

COMMISSION OF INQUIRY INTO STATE CAPTURE

HELD AT

PARKTOWN, JOHANNESBURG

10

08 MARCH 2019

DAY 62

20

PROCEEDINGS HELD ON 8 MARCH 2019

CHAIRPERSON: Good morning Mr Maleka, good morning everybody.

ADV VINCENT MALEKA SC: Good morning Chair. Today we will be presenting the evidence of Mr Opperman.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: Should we finish in time we will immediately get to the evidence of the next witness who is Mr Bester.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: Chair before I ask Mr Bester to take the oath may I
10 indicate what documentation we will utilise to present his evidence?

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: The first is the bundle comprising his statement which is marked U8.

CHAIRPERSON: U?

ADV VINCENT MALEKA SC: 8.

CHAIRPERSON: A?

ADV VINCENT MALEKA SC: U8.

CHAIRPERSON: U8?

ADV VINCENT MALEKA SC: Yes it is the very bundle before you Chair.

20 **CHAIRPERSON:** Yes.

MR GERT OPPERMAN: I have put my [indistinct] because it has...

CHAIRPERSON: It is just that the eight is not there. There is File 9.

ADV VINCENT MALEKA SC: Well I am not too sure why mine is marked U8 yours is marked 9.

CHAIRPERSON: Ja mine is not – it is marked Volume U File 9 of.

ADV VINCENT MALEKA SC: Yes. It is File 9 but ...

CHAIRPERSON: But it is Exhibit U.

ADV VINCENT MALEKA SC: But U.

CHAIRPERSON: Exhibit U8.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: Okay, okay. Thank you.

ADV VINCENT MALEKA SC: Chair if I may quickly orientate you and other interested persons about the contents of that file. You will see that it begins with an index.

CHAIRPERSON: Yes.

10 **ADV VINCENT MALEKA SC:** And the first part of the index is the statement of Mr Opperman.

CHAIRPERSON: YEs.

ADV VINCENT MALEKA SC: It runs from page 1 to page 18.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: The statement is fairly short by size only.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: But it is extremely voluminous in terms of content and substance.

CHAIRPERSON: Yes.

20 **ADV VINCENT MALEKA SC:** So we will take a bit time to canvass the contents of the statement.

CHAIRPERSON: YEs.

ADV VINCENT MALEKA SC: And what follows thereafter are annexures.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: Described through acronyms GJ01 up to GJ039. They

begin from page 19 up to the end of page 440. What we asked the administration of the commission to do.

CHAIRPERSON: YEs.

ADV VINCENT MALEKA SC: Is to separate each annexure with reference to the file divider.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: So that it will be easier for you to simply jump into...

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: The divided annexures.

10 **CHAIRPERSON**: Yes.

ADV VINCENT MALEKA SC: Conveniently.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: And we asked your Registrar to bring along two additional files because there may be some elementary ...

CHAIRPERSON: U got 5?

ADV VINCENT MALEKA SC: Yes. The first one Chair if I may remind you is the statement of Mr Clinton Ephron who testified on behalf of Glencore.

20 **CHAIRPERSON**: The files which are here do not appear to show on their spines that any of them includes Mr Ephron's statement. There is one which is – which contains the statements of Mr Mashego and Mr Bester.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: Then there is Exhibit U2. It does not – oh then it shows that the statement inside is that of Mr Naga.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: And then there is Exhibit U4 it just says File 5 of on the spine. Then

there is Exhibit U4 that has got the statements of Van Der Riet.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: Magwaza that us all.

ADV VINCENT MALEKA SC: All of those files except the statement and annexures to Mr Naga?

CHAIRPERSON: Ja.

ADV VINCENT MALEKA SC: Which is U2.

CHAIRPERSON: YEs.

ADV VINCENT MALEKA SC: Will be used later by Ms Hofmeyr.

10 **CHAIRPERSON:** Yes.

ADV VINCENT MALEKA SC: Can I ask you just to lift up.

CHAIRPERSON: Ja.

ADV VINCENT MALEKA SC: U2 and put it conveniently next to you.

CHAIRPERSON: U2?

ADV VINCENT MALEKA SC: U2 yes that is the statement of Mr Naga.

CHAIRPERSON: YEs.

ADV VINCENT MALEKA SC: We will refer to that file and we will do so when we deal with Mr Opperman's evidence relating to calculation of penalties. Because you would recall that Mr Mokoena took you through.

20 **CHAIRPERSON:** Yes.

ADV VINCENT MALEKA SC: The various calculations.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: And you asked a number of questions.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: And Mr Opperman for his sins.

CHAIRPERSON: Yes

ADV VINCENT MALEKA SC: Fundamentally differs with that calculation.

CHAIRPERSON: Okay.

ADV VINCENT MALEKA SC: And he will begin to answer some of the questions raised with Mr Naga and Mokoena about it.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: But is this a simple problem of miscalculations or under calculations

CHAIRPERSON: Yes.

10 **ADV VINCENT MALEKA SC**: And where is the correct intent on that score.

CHAIRPERSON: Yes. Ja. Okay, okay. No thank you. Now is Mr Ephron's statement included in the same bundle where we have got Mr Naga's statement or have we not find it – found it?

ADV VINCENT MALEKA SC: It is not. Ja but you should not be concerned by...

CHAIRPERSON: About it.

ADV VINCENT MALEKA SC: Its absence for now.

CHAIRPERSON: Okay.

ADV VINCENT MALEKA SC: Because what we are going to do is to cross-reference.

CHAIRPERSON: Ja.

20 **MR GERT OPPERMAN**: Some of the annexures as in Mr Opperman's statement to those of Mr Ephron's annexures.

CHAIRPERSON: Ephron – yes.

ADV VINCENT MALEKA SC: But we will ...

CHAIRPERSON: We might not need...

ADV VINCENT MALEKA SC: We might not need it.

CHAIRPERSON: Okay, okay.

ADV VINCENT MALEKA SC: I may have to read them out to you.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: And indicate where the cross-references would take place.

CHAIRPERSON: Okay no that is fine.

ADV VINCENT MALEKA SC: Chair subject to any further introductory remarks.

CHAIRPERSON: Ja.

ADV VINCENT MALEKA SC: Or queries you may have I would ask your registrar to
10 administer the oath.

CHAIRPERSON: YEs.

ADV VINCENT MALEKA SC: From Mr Opperman.

CHAIRPERSON: Thank you.

REGISTRAR: Please state your full names for the record?

MR GERT JACOBUS OPPERMAN: Gert Jacobus Opperman.

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

MR GERT JACOBUS OPPERMAN: No I do not.

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

MR GERT JACOBUS OPPERMAN: Yes.

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

MR GERT JACOBUS OPPERMAN: So help me God 3 in 1 Father, Ghost and – Holy Ghost and Son.

CHAIRPERSON: Thank you.

ADV VINCENT MALEKA SC: Mr Opperman good morning and welcome.

MR GERT JACOBUS OPPERMAN: Good morning Advocate Maleka.

ADV VINCENT MALEKA SC: You like me speak a bit softly can you make sure that your voice radiates through the microphone so that all of us can hear you.

MR GERT JACOBUS OPPERMAN: I will do that.

ADV VINCENT MALEKA SC: Yes. Can I just begin with formalities? Before you there is a file which has been submitted to the Chair as Exhibit U8. And that file begins with your typed statement which you made under oath correct?

MR GERT JACOBUS OPPERMAN: Correct.

10 **ADV VINCENT MALEKA SC:** Can I ask you to go to that statement and go to page 18.

MR GERT JACOBUS OPPERMAN: I am there.

ADV VINCENT MALEKA SC: Can you confirm that the signature at the top end of that statement is yours?

MR GERT JACOBUS OPPERMAN: I can.

ADV VINCENT MALEKA SC: And that is – your statement bear a signature of a commission of oath which you took on the 27 February 2019?

MR GERT JACOBUS OPPERMAN: I can confirm that yes.

ADV VINCENT MALEKA SC: And where did you take that oath?

MR GERT JACOBUS OPPERMAN: In Emalahlene, Witbank.

20 **ADV VINCENT MALEKA SC:** Witbank?

MR GERT JACOBUS OPPERMAN: Yes.

ADV VINCENT MALEKA SC: Emalahlene?

MR GERT JACOBUS OPPERMAN: Yes.

ADV VINCENT MALEKA SC: Yes. Mr Opperman you have had an occasion to read and re-read the contents of that statement, correct?

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: Do you confirm that they reflect the truth as far as you are concerned and to the best of your knowledge?

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: Is there any aspect of the statement you would like to reflect on, change or modify before we start with the substance of your evidence?

MR GERT JACOBUS OPPERMAN: Yes Mr Maleka it is the statement – the area that refers to the penalty provision and the amounts. As per my annexure 18.

ADV VINCENT MALEKA SC: Alright can you take us first to the body of the statement
10 which deals with penalties as far as ...

MR GERT JACOBUS OPPERMAN: So this is point number 47.

ADV VINCENT MALEKA SC: Yes.

MR GERT JACOBUS OPPERMAN: On page number 9.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: What is the page?

ADV VINCENT MALEKA SC: Page 9 Chair.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: And you say you want to make a modification with reference to paragraph 47 and you have drawn our attention to Annexure GJ18. Chair
20 you will find that from page 252.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: It is that spreadsheet which has different colour codes.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: What in that annexure would you like to reflect on?

MR GERT JACOBUS OPPERMAN: Mr Maleka the calculation that reflects on

Glencore's penalty as plus minus 18 million if one reference annexure GJ018 that amount was 13.8 million.

ADV VINCENT MALEKA SC: Yes.

MR GERT JACOBUS OPPERMAN: It might not be that significant but that is the correction to be made. The other amount is 720 that I am making...

CHAIRPERSON: Well I am sorry Mr Opperman let – let me get first to where you want to make the first amendment or correction. I am at page 253 on the spreadsheet and maybe would help me by telling me in relation to which month – against which month that item is?

10 **MR GERT JACOBUS OPPERMAN:** Chair it is the total on the third – the fourth column at the bottom. The total that reads 13.833 million.

ADV VINCENT MALEKA SC: Yes.

MR GERT JACOBUS OPPERMAN: So it is sum total on the ...

CHAIRPERSON: Oh okay, okay.

ADV VINCENT MALEKA SC: That is the sum total of the penalties as calculated and contended for by Glencore at the time?

MR GERT JACOBUS OPPERMAN: Correct, correct.

ADV VINCENT MALEKA SC: When there was a debate between it and Eskom about the quantum of the penalties?

20 **MR GERT JACOBUS OPPERMAN:** Correct.

ADV VINCENT MALEKA SC: How much do you want to change amount?

MR GERT JACOBUS OPPERMAN: To the 13.8.

ADV VINCENT MALEKA SC: 13.8?

MR GERT JACOBUS OPPERMAN: Yes.

CHAIRPERSON: So do we – do we cross out 33692? Just tell us once again Mr

Opperman.

MR GERT JACOBUS OPPERMAN: YEs.

CHAIRPERSON: What is the number that should be reflected there instead of 13833692,75?

MR GERT JACOBUS OPPERMAN: That – Chair that amount stays as it is we need to change in my affidavit.

ADV VINCENT MALEKA SC: Statement.

MR GERT JACOBUS OPPERMAN: In my statement point number 47. I made reference to the calculation as plus minus 16 million.

10 **CHAIRPERSON:** Oh.

ADV VINCENT MALEKA SC: So that 16 needs to reflect 13.8 Sir.

CHAIRPERSON: Oh okay, okay thank you.

ADV VINCENT MALEKA SC: So Chair if you can go to page 9 of the statement and go to paragraph 47. The second last sentence of that paragraph refers to plus minus 16 million. So Mr Opperman you want us to strike out that amount and replace it with 13.833 million?

MR GERT JACOBUS OPPERMAN: That is correct Sir.

CHAIRPERSON: Do you want us to say 13.3 million I see you have got plus minus before that?

20 **MR GERT JACOBUS OPPERMAN:** I am comfortable if we make it 14 million plus minus something like that.

CHAIRPERSON: Oh plus minus 14 million.

MR GERT JACOBUS OPPERMAN: That is fine.

CHAIRPERSON: Okay. I am changing to say plus minus 14 million.

MR GERT JACOBUS OPPERMAN: And then Mr Maleka with your leave I will leave

the plus minus 720 million which is pretty much in line in – to the amount 723 million that is reported in that spreadsheet.

ADV VINCENT MALEKA SC: Yes.

MR GERT JACOBUS OPPERMAN: So I am comfortable with that.

ADV VINCENT MALEKA SC: Well we will get to it in due course but you correct it is plus minus. We will not hold you to the precise or exact figures.

CHAIRPERSON: That was the first correction that you wanted to make? I thought you wanted to make another correction as well Mr Opperman?

MR GERT JACOBUS OPPERMAN: Correctly so Sir. Point number 16 on my
10 statement which is page number 3 refers to Eskom imposing penalties based on the supply of non-conforming coal and I think maybe...

CHAIRPERSON: I am sorry let me just get there. What paragraph, what page?

MR GERT JACOBUS OPPERMAN: Page number 3.

CHAIRPERSON: H'm.

MR GERT JACOBUS OPPERMAN: Point number 16.

CHAIRPERSON: Is that paragraph 16?

MR GERT JACOBUS OPPERMAN: That is correct.

CHAIRPERSON: Of – at page 3 of your statement?

MR GERT JACOBUS OPPERMAN: That is correct.

20 **CHAIRPERSON:** Okay alright what should be changed there?

MR GERT JACOBUS OPPERMAN: Okay it currently reads that Eskom imposed penalties based on the supply of non-confirming coal. I need to clarify this that these penalties were not imposed in 2008 and 2009 but they were recorded and it was not for non-conforming coal but it was for undersupply.

CHAIRPERSON: For undersupply?

MR GERT JACOBUS OPPERMAN: Correct.

CHAIRPERSON: So the first sentence should read:

“Eskom imposed penalties based on the undersupply of coal.”

Is that what it should read?

MR GERT JACOBUS OPPERMAN: I would prefer if we say that Eskom recorded penalties.

CHAIRPERSON: Oh okay. Eskom. So imposed becomes recorded

MR GERT JACOBUS OPPERMAN: Correct.

CHAIRPERSON: Recorded penalties based on the undersupply of coal?

10 **MR GERT JACOBUS OPPERMAN:** Correct.

CHAIRPERSON: Based on the undersupply of coal. Okay I have got that. Is there another correction you want to make in the statement?

MR GERT JACOBUS OPPERMAN: No that is all thank you Sir.

CHAIRPERSON: That is all okay thank you.

ADV VINCENT MALEKA SC: Alright Mr Opperman the second part of the formalities I would like to deal with is your confirmation that you are currently employed at Eskom?

MR GERT JACOBUS OPPERMAN: That is correct.

20 **ADV VINCENT MALEKA SC:** You confirm in your statement that you have a long history of employment at Eskom and that you started at Eskom fairly early. When did you start at Eskom?

MR GERT JACOBUS OPPERMAN: I started in Eskom in 1992 as a bursar but I was appointed in Eskom on 1 February 1996 as a plant operator at Kendal Power Station.

ADV VINCENT MALEKA SC: At Kendal?

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: Alright. And you rose through the ranks to become a

plant manager?

MR GERT JACOBUS OPPERMAN: That is correct.

ADV VINCENT MALEKA SC: When was it?

MR GERT JACOBUS OPPERMAN: It was around 2007, 2008.

ADV VINCENT MALEKA SC: And which plant were you managing at the time?

MR GERT JACOBUS OPPERMAN: It was the auxiliary plants areas looking after all the material handlings components on the power station.

ADV VINCENT MALEKA SC: Was it still at Kendal?

MR GERT JACOBUS OPPERMAN: Correct.

10 **ADV VINCENT MALEKA SC:** Okay. You then mention that at some point you moved to Hendrina Power Station?

MR GERT JACOBUS OPPERMAN: No that is not correct.

ADV VINCENT MALEKA SC: Alright.

MR GERT JACOBUS OPPERMAN: I was responsible for the management of coal supply to Hendrina but I never worked at Hendrina physically. That was in my capacity that I am appointed currently as – in the primary energy division.

ADV VINCENT MALEKA SC: Oh I see I misunderstood your statement then. So you say you worked in the primary energy division of Eskom?

MR GERT JACOBUS OPPERMAN: Correct.

20 **ADV VINCENT MALEKA SC:** As what?

MR GERT JACOBUS OPPERMAN: As the coal supply unit manager, the same position that I still occupy.

ADV VINCENT MALEKA SC: And in that position what do you do in relation to the various power stations owned by Eskom?

MR GERT JACOBUS OPPERMAN: We are a team of individuals that is allocated to

certain power stations. So for most of the close to ten years that I worked as a coal supply unit manager I have managed between one and two stations – power stations at a time. So my responsibility as towards that station is to make sure that their coal supply that they get confirms to their requirements at the power station and is also delivered as cost effectively as possible.

ADV VINCENT MALEKA SC: Can you mention those power stations by name that you were responsible for?

MR GERT JACOBUS OPPERMAN: Yes it was Majuba Power Station, Kumati Power Station, Hendrina Power Station and Arnot Power Station and at no particular time all
10 four of them it has just happened that it was at certain times two of the stations but those were the four that I was responsible for.

ADV VINCENT MALEKA SC: The two power stations that you must have managed that I will deal with in detail in the course of your evidence are Hendrina and Arnot. In relation to Hendrina when did you begin your management responsibilities particular insofar as they relate to the management of coal supply?

MR GERT JACOBUS OPPERMAN: I cannot recall the exact date but it must have been around September 2012 when I started managing the Optimum Contract.

ADV VINCENT MALEKA SC: Yes. And my understanding is that Hendrina procured coal from Optimum Coal Mine?

20 **MR GERT JACOBUS OPPERMAN:** Correct.

ADV VINCENT MALEKA SC: So that your commencement of the management responsibilities would have coincided with the appointment of Mr Clifton Ephron as the Chief Executive Officer of Optimum Coal Holdings which at the time owned Optimum Coal Mine. Do you know Mr Clifton Ephron?

MR GERT JACOBUS OPPERMAN: I do know him yes.

ADV VINCENT MALEKA SC: Have you come across him in the course of your functions and duties?

MR GERT JACOBUS OPPERMAN: Yes.

ADV VINCENT MALEKA SC: Alright. Chair we will get to the interface between the two of them in due course.

CHAIRPERSON: Okay.

ADV VINCENT MALEKA SC: And in relation to Arnot when did you commence your management functions and duties?

MR GERT JACOBUS OPPERMAN: I cannot recall that date.

10 **ADV VINCENT MALEKA SC:** More or less.

MR GERT JACOBUS OPPERMAN: I do remember that I was responsible for the management to the supply to Arnot Power Station at the time when the coal was contracted from Tegeta in January 2016.

ADV VINCENT MALEKA SC: 2016?

MR GERT JACOBUS OPPERMAN: Yes ja. So by that time I was there already.

ADV VINCENT MALEKA SC: We will get to how Tegeta was contracted to supply coal to Arnot and we will do so in detail. But from your perspective and from the moment you became involved in the management of coal supply from Tegeta can you give us a snapshot of how Tegeta supplied coal to Arnot Power Station? We will get to the details

20 but just to give us some snapshot of how the relationship worked?

MR GERT JACOBUS OPPERMAN: The coal supply started with a short term agreement initially I think it was for a once off volume of 100 000 tonnes which was then extended with a three months contract and again extended with a five months contract. At that moment in time Tegeta procured the coal from the Optimum Operation and sold it to Eskom. But the contracting party was with Tegeta and not with Glencore

at that moment in time.

ADV VINCENT MALEKA SC: Yes.

ADV VINCENT MALEKA SC: I have read your statement and it becomes clear when one reads it that there was not a long term supplier coal agreement which before the Chairperson have often been described as the Coal Supply Agreement. In other words there was no long term coal supply between Eskom and Tegeta for the supply of coal to Arnot Power Station, correct?

MR GERT JACOBUS OPPERMAN: That is correct.

ADV VINCENT MALEKA SC: Yes. DO you know anything about Brakfontein which
10 was supplying coal to Eskom?

MR GERT JACOBUS OPPERMAN: I know of Brakfontein very well I managed that contract from inception until it went into business rescue also in February 2018.

ADV VINCENT MALEKA SC: Yes. Chair Mr Hofmeyr will deal with the evidence of Mr Opperman insofar as it relates to Brakfontein.

CHAIRPERSON: To Brakfontein ja okay.

ADV VINCENT MALEKA SC: She has assumed the title of responsibility in relation to that contract involving Tegeta.

CHAIRPERSON: Yes I see it is quite – seems to be quite a nice division of work.

ADV VINCENT MALEKA SC: Yes Chair. I wonder how you are able to cope with so
20 much files, so much information when we have divided a team – our team across different topics.

CHAIRPERSON: Well it is because of your assistance.

ADV VINCENT MALEKA SC: Thank you Chair. Mr Opperman can I then take you back to your statement in the context of what you have just told us about your management responsibilities. I would like to highlight some of them beginning from

page 1 of your statement, paragraph 4. I am going to skip paragraphs 1 to 3 but you are welcome to deal with them if you think I have omitted something of significance to your evidence. Are you there?

MR GERT JACOBUS OPPERMAN: I am there.

ADV VINCENT MALEKA SC: Are you happy that we should go to paragraph 4?

MR GERT JACOBUS OPPERMAN: Hundred percent.

ADV VINCENT MALEKA SC: Yes. Now I would like to highlight some of these functions and duties. And the first that I would like to pick up is from the first bullet point. You say part of your duties is to determine and get approval for short, medium
10 and long term coal supply. First thing first what period do you describe as a short term supply?

MR GERT JACOBUS OPPERMAN: Short term will be a supply over three months typically something like that.

ADV VINCENT MALEKA SC: So anything less than three months would be short term?

MR GERT JACOBUS OPPERMAN: Ja it could even go up to five months but I will not say it is less than a year.

ADV VINCENT MALEKA SC: Okay. And then what do you cover in that medium term period? How should we understand it in terms of months?

20 **MR GERT JACOBUS OPPERMAN:** Medium term contracts is anything from a year and we have had medium term contracts for even up as long as ten years.

ADV VINCENT MALEKA SC: As ten years. So anything from one year to ten years would be a medium term, correct?

MR GERT JACOBUS OPPERMAN: Correct. It is not clearly defined like that but I think if one needs to put a time line to it that is [indistinct].

ADV VINCENT MALEKA SC: Oh ja no we working with your experience.

MR GERT JACOBUS OPPERMAN: Yes.

ADV VINCENT MALEKA SC: Because you are the one who describes your responsibilities in that way. I am not suggesting that there is a rule book we just working from your experience. And long term supply would be generally the CSA that we have looked at?

MR GERT JACOBUS OPPERMAN: Ja we do get CSA's for medium term contracts as well so the medium term contracts also does have a CSA and equally so the short term contracts as well but the long term contracts will typically exceed ten years so that
10 could be something as long as twenty years or thirty years.

ADV VINCENT MALEKA SC: Yes. The one that we have the longest period for is the thirty years contract relating to Hendrina.

ADV VINCENT MALEKA SC: Ja if I – I think if it is correct it is going for thirty-five years now.

ADV VINCENT MALEKA SC: Yes. And then you say that in regard to those periods type of supply contracts you have to get approval. Where do you get the approval from?

MR GERT JACOBUS OPPERMAN: This function that is part of my Portfolio in terms of approval is facilitated by the Fuel Sourcing Department. So we have got a
20 department in our division which is termed Fuel Sourcing and they will negotiate and facilitate the process of getting approvals. So my function in this regard is to make sure that coal supply agreements is approved by the time that it reaches our desk to execute it.

ADV VINCENT MALEKA SC: Yes.

MR GERT JACOBUS OPPERMAN: Or my desk to execute it.

ADV VINCENT MALEKA SC: Yes. Chair you have heard the evidence of Mr Nada I am going to repeat it but I would just like you...

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: Mr Opperman to inform us about your role in that approval process. What do you do to get that approval as the coal supply manager of these power stations what do you do? What physical do you do in order to facilitate that approval process?

MR GERT JACOBUS OPPERMAN: I cannot really say how we are – how I am involved in the approval of it other than assisting the Fuel Sourcing Department with
10 technical support or contract management experience through that facilitation process. But the submissions that will go to the various authorising committees that gets compiled by the Fuel Sourcing Division or Department and occasionally we will have inputs into it bringing our experience to the table.

ADV VINCENT MALEKA SC: I suppose what I want to establish from you is this that there will always be a need identified by a power station about its requirements relating to coal supply, correct?

MR GERT JACOBUS OPPERMAN: That need for coal supply will actually be identified through our integrated planning department.

ADV VINCENT MALEKA SC: YEs.

20 **MR GERT JACOBUS OPPERMAN:** Which is also one of the departments within the Primary Energy Division. So that department is responsible to look at burn requirement of the coal within the fleet and they will then based on that determine the shortage of coal at a specific power station and based on that that need will arise.

ADV VINCENT MALEKA SC: Yes. Do you play any role in the identification of a need?

MR GERT JACOBUS OPPERMAN: Not really, not really.

ADV VINCENT MALEKA SC: Alright and once the need has been identified and quantified then there will be a process for giving effect to it through a process of either procurement of coal from different coal suppliers or through some short term agreements. Correct?

