken by the owner of the venue.

ADV PHILLIP MOKOENA SC: It's 6 and 7 I'm told Mr Chair. Friday it's available, 6th and 7th it's not available.

10 **CHAIRPERSON**: Okay, alright, witnesses for Friday or witness for Friday will be ready?

ADV PHILLIP MOKOENA SC: Yes Mr Chair.

CHAIRPERSON: Okay no that's alright. We are going to adjourn, we are not sitting tomorrow and Thursday, we would have liked to sit but the owners of the venue had asked that certain dates be reserved for them because they have certain special events and those dates include tomorrow and Thursday so that is the reason why we won't be sitting, the venue is just not available. We will resume on Friday, before we adjourn on Friday should we start a little earlier or will we finish, will we be able to finish the witness within the normal hours?

ADV PHILLIP MOKOENA SC: Mr Maleka can respond to that Mr Chair.

20 **CHAIRPERSON**: Mr Maleka?

ADV VINCENT MALEKA SC: Chair I suggest we start early because we have two witnesses on Friday.

CHAIRPERSON: Shall we start at nine?

ADV VINCENT MALEKA SC: Nine thirty and we can take a short lunch adjournment if necessary, because the witness comes from Witbank.

CHAIRPERSON: Oh okay no that's fine if need be we can add in the afternoon. Okay we are going to adjourn today and we will resume at nine thirty on Friday. We adjourn.

INQUIRY ADJOURNS TO 8 MARCH 2019