MR GERT JACOBUS OPPERMAN: That is correct.

ADV VINCENT MALEKA SC: Do you play any role in the process?

MR GERT JACOBUS OPPERMAN: To give effect to the agreement?

ADV VINCENT MALEKA SC: To give effect to the procurement before the agreement?

10 **MR GERT JACOBUS OPPERMAN:** No, I do not play any role in it.

ADV VINCENT MALEKA SC: Alright and once the formal procurement process has been completed there will be an execution of an agreement between Eskom and a supplier?

MR GERT JACOBUS OPPERMAN: That is correct.

ADV VINCENT MALEKA SC: Do you play any role in that regard?

MR GERT JACOBUS OPPERMAN: No, nothing.

ADV VINCENT MALEKA SC: Well look at what you say in the second bullet point. You say that one of your responsibilities is to manage commercial and legal aspects of existing Coal Supply Agreements.

20 **MR GERT JACOBUS OPPERMAN:** That is correct. So in an existing Coal Supply Agreement meaning it went through the procurement process. It has been signed by all parties and it is in execution phase. Commercial aspects might include or will include payments for goods delivered, coal delivered and legal aspects will typically be when there are aspects that needs to be interpreted in the contract and I will liaise with the Legal Team on those.

ADV VINCENT MALEKA SC: Yes. That is a short hand for compliance obligations by suppliers?

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: And Eskom and that is a heavy responsibility, because often than not there is always a continuing dispute between Eskom and its suppliers relating to coal quality and coal quantity supply issues. Correct?

MR GERT JACOBUS OPPERMAN: That does happen, yes.

ADV VINCENT MALEKA SC: Yes. Just take us through what happens on the ground about how these disputes arise and how do you yourself become involved in trying to
10 resolve these disputes.

MR GERT JACOBUS OPPERMAN: I think one needs to narrow down a certain aspect be it either on quantity or on a quality, those disputes. So let us deal with the quantity one which is maybe the easier one. So a Coal Supply Agreement will have provisions on how the quantity in the Coal Supply Agreement needs to be managed. We term it in the contract when one looks at the quantity tables there is a nominal minimum and maximum. So it gives you an opportunity to do some phasing with volumes mainly to compensate for seasonal changes, but also to accommodate challenges be it at a power station or in the mining section. Certain contracts have provisions for an undersupply. I think most of the contracts have a provision for undersupply. These
20 undersupply provisions in the contracts are very harsh. It is a very harsh penalty and that is the way that we deal with it. So the moment that the supplier will deliver less than minimum. So you will have the contracted nominal. When he goes below minimum for a certain period depending what is noted in the contract a request for a rectification plan will be submitted. That is an official request to provide a plan on how it will be recovered. Within fairness that plan needs to be considered and ultimately we

are in the business of buying the coal. That is what we need. So we will liaise with the supplier and see how we can get around to actually get those volumes to materialise failing which the short supply penalty will then be applied.

ADV VINCENT MALEKA SC: Yes. You have given us a bit of detail there. I would like to understand where do you fit in, in that detail, you as Mr Opperman.

MR GERT JACOBUS OPPERMAN: I fit in all that, in that whole area. That is my responsibility.

ADV VINCENT MALEKA SC: So you manage that whole scheme of detecting short supply and imposition of penalties arising from short supply?

10 **MR GERT JACOBUS OPPERMAN:** That is correct. So I will be the person who will be able to identify if there is a short supply. From that short supply my finance team will assist me with the calculation of a short supply penalty if it goes to that point. I will be the person who will issue the request for rectification plan to the respective supplier to engage them on a recovery plan.

ADV VINCENT MALEKA SC: Yes and the same thing will be the case and it will be your responsibility when it comes to coal quality supply concerns that require imposition of penalties by Eskom? In other words you will play the same role?

MR GERT JACOBUS OPPERMAN: I do play the same role. However on coal qualities there is a process, a dispute process that can be followed. So the moment
20 that quality is out of specification there is a process that you can go through disputing those qualities which is again dependent on the method of contracting and then after those qualities have been disputed and the results become available those results then become final and binding. If those qualities then still require a penalty to be imposed I will be responsible for the imposition of that penalty and the penalty will be calculated with the support from the Finance Team.

ADV VINCENT MALEKA SC: Indeed. So you take responsibility for identifying the nature and extent of coal quality problems and you take responsibility for the calculation of penalties that Eskom will impose and I understand that although you yourself may not do the mathematics you take final responsibility for the numbers arising from the mathematics?

MR GERT JACOBUS OPPERMAN: I think that is fair to say. There are teams available or supporting me on the technical point as well on the quality determination, but that is a fair deduction, yes.

ADV VINCENT MALEKA SC: Yes. I understand. There will be what do you call, coal
10 scientists from Eskom who would go through the coal quality problems. There may well be even your Finance Division who will look at the numbers and come to you with some number and you agree to implement the number?

MR GERT JACOBUS OPPERMAN: That is correct.

ADV VINCENT MALEKA SC: Yes. Other than yourself doing all of those things relating to the two mines that you manage and we know that one of them is Optimum Coal Mine would there be any other person who would do the calculations relating to penalties?

MR GERT JACOBUS OPPERMAN: Yes. We have had an instance especially on the Optimum Coal Supply Agreement where there was a lot of contention around the way
20 that the calculation needed to be done where we have or I have consulted our internal legal people and we then consulted external legal firms to assist us with the calculation of penalties as well as the interpretation thereof.

ADV VINCENT MALEKA SC: Yes. Mr Opperman let me give you some indication of why I have asked you these questions and your responsibilities. The Chairperson has said a lot about the calculation and imposition of penalties relating to Optimum Coal

Mine which ultimately led to the declaration of hardship and business rescue of Optimum Coal Mine (Pty) Ltd. You are aware of that history. Correct?

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: And ultimately the amount that was sought to be imposed in the beginning. I am talking about June 2015 was in the order of 2.5 billion. Are you aware of that amount?

MR GERT JACOBUS OPPERMAN: It was in that order, yes.

ADV VINCENT MALEKA SC: Yes and finally when Optimum Coal Mine was taken over by Tegeta the amount reduced to 255 million cash payment. Are you aware of that
10 history?

MR GERT JACOBUS OPPERMAN: I am aware of that settlement amount.

ADV VINCENT MALEKA SC: Yes. Those are the two points or the penalties. In your statement you make it quite clear that you disagreed with the first leg of the penalties. We will get to that part of your evidence, but you confirm for now that you disagreed with the calculation of the penalties of R2.1 billion. Correct?

MR GERT JACOBUS OPPERMAN: I did not disagree with the calculation. I fully agree with the 2.1 billion. What is important is to understand the different reference points.

ADV VINCENT MALEKA SC: Yes.

20 **MR GERT JACOBUS OPPERMAN:** And if I am afforded the opportunity I will explain it.

ADV VINCENT MALEKA SC: Yes, but.

CHAIRPERSON: I am sorry. I take it that what you mean is you arrive at the same outcome?

MR GERT JACOBUS OPPERMAN: Correct.

CHAIRPERSON: Total but the method or the means by which you arrive at it might differ in some way from the method that may have been used by those who calculated and came to the same amount, 2.1 billion. Is that right?

MR GERT JACOBUS OPPERMAN: Chair there is not a different interpretation. I think.

CHAIRPERSON: Yes.

MR GERT JACOBUS OPPERMAN: Even the interpretation is the same, because.

CHAIRPERSON: Yes.

MR GERT JACOBUS OPPERMAN: We work from the same spreadsheet.

10 **CHAIRPERSON:** Yes.

MR GERT JACOBUS OPPERMAN: So there is no difference in that. I think Mr Maleka refers to the 720 million that I refer to in my statement and my statement to the 720 million only including the sizing penalty up until end of April, I think, 2013 when Optimum issued a notice where they wanted to renegotiate the sizing penalty. Whereas the 2.1 billion penalty considers the whole period.

CHAIRPERSON: Okay. No that is fine.

ADV VINCENT MALEKA SC: We will get to the details on how the calculation was done, but as far as you are aware you came to the conclusion that a justifiable amount of the penalties that Eskom could lawfully impose on your interpretation of the agreement was in the order of 720 million?

20

MR GERT JACOBUS OPPERMAN: That deduction that I made as I said was only for the period as consideration the sizing penalty up until 23 April 2013.

ADV VINCENT MALEKA SC: I understand.

MR GERT JACOBUS OPPERMAN: So I only considered, in my statement I only considered the sizing penalty up until the period when Optimum came to the table and

they said to us Eskom we want to renegotiate the sizing specification.

ADV VINCENT MALEKA SC: Yes.

MR GERT JACOBUS OPPERMAN: They are entitled according to the first addendum to request that to be done. There is a whole process that followed after that with multiple communications up and down for additional information and it never got to agreeing to a different sizing specification, but that was my interpretation.

ADV VINCENT MALEKA SC: Yes.

MR GERT JACOBUS OPPERMAN: So the whole time when I was referencing a penalty against this contract it considered the quality parameters, it excluded AA
10 because the AA was levied at that moment in any case, but it only included the sizing penalty up until April 2013.

ADV VINCENT MALEKA SC: Up until April 2013?

MR GERT JACOBUS OPPERMAN: That is correct.

ADV VINCENT MALEKA SC: And on that calculation you came to that number of R720-odd million. Correct?

MR GERT JACOBUS OPPERMAN: Ja, there was some interpretation done to it.

ADV VINCENT MALEKA SC: Ja.

MR GERT JACOBUS OPPERMAN: And me not being a mathematician, but use some averages and.

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

MR GERT JACOBUS OPPERMAN: And things like that and I got to the 723. I did a similar calculation on Mr Nagar's spreadsheet.

ADV VINCENT MALEKA SC: Yes.

MR GERT JACOBUS OPPERMAN: And on that spreadsheet it came to 719 million. So the 720 ballpark figure is that.

ADV VINCENT MALEKA SC: And that is really the point of the questions. That you do one calculation give your role and official responsibilities in Eskom. You arrive at one figure. Someone else does a calculation, arrive at a totally different figure. I would like you when we get to that point of your evidence to give some explanation of the differences, if any.

MR GERT JACOBUS OPPERMAN: Ja, I do not think there has been any differences.

ADV VINCENT MALEKA SC: Okay.

MR GERT JACOBUS OPPERMAN: I am confirming that it was the same figure.

ADV VINCENT MALEKA SC: It was the same figure?

10 **MR GERT JACOBUS OPPERMAN:** Correct.

ADV VINCENT MALEKA SC: Okay, thank you. Then I can take you back to your statement and reflect on some of the responsibilities that you outline on page 2? You say and I am reading from the second bullet point at the top of page 2 that you manage coal quality in terms of the CSA. Correct?

MR GERT JACOBUS OPPERMAN: That is correct.

ADV VINCENT MALEKA SC: And so in that debate around coal quality issues that will be your management responsibility?

MR GERT JACOBUS OPPERMAN: That is correct.

20 **ADV VINCENT MALEKA SC:** Alright and then in the fourth bullet point from the top you say, you also identify and manage coal supply and cost risk. Can I ask you to explain to us precisely what do you do in that regard and I am interested in the management of the cost risk?

MR GERT JACOBUS OPPERMAN: So what we will do is in certain instances when coal gets delivered not via conveyor where it is a fixed mode of delivery, but coal gets delivered via road we will consider that coal supply risk in that manner in terms of

considering different routes that a vehicle can take. The shorter the route the lower the Rand per ton that we pay for the logistics cost. It could be that. I immediately cannot think really of anything else.

ADV VINCENT MALEKA SC: Okay and to re-orientate you on the facts in this case relating to that official responsibility you are aware that coal supplied to Arnot from Optimum Coal Mine by Tegeta was transported by road?

MR GERT JACOBUS OPPERMAN: That is correct.

ADV VINCENT MALEKA SC: And that would have been part and parcel of managing that risk of delivery from Optimum Coal Mine to Arnot?

10 **MR GERT JACOBUS OPPERMAN:** That is correct.

ADV VINCENT MALEKA SC: From your memory or experience what is the distance between Optimum Coal Mine and Arnot Power Station?

MR GERT JACOBUS OPPERMAN: I cannot recall, but it must be in the region of around 60/64 kilometres. Somewhere around there.

ADV VINCENT MALEKA SC: Yes and so Eskom would pay not only for the actual price of the coal per ton, but it will also pay transport costs?

MR GERT JACOBUS OPPERMAN: That is correct.

ADV VINCENT MALEKA SC: Yes. Are you able to recall off hand what would have been the average of the transport costs relating to the Short Term Supply Agreement
20 between Tegeta and Eskom to supply coal to Arnot?

MR GERT JACOBUS OPPERMAN: I cannot recall a; you are referring to the Rand per ton for the transportation?

ADV VINCENT MALEKA SC: Yes.

MR GERT JACOBUS OPPERMAN: I cannot recall exact figures, but it must be in the region if I think around R140 or so.

ADV VINCENT MALEKA SC: Alright. The next responsibility I would like you to explain to is I think the fifth from the bottom where you say, you manage CSA Accounts. Do you see that?

MR GERT JACOBUS OPPERMAN: Yes.

ADV VINCENT MALEKA SC: What do you do in that regard?

MR GERT JACOBUS OPPERMAN: Sorry, can I just, can you just repeat that?

ADV VINCENT MALEKA SC: Do you see the fifth bullet point from the bottom on page 2 of your statement?

MR GERT JACOBUS OPPERMAN: Okay, yes, *ja*.

10 **ADV VINCENT MALEKA SC:** You say part of your responsibilities include the management of Coal Supply Agreement Accounts.

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: Yes. Would that be invoices from the suppliers?

MR GERT JACOBUS OPPERMAN: That is correct, yes.

ADV VINCENT MALEKA SC: And if there are queries you will query them?

MR GERT JACOBUS OPPERMAN: That is correct.

ADV VINCENT MALEKA SC: And I suppose if there are no queries you will certify them for payment?

MR GERT JACOBUS OPPERMAN: That is correct.

20 **ADV VINCENT MALEKA SC:** And the last responsibility I would like you to explain for us is the one that follows thereafter. You say you liaise with power station management, internal supply personnel, other Eskom clients and Industry Committees. You see that?

MR GERT JACOBUS OPPERMAN: That is correct.

ADV VINCENT MALEKA SC: Yes. Insofar as liaison with the power station

management is concerned can you explain to us what do you do?

MR GERT JACOBUS OPPERMAN: We will have monthly liaison meetings with the Power Station Coal Management Team. It will occasionally also be attended by the General Manager or the Coal Supply Unit Manager and the function of that is to really report on the previous month's performance and look at suppliers, try and align the burn requirements with the supply from the power station. We will also revisit qualities. So, *ja* that is what we do.

ADV VINCENT MALEKA SC: So that if there are problems in relation to the power stations regarding their requirement you will be someone who is informed about them
10 and you will be someone who would be able to deal would them in general terms?

MR GERT JACOBUS OPPERMAN: *Ja*, I will be informed with it, about it and will action it.

ADV VINCENT MALEKA SC: Yes and insofar as your interface with Eskom's clients and Industry Committees are concerned what do you do? Who are these clients more or less? Just categorisation of them quite quickly.

MR GERT JACOBUS OPPERMAN: In this aspect Eskom's clients are referred to as our suppliers. So I also have monthly engagements with the suppliers where we will meet and look at supply risks, quality risks. We will discuss any operational matters, potential coal supply issues, things like that. So it is mainly on that. Industry
20 Committees will include on occasion if we involve people who are specialists for argument on sampling or coal accounting, things like that.

ADV VINCENT MALEKA SC: Alright. So is it fair if we were to strike out that word clients and replace it with suppliers?

MR GERT JACOBUS OPPERMAN: *Ja* that is fair.

ADV VINCENT MALEKA SC: Okay. We have now.

CHAIRPERSON: Is that the; is that what comes after the bullet point with liaise with power station?

ADV VINCENT MALEKA SC: Yes Chair.

CHAIRPERSON: After Eskom?

ADV VINCENT MALEKA SC: Yes. After Eskom

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: After Eskom, clients.

CHAIRPERSON: Should be suppliers?

ADV VINCENT MALEKA SC: Indeed.

10 **CHAIRPERSON:** Okay, thank you.

ADV VINCENT MALEKA SC: Because Eskom's clients would generally municipalities and consumers of electricity, Mr Opperman?

MR GERT JACOBUS OPPERMAN: Yes.

ADV VINCENT MALEKA SC: Alright. We have an appreciation of your rules and responsibilities and you confirm in paragraph 5 that you report to Mr Petros Mazibuko, who is the General Manager of Coal Operations. Correct?

MR GERT JACOBUS OPPERMAN: That is correct.

ADV VINCENT MALEKA SC: And all of these reporting lines are within the Primary Energy Division of Eskom?

20 **MR GERT JACOBUS OPPERMAN:** That is correct.

ADV VINCENT MALEKA SC: Okay and Mr Mashigo leads that division as I recall?

MR GERT JACOBUS OPPERMAN: That is correct.

ADV VINCENT MALEKA SC: Yes. Now in paragraph 6 you explain the nature and extent of the evidence you have conversed in your statement. I am not going to deal with it unless you want to reflect on any part of it. For my part I confirm that I am

interested in your evidence insofar as it relates to Hendrina Power Station and Arnot Power Station and you have explained when you started your management responsibilities in relation to the two. Unless there is anything that you would like to raise I will skip that paragraph and go to paragraph 9. You mentioned the name of Mr George van der Merwe who was the Chief Operating Officer of Optimum Coal Mine. Do you see that?

MR GERT JACOBUS OPPERMAN: I see it.

ADV VINCENT MALEKA SC: Yes. The Chairperson has not heard the evidence of Mr van der Merwe who is the COO of that mine, but has heard the evidence of
10 Mr Ephron and Mr Ephron mentioned your name in the context of negotiations that followed the Cooperation Agreement. That you were part and parcel of the Negotiation Team for Eskom. Do you confirm that?

MR GERT JACOBUS OPPERMAN: Yes.

ADV VINCENT MALEKA SC: Did Mr van der Merwe take part in those negotiations as far as you are aware?

MR GERT JACOBUS OPPERMAN: No, Mr van der Merwe did not. Mr van der Merwe was the Chief Operating Officer for Optimum Coal Mine and the management and control of Tegeta.

ADV VINCENT MALEKA SC: Of Tegeta?

20 **MR GERT JACOBUS OPPERMAN:** Correct.

ADV VINCENT MALEKA SC: Oh, I see. Alright. I was a bit confused. Can I take you to page 3 of your statement? Under the heading background to Hendrina you give us some historical detail. Most of that has been dealt with by other witnesses. I will move quite quickly through the paragraphs if you do not mind, but again the qualification is that if you want to say something more please do. At paragraph 11 and you confirm

that that mine that is the mine which was supplying Hendrina it began on a specific pricing structure. It was a Cost Plus Mine Supply Structure. Do you confirm that?

MR GERT JACOBUS OPPERMAN: That is correct.

ADV VINCENT MALEKA SC: Do you know when it changed?

MR GERT JACOBUS OPPERMAN: It changed in 1993 with the signing of the next agreement.

ADV VINCENT MALEKA SC: Yes and it became a Fixed Price type of structure for the supply of coal?

MR GERT JACOBUS OPPERMAN: That is correct.

10 **ADV VINCENT MALEKA SC:** Okay. Chair I think they have explained the difference to you. I am not going to ask Mr Opperman.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: To deal with the differences.

CHAIRPERSON: Ja, thank you.

ADV VINCENT MALEKA SC: Alright. Mr Opperman you explain in paragraph 15 something relating to the coal quality that was procured from Optimum Coal Mine. Do you see that/

MR GERT JACOBUS OPPERMAN: Yes.

ADV VINCENT MALEKA SC: You say that:

20 “The coal sold and delivered to Eskom by Optimum Coal Mine
 had an excessively high abrasive index.”

Do you see that?

MR GERT JACOBUS OPPERMAN: Yes.

ADV VINCENT MALEKA SC: Okay. Chair you have heard enough of the evidence about what abrasive index is. I am not going to.

CHAIRPERSON: Will everybody please switch off their cell phones. Okay. Yes Mr Maleka.

ADV VINCENT MALEKA SC: Thank you Chair. I think we have a fair understanding Mr Opperman of what abrasive index is. So you can assume that we understand something about what it means, but what I would like you to explain to us is what is the typical implication to the operation of the mine, sorry the power station when coal has this high abrasive index? How does it affect the power station?

MR GERT JACOBUS OPPERMAN: So the abrasive index in coal that we measure is a determination of a certain chemical characteristic that coal has that impacts wear and
10 wear rates. So what typically will happen with a coal with a high wear rate, wherever it gets into contact with any metal surface it will wear away that metal surface. So this will typically impact the areas of your milling plant, the classifier plant, your PF ducting, your pulverised fuel ducting that feeds the coal to the furnace, the burner mouse. The burners that goes into the furnace and then what also happens is that the moment that coal is then combust it also has an impact on the ash characteristics with relevance to the pyrites and those chemical substances in the ash that then also have a wear impact on the boiler tubing, flue gas ducts, the air heaters in that stream even out on your ID fan impellers. So basically everything that gets into contact with that that stream of coal or ash, gas stream once it is combusted. So it is an indication of an impact on
20 wear on plant. So the higher the figure the higher your wear rate will be.

ADV VINCENT MALEKA SC: Yes. So the higher the abrasive index the greater and faster the wear and tear of the various parts of the power station takes place?

MR GERT JACOBUS OPPERMAN: Correct relating to the areas that have contact to the coal.

ADV VINCENT MALEKA SC: Indeed.

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: So as the coal with high abrasive index moves through various parts during the combustion process those parts wear quickly?

MR GERT JACOBUS OPPERMAN: That is correct.

CHAIRPERSON:

ADV VINCENT MALEKA SC: And there is a need for maintenance or replacement?

MR GERT JACOBUS OPPERMAN: That is correct.

ADV VINCENT MALEKA SC: And that is the reason why you impose penalties/

MR GERT JACOBUS OPPERMAN: That is correct.

- 10 **ADV VINCENT MALEKA SC:** Okay. Now I understand. I am going to get to that issue of the abrasive index with reference to an arbitration and settlement agreement that Eskom had with Optimum Coal Mine and you are aware of it?

MR GERT JACOBUS OPPERMAN: Yes, I am.

ADV VINCENT MALEKA SC: We will get to that issue later on, because there are questions of penalties there. You remember that?

MR GERT JACOBUS OPPERMAN: That is correct.

ADV VINCENT MALEKA SC: Alright. Now you have already dealt with paragraph 16. You have indicated how we should read it. In its current form it says:

“Eskom recorded penalties based on the undersupply of coal.”

- 20 And you say:

“OCM disputed the penalties imposed by Eskom and the dispute was referred to arbitration.”

You see that?

MR GERT JACOBUS OPPERMAN: Yes.

ADV VINCENT MALEKA SC: You say ultimately there was a settlement agreement

and you refer to the settlement agreement in paragraph 17. Do you confirm that?

MR GERT JACOBUS OPPERMAN: Yes. That is correct.

ADV VINCENT MALEKA SC: I would like to take you to the settlement agreement if you don't mind, it is from page 171 of U8. Are you there Mr Opperman?

MR GERT JACOBUS OPPERMAN: Yes.

ADV VINCENT MALEKA SC: Yes, you will see that the heading of that document is "Settlement of Arbitration and Second Addendum to the Hendriena Coal Supply Agreement", do you see that?

MR GERT JACOBUS OPPERMAN: Yes.

10 **ADV VINCENT MALEKA SC:** So that the purpose of that settlement was not only to settle the dispute relating to the short supply of coal by Hendriena at that point in time, but also to amend the CSA via the second addendum, do you agree with that interpretation?

MR GERT JACOBUS OPPERMAN: Yes.

ADV VINCENT MALEKA SC: Okay now let's look at Clause 1.3 on page 173, that clause it's a definition clause making it quite clear that the document we are looking at it's the second amendment to the SCA and that's why it's called the second addendum, correct?

MR GERT JACOBUS OPPERMAN: That's correct.

20 **ADV VINCENT MALEKA SC:** Now you will see that paragraph 2.2 on page 174 records the history giving rise to the second addendum, and the amendment to the SCA begin at paragraph 3.1, do you confirm that?

MR GERT JACOBUS OPPERMAN: Yes.

ADV VINCENT MALEKA SC: The first amendment related to the coal quantity so there is an amount of R5.5million per ton of coal that's Optimum Coal Mine agreed to

deliver to Eskom. Mr Ephron explained to the Chairperson the implication of that amendment and I don't want to take you through it but my recollection is that it was changing the maximum amount that was initially delivered under the SCA, do you agree with that?

MR GERT JACOBUS OPPERMAN: That's correct, it was previously 6.5.

ADV VINCENT MALEKA SC: Yes so there was a reduction of the amount and the oversimplification of it is that Optimum Coal Mine was quite satisfied that it could not deliver the previous maximum and therefore did not want to incur penalties relating to short supply?

10 **MR GERT JACOBUS OPPERMAN:** Correct.

ADV VINCENT MALEKA SC: Yes. Then the next amendment of importance to your evidence begin from page 178. I have skipped the rest but it's up to you if you want to bring our attention to other parts of the second addendum.

MR GERT JACOBUS OPPERMAN: That's fine.

ADV VINCENT MALEKA SC: It's paragraph 3.3, it talks about the topic of abrasive index, do you see that?

MR GERT JACOBUS OPPERMAN: Yes.

ADV VINCENT MALEKA SC: And the amendments are now set out in detail in paragraph 3.3.2, do you see that?

20 **MR GERT JACOBUS OPPERMAN:** Yes.

ADV VINCENT MALEKA SC: Now can I ask you to take us quickly if you can through these amendments because there is a stepladder like calculation of the abrasive index and the penalties depending on the degree of the calculated indexes, do you see that?

MR GERT JACOBUS OPPERMAN: Yes.

ADV VINCENT MALEKA SC: Can I please ask you to explain to us how the penalty

model will work under the second addendum.

MR GERT JACOBUS OPPERMAN: Okay so I want to take you back to paragraph 3.3.1, the paragraph just before that.

ADV VINCENT MALEKA SC: Yes.

MR GERT JACOBUS OPPERMAN: Because there's something of importance to note and it's the last section of that paragraph that clarifies the method or the manner in what – in how these qualities will be determined. So it says there that the target is to have AI less than 423mg iron on a seven day weighted rolling average basis. Okay, so this is important when we talk later about penalty determination. So this is the first time
10 that the qualities on AI gets raised and it clarifies the method in how it will be calculated and it is calculated on a seven day weighted rolling average basis.

ADV VINCENT MALEKA SC: Yes.

MR GERT JACOBUS OPPERMAN: Okay.

ADV VINCENT MALEKA SC: So you look not only on a stockpile per day, you look at an average of the stockpiles over a period of seven days?

MR GERT JACOBUS OPPERMAN: You look at it over a period of seven days, it is rolling, so the seven days will consistently roll, so that's correct, but you will also weight it according to the deliveries on that specific day.

ADV VINCENT MALEKA SC: Yes, okay, for some of us we don't understand how
20 weighted average work, can you explain to us how do you do your weighting during this period of seven days.

MR GERT JACOBUS OPPERMAN: Okay so what you will do during the period of seven days you will take the total tons supplied over the seven days and you will take the tons that was supplied on that specific day, that will be worked out as a percentage to one another and you will multiply the AI on that specific day with that weighting, and

that will roll the whole time, so the importance here is to understand that it's weighted, firstly, and the second one is that it is not a seven day window, but it is a rolling average, so it does become quite a complex calculation when one does this.

ADV VINCENT MALEKA SC: Alright but we know that the importance or the objective of that calculation is to make sure that the index is less than 423.

MR GERT JACOBUS OPPERMAN: That's correct.

ADV VINCENT MALEKA SC: If it's more the calculations of penalties begin.

MR GERT JACOBUS OPPERMAN: That's correct. And that takes us to point number 332, so I can explain that, so what you find here is that there is five ranges, so the
10 contract stipulates that it should be below 423 to not attract any penalties. The moment that it is greater than 423 but less than 500 or up to 500 the – Optimum will pay a penalty of R1.23 per ton, so where I get to this Optimum pay a penalty it's described just in the paragraph above where it says in the event that the AI level is greater than 423mg iron Optimum Coal Colliery will be liable to pay a penalty to Eskom calculated based on the following basis.

ADV VINCENT MALEKA SC: Yes.

MR GERT JACOBUS OPPERMAN: So what it will mean is that Optimum will invoice us and then they will pay that, so what we have done in reality is that this penalty on a monthly basis where it was applicable this penalty was offset against the invoice
20 amount on a monthly basis, okay and so it goes on.

ADV VINCENT MALEKA SC: Can I stop you there?

MR GERT JACOBUS OPPERMAN: Yes.

ADV VINCENT MALEKA SC: I think it's important to make sure that your evidence is understood by us. You say that if there is a need to impose penalties, then the penalties will be calculated and it will be levied on a monthly basis.

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: And the process of levying that penalty is you will do a set-off against invoices.

MR GERT JACOBUS OPPERMAN: For that specific month yes.

ADV VINCENT MALEKA SC: Yes, so – and that's important and I would like to make sure that your evidence is clear on that score. So every month Optimum will send out an invoice for the stockpile delivered and you will look at it and you will say but they are liable to pay a penalty, you will do your calculation and you will set off the amount of the calculated penalties against the invoices and you will pay the net between the invoiced
10 amount and the penalty amount.

MR GERT JACOBUS OPPERMAN: That's correct.

ADV VINCENT MALEKA SC: Okay and you say you do it on a monthly basis.

MR GERT JACOBUS OPPERMAN: Correct yes.

CHAIRPERSON: Before you actually do the – or effect the set-off would you have communicated to them your conclusion that penalties have to be imposed or they would only see when they see how much you are paying them that month?

MR GERT JACOBUS OPPERMAN: Chair there will be a remittance advice submitted by the Finance Department to the mine so they become aware through that before the payment is effected. At a later stage in the management of the contract I have started
20 drafting a letter which was a letter formatted by Cliffe Dekker and Hofmeyr where they advised us how to share this detail on a monthly basis and this letter made reference to the coal price at the time, the total invoiced amount, the amount deductible for coal quality CD as volatile sizing and then also the AI.

CHAIRPERSON: Okay thank you.

ADV VINCENT MALEKA SC: Thank you Chair I am going to skip the rest because we

can see how the amount increases as the AI goes up. Unless you want to make any comment on it, but what I would like to take you to, of relevance to the penalty, is paragraph 3.3.3, do you see it?

MR GERT JACOBUS OPPERMAN: Yes.

ADV VINCENT MALEKA SC: Can I ask you what is the implication of that paragraph to the penalties Eskom would be entitled to impose?

MR GERT JACOBUS OPPERMAN: So Chair these amounts, and if we just take the first range, the R1.23 per ton that is payable by Optimum for AI between 423 and 500 this R1.23 was as on the base date 1 April 2011 and this amount of R1.23 will then be
10 adjusted with the escalation matrix in this contract on an annual basis as the escalation happened.

ADV VINCENT MALEKA SC: So it's possible that although the baseline for calculation is R1.23 per ton that Rand amount may be escalated higher depending on the methodology set out in the CSA?

MR GERT JACOBUS OPPERMAN: That's correct.

ADV VINCENT MALEKA SC: Yes, now Mr Opperman I am going to take you to paragraph 3.4.3 on page 179 and it talks to the question that the Chairperson has posed to you, on my reading of that paragraph it is quite clear that there is an obligation for Eskom to advise Optimum Colliery on a month to month basis about the nature and
20 extent of the penalties it intends to impose correct?

MR GERT JACOBUS OPPERMAN: That's correct.

ADV VINCENT MALEKA SC: And you do so with reference to providing details including the calculation of those penalties, correct?

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: Including the laboratory tests that you have at your

disposal concerning the level of the AI that you may have picked up from the stockpile supplied, correct?

MR GERT JACOBUS OPPERMAN: That's correct.

ADV VINCENT MALEKA SC: It's an elaborate process, and it seems to me that you are at the front line of making sure that this process is complied with, correct?

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: Given this elaborate process and the need for a monthly imposition, sorry firstly monthly calculation and monthly communication of the funds imposed to the relevant mine why would there be a debate in due course as between
10 Optimum and Eskom about these penalties, because it seems to me that this clause is designed to anticipate those debates and resolve them as and when they happen, do you agree?

MR GERT JACOBUS OPPERMAN: I agree.

ADV VINCENT MALEKA SC: But why would then be such a historical debates of two years worth penalties, in the light of this matrix of dispute resolution?

MR GERT JACOBUS OPPERMAN: Throughout this contract there has been various attempts in terms of the interpretation of the penalty provisions of this contract and I think this was just again one other example where the parties fail to agree on the method of calculation of this penalty and that is why there was that discontent around
20 the penalty amount and there has been a lot of engagements around that with Glencore on a frequent basis where calculations were shared. The laboratory results is shared in real time on a daily basis so that is something that is available to either party at any given time. The calculations were shared at intervals, I would not say that it was consistently shared every month but if you draw up a spreadsheet and you say well this is the way that we calculate it then it implies every month you just plug in the actual

quality parameter that's relevant to that seven day rolling period and it should yield the result, but yet there was a difference of interpretation around this calculation.

CHAIRPERSON: And when you have advised, when you would have advised them of the imposition of a penalty in a particular month and they didn't agree with you and therefore there was some issue would you go ahead and effect the set-off in regard to that month or would the implementation of the set-off wait until there is some resolution in regard to that particular month?

MR GERT JACOBUS OPPERMAN: Chairperson on the AI we did offset that amount every month, irrespective of ...(intervention)

10 **CHAIRPERSON:** Of a dispute.

MR GERT JACOBUS OPPERMAN: Of a dispute yes.

CHAIRPERSON: So the dispute could be handled in due course but you would have effected that set-off in the meantime?

MR GERT JACOBUS OPPERMAN: Correct, we felt from Eskom that the second addendum was very clear on how the AI should be calculated and that amount was deducted every month, reason being that the month that that AI was high we incurred the additional wear at our power plant and that was a material cost and that was all determined through a recent study that informed these penalty parameters in the second addendum.

20 **CHAIRPERSON:** I guess it follows that if you had effected a set-off in a particular month but a dispute arose or was still going on and later on you were persuaded that you were wrong you would then reverse that.

MR GERT JACOBUS OPPERMAN: We could do that yes.

CHAIRPERSON: Ja, okay.

ADV VINCENT MALEKA SC: Thank you Chair. There are two other additional points I

would like to draw your attention to relating to this second addendum, the first is at page 179 paragraph 3.5.1 do you see that?

MR GERT JACOBUS OPPERMAN: Yes sir.

ADV VINCENT MALEKA SC: It's about the base price for the coal supplied, or to be supplied, you see that it changes now to become 115, R115 per ton.

MR GERT JACOBUS OPPERMAN: That's correct.

ADV VINCENT MALEKA SC: Yes, and it will begin from 11 April 2011, correct?

MR GERT JACOBUS OPPERMAN: Now it only meant that this is the base price for that specific date and that the escalation will be made on the indexes from that date
10 going forward.

ADV VINCENT MALEKA SC: Yes, no I understand that, from that date going forward you will obviously apply whatever escalation.

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: But there's a base price, alright. The next part relates to paragraph 3.6.1 and it's going to become important as we explore your evidence in two ways, firstly it seems to me when I read this clause and others that support the philosophy of it, that the parties were well aware and were concerned about the abrasive index of the coal stock from that mine, from Optimum Coal Mine, and they wanted to do their best efforts to see what were the reasons for it, and how they can
20 resolve it, do you agree with that?

MR GERT JACOBUS OPPERMAN: Yes.

ADV VINCENT MALEKA SC: Yes, and the parties committed themselves to how they will deal with it, in fact they formed the Sterling Committee, correct?

MR GERT JACOBUS OPPERMAN: That's correct.

ADV VINCENT MALEKA SC: Were you part of it or were you not there at the time?

MR GERT JACOBUS OPPERMAN: No I was not there at the time, I only started managing this contract in September the following year, 2012.

ADV VINCENT MALEKA SC: Yes, from anecdotal evidence you could have obtained do you know whether the process to investigate this problem about coal from Optimum was taken further as between the parties?

MR GERT JACOBUS OPPERMAN: I do recall that there was a study done by an independent expert company, in short I can just refer it to the Turgess Study, I am not exactly sure over what period it fell but I would like to believe that it coincided with the actions from this Steercom where it was done.

10 **ADV VINCENT MALEKA SC:** Okay, Chair I am going to leave paragraph 4.1 and 4.2 on page 181 because it will become relevant when we deal with the third addendum, so may I ask you to note that there is still that part of 4.1 and 4.2 but it becomes relevant when we deal with the third addendum. And the last part Mr Opperman is the lawyer's clause where the parties agree to abandon whatever disputes or contentions they may have had and that is paragraph 6.1, do you see that?

MR GERT JACOBUS OPPERMAN: Yes.

ADV VINCENT MALEKA SC: Okay. Subject to any other issue you would like to bring to our attention I would like to go back to your statement and pick up your evidence from paragraph 18, are you there? Page 4 paragraph 18 of your statement.

20 **MR GERT JACOBUS OPPERMAN:** I'm there.

ADV VINCENT MALEKA SC: You talk about the fact that Glencore acquired Optimum in 2012, correct?

MR GERT JACOBUS OPPERMAN: Yes.

ADV VINCENT MALEKA SC: And as a result of that acquisition the parties signed a third addendum, correct?

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: And you say the purpose of the third addendum was to delete paragraphs 4.1 and 4.2 of the second addendum, correct?

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: Chair it's in that context and it was for that reason that I skipped paragraphs 4.1 and 4.2 of the second addendum.

CHAIRPERSON: Yes, yes.

ADV VINCENT MALEKA SC: If you don't mind I would like to go back to it to see precisely what is the effect of the third addendum on those two paragraphs of the
10 second addendum. Chair you will find the third addendum on ...(intervention)

CHAIRPERSON: Was it 131, or not really?

ADV VINCENT MALEKA SC: No I think it comes after 171, it will be at 187.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: It begins from page 188, do you see that, Mr Opperman are you at page 188?

MR GERT JACOBUS OPPERMAN: Yes.

ADV VINCENT MALEKA SC: Okay, can you confirm that that is the third addendum that you referred to in paragraph 18 of your statement?

MR GERT JACOBUS OPPERMAN: Yes it is.

20 **ADV VINCENT MALEKA SC:** Yes. You see that it was signed by Mr – or Ms Kirin Maharajah on the 11th of February 2013 on behalf of Eskom if you go to page 190, correct?

MR GERT JACOBUS OPPERMAN: That's correct.

ADV VINCENT MALEKA SC: Do you know who signed it on behalf of Optimum Coal Holdings and Optimum Coal Mine Pty Limited seems to be the same signature.

MR GERT JACOBUS OPPERMAN: I think it's Mr Ephron signature but I'm under correction.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: You think it's Mr?

MR GERT JACOBUS OPPERMAN: Ephron, Clinton Ephron.

CHAIRPERSON: Ephron, okay, thank you.

ADV VINCENT MALEKA SC: The substance of that third addendum you will find it on page 189, do you see that?

MR GERT JACOBUS OPPERMAN: Yes.

10 **ADV VINCENT MALEKA SC:** And paragraph 3.1.1 can you read it for us?

MR GERT JACOBUS OPPERMAN: "The parties hereby amend the second addendum by deleting the provision of clauses 4.1 and 4.2 of the second addendum."

ADV VINCENT MALEKA SC: Yes. So Chair what we did for our part is to go back to paragraphs 4.1.1, sorry 4.1 and 4.2 which are on page 181.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: And we simply ...(intervention)

CHAIRPERSON: Crossed out ...(intervention)

ADV VINCENT MALEKA SC: Crossed – a red line across those two clauses Chair.

20 **CHAIRPERSON:** Okay. I'm just making a note amended by the 3rd Addendum, is that right?

ADV VINCENT MALEKA SC: Ja, we will say deleted Chair.

CHAIRPERSON: Sorry?

ADV VINCENT MALEKA SC: We will suggest that you delete it.

CHAIRPERSON: Yes, yes delete it, not amend it, delete it.

ADV VINCENT MALEKA SC: Yes, in terms of 3.1.1 of the 3rd Addendum.

CHAIRPERSON: Thank you.

ADV VINCENT MALEKA SC: And the importance of this Mr Opperman if you would recall is to make sure that the original coal supply agreement, as amended by the second – sorry the first and second addenda would continue to operate as they were, correct?

MR GERT JACOBUS OPPERMAN: That's correct.

ADV VINCENT MALEKA SC: Because the deleted 4.1 and 4.2 impose the obligations on the parties to relook at those clauses of the original CSA and to see how they can restate them, do you agree?

10 **MR GERT JACOBUS OPPERMAN:** Yes Mr Maleka, maybe I can clarify it, so at this moment in time one needs to appreciate that this was a contract that was signed around 1983 that has already undergone ownership and it also has now undergone two addendums, so at this moment in time the intention of these clauses was to consolidate the 1983 contract, the 1993 contract, the first addendum and the second addendum into coal supply agreement and let's call it a more modern practical executable contract, and at this moment in time at the signing of the 3rd Addendum both parties have had several workshops, several engagements and attempts to achieve that and we could not reach consensus.

ADV VINCENT MALEKA SC: Yes.

20 **MR GERT JACOBUS OPPERMAN:** And hence the decision to say we are not going to consolidate this, we will leave it as it is, that's basically what the third addendum does.

ADV VINCENT MALEKA SC: Yes, and the parties, you were under obligation as Eskom to produce the first draft?

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: And you did not?

MR GERT JACOBUS OPPERMAN: We could not.

ADV VINCENT MALEKA SC: And this is the reason why these clauses were deleted, alright.

MR GERT JACOBUS OPPERMAN: Yes.

ADV VINCENT MALEKA SC: Alright, so we're now operating in that world of CSA original, first and second addendum.

MR GERT JACOBUS OPPERMAN: That's correct yes.

ADV VINCENT MALEKA SC: And third addendum of course.

10 **MR GERT JACOBUS OPPERMAN:** Yes.

ADV VINCENT MALEKA SC: Okay.

MR GERT JACOBUS OPPERMAN: I need to just make it clear we say that Eskom did not provide a draft, there was several attempts to get this draft but there was not something that both parties could agree to, to say this is the first draft revision that both parties could take to their legal teams and get a validation on it.

CHAIRPERSON: So does that mean that Eskom did produce a draft but it was not the two parties did not reach agreement on the draft?

MR GERT JACOBUS OPPERMAN: I don't even think it came to the compilation of a draft document sir.

20 **CHAIRPERSON:** Oh, okay. So you didn't produce draft.

MR GERT JACOBUS OPPERMAN: Yes.

CHAIRPERSON: Okay I thought you sought to qualify that.

ADV VINCENT MALEKA SC: I think Mr Opperman it was along answer to a simple question which you had previously answered. Mr Opperman you begin to tell us what problems Eskom experienced one Glencore took over the mine. You do so from

paragraph 19. I am at page 4 of your statement.

MR GERT JACOBUS OPPERMAN: That's correct.

ADV VINCENT MALEKA SC: Are you at page 4 of your statement?

MR GERT JACOBUS OPPERMAN: Yes.

ADV VINCENT MALEKA SC: In paragraph 9 you say: "After the purchase of the mine by Glencore all CM's started to supply coal to Hendrina Power Station that did not meet the size specifications." Do you see that?

MR GERT JACOBUS OPPERMAN: Yes.

ADV VINCENT MALEKA SC: Of course you can talk about your knowledge of the coal
10 quality on size from Optimum Coal Mine when you took over the management
responsibility relating to Hendrina Power Station, correct?

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: Should we read that paragraph to say that you
beginning to talk about coal quality sizing issues from the date you took over the
management of Hendrina Mine?

MR GERT JACOBUS OPPERMAN: Yes it was there and there about although at that
moment in time there has already been a first notice issued by the previous contract
manager to Optimum putting it on record that the size grading is out so I am not the first
person to raise it.

20 **ADV VINCENT MALEKA SC:** Yes, yes. And you begin to issue compliance or non-
compliant notices of your own immediately after you took over management of the
mine?

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: I would like to refer to one of two of them and the first
one is the one that you refer to in paragraph 20. Chair it is Annex GJ5. You will find it

from page 191 if I am correct. Are you there Mr Opperman?

MR GERT JACOBUS OPPERMAN: I am.

ADV VINCENT MALEKA SC: The date of that letter is 7 August 2012, do you see that?

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: And it is written by someone called H Mokoena.

MR GERT JACOBUS OPPERMAN: That is correct.

ADV VINCENT MALEKA SC: Do you know that person?

MR GERT JACOBUS OPPERMAN: I know of him, I do not know if I can say I know
10 him.

ADV VINCENT MALEKA SC: Okay subject to your guidance I am merely going to draw your attention to the second last paragraph. Can I ask you to read it?

MR GERT JACOBUS OPPERMAN:

“In terms of Clause 3.44 of the first addendum of the Hendrina Coal Supply agreement Eskom hereby request a meeting with Optimum Coal Mine to assess the extent of our risk as well as the plans that Optimum has implemented to reduce the minus 0.81 millimetre material delivered to Hendrina Power Station.”

ADV VINCENT MALEKA SC: Do you know what happened after this letter was sent
20 by Eskom? Did the meeting that is contemplated in the paragraph you have just read ever take place?

MR GERT JACOBUS OPPERMAN: I cannot say.

ADV VINCENT MALEKA SC: Anyway you refer to your working group and you say there was a report issued by that working group. Chair I am at paragraph 22 of Mr Opperman’s statement on page 4.

CHAIRPERSON: Thank you.

ADV VINCENT MALEKA SC: And you confirm in paragraph 22 Mr Opperman that there was a report produced by the working group and you annex a copy of that report from page 198. Are you there?

MR GERT JACOBUS OPPERMAN: That is correct.

ADV VINCENT MALEKA SC: I am afraid I have looked at this report and I cannot understand precisely what it is supposed to convey because it conveys sampling results I am not too sure what they mean. Maybe you would be able to help us on how we should approach the results recorded in this report? Does it suggest or does it not
10 suggest that there was some solution to the coal sizing problem from Optimum Coal Mine? Are you able to help us in that regard?

MR GERT JACOBUS OPPERMAN: I can Sir.

ADV VINCENT MALEKA SC: Please do.

CHAIRPERSON: Is that the report at 198?

ADV VINCENT MALEKA SC: Yes Chair.

CHAIRPERSON: Okay.

ADV VINCENT MALEKA SC: You will see Chair that it gives you a background which I do not understand and on page 199 it gives you the planting – the sampling results through all sorts of graphs and numbers that I do not understand. Are you able to help
20 us how we should approach this document?

MR GERT JACOBUS OPPERMAN: I can.

ADV VINCENT MALEKA SC: Please do.

MR GERT JACOBUS OPPERMAN: Mr Chair I – for a moment just want to take you back to the previous Annexure GJ05 and not the first page but on page 193 because this is what guided this work group that was established in September on what initial

action to take. So around the middle of – so this is an email response from Mr Riaan De Plooy which at that moment in time I think was the Chief Operation Officer at Optimum Mine. So he responds to the Eskom team following this letter or following the initial email that was sent to Mr Doug Gain and around the middle of that print I am going to start reading there where it says:

“The coal from the KN and KN abbreviation is for Kwagga North which is the mining area stream contains more finds than the coal from Pullenshope and Pullenshope was an underground operation for three primary reasons.”

- 10 So the first reason that gets shared there is to say that this coal comes over a conveyer belt that is 35 kilometres long and it has 18 transfer points where the coal falls from one transfer point to another transfer point. So the indication is to say that because of all these drops at the transfer point this coal is breaking and it is adding to the size fraction breaking down. Now maybe at this time also I need to just clarify something. In the contract we will often refer to the size grading as finds so I might in my explanation talk about finds. So finds in this terminology in the contract does not refer to a punitive amount or anything it refers to the size grading. So if I do use that word but I will try and refrain from it. So the bullet refers to that – that this degradation of this coal is added to because of all this transfer points. The second one talks about the fact that
- 20 this coal in the open cast is actually more friable from nature – by nature just by the deposition that is there. And then the last bullet talks about the Bosmanspoort so PMP is another underground operation, Bosmanspoort which also generates some more finds. So at the hand of this explanation from Mr Du Plooy we undertook the exercise of which this report reports on where we identified the different transfer points along this conveyer and at each transfer point we started doing sampling to see what is the

degradation of this coal along the way. So that is basically how we got to this. So there was this high percentage of finds. It was abnormally high. The contract specification for this quality parameter has a limit of 15%, 15 and there was instances where it was as high as 30 to 35%. So it was double the normal. So this asked for something to be done and we needed to investigate it and this is where we started at the hand of the advice from Mr Du Plooy from his experience being in the mining environment. So what these – what this...

CHAIRPERSON: Yes before you proceed Mr Opperman if you go back to that first bullet point at page 193 where he explains how all the coal gets degraded is degraded
10 the correct word?

MR GERT JACOBUS OPPERMAN: Yes.

CHAIRPERSON: If what he was saying was correct would that have meant that there should be no penalty if that was correct?

MR GERT JACOBUS OPPERMAN: Not necessarily.

CHAIRPERSON: Yes.

MR GERT JACOBUS OPPERMAN: Because the measuring point for this quality parameter remained at the sampling station at the power plant.

CHAIRPERSON: YEs.

MR GERT JACOBUS OPPERMAN: But what it would have done, it would have
20 provided some background for the origin of this high size fraction.

CHAIRPERSON: Yes.

MR GERT JACOBUS OPPERMAN: And one first need to know in what area to focus in order to correct what went wrong.

CHAIRPERSON: YEs.

MR GERT JACOBUS OPPERMAN: So at this moment in time we saw from the

analysis that around April, May 2012 the size fraction started increasing and we needed to understand why. There is some other background as well in the top paragraph.

CHAIRPERSON: Yes.

MR GERT JACOBUS OPPERMAN: Where Mr Du Plooy refers to a drag line that has moved to a new area and all of that might have contributed and he actually deals with it under point number 2 where he says: “the area where this drag line is now positioned actually the coal is more friable.

CHAIRPERSON: Okay, okay.

ADV VINCENT MALEKA SC: Chair can I follow up on the question that you have
10 posed?

CHAIRPERSON: Yes sure.

ADV VINCENT MALEKA SC: Now Mr Opperman we now have a study which explains the reasons why there is this degradation of coal quality on sizing at least. You now know the reasons as Eskom, correct?

MR GERT JACOBUS OPPERMAN: I do not understand the statements.

ADV VINCENT MALEKA SC: You now have the reason, you have an explanation about this coal quality problems.

MR GERT JACOBUS OPPERMAN: Yes.

ADV VINCENT MALEKA SC: You cannot speculate about what the reasons are you
20 have established them through this study, correct?

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: What happened after this study? Was there any improvement or did matters get worse?

MR GERT JACOBUS OPPERMAN: There was no improvement. I cannot say that it got worse or that it got better but the size specification did not come back in line with

the contract specification.

ADV VINCENT MALEKA SC: Yes.

MR GERT JACOBUS OPPERMAN: It remained high. We were not too much convinced that this test really concluded the whole exercise. And what we have done after this is subsequent exercises as well where we had independent specialists from the industry to come and have a look at the sampling station because that was the next point that we needed to sit and say: Maybe there is a problem at the sampling station. Because what we also became aware of at this moment in time that was around March, April that area there was a modification done to the sampling system that is used to
10 analyse this coal. So the next point was to then go to the sampler and try and identify it there. So this exercise that we did on the degradation of the coal did indicate some degradation but not to the extent to contribute to these high finds that we were seeing. So yes it did apportion some reason but it did not answer the full question for us.

ADV VINCENT MALEKA SC: Well can I ask you to go to page 205 because the explanation that you give does not explain to me why Eskom wrote the letter on page 205. That letter suggest that Eskom was still concerned about the coal quality.

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: And Eskom called upon Optimum Coal Mine at that point in time to take remedial measures.

20 **MR GERT JACOBUS OPPERMAN:** Correct.

ADV VINCENT MALEKA SC: And it did not do so.

MR GERT JACOBUS OPPERMAN: No.

ADV VINCENT MALEKA SC: Yes. And if I may ask you lead – to read the second last paragraph.

MR GERT JACOBUS OPPERMAN: The one that starts with Eskom wishes?

ADV VINCENT MALEKA SC: Yes.

MR GERT JACOBUS OPPERMAN:

“Eskom wishes to place on record that this is a transgression of the coal – of the quality specification of the first addendum of the coal supply agreement and calls upon OCM to rectify this transgression.”

ADV VINCENT MALEKA SC: And that letter was written by Pam Pillay on the 23 April 2013. Do you see that?

MR GERT JACOBUS OPPERMAN: The 22nd yes.

ADV VINCENT MALEKA SC: 22nd April 2013. And that is more or less eight or so
10 months after you had received that email from Mr Riaan Du Plooy. So there was this grey spirit of eight months where Eskom was told about the reasons for the degradation and Eskom called for remedial action and Glencore did not do that.

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: Sorry Optimum did not do that at that point in time, correct?

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: Yes. Now before we go to lunch – sorry to tea can I ask you to see the reply of Optimum Coal Mine to that letter of Pillay. Chair you will find the reply on page 207 and 208.

20 **CHAIRPERSON:** Yes. I guess you – this might be the convenient time?

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: Or you wanted one last question?

ADV VINCENT MALEKA SC: One last question.

CHAIRPERSON: Okay alright.

ADV VINCENT MALEKA SC: Can you confirm that the letter beginning at page 207 is

the reply by Optimum Coal Mine to the notice given by Eskom on page 205?

MR GERT JACOBUS OPPERMAN: That is correct.

ADV VINCENT MALEKA SC: In fact it comes a day later.

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: Yes. Chair that will be a convenient stage to take the tea adjournment.

CHAIRPERSON: We will take the tea adjournment until half past eleven. We adjourn.

INQUIRY ADJOURNS

INQUIRY RESUMES

10 **CHAIRPERSON:** Yes you may proceed Mr Maleka.

ADV VINCENT MALEKA SC: Thank you Chair. Mr Opperman we were at page 207 which is the response of Optimum Coal Mine. You see it?

MR GERT JACOBUS OPPERMAN: Yes.

ADV VINCENT MALEKA SC: I would like you to deal with paragraph 3 of that letter.

MR GERT JACOBUS OPPERMAN: Can I cite it?

ADV VINCENT MALEKA SC: Yes.

MR GERT JACOBUS OPPERMAN: “OCM has now reached the conclusion that the sizing specification set out in Clause 3.4.3 of the first addendum is no longer realistically representative of the coal which OCM can reasonably be expected to achieve from the exploitation of the coal deposits constituting the Optimum Colliery. It being OCM’s view that OCM is conducting its operation in a proper manner and in accordance with best industry standards.”

20

ADV VINCENT MALEKA SC: Yes. That part of the letter was also dealt with by

Mr Clinton Ephron and he made it quite clear that there was no way Optimum Coal Mine could meet the sizing specification in the Coal Supply Agreement. They were not realistic. That was his evidence and then he also dealt with paragraph 4 on page 208 and you will see that that paragraph calls for renegotiation of the specifications of the coal quality sizing in terms of those clauses of the first addendum. Now it is quite clear and I would like your comment on this that at least as at April 2013 the coal coming from Optimum Coal Mine was no longer suitable in terms of sizing at least for Hendrina Power Station and therefore the supplier took the view that there was a need to renegotiate questions of sizing. Do you accept that?

10 **MR GERT JACOBUS OPPERMAN:** I accept that that was OCM's view.

ADV VINCENT MALEKA SC: Yes. What was Eskom's response to OCM's view that they were conducting operations according to best practice? They could no longer meet the specifications under the agreement and they called for a renegotiation to see whether or not new specifications can be agreed. How did you respond to that?

MR GERT JACOBUS OPPERMAN: So Mr Chair Eskom responded to inform OCM that we are prepared to engage with the discussions to renegotiate in good faith as guided in the first addendum. As part of the process we also engaged our Centre of Excellence, CEO, which is an Engineering Department within Generation which has materials handling specialists in that team to assist us with an assessment of the
20 Hendrina Power Plant materials handling plant in order to determine if that plant could handle the 20 percent -0.81 millimetre size fraction compared to the 15 percent. Numerous letters followed over the next couple of months which goes to the extent where Eskom requested from Optimum to provide details on their analysis as to why they say they cannot meet the quality parameter. We were of the view that the exercise that was completed by 29 November did not conclusively provide a reason to say that is

what it is. So Eskom did not agree to the increase of the sizing although we said it is fine. We will negotiate in good faith with them and in our view negotiations was to say we will get technical experts to come and provide advice. We will most probably go on and do some more tests. It will be a process. So we did not tell Optimum we are not interested, we do not want to listen you. We participated in the process and during this process this matter has even been escalated within the Eskom Organisation to my seniors. So everybody was well aware of this and I am going to call it for now perceived sizing issue at Hendrina.

ADV VINCENT MALEKA SC: What was the upshot of those negotiations?

10 **MR GERT JACOBUS OPPERMAN:** The negotiations were inconclusive.

ADV VINCENT MALEKA SC: Yes.

MR GERT JACOBUS OPPERMAN: In the sense that we embarked on some inspections by independent specialists and that happened in November 2013 where we got a company or a specialist in from Intertek who this individual has vast knowledge around coal sampling, coal analysis Mr Erasmus. He did an exercise on the sampling plant. We also got the OEM, the Original Equipment Manufacturer which was Multotec. That was the company that installed the sampler in around 2012 the modified sampler. We even got them out. They did an assessment on 3 December as well. So throughout this process we were still trying to determine what the reason for this sizing

20 is and we could not get to it. It eventually got to a point where Eskom was requesting information from Optimum to be made available in order to understand why they want to change the parameter and Optimum just never provided that information. So I think it just went into a stalemate, but the issue with the sizing persisted. So the sizing never improved. Every month we sat and in fact that this moment in time it got to the extent where the sizing was out throughout the month and when in our interpretation one then

applies the penalty this coal price was now defaulting down to R1 a ton, because of the penalty mechanism that we applied.

ADV VINCENT MALEKA SC: Yes.

MR GERT JACOBUS OPPERMAN: Rightly or wrongly, but that is how we determined it and maybe I can fast track, maybe I can fast track this to what happened on 1 October 2015 where Mr Jan Voges who was a Glencore employee at the time, I am not 100 percent sure of his background, but I know he has got a very good background on coal, geology. I do not know if he is a qualified metallurgist, but he has got vast knowledge. He also participating in this process throughout, where he identified a
10 problem on the sampling plant. So this was the plant analysing the coal where there was a crusher that he went and switched off and immediately on the following day there was a step change in the fine, the small size fraction reported by the sampler. It did not correct itself 100 percent, but it significantly improved and this for me substantiated or supported this whole effort that we consistently were putting in to try and identify what is the real issue, because have we just admitted in the beginning that it is this coal that is friable and the transfer of the coal from Kwagga North we would have made the wrong decision. We would have made the wrong decision.

ADV VINCENT MALEKA SC: So should the Chairperson approach your evidence on the basis that the sizing problems relating to Optimum Coal Mine was not resolved by
20 the parties. In fact it continued?

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: And I am suggesting to you that it continued throughout the contractual relationship between Eskom and Optimum. That issue about size continued?

MR GERT JACOBUS OPPERMAN: It did continue up until October 2015 when that

crusher was switched off. After October 2015 there were instances where the sizing still did not meet the specification, but there was a significant improvement.

ADV VINCENT MALEKA SC: What do you mean there was significant improvement?

MR GERT JACOBUS OPPERMAN: Meaning that beforehand the -0.81 millimetre size fraction that was reported on a daily basis by the laboratories were in the region of 30/35 percent. That then dropped to around 18 percent/19 percent and there was even instances where it dropped below 15 percent. So it significantly reduced.

ADV VINCENT MALEKA SC: Alright. Thank you. Can I then take you back to your statement at page 5? You begin a new topic relating to the declaration of hardship by
10 Optimum Coal. Again the Chairperson has heard evidence relating to how Optimum Coal Mine declared hardship and the result of it was that the parties decided to conclude a Cooperation Agreement. You are aware of that development?

MR GERT JACOBUS OPPERMAN: Yes, I am.

ADV VINCENT MALEKA SC: Yes. Can I ask you to deal with paragraph 25? You may have dealt with parts of it when you testified about some significant improvement to the sizing problem, but just to complete your evidence can I ask you to deal with paragraph 25?

MR GERT JACOBUS OPPERMAN: So this paragraph reports that:

“The senior management team of PED...”

20 That is the Primary Energy Division.

“...met with representatives of Glencore on 12 August 2013...”

And I make note that I cannot recall that I was part of that meeting.

“...to discuss and agree on the revision of the sizing requirements of the Coal Supply Agreement. This meeting is recorded in a letter from OCM dated 21 August which is

attached. Eskom requested further information on OCM to negotiate the matter in good faith in a letter dated 18 October.”

So I think this refer to my previous statement where Optimum responded to, pardon me. Eskom responded to Optimum requesting additional information to substantiate this increase in the sizing specification.

ADV VINCENT MALEKA SC: Yes and that letter of 21 August 2013 is on page 2010, but it seems to me when I read paragraph 4 of that letter that at best for the parties there was a mere proposal by Optimum Coal concerning the sizing issues and that is as far as matters went at that point in time. In other words there was no agreement.

10 **MR GERT JACOBUS OPPERMAN:** There was a mere proposal between the parties?

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: Correct. Alright, then you take the issue further from paragraph 26 when you talk about reference to arbitration. Do you see that?

MR GERT JACOBUS OPPERMAN: Yes.

ADV VINCENT MALEKA SC: But that arbitration to be clear is on a different matter. It is on a hardship dispute declared by Optimum Coal. Correct?

MR GERT JACOBUS OPPERMAN: That is correct.

ADV VINCENT MALEKA SC: And do you know what the reason for that hardship declared by Optimum Coal was?

20 **MR GERT JACOBUS OPPERMAN:** I cannot recall the exact reason of that hardship claim, but I would like to believe that it related to the imposition of the sizing penalties that has been accrued over a long period of time which were placed on record over numerous, with numerous correspondence and also at the hand that at this point in time there has been several efforts to try and identify the original of the sizing and the teams have still failed to do it. At this moment in time we in August 2013 or there

around so it is still way before October 2015 when Mr Voges identified the issue.

ADV VINCENT MALEKA SC: Yes. So the parties resolved to go to arbitration to resolve the sizing issue arising from declaration of hardship and you know Mr Opperman that that arbitration was not finally concluded through an award of the Arbitrator. The parties agreed to settle the arbitration dispute. You know that?

MR GERT JACOBUS OPPERMAN: I recall that the parties entered a cooperation agreement where the hardship was sort of set aside. If I can [intervenes].

ADV VINCENT MALEKA SC: Was suspended?

MR GERT JACOBUS OPPERMAN: Suspended.

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

MR GERT JACOBUS OPPERMAN: That is the correct word.

ADV VINCENT MALEKA SC: Yes. In your statement you refer to the statement you refer to the Cooperation Agreement. Chair we have looked at it. I would simply want to direct the attention of Mr Opperman to parts of it, but we looked at it in detail when Glencore's witness testified.

CHAIRPERSON: Ja.

ADV VINCENT MALEKA SC: On Mr Opperman's documentation you will find it at page 212.

CHAIRPERSON: Yes.

20 **ADV VINCENT MALEKA SC:** Mr Opperman are you at page 213?

MR GERT JACOBUS OPPERMAN: Yes I am.

ADV VINCENT MALEKA SC: You will see that that page records the basis of the Cooperation Agreement. You will find it in paragraph 3 on page 213. Are you there?

MR GERT JACOBUS OPPERMAN: Yes.

ADV VINCENT MALEKA SC: And then if you go to the next page and I am referring to

Clause 5.2 you will see that there is an agreement to suspend the hardship arbitration.

Do you see that?

MR GERT JACOBUS OPPERMAN: Yes I do.

ADV VINCENT MALEKA SC: And if you go to paragraph 5.1 on the same page you will see that there is a constitution of the negotiating teams and your name comes up in paragraph 5.4. Do you see that?

MR GERT JACOBUS OPPERMAN: Yes.

ADV VINCENT MALEKA SC: And lastly if you go to page 216, I will skip the rest, you will see that there is a timetable on various matters that the parties had to negotiate
10 and must agree by a certain specific date. The one which is of importance to you would be the date by which a new Coal Supply Agreement ought to be negotiated and if necessary concluded. That would be the one March 2015. Do you see that?

MR GERT JACOBUS OPPERMAN: Yes.

ADV VINCENT MALEKA SC: Mr Opperman we know that you are part and parcel of the negotiating team. Correct?

MR GERT JACOBUS OPPERMAN: [No audible reply].

ADV VINCENT MALEKA SC: Can you just explain from your perspective whether the negotiations were successful or not?

MR GERT JACOBUS OPPERMAN: I think it is important to note what my function was
20 in this Negotiation Team.

ADV VINCENT MALEKA SC: Yes.

MR GERT JACOBUS OPPERMAN: So this is a process that is facilitated by the Fuel Sourcing Department because it will be an addendum to a contract. So it is not something that I can do. So my function in this team at this moment in time was to be the liaison between the power station and this team. So at this moment in time one of

the provisions of this Cooperation Agreement was that there will be a change in the price. There is a potential extension of this agreement and at that time because there was a change in the price there was an expectation from the power station to also realign the coal quality parameters on this contract that might not have been what they wanted it to be. So my function during this period in time was to liaise with the power station and the technical specialist at the power station at the Centre of Excellence as well at the [indistinct] Department that has been reported on previously to identify or get to a point where we could get the best benefit going forward.

ADV VINCENT MALEKA SC: Yes.

- 10 **MR GERT JACOBUS OPPERMAN:** So we all realised it is going to be most probably an increased price that is where the hardship related from. So it will be an increased price but let us also have a look at the coal quality parameter.

ADV VINCENT MALEKA SC: Yes and your sounding board was the people who operated the power station?

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: So you would go and talk to them about what the negotiations were all about and they will tell you their requirements?

MR GERT JACOBUS OPPERMAN: That is correct.

- 20 **ADV VINCENT MALEKA SC:** And you take those requirements back to the negotiations?

MR GERT JACOBUS OPPERMAN: That is correct.

ADV VINCENT MALEKA SC: Alright. We now know that as a result of that process of negotiations the parties decided to formulate a draft fourth addendum. Correct?

MR GERT JACOBUS OPPERMAN: That is correct.

ADV VINCENT MALEKA SC: What I want to confirm with you is to the extent that the

draft fourth addendum dealt with questions of price for the supply of coal to Hendrina you would have received the import from those who operated Hendrina at that point in time about whether or not they were comfortable with that level of a proposed price?

MR GERT JACOBUS OPPERMAN: Yes. I think in a way although the main focus with the engagement at Hendrina was to look at the coal quality parameters.

ADV VINCENT MALEKA SC: Yes.

MR GERT JACOBUS OPPERMAN: One need to appreciate that those parameters and the price walks hand in hand.

ADV VINCENT MALEKA SC: [Intervenes].

10 **MR GERT JACOBUS OPPERMAN:** So I cannot say no.

ADV VINCENT MALEKA SC: *Ja.*

MR GERT JACOBUS OPPERMAN: But the price primarily was driven by the negotiations.

ADV VINCENT MALEKA SC: I understand. The price is the other side of the coin relating to coal quality?

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: I mean the two go.

MR GERT JACOBUS OPPERMAN: Correct.

20 **ADV VINCENT MALEKA SC:** Hand in hand and what I want to understand from you is on both scores that is price and quality you always had a sounding board from the mines?

MR GERT JACOBUS OPPERMAN: The power stations.

ADV VINCENT MALEKA SC: The power stations?

MR GERT JACOBUS OPPERMAN: Yes, sorry.

ADV VINCENT MALEKA SC: The power stations, yes. Correct.

MR GERT JACOBUS OPPERMAN: That is correct.

ADV VINCENT MALEKA SC: So whatever was reflected on the draft fourth addendum reflected the level of comfort by those who operated the mine?

MR GERT JACOBUS OPPERMAN: 100 percent.

ADV VINCENT MALEKA SC: Yes.

MR GERT JACOBUS OPPERMAN: So Mr Chair maybe just to get back to answer the previous question in full. The question was what aspects did the fourth addendum address that I was responsible for and I think if one goes to the fourth addendum there was a couple of matters that needed clarification. Some that included the interpretation
10 and the implementation of this penalty, because there was clearly still not alignment around that. The second aspect the implementation and the execution of the sampling process, because we are now at the point where we started questioning the sample process. We are not in October 2015 yet, but at this moment in time we are saying that modification that was done in 2012 did we do the right thing. Are we in a position where we might need to something different? Then there was the continuing failure from Optimum to supply the right size grade in coal. So the issue was still there. Optimum still had the belief that it originates from their mining and we were not too sure about that. There was also an issue that just before the Cooperation Agreement also came to light and that was or came to the table and that was a reduced availability of
20 conveyor belts. So because Optimum had to give this coal over a conveyor belt to Hendrina and Hendrina Power Station had some breakdowns on these belts. Optimum was of the view that they could not supply the coal. So we were issuing them or I was issuing them with short supply notifications but they were contesting that they were not able to supply the coal and then I think the last one was the whole price adjustment on the size fraction which we still did not know how to do the sizing and maybe I can

expand on it. When one gets to the sizing parameter in the coal supply agreement that supplied it talks about measuring the coal sizing on a monthly average, but yet there is no penalty mechanism that talks to this monthly average.

ADV VINCENT MALEKA SC: Yes.

MR GERT JACOBUS OPPERMAN: The only big penalty mechanism that exists on this contract is this three day, four day, five day, six day and seven day rolling period.

ADV VINCENT MALEKA SC: Yes.

MR GERT JACOBUS OPPERMAN: And there was this disconnect on how to align it. So even though all this time we have been accruing this sizing penalty that was
10 calculated there was this very strong disconnection between the two parties on how to really calculate this, the sizing penalty. So that was also something that we wanted to try and attempt and [indistinct] off with the fourth addendum. So maybe in a way the fourth addendum was doing a bit what the third addendum should have done.

ADV VINCENT MALEKA SC: Yes. You explain a lot about the negotiation process. I am not going to take you through them, because that is not the point. The point is that the negotiations resulted in some kind of an understanding as between the Negotiating Teams and that is to formulate a draft fourth addendum?

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: We will get to it in due course hopefully, but for now after
20 the fourth addendum was presented in draft form those who were negotiating sought to get a mandate from decision makers in Eskom in order to authorise the execution of the fourth addendum?

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: And in your bundle of documents you enclose a submission that was made to the Board of Directors. You will find it Chair on page 231.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: Before I take you to that Board's submission I would like you to explain something to us in your statement. It is in paragraph 35 on page 8.

MR GERT JACOBUS OPPERMAN: Yes I am there.

ADV VINCENT MALEKA SC: Are you there?

MR GERT JACOBUS OPPERMAN: I am.

ADV VINCENT MALEKA SC: Yes. You will see there you introduce a discussion you had with the Hawks?

MR GERT JACOBUS OPPERMAN: That is correct.

10 **ADV VINCENT MALEKA SC:** About two letters. Can you indicate to us how the Hawks sought to interview you about these two letters? What were so important about these two letters that the Hawks decided to interview you about them? If you want to look at those two letters you will find them from page 226 of your bundle. I have looked at those letters from page 226. I must confess I do not know why these documents would be so serious and of interest to the Hawks that they would want to interview you on them.

MR GERT JACOBUS OPPERMAN: I cannot comment on the reason why the Hawks made reference to the letters. I merely included them at the time because I thought maybe it might be referenced in some way at some stage, but I think these two letters
20 were letters that were signed by Mr Ncube my senior at the time putting on record the coal supply commitment and the relation to the sizing penalty that was still at this stage sought of put on hold if I can say it like that.

ADV VINCENT MALEKA SC: Mr Opperman you like me have looked at these two letters. They merely record failure by Optimum Coal to meet its contractual obligations relating to the supply...

ADV VINCENT MALEKA SC: Ja, Mr Opperman you, like me, have looked at these two letters, they merely record failure by Optimum Coal to meet its contractual obligations relating to the supply of coal, correct?

MR GERT JACOBUS OPPERMAN: Yes that's correct sir.

ADV VINCENT MALEKA SC: These letters set out what has always been Eskom's position?

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: What was so unique about them?

MR GERT JACOBUS OPPERMAN: I can't say.

10 **ADV VINCENT MALEKA SC:** You can't say. Alright, can you go to the Board submission on page 31, 231, you have read this Board submission before, correct?

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: Did you make any input to this submission?

MR GERT JACOBUS OPPERMAN: I was party to the negotiation team so I would like to believe that I did make inputs, I was not party to the drafting of this document, but surely my involvement in the negotiation team would have meant that there is comments in here that related to my involvement.

ADV VINCENT MALEKA SC: Yes, in other words parts of this document reflects your input in the negotiations.

20 **MR GERT JACOBUS OPPERMAN:** Correct.

ADV VINCENT MALEKA SC: Right, I'm going to reflect on two parts of this, maybe more but for now I would like you to go to page 232, and I am going to read the paragraph beginning with PED.

"Primary Energy Division now requires a mandate to conclude negotiations with Optimum to ensure security of supply to Hendriena."

Do you see that?

MR GERT JACOBUS OPPERMAN: Yes.

ADV VINCENT MALEKA SC: From your perspective that must have been a legitimate reason why you sought a mandate to conclude the negotiations, because the security of supply for coal to your power station is a very vital part of your business operations.

MR GERT JACOBUS OPPERMAN: Yes it is.

ADV VINCENT MALEKA SC: Yes, and I continue.

10 “Hence it is requested that the Board of Directors resolves that Primary Energy Division is mandated to conclude negotiations with Optimum Coal Mine, to ensure security of supply for Hendriena Power Station ...”

And you put something in brackets

“...February 2015 money values for a CV of 23.5 [I don’t know what that means] dry basis from 1 April 2015 to 31st December 2018 and to include this new coal supply agreement the following available rights to be exercised by 31st December 2015.”

Do you see that?

MR GERT JACOBUS OPPERMAN: Yes.

20 **ADV VINCENT MALEKA SC:** There’s a price point that you reflect there of R442 per ton, do you see that?

MR GERT JACOBUS OPPERMAN: Yes.

ADV VINCENT MALEKA SC: It seems to me that a request for mandate in regard to that price point was something that you as negotiator supported.

MR GERT JACOBUS OPPERMAN: Yes.

ADV VINCENT MALEKA SC: You were quite comfortable with that price?

MR GERT JACOBUS OPPERMAN: Ja, that was the price at the time that we were talking about.

ADV VINCENT MALEKA SC: Yes. Can I take you to page 233, and ...(intervention)

CHAIRPERSON: What page, I'm sorry?

ADV VINCENT MALEKA SC: 233.

CHAIRPERSON: Okay.

ADV VINCENT MALEKA SC: The first bullet point there, and let me read it out to you and ask for your comment.

10 “Primary Energy Division is mandated to negotiate with Optimum for the full
Optimum reserve/resource and production for Eskom supplied by Hendriena
and for other Eskom power stations including but not limited to Tutuka and
Arnot Power Stations should it be possible to achieve an average cost per
ton at or below 500 per ton from one 1 April 2015 to 31st December 2018 and
at a cost below R527 per ton from 1 January 2019 up to 31 December 2035.”

Do you see that?

MR GERT JACOBUS OPPERMAN: Yes.

20 **ADV VINCENT MALEKA SC:** What I would like you to help us with is that this point
at which you seek this mandate reflects on two things, the one is the supply to
Hendriena during the lifetime of the existing CSA which we know was going to come to
an end around 31 December 2018.

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: But you were also looking for a mandate to look
beyond that period, correct?

MR GERT JACOBUS OPPERMAN: Yes.

ADV VINCENT MALEKA SC: And you said the second leg of the future period you're

looking would begin from 1 January 2019 to 31st December 2035, do you see that?

MR GERT JACOBUS OPPERMAN: Yes.

ADV VINCENT MALEKA SC: More or less 15 years going forward.

MR GERT JACOBUS OPPERMAN: Yes.

ADV VINCENT MALEKA SC: I read this to mean that you were so concerned about the security of supply concerning coal from Optimum Mine that you wanted to make sure that you secure it for the lifetime of that mine, correct?

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: Yes. And your security of supply concerns also went
10 beyond Hendriena, you also wanted to secure supply to other mines, correct?

MR GERT JACOBUS OPPERMAN: To other power stations, correct?

ADV VINCENT MALEKA SC: Yes, yes. You know by now that that did not happen, correct?

MR GERT JACOBUS OPPERMAN: Correct, yes.

ADV VINCENT MALEKA SC: You are someone who is in charge of the management of mining operations and you are part and parcel of this recommendation, and this recommendation is not endorsed by decision makers in Eskom. How did that impact on your responsibility as to properly manage Arnot and Hendriena?

MR GERT JACOBUS OPPERMAN: Firstly it significantly impacted on the future
20 supply, post December 2018, plus at the time when we were looking at this coal supply there must have been a need for coal at the Tutuka and Arnot power stations as well, so it most definitely was not a very well received decision to say now we're not going ahead and we're losing these volumes. That is on the second part of it. On the first part of it what was said about it is that this coal supply would have been a coal supply over a conveyer belt to Hendriena Power Station and in hindsight where we are sitting

today we are now trucking in all the coal to this power station, and at that moment in time because there was this hardship that was there, there was all these issues that was there we realised that there is the potential of losing this coal supply completely to Hendriena Power Station and we felt very strong about it.

ADV VINCENT MALEKA SC: And with the greatest of respect it is not in hindsight, it was clearly foreseeable that if you lose volumes from Hendriena which was transporting stockpile via a conveyer belt you would have to procure them elsewhere.

MR GERT JACOBUS OPPERMAN: Most certainly yes.

ADV VINCENT MALEKA SC: And that will be increased logistical transportation
10 costs. It was so foreseeable that either you have this, if you don't have this you are going to have the worst, correct?

MR GERT JOHANNES OPPERMAN: 100% and Mr Chair I think that partly also contributed to this price where we – how we got to this price.

ADV VINCENT MALEKA SC: Yes.

MR GERT JOHANNES OPPERMAN: It's common knowledge, or public knowledge at this moment that we know that the Optimum price at this moment in time was around R200 a ton, so to sit and look at an amount of R442 a ton that's a significant jump, but the coin side to this is exactly what you're saying, it was contracting coal from another source and bringing by a truck most probably landing it at this cost or slightly more.

20 **ADV VINCENT MALEKA SC:** Yes, and I know that you are not a Board member of Eskom and I know that you are not a member of the Senior Executives of Eskom, but on your evidence, on your approach I suggest to you that it is reckless in the extreme for decision makers not to adopt this recommendation unless they have something much better that can compete with this recommendation. What is your comment to that proposition?

MR GERT JOHANNES OPPERMAN: I agree the much better could have been to just default to the original coal supply agreement.

ADV VINCENT MALEKA SC: Yes, anyway you know now that this mine as we speak today it is no longer operational, correct?

MR GERT JOHANNES OPPERMAN: Correct.

ADV VINCENT MALEKA SC: And Hendriena is no longer sourcing its coal from Optimum Coal Mine.

MR GERT JOHANNES OPPERMAN: That's correct.

ADV VINCENT MALEKA SC: And that mine is just like a scrap yard, correct?

10 **MR GERT JOHANNES OPPERMAN:** Yes.

ADV VINCENT MALEKA SC: So as we speak Hendriena would be sourcing its coal from elsewhere?

MR GERT JOHANNES OPPERMAN: That is correct.

ADV VINCENT MALEKA SC: Do you know where is it getting its coal?

MR GERT JOHANNES OPPERMAN: It's most probably currently getting its coal from three or four different other sources, and it's not all directly close to Hendriena Power Station, it is in the Witbank area but it's multiple deliveries from multiple sources.

ADV VINCENT MALEKA SC: Chair through you can I ask Mr Opperman to do a calculation for us, to see precisely what is the cost implication for procuring coal from
20 other sources to Hendriena, I would like you to do that calculation for us to see whether or not there was value for money for Eskom to reject this proposal and to find itself as we speak in a totally different set of circumstances for procuring coal far away from the power station. Are you able to do that for us?

MR GERT JOHANNES OPPERMAN: Yes, I do have some amounts with me and if I try and relate it Mr Chair to the period which was around June 2013 – so – June 2015, and

I just go back to the cost of coal delivered over that period at that moment in time the Hendriena cost was around R159 a ton, and the landed cost for coal delivered via road trucks was around R450 a ton.

ADV VINCENT MALEKA SC: For now I will work with that figure of R450 per ton, going forward, alright. I will come back to this figure at some point, because we know that this request for a mandate was not given by the Board of Eskom. I am going to jump ahead to the next development that happened after this draft 4th Addendum was not approved by the Board. You will get that next development at page 249. Chair you would recall that Mr Ephron dealt with this in the context of his evidence to the effect

10 that when he was told that the 4th Addendum was not approved by the Board he then approached Mr Malefe to try and understand why and thereafter when he was told that Eskom was not happy with the 4th addendum and in fact they were not going to sign it he decided to renegotiate by relooking at the cost that was quoted in the 4th Addendum and reduced it by means of the proposal set at page 249, and I would like to deal with that proposal from your perspective Mr Opperman, you attached this proposal in your bundle of documents, correct?

MR GERT JOHANNES OPPERMAN: Correct.

ADV VINCENT MALEKA SC: Now I take it therefore that you are aware of this proposal?

20 **MR GERT JOHANNES OPPERMAN:** Correct.

ADV VINCENT MALEKA SC: How did you become aware of it?

MR GERT JOHANNES OPPERMAN: I would like to think that it was shared with the negotiation team at that moment in time, this proposal was addressed to Mr Johann Bester, as the General in Fuel Sourcing, which was part of the negotiation team at that stage, so I can't recall exactly how I got hold of it but I would like to think that it was

shared in a forum where as a negotiation team on the Eskom side met to say well there's a revised proposal on the table because ultimately this was something different to the previous mandate that was compiled for submission to the Board.

ADV VINCENT MALEKA SC: Yes, so it's fair to approach your evidence on the basis that you received it at a point in time when Mr Ephron revived the negotiations, correct?

MR GERT JOHANNES OPPERMAN: Correct yes.

ADV VINCENT MALEKA SC: The date is 30 June 2015, I am going to skip it, and the introductory paragraph says the following:

10 “We refer to the meeting held at Eskom on 11 June 2015 between your Mr Malefe and Mr Mbuwene and our Mr Ivan Glassenbergh and Clinton Ephron. As discussed at the meeting Optimum is willing to consider a compromise deal in relation to the negotiation and extension of the Hendriena supply agreement. We have given consideration as to what sort of compromise would be feasible in the circumstances and accordingly we hereby submit this revised offer for Eskom's consideration. The proposed new agreement would supersede the existing Hendriena Coal Supply agreement and be in full and final settlement of all pending disputes and claims.”

20 I would like to take you to the question of price first, it's up to you if you want to highlight any issue relating to commencement and duration, but for me the important issue relates to price. The offered price is for the period 1 July 2015 to 31 December 2018, which is described as the first period. The base price as at 1 July 2015 is R300 per ton, do you see that?

MR GERT JOHANNES OPPERMAN: Yes.

ADV VINCENT MALEKA SC: That's a significant revision from the price proposed in the 4th Addendum, do you see that?

MR GERT JOHANNES OPPERMAN: That is correct Mr Chair, what is of importance to note as well is that this quality parameter also now again defaulted to the original contract qualities and not the higher qualities as what was negotiated.

ADV VINCENT MALEKA SC: Indeed and we will get to that. But for now insofar as price is concerned there is a proposed reduction on my calculation of something in the order of R142 per ton.

MR GERT JOHANNES OPPERMAN: That's correct.

ADV VINCENT MALEKA SC: Compared to the previous price proposed in the 4th Addendum. On price alone that reduction is almost a third of the price previously agreed, do you agree with it?

MR GERT JOHANNES OPPERMAN: I agree with it.

ADV VINCENT MALEKA SC: Yes. We will come to the core quality parameters because I would like you to help us. And then you will see that there is a second price proposed for what is called the second period, you will find it in the second bullet under the heading or column "price". From 1 January 2019 to 31 December 2023 in the second period the base price as at the base date will be R570 per ton, do you see that?

MR GERT JOHANNES OPPERMAN: Yes.

ADV VINCENT MALEKA SC: This of course as a second period is the one that comes after the initial period of the CSA comes to an end, correct?

20 **MR GERT JOHANNES OPPERMAN:** Correct.

ADV VINCENT MALEKA SC: So it's again a futuristic view that Glencore adopts that we would like to supply to secure a security of supply beyond the existing CSA, correct?

MR GERT JOHANNES OPPERMAN: That is correct, I think Mr Chair what is important to just also note if we're trying to compare apples with apples because we're relating

this to the mandated document is to note that the original mandated document for this period was R500 a ton.

ADV VINCENT MALEKA SC: Yes.

MR GERT JOHANNES OPPERMAN: So the price is now higher.

ADV VINCENT MALEKA SC: Yes.

MR GERT JOHANNES OPPERMAN: Again it is still at the original contract qualities not at the higher qualities that we negotiated.

ADV VINCENT MALEKA SC: Yes.

MR GERT JOHANNES OPPERMAN: So most probably at this moment in time this
10 coal will not be suitable for Arnot so one is losing some alternative but I agree if the strategy was to secure for the long term this does deal with that.

ADV VINCENT MALEKA SC: Alright, then there's another part of this offer which is quite interesting, and I would like you to comment on it. If you go to page 2050 I will skip the coal quantity which is expressed in the first bullet point, I will go to the second bullet point. It says Eskom shall be entitled by no later than 31 December 2015 to implement and conclude a tender process to obtain a *bona fide* written offers from third party suppliers, do you see that?

MR GERT JOHANNES OPPERMAN: Yes.

ADV VINCENT MALEKA SC: It seems to me that the implication of this clause Mr
20 Opperman is to offer an opportunity to Eskom to go and test the market.

MR GERT JOHANNES OPPERMAN: That is correct.

ADV VINCENT MALEKA SC: On whether they can get a better offer, correct?

MR GERT JOHANNES OPPERMAN: That is correct ja.

ADV VINCENT MALEKA SC: And normally that's how public entities such as Eskom operate, you go out to the market to test whether or not there is a competitive cost

effective and transparent deal, correct?

MR GERT JOHANNES OPPERMAN: That's correct yes.

ADV VINCENT MALEKA SC: If you were part of the negotiations would you have supported this part of the offer, to go out to the market to test it?

MR GERT JOHANNES OPPERMAN: Yes I will because I would like to confirm that the price is reasonable.

ADV VINCENT MALEKA SC: Yes. And then the third bullet point tells us what will happen if Eskom had gone out to the market and had received a better offer, Optimum would be obliged to – or will be entitled to match that offer, correct?

10 **MR GERT JOHANNES OPPERMAN:** That's correct yes.

ADV VINCENT MALEKA SC: Yes, subject to the question of coal quality what is your view of this offer?

MR GERT JOHANNES OPPERMAN: I think it was reasonable, one needs to consider that at this moment in time the price of coal at the Hendriena Power Station was maybe around R175 a ton, so R300 a ton for the same quality might seem like a lot of money, but obviously this opens up that extended 15 year window with some security, so I think it's reasonable, considering the mandated document that was drafted this is a good proposal.

ADV VINCENT MALEKA SC: Yes, you know that this proposal was not accepted by
20 the decision makers in Eskom?

MR GERT JOHANNES OPPERMAN: Yes I do.

ADV VINCENT MALEKA SC: Were you told why it was not accepted?

MR GERT JOHANNES OPPERMAN: No I was not told.

ADV VINCENT MALEKA SC: As you sit there in the witness box with hindsight, because I believe that's a term that you used before, were you able to get the reasons

why this offer was not accepted by the decision makers in Eskom?

MR GERT JOHANNES OPPERMAN: No I was not able.

ADV VINCENT MALEKA SC: You see what troubles me is this, that this offer contemplated a genuine procurement and competitive proposal, out there in the market, what happened later is something else, Eskom agrees to cede the shares in Optimum Coal Pty Limited to a third party who is Tegeta, without any competitive bidding process to supply coal to that mine, to that power station.

MR GERT JOHANNES OPPERMAN: Yes.

ADV VINCENT MALEKA SC: I'm sure when those who made the decision come
10 before this commission will ask questions around how they decided to implement a different strategy of cession, from your perspective did things change in relation to Optimum Coal Mine after this offer was rejected? When I say things changed I refer to coal quality, did that change?

MR GERT JOHANNES OPPERMAN: Not really what I could recall.

ADV VINCENT MALEKA SC: The price remained the same?

MR GERT JOHANNES OPPERMAN: Correct.

ADV VINCENT MALEKA SC: And that was about less than 200 per ton?

MR GERT JOHANNES OPPERMAN: That's correct yes.

ADV VINCENT MALEKA SC: I'd like to take you back to your statement, and Chair I
20 am at page 8, you deal with the question of the rejection of both the 4th Addendum and the subsequent offer that we have deal with a moment ago, from paragraph 39 of your statement, correct?

MR GERT JOHANNES OPPERMAN: That's correct.

ADV VINCENT MALEKA SC: And in paragraph 42 you say I do not know why Mr Brian Malefe made this decision to stop the settlement process as I did not have any personal

discussion with him regarding the matter prior to this decision. You see that? From your perspective did anyone ever consult with you to tell you that they are going to reject the 4th Addendum proposal and the proposal from Mr Clinton Ephron of June 2015? Were you consulted on this score?

MR GERT JOHANNES OPPERMAN: No I was never consulted.

ADV VINCENT MALEKA SC: And then in paragraph 43 you say that the cancellation of the cooperation agreement reinstated the hardship arbitration, dated 23 June 2015, do you see that?

MR GERT JOHANNES OPPERMAN: Yes.

10 **ADV VINCENT MALEKA SC:** Alright, before I get to paragraph 44 can I ask you this, do you know what was the upshot of that arbitration on hardship?

MR GERT JOHANNES OPPERMAN: I'm not sure if I understand the question?

ADV VINCENT MALEKA SC: What happened to that arbitration which was reinstated after the cancellation of the cooperation agreement? Remember the 4th Addendum is not approved.

MR GERT JOHANNES OPPERMAN: Ja.

ADV VINCENT MALEKA SC: Remember the arbitration was suspended. Because of the lack of approval of the fourth addendum and the cancellation of the cooperation agreement the arbitration is revived.

20 **MR GERT JACOBUS OPPERMAN:** Correct.

ADV VINCENT MALEKA SC: Mr Clinton told us a lot about it. Mr Ephron rather told us a lot about it. What I want to understand from you is do you know what ultimately happened to that arbitration?

MR GERT JACOBUS OPPERMAN: I do not happen with that arbitration other than Glencore going into business rescue in August two months later.

ADV VINCENT MALEKA SC: Yes. In – from paragraph – so let me go to paragraph 44 which I skipped. There you said there was a meeting between Mr Molefe, Mr Mobweni and Mr Glassenberg and Mr Ephron on 11 June 2015. Following this meeting OCM made a revised offer which was sent to Eskom on 30 June 2015 and that is the offer we have looked at, correct?

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: Alright so we can comfortably go to the next topic you deal with which is your topic on the imposition of penalties, do you see that?

MR GERT JACOBUS OPPERMAN: YEs.

10 **ADV VINCENT MALEKA SC:** You start with the topic from paragraph 45. In paragraph 46 you refer to a Mr Christo Kruger of the Primary Energy Division as someone who made the calculation of the penalties imposed, correct?

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: What I find interesting with that part of your statement you say “I do not know how Mr Christo Kruger calculated the penalty amount and or how it was applied to the CSA and or the relevant addendums to the CSA.” Do you see that?

MR GERT JACOBUS OPPERMAN: Yes.

20 **ADV VINCENT MALEKA SC:** Can I ask you some few questions around that? We have looked at your mandate. We have looked at your job description and you have explained to us how they work. And the sum total of what you explained to us is that you were someone who was responsible for the calculation of penalties including the input from the scientists and the input from the financial division, correct?

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: Why would Mr Christo Kruger take it upon himself to do

the calculation on penalties that ultimately were imposed?

MR GERT JACOBUS OPPERMAN: Mr Kruger he is supporting me on a finance point of view and they will do this calculations. Maybe for clarification point number 46 what I meant by this is that at the moment when Mr Kruger did this calculation I did not understand the method that this calculation was – this penalty was derived to how it was got - how he got to that amount. And the reason was because of this continued difference in interpretation on like for instance the application of the sizing. Where the sizing is measured on a monthly average but applied on a three, four, three to seven day rolling period. I am not trying to say that I do not agree to the 2.1 million but it was
10 merely the way that it was calculated at that moment in time there was not a common understanding between Glencore and Eskom this is how we are going to determine the qualities.

CHAIRPERSON: {Coughing} excuse me. Well you might have to just clarify the position with regard to your position with regard to this R2.1 billion because when you talked about it for the first time earlier this morning the first answer that I think you gave to Mr Maleka's question or his question may have been based on the understanding that you did not agree with that amount. But you subsequently said as I understood you that you had no problem with the amount of R2.1 billion but there was some other issue and I cannot remember whether it was the method of calculation. I think I did ask
20 you whether your issue related to the method of calculation or the means by which they had arrived at that amount. You gave a certain answer and now I hear that you say you do not have a problem with that amount. I think you say now again but I saw something here also – ja in paragraph 47.

MR GERT JACOBUS OPPERMAN: Yes Chair.

CHAIRPERSON: You specifically – well the first line of paragraph 27 you say: "I was

later informed that the penalty amount calculated by Mr Christo Kruger came to about R2.1 billion.” And in the next sentence you say: “I was not in agreement with the amount since.” And then you proceed. So right now I am not sure exactly whether you agreed at the time with the amount of R2.1 billion but you do not agree now or whether you agree now with that amount but you did not agree with it then and if you did not agree what the basis was for your not agreeing with it I am not sure. Do you want to take your time and try and explain to me what your position was then in regard to the amount and what your position is now with regard to that amount and to the extent that there may have been differences of how that amount was – how you arrived at that amount or the basis of your disagreement please just explain it making a distinction
10 between what your position was then and what your position is now to the extent that there may be a difference between the two positions?

MR GERT JACOBUS OPPERMAN: Good thank you Mr Chair. What I tried to explain this morning was to say that at the time of this calculation being done to 2.1 million in this moment in time Mr Kruger’s reference point and the reference point that myself and Mr Needham from Glencore did was different. In the sense that the Glencore view and the reference point that I used was to only account for the sizing penalty from May 2012 up until April 2013 which was the date when Optimum issued the letter indicating that they want to renegotiate the sizing penalty. So I only considered the sizing penalty up
20 until that period and if you consider that period it gave me this amount of around 720 million. If I consider Mr Kruger’s point of reference where he looked at the penalty period the sizing penalty for the full period it gets to 2.2 million.

ADV VINCENT MALEKA SC: No, no, no. Look at your statement. We now know that for the – when the penalty is imposed for the first time it is in the amount of 2.1 million.

MR GERT JACOBUS OPPERMAN: Million correct.

ADV VINCENT MALEKA SC: And we know that it is around June, July, August when the penalties were imposed?

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: In the order of 2.1 billion.

MR GERT JACOBUS OPPERMAN: That is correct.

ADV VINCENT MALEKA SC: Correct. At that point in time your view is you do not agree with Mr Christo Kruger's calculation because you took a view that on the interpretation of the agreement that amount was too high in 2015 because that reference point of 2015 is the last point at which the penalties are calculated in the
10 order of 2.1 billion, correct?

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: If you take that reference point you came to a totally different conclusion that the calculation of 2.1 billion was too excessive. In fact you came to the conclusion that the appropriate amount was something in the order of R720 million give or take rands and cents, correct?

MR GERT JACOBUS OPPERMAN: Correct based on my interpretation of the contract.

ADV VINCENT MALEKA SC: Indeed, indeed.

MR GERT JACOBUS OPPERMAN: Correct.

20 **ADV VINCENT MALEKA SC:** Indeed. So to answer the Chairperson's point and this is the reason why we called your evidence here is to tell us that as far as Eskom is concerned there was not a consistency of position and that point in time about the nature and extent of the penalty it ought to impose?

MR GERT JACOBUS OPPERMAN: I would not say that. If I can take you to Annexure 18 which is my calculation sheet that I attached to my statement.

ADV VINCENT MALEKA SC: Can I read this and ask you to confirm before we go there?

CHAIRPERSON: Maybe before it is read let me ask this question Mr Opperman. Let us go back to the position when you either heard or saw for the first time that Mr Christo Kruger had reached the total amount of R 2.1 billion in his calculations.

MR GERT JACOBUS OPPERMAN: Correct.

CHAIRPERSON: Okay. I take it that at a certain stage you familiarised yourself with how he came to that amount, is that right?

MR GERT JACOBUS OPPERMAN: Correct.

10 **CHAIRPERSON:** And in doing so you got to understand that he interpreted the agreement in a certain way, is that right?

MR GERT JACOBUS OPPERMAN: I interpreted it in the same way.

CHAIRPERSON: You interpreted the – you agreed with his interpretation?

MR GERT JACOBUS OPPERMAN: One hundred percent yes.

CHAIRPERSON: Okay at that stage what was your attitude to the outcome of that calculation namely R2.1 billion? Did you take the view that his outcome was correct?

MR GERT JACOBUS OPPERMAN: The calculation to get to the R2.1 billion was correct and I supported. My interpretation of the coal supply agreement from a contract management point of view said that I should not apportion the sizing penalty after
20 Optimum issued a letter to ask can we please renegotiate the sizing which was in April 2013. So if you take the same calculation that Mr Kruger did and the same calculation that I have in my annexure and you remove – and you add the sizing penalties from April, May 2013 until 2015 in fact I get to a value of R2.27 million. So we are there and there about on the same volume

CHAIRPERSON: Yes. So if you were the one who had been asked to make the

calculation instead of Mr Kruger being the one who was asked what is the total that you would have arrived at on your own understanding of what was to be taken into account and what was not to be taken into account in calculating the amount? What was the amount that you have come to?\

MR GERT JACOBUS OPPERMAN: R723 million and it is based on the fact that I did not include the sizing penalty post the date that Optimum request the renegotiation.

CHAIRPERSON: So and did Mr Kruger do something different in regard to that item?

MR GERT JACOBUS OPPERMAN: He included the sizing post April 2013.

CHAIRPERSON: And you excluded it?

10 **MR GERT JACOBUS OPPERMAN:** I excluded it.

CHAIRPERSON: You would have excluded it?

MR GERT JACOBUS OPPERMAN: Correct.

CHAIRPERSON: And when you calculated you excluded it.

CHAIRPERSON: Correct.

CHAIRPERSON: Now as far as you are concerned was he wrong to include it?

MR GERT JACOBUS OPPERMAN: Mr Chair I do not know.

CHAIRPERSON: You do not know?

MR GERT JACOBUS OPPERMAN: We do not have – we do not have that advice on what it should be. Was the sizing penalty out at that post April 2013? Yes it was out.

20 Should they have been penalised? Maybe they should have been penalised. From a contract management point of view there was just this let me call it this peg in the ground where we said well the penalties – because you did not contest the penalties it sensed that you – my sense was that you accepted it. So up until April 2013 you did not contest the penalties so in my mind you accepted it but in April 2013 you asked, can we please renegotiate it? And in my view that is a period where the sizing penalty

should have been dealt with differently. If a decision was to say what is the total penalty at this moment in time that needs to be levied most probably it would have been R2.1 billion.

CHAIRPERSON: But from what you say it seems clear to me that you took a view that I cannot remember what you said it was that should be excluded in the calculation, what was that?

MR GERT JACOBUS OPPERMAN: Ja the sizing penalty post 2013 – ja.

CHAIRPERSON: Ja the sliding penalties.

MR GERT JACOBUS OPPERMAN: Sizing penalties.

10 **CHAIRPERSON**: Sizing penalties.

MR GERT JACOBUS OPPERMAN: Ja.

CHAIRPERSON: Ja you took the view that they should be excluded from the calculation?

MR GERT JACOBUS OPPERMAN: Post April 2013.

CHAIRPERSON: Yes but Mr Kruger took the view that they should be included.

MR GERT JACOBUS OPPERMAN: Correct.

CHAIRPERSON: Yes that – because of the different views that you both took you did not come to the same conclusion – outcome, is that right? He came to R2.1 billion, you came to about 700 and something million rand?

20 **MR GERT JACOBUS OPPERMAN**: Correct.

CHAIRPERSON: So now I do not understand why you would then in the light of this still say you agreed with his amount of R2.1 billion when your view was there was something he took into account which took him to that amount, that total which in your view should not be taken into account. Why do you say – why do you say you agreed with his total of R2.1 billion then?

MR GERT JACOBUS OPPERMAN: The method of calculating the R2.1 billion penalty I agree with. So the total of R2.1...

CHAIRPERSON: But it includes what you think should be excluded, is it not?

MR GERT JACOBUS OPPERMAN: Exactly but the fact that I am including or excluding a portion that is an interpretation of the relationship or the communication that has happened under this contract. So if you – if you consider the quality parameters and the penalty provisions against this contract and you do a calculation the calculation is R2.1 billion. If you now go and look at what has happened in this life of the power station it means that somewhere in this life and that happened in April 10 2013 there was an engagement which said we contest this sizing penalty and we want to renegotiate it. And yes there was a process that followed after that that then conclude at the time when even the corporation agreement was signed or the fourth addendum was signed and hence the reason why in the fourth addendum it was included to say that the parties need to agree on this historical penalty because there was no agreement. There was no agreement between Glencore and Eskom at that moment in time on how it should be calculated.

CHAIRPERSON: But as I understand it and you must just tell me if there is something I misunderstand. As I understand what was being calculated was the total amount of penalties.

20 **MR GERT JACOBUS OPPERMAN:** Correct.

CHAIRPERSON: That Eskom was entitled to.

MR GERT JACOBUS OPPERMAN: Correct.

CHAIRPERSON: Okay. Now I take it Mr Kruger was asked please calculate for us what we are owed as Eskom in terms of the total penalties?

MR GERT JACOBUS OPPERMAN: Correct.

CHAIRPERSON: He came to the amount of R2.1 billion?

MR GERT JACOBUS OPPERMAN: Correct.

CHAIRPERSON: By whatever method he came to that amount?

MR GERT JACOBUS OPPERMAN: Correct yes.

CHAIRPERSON: Now if you were asked or you asked or you decided to calculate the total penalties that Eskom was entitled to is that right on your own?

MR GERT JACOBUS OPPERMAN: Yes.

CHAIRPERSON: And you arrived at R700 and something million, is that right?

MR GERT JACOBUS OPPERMAN: The calculation that I did actually came to R2.2
10 billion.

CHAIRPERSON: Now let me ask this question before I allow Mr Maleka to continue. But what was your answer and maybe what is your answer now also as to what was Eskom – what penalties as a total was Eskom entitled to at that time in your view?

MR GERT JACOBUS OPPERMAN: In my view it should have been somewhere around R2 billion because the agreement to exclude the size or the decision to exclude the sizing penalty post April 2013 when the request was made to exclude it. That portion of penalties that was excluded which is the balance between R720 million and the R2.1 billion will most probably be something that the parties would have negotiated and agreed to. But the penalty that was due to Eskom is the R2.1 billion.

20 **CHAIRPERSON**: I am not sure if I am any better – I am any wiser.

ADV VINCENT MALEKA SC: Well can I...

CHAIRPERSON: But I let you continue.

ADV VINCENT MALEKA SC: Chair that is important.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: You know Mr Opperman I do not know what is the job

description and official responsibilities of Mr Kruger but from your perspective I know that your job description includes the management of commercial and legal aspects relating to the CSA, correct?

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: So that the very issue relating to the calculation of the penalties, the very issue relating to the interpretation of a contract on how penalties must be calculated falls squarely within your responsibilities?

MR GERT JACOBUS OPPERMAN: That is correct.

ADV VINCENT MALEKA SC: Whatever interpretation you place on the CSA is an
10 interpretation which in all probabilities Eskom will be guided by you?

MR GERT JACOBUS OPPERMAN: It would be guided by me it might not be the decision that is taken.

ADV VINCENT MALEKA SC: I understand.

MR GERT JACOBUS OPPERMAN: Yes.

ADV VINCENT MALEKA SC: And that is a point of the enquiry that you come to the conclusion on the interpretation of the agreement. That the good estimate of the penalty is R720 odd million on your own interpretation of that agreement, correct?

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: Someone we do not know on his own interpretation of
20 the agreement comes to a totally different conclusion.

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: On the interpretation of the agreement that Eskom should impose a penalty of R2.1 billion, correct?

MR GERT JACOBUS OPPERMAN: Yes.

ADV VINCENT MALEKA SC: The point of the inquiry is this, did anyone consult with

you before this R2.1 billion penalty was imposed?

MR GERT JACOBUS OPPERMAN: No, nobody did.

ADV VINCENT MALEKA SC: Someone does not consult with you to impose a penalty of R2.1 billion on a matter that falls squarely within your official responsibilities?

MR GERT JACOBUS OPPERMAN: No.

ADV VINCENT MALEKA SC: And I appreciate – I hope that you understand why this line of inquiry is important.

MR GERT JACOBUS OPPERMAN: No I understand.

ADV VINCENT MALEKA SC: Because if it is Eskom's position that penalties of R2.1 billion must be imposed that position must maintain regardless of who owns the mine, do you agree with that?

MR GERT JACOBUS OPPERMAN: Just repeat?

ADV VINCENT MALEKA SC: Despite your interpretation of the agreement and despite the fact that you contend on your interpretation for imposition of a lowered penalty Eskom goes ahead that I will impose a penalty of R2.1 billion. That position must remain regardless of who owns the mine.

MR GERT JACOBUS OPPERMAN: For sure.

ADV VINCENT MALEKA SC: It does not matter whether it is owned by Glencore or by Tegeta?

20 **MR GERT JACOBUS OPPERMAN:** For sure yes.

ADV VINCENT MALEKA SC: Before we go to lunch can I ask you this for your comment? Why questions of penalty suddenly become important and they reduce fundamentally to almost a hundredth when the mine is owned by Tegeta? Why does the penalty amount changes and comes to R250 odd million when the mine is now owned by Tegeta?

MR GERT JACOBUS OPPERMAN: I cannot answer that.

CHAIRPERSON: Were you consulted about the R250 million?

MR GERT JACOBUS OPPERMAN: No. In fact I only got to know about the settlement that was reached way, way after the settlement was done. I only became aware of the settlement agreement for the first time on the 23 January 2018.

ADV VINCENT MALEKA SC: You became aware of that settlement agreement when?

MR GERT JACOBUS OPPERMAN: The 23 January 2018.

ADV VINCENT MALEKA SC: Gee yes. Chair before we go for lunch can I ask Mr Opperman to confirm some sure things?

10 **CHAIRPERSON:** Yes.

ADV VINCENT MALEKA SC: They are common cause but they lead me to the next topic. You confirm that as a result of the imposition of the penalties on Optimum Coal Mine it went under business rescue, correct?

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: And that is a matter which ought to have been of concern to Eskom?

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: And to you as the operate – as the manager of the various mining holdings of Eskom – sorry power stations of Eskom?

20 **MR GERT JACOBUS OPPERMAN:** Correct.

ADV VINCENT MALEKA SC: Yes. Chair is this a convenient time to go for a tea break?

CHAIRPERSON: Yes it is. Thank you we will take the lunch adjournment and resume at two. We adjourn.

ADV VINCENT MALEKA SC: Thank you Chair.

INQUIRY ADJOURNS

INQUIRY RESUMES

CHAIRPERSON: You may proceed Mr Maleka.

ADV VINCENT MALEKA SC: Thank you Chair. Mr Opperman can I ask you to reflect on the following concluding remarks relating to your calculation of the penalties? Do you know that Mr Nagar did his own calculation of the penalties?

MR GERT JACOBUS OPPERMAN: I am not aware that he did his own calculations. I would like to think it is the same schedule as what Christo used, but I cannot.

ADV VINCENT MALEKA SC: Yes. I am sure you were not aware that he testified
10 about those calculations and the amount that he said he supported gave the
Chairperson some details. Chair I believe that you do have Mr Nagar's statement. It is
U2 and.

CHAIRPERSON: Yes I do, yes.

ADV VINCENT MALEKA SC: I would ask you to go to SN11B which is that A3 page
set of documents Mr Mokoena gave to you.

CHAIRPERSON: Just repeat the last part. Would you?

ADV VINCENT MALEKA SC: SN11B.

CHAIRPERSON: SN, is that the spreadsheet?

ADV VINCENT MALEKA SC: It is the spreadsheet, but I will just read around.

20 **CHAIRPERSON:** Oh, I think my Registrar put it somewhere. Zondi where is that
spreadsheet. Did you put it in?

REGISTRAR: [Indistinct].

CHAIRPERSON: Okay. I have got it.

ADV VINCENT MALEKA SC: Thank you Chair. If you could go to SN11B. You do not
have it Mr Opperman, but I am just going to read out a figure to you and ask you to

reflect on some concluding remarks that I would like to make on this topic. Chair would recall that what he did in relation to that figure he talked about two sets of dates. The first you will see is the settlement agreement/Optimum letter/CDH Response Letter.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: That is the history of the calculation which he tracked and traced from the letter of demand sent by CDH on behalf of Eskom and then he reflected on a date 2017/03/03 and he calls it updated penalty master.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: And then he said the amount that he was willing and
10 prepared to support is R1.166 billion which is right at the bottom under the column updated penalty master.

CHAIRPERSON: Yes, I remember the figure. I cannot see it now, but I think you may proceed.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: I will find it.

ADV VINCENT MALEKA SC: And he said he was surprised that Eskom was willing to settle at R255 million.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: In the light of this figure.

20 **CHAIRPERSON:** Yes.

ADV VINCENT MALEKA SC: And that this is the amount which Eskom was willing to give up.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: In his own words, I think.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: If I am not quoting.

CHAIRPERSON: Hm.

ADV VINCENT MALEKA SC: Certainly paraphrasing his evidence.

CHAIRPERSON: Hm.

ADV VINCENT MALEKA SC: And for your purposes Mr Opperman your colleague Mr Nagar, I think you know him?

MR GERT JACOBUS OPPERMAN: Yes.

ADV VINCENT MALEKA SC: Was prepared to support a penalty amount of 1.166 billion. The concluding remark that I would like you to reflect on and comment about is
10 this. Did you know that Mr Nagar as at 2017, March had done this calculation and did he share it with you?

MR GERT JACOBUS OPPERMAN: No, he did not.

ADV VINCENT MALEKA SC: So you are not aware of this?

MR GERT JACOBUS OPPERMAN: No, I am not.

ADV VINCENT MALEKA SC: Okay. The next concluding remark that I would like you to reflect on is based on your own interpretation of the agreement you arrived an amount of R720-off. Did you convey that amount to anyone?

CHAIRPERSON: Million.

ADV VINCENT MALEKA SC: R20 million, sorry. My apologies. Eskom will kill me.
20 Did you convey that amount of R720-odd million to anyone in Eskom?

MR GERT JACOBUS OPPERMAN: No.

ADV VINCENT MALEKA SC: Not. So what happened you kept it to your own?

MR GERT JACOBUS OPPERMAN: I need to recall in January 2015 I wrote a letter to the Negotiation Team.

ADV VINCENT MALEKA SC: Yes.

MR GERT JACOBUS OPPERMAN: Giving a response on the discussion between myself and Mr Needham from Glencore around the penalty calculations.

ADV VINCENT MALEKA SC: Yes.

MR GERT JACOBUS OPPERMAN: I cannot recall if I actually mentioned the amount in that letter.

ADV VINCENT MALEKA SC: Is that letter in your bundle?

MR GERT JACOBUS OPPERMAN: I do not think I referenced it, no.

ADV VINCENT MALEKA SC: Okay. If you were to obtain a copy of it in due course could you make it available to us?

10 **MR GERT JACOBUS OPPERMAN:** I will gladly do that?

ADV VINCENT MALEKA SC: Yes. So what was the significance of that letter?

MR GERT JACOBUS OPPERMAN: As part of the Negotiation Team with the negotiations around the fourth addendum or Cooperation Agreement I was tasked to engage with Mr Needham to get alignment and the same understanding on the penalty calculations on this Coal Supply Agreement.

ADV VINCENT MALEKA SC: Yes.

20 **MR GERT JACOBUS OPPERMAN:** And that memorandum was intended to just provide feedback to the Negotiation Team. It did not conclude that there was alignment or agreement on the penalty calculation mechanism. It merely provided feedback and an update on the discussion that I had with Mr Needham.

ADV VINCENT MALEKA SC: Yes. So do I then take it that your members that is the Eskom side of the Negotiation Team would have been aware of that letter?

MR GERT JACOBUS OPPERMAN: Yes, *ja*.

ADV VINCENT MALEKA SC: So they would have been aware of the position that you took in relation to the calculation of the penalties?

MR GERT JACOBUS OPPERMAN: As I say I cannot recall if I put it into that document. I will have to check.

ADV VINCENT MALEKA SC: Yes and finally on this issue you have explained to the Chair how you arrived at that amount and Chair that is the document or the spreadsheet at 253.

CHAIRPERSON: Is that; are we back?

ADV VINCENT MALEKA SC: Two.

CHAIRPERSON: To the other file?

ADV VINCENT MALEKA SC: Yes.

10 **CHAIRPERSON:** Oh.

ADV VINCENT MALEKA SC: To U8.

CHAIRPERSON: Okay, 253 you said?

ADV VINCENT MALEKA SC: 253.

CHAIRPERSON: Okay.

ADV VINCENT MALEKA SC: I would like to.

CHAIRPERSON: Yes, I have got it.

ADV VINCENT MALEKA SC: Thank you Chair. I would like to draw some conclusions on this, if you do not mind Mr Opperman. This is your spreadsheet. Correct?

20 **MR GERT JACOBUS OPPERMAN:** That is correct.

ADV VINCENT MALEKA SC: When did you prepare it?

MR GERT JACOBUS OPPERMAN: I cannot say, but it must have been around that period, February 2015 up until when this document was updated.

ADV VINCENT MALEKA SC: Alright and what did you do with this spreadsheet after you had prepared it?

MR GERT JACOBUS OPPERMAN: I cannot recall that I did anything with it. It was just a calculation that I did.

ADV VINCENT MALEKA SC: [Intervenes].

MR GERT JACOBUS OPPERMAN: I might have discussed it with Mr Kruger. I cannot.

ADV VINCENT MALEKA SC: No, the point is you were not doing anything other than fulfilling your official functions and duties?

MR GERT JACOBUS OPPERMAN: Yes.

ADV VINCENT MALEKA SC: Yes and so it would have been a document that on the
10 face of it in your view a reflection of the outcome of your functions and duties?

MR GERT JACOBUS OPPERMAN: Okay.

ADV VINCENT MALEKA SC: During the negotiations period? I take it that you did not prepare it and simply put it in your own file. You must have done something to execute those functions and duties.

MR GERT JACOBUS OPPERMAN: I will have to go and check if I shared it with somebody. I cannot recall. I cannot recall.

CHAIRPERSON: As you say yes and so on or no Mr Opperman just make sure that the mic can catch your words so that it is recorded.

MR GERT JACOBUS OPPERMAN: 100 percent sir.

20 **CHAIRPERSON:** Thank you.

ADV VINCENT MALEKA SC: Alright. Again I would like you to reflect on that issue and come back to us even if it is by way of a formal affidavit. I am interested in finding out what did you do with the spreadsheet after you had prepared it around 2015. Chair I have dealt with the question of penalties and subject to your direction I will move on to the next topic.

CHAIRPERSON: No that is fine.

ADV VINCENT MALEKA SC: And that begins Mr Opperman from page 9 paragraph 48.

CHAIRPERSON: I just wanted to say I am still not sure about the issue that we discussed earlier about where Mr Opperman stands with regard to the R2.1 billion versus 700 and something million, but I guess we have spent more than enough time on it. I will.

ADV VINCENT MALEKA SC: Yes Chair.

CHAIRPERSON: Read the transcript and see.

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

CHAIRPERSON: What the position is, *ja*.

ADV VINCENT MALEKA SC: Chair we are clear about.

CHAIRPERSON: *Ja*.

ADV VINCENT MALEKA SC: The evidence. In other words.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: It matters not whether he is correct.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: It matters not whether his.

CHAIRPERSON: *Ja*.

20 **ADV VINCENT MALEKA SC:** Calculations were based on a proper interpretation of the agreement.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: The point that we sought to make.

CHAIRPERSON: Hm.

ADV VINCENT MALEKA SC: Through him is that he was not consulted on a matter

that clearly falls within his portfolio.

CHAIRPERSON: Okay.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: Okay.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: Okay. Well of course I guess the other point you may have been seeking to make is also that if he had been consulted and assuming that the relevant authorities sought to give due weight to his view on the amount maybe it is unlikely that they would have settled at the low amount on which they settled.

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

CHAIRPERSON: So they might not have insisted on 2.1 billion, but at least maybe they would have insisted on his figure.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: Ja.

ADV VINCENT MALEKA SC: Chair the [indistinct] we understand for those who will be called to explain to you.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: Is this that if they go for 2.1 billion.

CHAIRPERSON: Yes.

20 **ADV VINCENT MALEKA SC:** In July/August 2015 without even consulting with Mr Opperman then it means that they did not do their job properly. The result of that failure of duty is that you have placed Optimum into business rescue with the drastic consequences that that carried. On that approach what happened to the arbitration for that 2.1 billion when Tegeta takes over, because once Tegeta takes over we hear nothing about 2.1 billion.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: At the arbitration on that score.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: Because the only explanation they can give is that business rescue suspended the arbitration.

CHAIRPERSON: Huh-uh.

ADV VINCENT MALEKA SC: But we know that the business rescue ended in September 2016.

CHAIRPERSON: Hm.

10 **ADV VINCENT MALEKA SC:** The arbitration for 2.1 billion would have sat there.

CHAIRPERSON: Hm.

ADV VINCENT MALEKA SC: And still continued.

CHAIRPERSON: Hm.

ADV VINCENT MALEKA SC: But instead of the arbitration on 2.1 billion.

CHAIRPERSON: Hm.

ADV VINCENT MALEKA SC: What happens is the reduction of the penalties.

CHAIRPERSON: Hm.

ADV VINCENT MALEKA SC: And those are the inexplicable sets of circumstances.

CHAIRPERSON: Yes.

20 **ADV VINCENT MALEKA SC:** Which we would like people to explain.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: It is for that reason we call Mr Opperman.

CHAIRPERSON: Ja.

ADV VINCENT MALEKA SC: We call him to interrogate that issue. We have his version.

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

ADV VINCENT MALEKA SC: And that is why Chair we would simply suggest that there is something more than a mere miscalculation.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: There is something more than a mere.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: Advancement of a claim which is not well founded.

CHAIRPERSON: Yes, okay.

ADV VINCENT MALEKA SC: Mr Opperman I am going to ask you to go to page 9 and
10 paragraph 48 of your statement. You do confirm that there was a commencement of business rescue proceedings and you know that Mr Pierce Marsden and his colleague were appointed as joint Business Rescue Practitioners?

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: Did you ever deal with them in their capacity as Business Rescue Practitioners?

MR GERT JACOBUS OPPERMAN: I have dealt with them once or twice, but not on an ongoing basis and I once attended, I think it was a creditors meeting that they chaired.

ADV VINCENT MALEKA SC: Yes.

20 **MR GERT JACOBUS OPPERMAN:** And I think there was a letter that I sent to them that was addressed to them.

ADV VINCENT MALEKA SC: Yes.

MR GERT JACOBUS OPPERMAN: Something like that.

ADV VINCENT MALEKA SC: Are you aware that one of the issues they had to confront as Business Rescue Practitioners is the fact that Eskom withheld payment of

two invoices in June and August 2016? I mean that is a matter that falls within your portfolio. Correct?

MR GERT JACOBUS OPPERMAN: Correct, yes.

ADV VINCENT MALEKA SC: The processing and payment of invoices?

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: Are you aware of that fact?

MR GERT JACOBUS OPPERMAN: I can recall it yes.

ADV VINCENT MALEKA SC: Yes. Do you know why Eskom withheld that payment, those two payments?

10 **MR GERT JACOBUS OPPERMAN:** At that moment time there was a consultation with Mr Nagar and the view was that that monies be withheld to compensate for the accrued penalties up to that moment in time, because Eskom's view was that if Optimum goes in business rescue we will not get any monies.

ADV VINCENT MALEKA SC: So again Eskom was insisting on payment of penalties at that point in time?

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: Yes. Are you also aware that the Business Rescue Practitioners suspended a supply of coal to Hendrina?

MR GERT JACOBUS OPPERMAN: Yes. That happened in August, yes.

20 **ADV VINCENT MALEKA SC:** In August 2015?

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: Yes. Did you deal with the Business Rescue Practitioners around the suspension of coal?

MR GERT JACOBUS OPPERMAN: I cannot recall exactly. There must have been some engagement. I know that the suppliers were suspended around 3 August for

about three/four days.

ADV VINCENT MALEKA SC: Yes.

MR GERT JACOBUS OPPERMAN: And then it was again suspended I think around 21 August and that continued to 3 September when they recommenced with.

ADV VINCENT MALEKA SC: Yes.

MR GERT JACOBUS OPPERMAN: With deliveries.

ADV VINCENT MALEKA SC: All I want to understand is that this is the matter that also fell within your portfolio. Did you ever deal with them on that issue?

MR GERT JACOBUS OPPERMAN: I cannot recall how we dealt with it at that moment
10 in time. It might have been communication through our legal team with them. Surely there was an engagement on my side to have an engagement with Optimum. I cannot recall exactly if I communicated directly with them or if it was through our internal legal team.

ADV VINCENT MALEKA SC: Alright. You conclude that topic around the business rescue status of OCM by referring to an event which I cannot locate in the evolution of the relation between Optimum Coal Mine and business rescue and Eskom. I direct your attention to paragraph 50 on page 10 of your statement. You say there:

20 “On 17 September 2015 OCM sent a settlement proposal to Eskom on all outstanding matters. I do not have a record of the proposal and on 19 September 2015 CDH issued a notice to OCM that relaxed the sizing specification and suspended penalties on qualities. I do not have a record of the notice issued by CDH. This agreement was backdated to commence 4 September 2015 and was only for 60 days.”

Do you see that?

MR GERT JACOBUS OPPERMAN: Yes.

ADV VINCENT MALEKA SC: What was the effect of this arrangement, because my understanding is that Eskom had always insisted on compliance with coal quality, sizing specifications? You have just also indicated that it insisted on withholding payment because of all those coal quality specification deficiencies?

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: Why in September 2015 there is a notice from the attorneys of Eskom to suspend sizing specifications and penalties?

MR GERT JACOBUS OPPERMAN: I can only thing that the discussion was around
10 the reinstatement of the supply. It coincides with 4 September when the supply reconvened. I; and that Optimum agreed at that moment in time to say we will reconvene with the coal supply, but then you need to suspend these penalties. As this proposal or this letter came from Cliffe Dekker and Hofmeyr which was our legal advisors there was obviously consultation between them and the Business Rescue Practitioners and they were talking and there was an agreement around this. I think at that moment in time the most critical thing for us was to get the coal supply to Optimum, to Hendrina Power Station reinstated.

ADV VINCENT MALEKA SC: Yes. I suppose you were not consulted on this proposal?

20 **MR GERT JACOBUS OPPERMAN:** I cannot recall it, no.

ADV VINCENT MALEKA SC: No, but if you were you would have recalled?

MR GERT JACOBUS OPPERMAN: For sure.

ADV VINCENT MALEKA SC: And if you were consulted you would have given us copies of these letters?

MR GERT JACOBUS OPPERMAN: For sure.

ADV VINCENT MALEKA SC: So the bottom line is you were not consulted at all?

MR GERT JACOBUS OPPERMAN: Correct, yes.

ADV VINCENT MALEKA SC: You move to the next topic and I will be fairly quick there, because we now understand the process for certification of coal compliance when it is delivered on the one hand through a conveyor belt or when it is delivered on the other hand through rail. You explained that process from paragraph 51 on page 10 and you conclude that insofar as coal from Hendrina is concerned it was delivered by a conveyor belt and the process for coal certification for compliance will be through sample testing. Correct?

10 **MR GERT JACOBUS OPPERMAN:** *Ja*, the sample was collected through a sampler yes.

ADV VINCENT MALEKA SC: Yes. There is nothing that turns on your explanation. From paragraph 56 you deal with that issue and there is nothing that arises for purposes of asking you further questions on it unless you want to raise anything. In that regard I would ask you to go to page 12 paragraph 59. In paragraph 59 you say:

“In hindsight it became clear that soon after 2012 refurbishment of the sampling plant the recorded sizing parameters of the coal supplied via conveyor did not meet the contract specification.”

20 Do you see that?

MR GERT JACOBUS OPPERMAN: Yes I do.

ADV VINCENT MALEKA SC: When did you pick up for the first time that as a matter of hindsight the coal delivered did not comply with sizing specifications?

MR GERT JACOBUS OPPERMAN: It became evident at the time on 1 October when the crusher was switched off in the sampling plant that the issue all the time was

actually related to the upgrade and the work that was done on the sampler around 2012 that introduced these increased fines that was reported.

ADV VINCENT MALEKA SC: I just need a time that I can work it. Is that the time you refer in paragraph 62?

MR GERT JACOBUS OPPERMAN: Yes. 61 and 62, correct.

ADV VINCENT MALEKA SC: 61 and 62. So it is around October?

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: Yes. My recollection of your evidence on this score earlier on when we anticipated these two paragraphs was that the problem was not
10 resolved fully. You said that there was some significant improvement. Correct?

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: And that the problems of sizing still remained?

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: Yes. So that the coal quality which was delivered after this period still had some problem of some sort related to sizing. Correct?

MR GERT JACOBUS OPPERMAN: That is correct.

ADV VINCENT MALEKA SC: Yes. I am asking you this question because we know that after the new owner took over it continued to deliver coal to Hendrina from the same mine. Correct?

20 **MR GERT JACOBUS OPPERMAN:** That is correct.

ADV VINCENT MALEKA SC: Yes and they would all things been equal still be coal quality problems related to sizing?

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: What I want to understand is after the new owner took over did you guys look at the question of penalties coming from the same coal mine? I

am talking about the period April. In fact let me become more precise. I am talking about the period to September 2016 going forward.

MR GERT JACOBUS OPPERMAN: Yes we did.

ADV VINCENT MALEKA SC: And did you impose those penalties?

MR GERT JACOBUS OPPERMAN: Yes we did.

ADV VINCENT MALEKA SC: Alright. I would like you to take me to your documentation where that happened. I am distinguishing between two things.

MR GERT JACOBUS OPPERMAN: Huh-uh.

ADV VINCENT MALEKA SC: Historic penalties of 2.1 billion and future penalties that
10 began to apply from September 2016. Your evidence is that you did impose penalties?

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: Okay. Chair I will explore that issue when we come to September 2016.

CHAIRPERSON: That is fine.

ADV VINCENT MALEKA SC: Because I.

CHAIRPERSON: Hm.

ADV VINCENT MALEKA SC: I cannot pick it up.

CHAIRPERSON: Okay.

ADV VINCENT MALEKA SC: I confess that.

20 **CHAIRPERSON:** *Ja*.

ADV VINCENT MALEKA SC: I may have been drowned in documentation.

CHAIRPERSON: *Ja*.

ADV VINCENT MALEKA SC: And forgot the bigger picture.

CHAIRPERSON: No that is fine.

ADV VINCENT MALEKA SC: Yes. Mr Opperman I have now concluded anything

before the question of cession which is a new topic. You deal with from page 12 paragraph 63. Do you see that?

MR GERT JACOBUS OPPERMAN: Yes.

ADV VINCENT MALEKA SC: In that paragraph you talk about an internal memo dated 29 October 2015. Chair you will find that memo on page 258 and I would like to take you there if you do not mind.

CHAIRPERSON: 258?

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: Okay.

10 **ADV VINCENT MALEKA SC:** Come on. Is it me again?

CHAIRPERSON: Is that the correct page you gave me?

ADV VINCENT MALEKA SC: I think it is; I made a mistake, *ja*.

CHAIRPERSON: Hm. It is GJ?

ADV VINCENT MALEKA SC: [Intervenes].

CHAIRPERSON: Is it 19?

ADV VINCENT MALEKA SC: No, I am sorry. It is my understanding, because GJO19 is 254.

CHAIRPERSON: Okay. Yes.

20 **ADV VINCENT MALEKA SC:** Mr Opperman you included this memo in your documentation. Do you see that?

MR GERT JACOBUS OPPERMAN: Yes I did.

ADV VINCENT MALEKA SC: And it seems to me that this is a request for approval by the Group Executive for Generation for the supply of coal from Optimum Mine for a specific period. Do you see that?

MR GERT JACOBUS OPPERMAN: Yes.

ADV VINCENT MALEKA SC: If you look at paragraph 2 on page 255. Can I ask you to give us some background why in October 2015 approval is required from Mr Koko about a short term supply for coal from Optimum Mine? I would have thought that by that time there always existed a CSA between Eskom and Optimum to supply coal.

MR GERT JACOBUS OPPERMAN: Mr Chair at this moment in time I can take you to page 254.

ADV VINCENT MALEKA SC: Yes.

MR GERT JACOBUS OPPERMAN: The table under point number C. What is of relevance is that this table changes the sizing parameters under the existing CSA for
10 this period. So one can see that the size fraction for the 0.81 where the previous contract specification was 15 percent it is now increased to 20 percent.

ADV VINCENT MALEKA SC: Where are you reading from? I am sorry. I missed you.

MR GERT JACOBUS OPPERMAN: Page 256.

ADV VINCENT MALEKA SC: 256.

MR GERT JACOBUS OPPERMAN: In that table.

ADV VINCENT MALEKA SC: Yes.

MR GERT JACOBUS OPPERMAN: Under quality if you go right to the bottom.

ADV VINCENT MALEKA SC: Yes.

MR GERT JACOBUS OPPERMAN: It refers to the size specification on the smaller
20 size 0.81 millimetre.

ADV VINCENT MALEKA SC: Yes.

MR GERT JACOBUS OPPERMAN: And it says:

“No more than 20 percent of the coal supply will be small than
the 0.81 millimetre.”

ADV VINCENT MALEKA SC: Yes.

MR GERT JACOBUS OPPERMAN: The existing contract specification at this moment in time that was 15 percent. So in essence this memo is requesting a change in the quality parameters on the existing CSA for this period.

ADV VINCENT MALEKA SC: I see.

CHAIRPERSON: So it was – was it making things easier in terms of quality and to the detriment of Eskom.

MR GERT JACOBUS OPPERMAN: I think it was dealing Chair with the size fraction that was consistently high and above the 15% and attracting sizing penalties on an ongoing basis.

10 **CHAIRPERSON:** Yes.

MR GERT JACOBUS OPPERMAN: So at this moment in time there must have been some engagement to say if we can change it to 20% that is something that the mine can achieve, because that's the only thing that I can see that was changed.

CHAIRPERSON: So previously it was 15%?

MR GERT JACOBUS OPPERMAN: One five correct yes.

CHAIRPERSON: 15 so in which case under that regime the penalties would start accumulating earlier, quicker.

MR GERT JACOBUS OPPERMAN: Correct.

20 **CHAIRPERSON:** But now no penalties will accumulate until 20% at least has been exceeded.

MR GERT JACOBUS OPPERMAN: That's correct.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: You know at this point what is surprising about this, and don't misunderstand me or the tone of my question, I'm not blaming you but what is surprising about this request for approval at that point in time, is that Glencore had

been requesting this shift in change of the penalty level from 15 to even 20, correct?

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: And that was rejected?

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: Having rejected that historic request you're now going to – Eskom is seeking an approval to change that very same position it had rejected previous, correct?

MR GERT JACOBUS OPPERMAN: That is correct.

ADV VINCENT MALEKA SC: Why the sudden change of heart?

10 **CHAIRPERSON:** Why the inconsistency?

MR GERT JACOBUS OPPERMAN: Pardon me Chair?

CHAIRPERSON: No I'm saying Mr Maleka is asking why the inconsistency, why are Glencore and Tegeta treated differently by Eskom in regard to this issue?

MR GERT JACOBUS OPPERMAN: I cannot answer that question Chair, the requestor of this Ms Ayanda Nteta and I think that is the person to answer it.

ADV VINCENT MALEKA SC: Alright, and this request was supported by a number of people and there are names are here on page 257, do you see that?

MR GERT JACOBUS OPPERMAN: That's correct.

ADV VINCENT MALEKA SC: What happened to this request, was it approved?

20 **MR GERT JACOBUS OPPERMAN:** By the look of the signatures it was approved, yes.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: The final approval was Mr Koko, according to the last page of the memo, Ms Nteta was the requestor and Neo Cholanco was a supporter, Nkosi Simbuweni was a supporter, Mr Matshella Koko was the approver, okay?

ADV VINCENT MALEKA SC: Do you see that?

MR GERT JACOBUS OPPERMAN: Yes.

ADV VINCENT MALEKA SC: So we know that they've approved it and it's for a short period of time and we know it was during the time when this entity was still under business rescue, correct?

MR GERT JACOBUS OPPERMAN: That's correct yes.

ADV VINCENT MALEKA SC: I am going back to your statement, in paragraph 63 you refer to Annexure GJ20, Chair it's a report by a consultancy that has Eskom engaged I've read it and maybe Mr Opperman will help us about the importance of this.

10 **CHAIRPERSON:** Ja.

ADV VINCENT MALEKA SC: Because it simply talks about the market analysis of coal all over the world and here and what could be the possible reason why Glencore sought a renegotiation, but I'm not too sure if it adds anything to the debate. Mr Opperman how do you want us to consider this document?

MR GERT JACOBUS OPPERMAN: Mr Chair I cannot recall requesting this document and I thought that it was of relevance to include it since this came at the hand of this sizing adjustment. A similar document was requested in December 2013, a similar exercise was undertaken by a different company and in reality it basically made the same conclusion where it just talked to the impact of the markets and the different
20 movements around it.

ADV VINCENT MALEKA SC: Ja, in terms of cash to cost if this document is relevant at all you will find the analysis done by the consultants on page 280 about the different mines owned by Glencore supplying coal to Eskom and what was the cash to cost implication of the supply to Eskom. The bottom line is that Optimum was not the most expensive, correct?

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: The most expensive was Spring Lake, do you see that?

MR GERT JACOBUS OPPERMAN: Yes.

ADV VINCENT MALEKA SC: Chair I can't take it further, I mean I will leave it and this you ...

CHAIRPERSON: No that's fine.

ADV VINCENT MALEKA SC: I would like to take you back to your statement and ask you to go to paragraph 64 on page 13, you refer to Annexure GJ21 and Chair you
10 will find it at page 285.

CHAIRPERSON: 285?

ADV VINCENT MALEKA SC: Yes, but the real document begins at 286, I'd ask you to go there Chair.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: Mr Opperman you will see that that's the change of ownership.

MR GERT JACOBUS OPPERMAN: That is correct yes.

ADV VINCENT MALEKA SC: And it takes place through a cession of shares in the operating company that owns the mine, correct?

20 **MR GERT JACOBUS OPPERMAN:** That's correct.

ADV VINCENT MALEKA SC: Yes. I want to focus on paragraph 1.2 on page 286, paragraph 1.2 of the approval given by the BTC consent to that change of ownership provides that there will be a release of the guarantee given by OCH to Eskom, you would know as the manager of the various power stations, especially in relation to Hendriena that a guarantee of performance given by a supplier it's a useful collateral

for Eskom, correct?

MR GERT JACOBUS OPPERMAN: That's correct.

ADV VINCENT MALEKA SC: If you release the supplier from that guarantee then there's a risk posed to Eskom about the performance by the supplier of his contractual obligations, correct?

MR GERT JACOBUS OPPERMAN: That's correct.

ADV VINCENT MALEKA SC: So make sure that the change of ownership does not impact adversely on Eskom you would insist that the new owner provide a guarantee correct?

10 **MR GERT JACOBUS OPPERMAN:** That's correct.

ADV VINCENT MALEKA SC: So what paragraph 3 records and Chair I'm at page 286, is that the condition for that cession is that Tegeta had to provide a guarantee of its own, is that correct?

MR GERT JACOBUS OPPERMAN: Correct yes.

ADV VINCENT MALEKA SC: Yes, the question is – well before I put the question, that change of ownership was contractually recorded as between Eskom and Tegeta by means of an amendment to the existing CSA, and remember when the CSA was in operation the last of the amendments we have looked at was the third addendum.

MR GERT JACOBUS OPPERMAN: That's correct.

20 **ADV VINCENT MALEKA SC:** The addendum which constituted the amendment to reflect the change of ownership is now called the 4th addendum, correct?

MR GERT JACOBUS OPPERMAN: That's correct.

ADV VINCENT MALEKA SC: To be distinguished from the draft 4th addendum which the Board had rejected and that 4th addendum you will find it Chair from page 288.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: And for the purposes of the question that I had intimated but I had not yet put to you can I ask you to go to page 291, you will see paragraph 2.1.5.2 it says Eskom being issued with a guarantee by Tegeta on the same terms as the Eskom guarantee to Eskom's satisfaction, do you see that?

MR GERT JACOBUS OPPERMAN: Yes.

ADV VINCENT MALEKA SC: So that it is part and parcel of this 4th Addendum that Eskom had to be given a guarantee by Tegeta to Eskom's satisfaction, correct?

MR GERT JACOBUS OPPERMAN: Correct yes.

ADV VINCENT MALEKA SC: The Board had required that addendum be given the
10 4th Addendum we have looked at provide for the contractual obligation to provide for the guarantee and the question is was that guarantee given by Tegeta?

MR GERT JACOBUS OPPERMAN: According to my understand no it has not been given, something that I also want to mention is that I only became aware of this 4th Addendum on the 8th of June 2017.

ADV VINCENT MALEKA SC: June 20?

MR GERT JACOBUS OPPERMAN: 17.

ADV VINCENT MALEKA SC: Okay.

MR GERT JACOBUS OPPERMAN: I only saw the addendum for the first time on the 24th of July 2017, so on the 8th of June 2017 I became aware that there is a 4th
20 addendum, it was in the process where we stated with the drafting of what was now the 5th addendum and in that draft document we called it the 4th addendum and then we were told but there already a 4th addendum, you can't draft a 4th addendum, so that happened around the 8th of June 2017 and as I say the first time that I saw this document was on the 24th of July 2017.

ADV VINCENT MALEKA SC: Yes, we will come back to the significance of that

evidence and you do confirm, so if you can go to page 13 paragraph 67 you do confirm in paragraph 67 that the first time the 4th addendum was made known to you was on the 8th of June 2017, correct?

MR GERT JACOBUS OPPERMAN: Correct yes.

ADV VINCENT MALEKA SC: There are several issues that I would like to explore with you, you are aware that the 4th addendum was signed by the parties 14 months earlier than the date when you yourself became aware of it, correct?

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: And Mr Opperman I mean the questions relating to the
10 4th addendum, the amendment of the CSA by way of a 4th addendum are matters that fall within your portfolio.

MR GERT JACOBUS OPPERMAN: That's correct.

ADV VINCENT MALEKA SC: Yes. From all events it seems as if people were doing something about your portfolio without even telling you.

MR GERT JACOBUS OPPERMAN: That is correct.

ADV VINCENT MALEKA SC: Why would that be the case, I mean can you think of any reason why you being the person in charge of whether the 4th addendum should, - well whether the CSA should be amended and if so whether it should be on the terms formulated by the addendum, what is any plausible reason that people in Eskom would
20 avoid and not talk to you on that issue?

MR GERT JACOBUS OPPERMAN: I can only speculate Mr Maleka.

ADV VINCENT MALEKA SC: Please do.

CHAIRPERSON: Mr Opperman the way he looks at me it's as if he is saying well come to my rescue, why must I speculate. I think Mr Maleka don't force him to speculate.

ADV VINCENT MALEKA SC: Chair I – in fairness I thought I should put that

question, but we have our own reasons and we don't want to be accused of unfair speculation when the witness who could have helped us has come and again, but ... (intervention)

CHAIRPERSON: Ja no I think let him not speculate.

ADV VINCENT MALEKA SC: Let us not speculate but it is surprising is it not?

MR GERT JACOBUS OPPERMAN: Very surprising.

ADV VINCENT MALEKA SC: You are ignored on a matter falling within your portfolio.

MR GERT JACOBUS OPPERMAN: Very much yes.

10 **ADV VINCENT MALEKA SC:** And you say you became aware of the 4th addendum a year and two months later, but you now confirmed that the guarantee contemplated in the 4th addendum was not given?

MR GERT JACOBUS OPPERMAN: No.

ADV VINCENT MALEKA SC: Yes. Even by the time when Optimum went into a second business rescue, that guarantee had not been given?

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: As we speak today that guarantee is not in place?

MR GERT JACOBUS OPPERMAN: That's correct.

20 **CHAIRPERSON:** Yes that's when I say articulate your answers so the microphone can catch and record your answer Mr Opperman, I know it's been a long day, but when you nod the answer is not recorded.

MR GERT JACOBUS OPPERMAN: You are correct Mr Maleka.

ADV VINCENT MALEKA SC: Thank you. So Eskom has been on risk the day Glencore divested ownership of this mine and the day Tegeta took over this mine.

MR GERT JACOBUS OPPERMAN: That is correct yes.

ADV VINCENT MALEKA SC: I won't ask you to speculate why.

MR GERT JACOBUS OPPERMAN: Thank you.

CHAIRPERSON: Well you were kept in the dark about the 4th addendum for a long time, when you say this guarantee was never provided to Eskom what are the chances that you might not know the true position, it might be there but you have been kept in the dark about it as well also.

MR GERT JACOBUS OPPERMAN: Mr Chair that is possible.

CHAIRPERSON: Sorry?

MR GERT JACOBUS OPPERMAN: Mr Chair that is possible.

10 **CHAIRPERSON:** Mm, but in terms of chances you would say probably the position is that it's not there or you are not able to indicate in terms of what's possible or what's probable?

MR GERT JACOBUS OPPERMAN: I do not 100% know it is there or it is not there.

CHAIRPERSON: Yes, but in terms of your work chances are that if it was there you would have seen it or you are not able to go that far?

MR GERT JACOBUS OPPERMAN: I will not necessarily have seen it, it will be something that will be submitted to the fuel sourcing department because they are contracting these new agreements and transition things.

20 **CHAIRPERSON:** Yes, but if you wanted to know whether it's there you would have a way of finding out wouldn't you?

MR GERT JACOBUS OPPERMAN: I could yes.

CHAIRPERSON: Okay, Mr Maleka I don't know whether you want to do anything about that?

ADV VINCENT MALEKA SC: No Chair.

CHAIRPERSON: Or you may have your other ways.

ADV VINCENT MALEKA SC: I have ...

CHAIRPERSON: You have, okay no that's alright.

ADV VINCENT MALEKA SC: I will – otherwise I am going to go to that world of speculation.

CHAIRPERSON: Okay, alright yes.

ADV VINCENT MALEKA SC: We have our own views Chair, but I think in fairness to Mr Opperman we will interrogate those views with other witness who was supposed to explain these anomalies. Mr Opperman I would like to move then to the next phase of your statement which is the declaration of business rescue. You start with the topic
10 from paragraph 68, on page 13, okay, you talk about Section 54 notice, we have dealt with Section 54 notices during the evidence of Mr Ephron, I am not going to ask you to repeat it. It's up to you, you may want to give us more information we are not aware of. You then move to the question of the declaration of impossibility by Eskom at page 69 because of strike issues.

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: Ja, I would like to move away from it unless you think that is important.

MR GERT JACOBUS OPPERMAN: That's fine.

ADV VINCENT MALEKA SC: Then you begin with the topic of an interim agreement
20 at the request of Werksmans Attorneys who we know at the time they were acting for business rescue practitioners, correct?

MR GERT JACOBUS OPPERMAN: That's correct.

ADV VINCENT MALEKA SC: Chair you will find that letter on page 300. Mr Opperman that letter records the extension of the interim agreement, I assume that that's the short term supply agreement that you said was recommended by Ms Nteta.

CHAIRPERSON: I'm sorry is that the one on 302 because I don't have a letter on 300, I've got a divider and then Annexure JG026 and then a letter at 302.

ADV VINCENT MALEKA SC: Chair do you not have JG025 which is on page 300?

CHAIRPERSON: Hang on, no I'm sorry I do have thank you.

ADV VINCENT MALEKA SC: Yes, do you see that?

MR GERT JACOBUS OPPERMAN: Yes I do.

ADV VINCENT MALEKA SC: So it's a request by the lawyers of the business rescue practitioners to extend further that short term agreement.

MR GERT JACOBUS OPPERMAN: That's correct.

10 **ADV VINCENT MALEKA SC:** Yes, and just as a matter of clarity it is the same agreement that was recommended by Ms Nteta?

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: Yes, then you refer to JG26, Chair you will find it from page 301.

CHAIRPERSON: Yes I think that's the one.

ADV VINCENT MALEKA SC: Yes, and that is notice by the business rescue practitioner to the creditors, shareholders, and all other interested parties of Optimum to tell them that they are now out of business rescue. Are you there at page 302?

MR GERT JACOBUS OPPERMAN: I am.

20 **ADV VINCENT MALEKA SC:** Yes so that seems to me that that's the end of the commercially limping status of Optimum as a company in financial distress.

MR GERT JACOBUS OPPERMAN: By the look of it yes.

ADV VINCENT MALEKA SC: Yes, so it can trade on its own financial muscle. Now what I want to ask you is this, and we will clear this with the Business Rescue Practitioners when they come in on Tuesday Chair. Do you know whether or not they

had filed a Business Rescue Plan?

MR GERT JACOBUS OPPERMAN: I would not know the Business Rescue Plan would have been shared with Cliffe Dekker & Hofmeyr at that moment in time but I would not know.

ADV VINCENT MALEKA SC: You yourself would not know.

MR GERT JACOBUS OPPERMAN: No.

ADV VINCENT MALEKA SC: Fair enough. They sent the same letter to other people of course and one of them is Mr Petrus Mazibuko who was your superior as I recall?

10 **MR GERT JACOBUS OPPERMAN:** That is correct.

ADV VINCENT MALEKA SC: You reported to him?

MR GERT JACOBUS OPPERMAN: That is correct.

ADV VINCENT MALEKA SC: Chair you will find that letter on page 308.

MR GERT JACOBUS OPPERMAN: Thank you.

ADV VINCENT MALEKA SC: And in it – in fact I made a mistake, I thought that it was sent by the Business Rescue Practitioners, far from it, that letter was sent by the new Chief Operating Officer of Optimum after it was taken out of business rescue.

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: It is Mr van der Merwe.

20 **MR GERT JACOBUS OPPERMAN:** That's correct.

ADV VINCENT MALEKA SC: Chair you will find his name on page 310.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: So this is a company under new management, it sends a letter to Mr Mazuduko confirming that it is out of business rescue, but of importance is what Mr van der Merwe says in the paragraph just before the escalation matrix, do you

see it Mr Opperman?

MR GERT JACOBUS OPPERMAN: I do see the paragraph.

ADV VINCENT MALEKA SC: Yes, he says in it:

“As proposed last time we met we would like to propose the following modification to the pricing mechanism.”

Do you see that?

MR GERT JACOBUS OPPERMAN: Yes.

ADV VINCENT MALEKA SC: And then he starts explaining the pricing mechanism that he proposes which is effectively an escalation to the Rand per ton of the price that

10 Optimum was providing coal to Eskom, correct?

MR GERT JACOBUS OPPERMAN: That's correct.

ADV VINCENT MALEKA SC: Yes, Chair you will find the explanation of the matrix relating to the escalation on page 309.

CHAIRPERSON: Yes I've got it.

ADV VINCENT MALEKA SC: Mr Opperman when you look at the table of the escalation Glencore when it owned this mine it made and requested Eskom to agree to this matrix of a price escalation, are you aware of that fact?

MR GERT JACOBUS OPPERMAN: Yes.

ADV VINCENT MALEKA SC: And Eskom rejected that request.

20 **MR GERT JACOBUS OPPERMAN:** I think it was rejected Chair as part of the 4th Addendum that was drafted at that moment in time, so yes the answer is it was rejected because that was terminated.

ADV VINCENT MALEKA SC: Yes, yes. Chair can I ask you to cross-reference the pricing mechanism requested by Mr van der Merwe on behalf of Tegeta to the request made by Glencore through Mr Ephron via the 4th Addendum at page 148 of Mr Ephron's

statement.

CHAIRPERSON: 108?

ADV VINCENT MALEKA SC: 148.

CHAIRPERSON: Yes I've got it.

ADV VINCENT MALEKA SC: I'm sure you don't have it but you are aware of it, it is the same cost component of running an operation, it is labour, it is diesel, it is electricity, other materials including engineering and electrical materials. Those are the normal cost items to run a mine and Glencore requested the same adjustments in terms of price escalation and you do confirm that they were rejected?

10 **MR GERT JACOBUS OPPERMAN:** Correct yes.

ADV VINCENT MALEKA SC: Yes, what happened to this request by Mr van der Merwe, did Eskom approve it?

MR GERT JACOBUS OPPERMAN: It was eventually approved as part of the 5th addendum yes in – I think in January 2018.

ADV VINCENT MALEKA SC: Yes. In fact it was earlier than that, if you go to page 312, you will see that Mr Mazibuko responds to that letter of Mr van der Merwe.

MR GERT JACOBUS OPPERMAN: Correct.

20 **ADV VINCENT MALEKA SC:** And he tells me that as far as he is concerned he agrees to it but he will refer to the Board for approval. And then the approval comes via the 5th addendum, correct?

MR GERT JACOBUS OPPERMAN: That's correct.

ADV VINCENT MALEKA SC: I do recall that I saw the 5th addendum in your documentation. Chair you will find the 5th addendum on page 327.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: And Mr Opperman I would like to take you to page 330.

You will see that there is a rebasing of the price to R201.46 per tonne that is a revised price structure?

MR GERT JACOBUS OPPERMAN: That is correct. In order to apply this price adjusted mechanism this escalation mechanism it needs to refer to a base price and at this moment in time the base price on this contract still moved back to the price that was in the second addendum which R115.00, 115. So in order for that price to be current an assessment was done and it was calculated that that is a – the most representative price of what the coal price would have been at that moment in time not escalated and then being escalated going forward based on this matrix.

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

ADV VINCENT MALEKA SC: So it is – it is a new price but it was really setting a base price.

ADV VINCENT MALEKA SC: Yes. Alright thank you for that clarity. We now know that there is a fifth addendum that regulates the new price arrangements. I am now at page 14, paragraph 72 of your statement. This is a memorandum sent to the executives of Eskom. Can you give us some background to this memorandum? It is on page 314 Chair going forward.

CHAIRPERSON: What page?

ADV VINCENT MALEKA SC: 314.

20 **CHAIRPERSON:** Thank you.

ADV VINCENT MALEKA SC: Can you give us some background why this memorandum was sent to the senior executives of Eskom?

MR GERT JACOBUS OPPERMAN: So Mr Chair at this moment in time I am taking you to page 315 paragraph number 7. What was of significance is that the Hendrina stock days by this time has significantly reduced and were down at 25.2 days. We

were sitting in October it is just before the rainy season. The December festive break is on its way when we traditionally have a road embargo period where we do not haul coal on the road. And we were concerned that the stock days will drop below 20 days. 20 Days is of significance in terms of grid code compliance within generation where power stations stock days need to be maintained at and the intent of this document was to seek approval to increase deliveries via road to Hendrina Power Station. At this moment in time it was evident that Optimum could not sustain or could not meet the burn requirement of the power station and we realised that we – we needed to get some additional coal in. At this moment in time of drafting this note Eskom were in

10 financial constraints and because of this significant cost impact as the coal operations team we felt that it is necessary to seek approval for this additional expenditure and the typical cost implication is listed under point number 8 where the typical cost for the coal that was then contracted to Hendrina on road is noted against the cost of coal at that moment in time from Optimum via conveyer. Bullet point number 9 then reflects the additional coal cost and then the recommendation on the next page then seeks the support in order to bring in additional coal to Hendrina Power Station to recover the stock days back to around 30 days.

ADV VINCENT MALEKA SC: Alright Mr Opperman all you saying in short is that you were going to request an approval to buy coal from elsewhere than from Optimum Coal

20 Mine?

MR GERT JACOBUS OPPERMAN: Ja Liketh, the Liketh contract, the Liketh KK Pit 5 contract that is mentioned here is a contract that what – at that moment was contracted for Hendrina. So historically they did deliver coal to Hendrina but just in lower volumes because the makeup volumes was low and at this moment in time we had to significantly increase which were not budgeted for.

ADV VINCENT MALEKA SC: No I understand but you were going to buy from a third party supplier?

MR GERT JACOBUS OPPERMAN: Correct yes.

ADV VINCENT MALEKA SC: Yes.

MR GERT JACOBUS OPPERMAN: But it was an already existing contract.

ADV VINCENT MALEKA SC: I see.

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: And you are going to incur substantial additional costs?

MR GERT JACOBUS OPPERMAN: That is correct Chair.

10 **ADV VINCENT MALEKA SC:** Yes. And the cost component which is an additional cost for Eskom was in the order of R494,00 per tonne?

MR GERT JACOBUS OPPERMAN: No Mr Maleka to – the additional cost under point number 9 and it is around R312,00 per tonne.

ADV VINCENT MALEKA SC: Oh. Just explain to me how do you get to the figure?

MR GERT JACOBUS OPPERMAN: So under point number it is explained what the Liketh cost component is at that moment in time R494,99 per tonne that was delivered cost.

ADV VINCENT MALEKA SC: Yes.

20 **MR GERT JACOBUS OPPERMAN:** So that is coal and transportation included and then the coal cost from Optimum Hendrina at that moment in time was R182,89 so ...

ADV VINCENT MALEKA SC: So you minus the one [indistinct].

MR GERT JACOBUS OPPERMAN: The variance is the additional part correct yes.

ADV VINCENT MALEKA SC: So the additional cost is the variance.

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: Which is R312,00?

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: Okay. Now can I ask you this? Was that approval given to your recollection?

MR GERT JACOBUS OPPERMAN: Yes it was given the – on the next page, page 316 the document was signed and it was signed by Mr Edward Mabolane on behalf of Matshela Koko as group executive generation. So most probably at that time he was acting in that position. Well he however do limit the volume.

ADV VINCENT MALEKA SC: Yes.

MR GERT JACOBUS OPPERMAN: And that is – there is this handwritten comment
10 where he says that he does improve – he does approve to only import 100 kilo tonnes and he also gives the date by when it can be done.

ADV VINCENT MALEKA SC: Can you read that handwritten manuscript for us I cannot make head or tail of it, if you could that will be great.

MR GERT JACOBUS OPPERMAN: I will try my best.

ADV VINCENT MALEKA SC: Yes.

MR GERT JACOBUS OPPERMAN: So Mr Mabolane makes a *with a footnote where he said: “Approved to import a 100 kilo tonne that is a hundred thousand tonne still 15.11.26 so that is 15 November 2016 to afford – okay I cannot decipher that but it says to afford and it looks like the station opportunity to either recover full supply from the
20 mine or increase reclaim capacity by deploying additional plant.”

ADV VINCENT MALEKA SC: Alright.

MR GERT JACOBUS OPPERMAN: So if I read it his approval is granted for 100 kilo tonnes at a certain date and then the station need to perform on two aspects which is either to recover the supply from the mine. So meaning that there is something that gets corrected there or alternatively to get additional reclaiming infrastructure to move

the coal from their coal reserves that they have.

ADV VINCENT MALEKA SC: Yes. So at that point in time we are sitting with a position where there is an existing CSA.

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: In terms of which Optimum Coal is obliged to supply certain maximum tonnage to Hendrina, correct?

MR GERT JACOBUS OPPERMAN: That is correct.

ADV VINCENT MALEKA SC: And you request for a purchase of a shortfall to cover the December holiday problem. Had you at that point in time made an analysis that
10 what was supplied to Hendrina at that point in time were tonnages that were consistent with the contractual volume that the mine had to supply. What I want to understand is the shortage in the stock pile at that point in time was it because Optimum did not comply with its obligation to provide the tonnages under the contract? What was the reason for the short?

MR GERT JACOBUS OPPERMAN: The reason for the shortfall was the fact that Optimum just came out of business rescue and during the business rescue period Optimum basically delivered whatever they could deliver. So even though the contract was 458.3 kilo tonnes per month if one goes back the actually deliveries were more often than not ranging between 300 and 400. So over a period of time while Optimum
20 were in business rescue the stock levels slowly depleted and at this moment in time the significance of the risk was the upcoming rainy season as well as the December festive break.

ADV VINCENT MALEKA SC: No I understand. So the short supply is attributable to business rescue situation of Eskom – of Optimum?

MR GERT JACOBUS OPPERMAN: Mainly yes.

ADV VINCENT MALEKA SC: Okay thank you for that. Then you go to the next topic about the suspension of penalties and a second business rescue situation. You deal with that topic from paragraph 73. And I would like to take you to Annexure GJ30. Chair you will find Annexure GJ30 on page 317.

CHAIRPERSON: Thank you.

ADV VINCENT MALEKA SC: And you see that that again it is a letter addressed to Mazibuko to Mr – from Mr George Van Der Merwe. So it is Optimum Coal under new management speaking to Eskom. I am going to read the second unnumbered paragraph on page 318 and ask you for your comments. It reads as follows Mr

10 Opperman:

“As we are all well aware that the current agreement is an onerous agreement.”
Do you see that?

MR GERT JACOBUS OPPERMAN: I do yes.

ADV VINCENT MALEKA SC: What is new about this? Glencore had already told Eskom about the onerous nature of this agreement.

MR GERT JACOBUS OPPERMAN: That is correct yes.

ADV VINCENT MALEKA SC: So what has suddenly changed? This is an old historic problem the mine had nothing is new.

MR GERT JACOBUS OPPERMAN: I think the only thing that was new at this moment
20 is the new management at the mine but that is it.

ADV VINCENT MALEKA SC: Indeed. And that is the point. That Eskom is now willing to entertain old problems because they are raised by a new manager or a new owner. Anyway let us read on.

“Due to this Glencore went into business rescue by August
2015”.

That we know.

“The factors surrounding the hardship clause in the agreement has not changed.”

That we know.

“Since the signing of the cooperation agreement inflation has increased two consecutive years by more than 6% even though the mine inflation is well documented to be more in the region of 10 to 12% per year. This shows that the hardship had increased significantly.”

10 Let me read it again Chair.

CHAIRPERSON: Mr Opperman will have to come to our rescue. Did you see that Mr Opperman.

MR GERT JACOBUS OPPERMAN: Yes I did.

CHAIRPERSON: It looks like Eskom is threatening to let us stop – make us stop.

MR GERT JACOBUS OPPERMAN: Mr Chair unfortunately I cannot be in two places at once.

ADV VINCENT MALEKA SC: Okay. Chair we still have some time I think we should continue.

CHAIRPERSON: Yes no, no we should continue.

20 **ADV VINCENT MALEKA SC**: Stop and go would be the order of the day if Eskom does not help us.

CHAIRPERSON: No we must continue.

ADV VINCENT MALEKA SC: Yes. Mr Opperman I was reading the last sentence.

“This shows that the hardship has increased significantly since then.”

Alright. Can I stop there and ask you the following questions? We heard from the evidence of Mr Clinton Ephron that before Glencore accepted the final offer that was made by Tegeta to acquire this mine it did a due diligence you aware of that fact?

MR GERT JACOBUS OPPERMAN: Yes.

ADV VINCENT MALEKA SC: So anyone who does a DD about an asset to be acquired would know about these problems?

MR GERT JACOBUS OPPERMAN: That is correct Chair.

ADV VINCENT MALEKA SC: So this is nothing new you agree with that?

MR GERT JACOBUS OPPERMAN: That is correct Chair.

- 10 **ADV VINCENT MALEKA SC:** Yes. But what is important and I would like you to ask us even if you go back to your records we now know that when Glencore – when Tegeta bought this mine the hardship arbitration was still there, it had not been concluded?

MR GERT JACOBUS OPPERMAN: That is correct.

ADV VINCENT MALEKA SC: Yes. So what they raise here is the progression of hardship in the middle of an existing or subsisting arbitration.

MR GERT JACOBUS OPPERMAN: That is correct.

ADV VINCENT MALEKA SC: On the very same issue of hardship, correct?

MR GERT JACOBUS OPPERMAN: That is correct.

- 20 **ADV VINCENT MALEKA SC:** Yes. Optimum is threatening and let me interrupt myself – Optimum under a new management is threatening the second round of business rescue based on the same set and circumstances that gave rise to the first round of business rescue, correct?

MR GERT JACOBUS OPPERMAN: That is correct Chair.

ADV VINCENT MALEKA SC: Yes. What was the response of Mr Mazibuko to this

letter of Mr Van Der Merwe?

MR GERT JACOBUS OPPERMAN: Chair I do not recall the response to that letter specifically and I can go and check on the records if there is something but I think the next annexure refers to a memo that Mr Mazibuko then sent to the Chief Procurement Officer on this same matter.

ADV VINCENT MALEKA SC: And that memo begins at page 321. Correct?

MR GERT JACOBUS OPPERMAN: That is correct yes Sir.

ADV VINCENT MALEKA SC: You will see Chair that has been signed by Mr Mazibuko on page 324.

10 **CHAIRPERSON:** It was compiled and signed by him and two others also signed.

ADV VINCENT MALEKA SC: And it was approved amongst others by Mr Edwin Mabelane and Mr Koko.

MR GERT JACOBUS OPPERMAN: Chair that signature is not Mr Koko's signature that was Mr Willie Majola's signature.

ADV VINCENT MALEKA SC: Yes but he signs on his behalf.

CHAIRPERSON: Okay.

MR GERT JACOBUS OPPERMAN: On his behalf.

ADV VINCENT MALEKA SC: Yes.

MR GERT JACOBUS OPPERMAN: Correct.

20 **ADV VINCENT MALEKA SC:** Yes. The bottom line is that that memorandum by Mr Mazibuko was signed.

MR GERT JACOBUS OPPERMAN: That is correct it is supported.

ADV VINCENT MALEKA SC: Yes. Now I would like to get your assistance on aspects of this document. The subject matter is Optimum Request for Cooperation Agreement, you see that?

MR GERT JACOBUS OPPERMAN: I do Sir.

ADV VINCENT MALEKA SC: More or less what Glencore did during its days when it requested for a cooperation agreement in order to look into and resolve the hardship clause claims and arbitration, correct?

MR GERT JACOBUS OPPERMAN: That is correct.

ADV VINCENT MALEKA SC: Yes. Paragraph 1 says:

“This memorandum aims to provide a summary on the proposals that Optimum shared with Eskom to consider in order to keep Optimum from evoking hardship provision in the contract.”

10 I am sure the verb there was intended to be from invoking the hardship clause correct?

MR GERT JACOBUS OPPERMAN: That is correct.

ADV VINCENT MALEKA SC: Yes. The background is given in paragraph 2, paragraph 3 and the financial implication of the proposal is set out in paragraph 7 on page 22, do you see that?

MR GERT JACOBUS OPPERMAN: I do yes.

ADV VINCENT MALEKA SC: Yes. And there Mr Mazibuko says to his seniors: “Currently the shortfall coal is delivered at approximately 500 tonne versus the approximate 200 tonne currently paid to Optimum.”

I suppose this is the shortfall that you have talked about from a third party supplier?

20 **MR GERT JACOBUS OPPERMAN:** That is correct so at this moment in time the additional coal that was delivered via road to make up for the balance is referred to here as R500 a tonne delivered cost.

ADV VINCENT MALEKA SC: Yes. There are recommendations which are made from paragraph 9.1 and I am just going to ask you to go to paragraph 10. Can I ask you to read it out for us please?

MR GERT JACOBUS OPPERMAN:

“Should Eskom consider decide to implement the existing agreement Eskom would have to change Optimum’s shortfall to supply penalties in the region of R585 million. It is Eskom’s view that this will probably cripple the company and put it into liquidation. The next best alternative option for Eskom would exceed the cost of Hendrina Coal Supply. It therefore makes business sense to keep Optimum afloat and supplying Eskom at the current terms and conditions of the contract even if the supply is reduced.”

ADV VINCENT MALEKA SC: What does that mean Mr Opperman?

MR GERT JACOBUS OPPERMAN: Mr Chair I cannot really understand the first sentence that talks about the short supply and it talks about short supply penalties of the region of R585 million. But I think the paragraph continues to say that these penalties need to be waived I think it is implied.

CHAIRPERSON: Well I am sorry. I am sorry Mr Opperman. Let us go back to the first sentence and see if there is a problem understanding it. Forget about the fact that there are two verbs that follow each other in there, consider and decide. Probably one should read it like this. Should Eskom decide to implement the existing agreement Eskom would have to charge Optimum shortfall coal supply penalties in the region R585 million. Does that assist at all?

MR GERT JACOBUS OPPERMAN: That does help thank you Chair. Thank you.

CHAIRPERSON: Okay.

ADV VINCENT MALEKA SC: Yes.

MR GERT JACOBUS OPPERMAN: So I – what my deduction is at this moment in

time is that if the existing agreement just carries on there is a penalty that is due for short supply in the region of R585 million. It then carries on to say that – that it is Eskom's view that if this penalty is applied that it will cripple the company, put it in liquidation and that will imply that Hendrina will not get coal supply from Optimum and that will have an even worst effect if I can say it like that.

ADV VINCENT MALEKA SC: Indeed. In fact if you go to paragraph 9.3 on the same page. You will see that the recommendation by Mr Mazibuko is that Eskom should reserve its right on – reserve its rights on all penalties and not deduct the same.

MR GERT JACOBUS OPPERMAN: Correct.

- 10 **ADV VINCENT MALEKA SC:** Correct. In other words you say look I know there are penalties that are accumulating but I am not going to impose them.

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: And the idea is if you impose them then there is liquidation coming.

MR GERT JACOBUS OPPERMAN: That is correct.

ADV VINCENT MALEKA SC: Yes.

MR GERT JACOBUS OPPERMAN: And I think it is in line Chair with the request that was originally made that detailed point number 5.3 of the cooperation agreement the then cooperation agreement with Glencore that refers to the suspension of penalties.

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

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: But the difference is this. There Eskom said I will suspend the penalties pending the outcome of the negotiations.

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: When negotiations failed Eskom imposed those

penalties.

MR GERT JACOBUS OPPERMAN: That is correct.

ADV VINCENT MALEKA SC: The difference here is that Eskom at least from Mr Mazibuko's recommendation as accepted amongst others by Mr Mabalane is that you are going to give a favourable treatment to Tegeta under new management.

CHAIRPERSON: I see you nod.

MR GERT JACOBUS OPPERMAN: Ja if I read this point number 9.3 it does says that Eskom to reserve its rights on penalties so yes, correctly.

ADV VINCENT MALEKA SC: Yes.

10 **MR GERT JACOBUS OPPERMAN:** It means that the penalties will not be levied.

ADV VINCENT MALEKA SC: Indeed. That is a favourable treatment of the same – arising from the same mine from the same condition simply because there is a new owner.

MR GERT JACOBUS OPPERMAN: That is correct.

ADV VINCENT MALEKA SC: Yes. Can I take you to the next document which is the Temporary Relief Agreement you talk about it. From paragraph 75 on page 14. Chair as I have it that document will be from page 325.

CHAIRPERSON: Okay I have got it at 326.

20 **ADV VINCENT MALEKA SC:** You see in that document Mr Mabalane records the extent of the relief measures extended to Optimum Coal under new management. And they are set out from paragraphs 1 to 3 on page 326. Do you see that?

MR GERT JACOBUS OPPERMAN: I do see it yes.

ADV VINCENT MALEKA SC: The penalties are not deducted. The monthly supply is reduced to 375 tonnes, do you see that?

MR GERT JACOBUS OPPERMAN: I do.

ADV VINCENT MALEKA SC: And you know that under the CSA if you short supply you incur the short supply penalties.

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: So another form of penalty which is now almost abandoned?

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: Yes. And the number one measure that I have skipped related to the inflation matrix which has now been escalated. The point of clarity there is, is it the same escalation matrix that we have previously looked at?

10 **MR GERT JACOBUS OPPERMAN:** Yes Mr Chair it is the same.

ADV VINCENT MALEKA SC: Or just a new one. It is the same one.

MR GERT JACOBUS OPPERMAN: It is the same.

ADV VINCENT MALEKA SC: Okay. Alright. Were you consulted about these measures before they were formally communicated to the new management of Optimum?

MR GERT JACOBUS OPPERMAN: I do recall being engaged by Mr Mazibuko around the coal burn requirements for Hendrina Power Station at that moment in time. So, yes I was involved in that.

20 **ADV VINCENT MALEKA SC:** Yes. Mr Opperman I know that from paragraph 78 on page 14 you deal with a number of developments. From my part I am not going to deal with them because you have already dealt with the history of the fifth addendum as you reflect on it in paragraph 78 page 15. With your permission and that of the Chair I would like to jump to the next event from paragraph 79 of your statement and there you deal with the second round of business rescue by Optimum which was initiated on 19 February 2018. Correct?

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: You refer to the relevant CIPC Documents from page 345. Chair you will see the documentation that is required by the Commissioner of Intellectual Property from page 345 and this is your voluntary.

CHAIRPERSON: Have I got it?

ADV VINCENT MALEKA SC: It is a voluntary business rescue proceedings initiated by the Directors of Optimum Coal. Correct?

MR GERT JACOBUS OPPERMAN: That is correct.

ADV VINCENT MALEKA SC: By their resolution. You will see the resolution appear
10 on page 346 and the explanatory sworn statement Chair begins at page 348.

CHAIRPERSON: What begins at 348?

ADV VINCENT MALEKA SC: The explanatory grounds for the resolution to.

CHAIRPERSON: Oh.

ADV VINCENT MALEKA SC: Initiate voluntary business rescue.

CHAIRPERSON: Oh, okay.

ADV VINCENT MALEKA SC: And the contention of financial distress is explained from page 350. Mr Opperman I am sure you have looked at the grounds for initiating business rescue proceedings as set out in this explanatory sworn statement.

CHAIRPERSON: Have you got it Mr Opperman?

20 **ADV VINCENT MALEKA SC:** Are you there?

MR GERT JACOBUS OPPERMAN: I am here, yes.

ADV VINCENT MALEKA SC: I have looked at this and the grounds for initiating business rescue proceedings are unrelated to the hardship that was brought to your attention by Optimum Coal. In fact they relate to the fact that several banking institutions had closed the accounts of Tegeta?

MR GERT JACOBUS OPPERMAN: That is correct.

ADV VINCENT MALEKA SC: Do you know whether Optimum Coal Mine had its own account separate from the accounts of Tegeta, Oakbay and other associated companies?

MR GERT JACOBUS OPPERMAN: Mr Chair I know that the banking details had to be cancelled on the transition of the sale between Glencore and Tegeta and that went into a Bank of Baroda account initially and then I think at some stage it changed to a Nedbank account. So my interpretation from that was that it is not an Optimum account. It was a Tegeta account.

10 **ADV VINCENT MALEKA SC:** It was a Tegeta account?

MR GERT JACOBUS OPPERMAN: Yes.

ADV VINCENT MALEKA SC: Alright. So for that reason this company went into business rescue and new Business Rescue Practitioners were appointed?

MR GERT JACOBUS OPPERMAN: That is correct.

ADV VINCENT MALEKA SC: Yes. Do you know them? Have you dealt with them before?

MR GERT JACOBUS OPPERMAN: I have met them and I have dealt with them a couple of times.

20 **ADV VINCENT MALEKA SC:** Alright. I am now going to go to the new topic, but before I go there I would like to put some concluding proposition to you and ask for your reaction if the Chair would permit me.

CHAIRPERSON: You are permitted Mr Maleka.

ADV VINCENT MALEKA SC: Mr Opperman it is quite clear from what we have discussed. It is quite clear from the change of ownership that once set of owners were treated fundamentally different to another set of owners by Eskom. Do you agree?

MR GERT JACOBUS OPPERMAN: I agree.

ADV VINCENT MALEKA SC: Yes. You also agree that because of that difference of treatment the one set of owners which is Glencore was forced to take the radical decision of declaring a hardship which led to an arbitration. Do you also agree that as a result of that difference in treatment Glencore had to put Optimum Coal Mine into a business rescue?

MR GERT JACOBUS OPPERMAN: I agree Chair.

ADV VINCENT MALEKA SC: Yes and do you also agree that in regard to the new owner Eskom extended favourable treatment totally different to that of Glencore. In
10 that context I would like you to comment on the following. One, do you agree that Eskom accommodated the financial and operating difficulties that Optimum experienced after Tegeta took over?

MR GERT JACOBUS OPPERMAN: Definitely yes.

ADV VINCENT MALEKA SC: All of these difficulties which related to Optimum Coal Mine were clearly foreseeable when Tegeta took over that mine. They were not new. In fact they were a continuation of the old problem.

MR GERT JACOBUS OPPERMAN: That is correct, yes.

ADV VINCENT MALEKA SC: Chair I would like to go to the next topic which is Arnot.

CHAIRPERSON: Yes.

20 **ADV VINCENT MALEKA SC:** And I hope to be quick, because they provide a useful context to the prepayment, the R659 million prepayment that Mr Nagar talked about in detail on Tuesday.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: You begin with the topic from paragraph 80 and in paragraph 81 you record that:

“The primary supplier of coal to Arnot was Exxaro.”

Correct?

MR GERT JACOBUS OPPERMAN: That is correct.

ADV VINCENT MALEKA SC: Yes and it did so in terms of a long term Coal Supply Agreement which was a Cost Plus type of agreement?

MR GERT JACOBUS OPPERMAN: That is correct.

ADV VINCENT MALEKA SC: Yes. Do you know when then the agreement between Eskom and Exxaro came to an end?

MR GERT JACOBUS OPPERMAN: Chair I am not 100 percent sure but it was in
10 December 2015. I am not sure of the exact date.

ADV VINCENT MALEKA SC: Yes. It seems to me that it was because of the termination of that Exxaro Agreement that Eskom decided to go into short term supply agreement with Tegeta and you begin to explore the first agreement from paragraph 82 on page 16. That short supply agreement came into being from 16 January 2016. Correct? Chair you will find it on page 353.

MR GERT JACOBUS OPPERMAN: Chair I have it that it came into existence on 13 January and that it is as per paragraph 2 on page 354.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: Yes I found it. Mr Opperman you were making some point while I
20 was looking for page 35.

MR GERT JACOBUS OPPERMAN: Chair Mr Maleka indicated that it commenced on 16 January and I just clarified to say that based on point number two it seems that it commenced on 13 January.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: Oh, okay.

ADV VINCENT MALEKA SC: Yes. Alright. The coal which Tegeta was going to supply to Arnot comes from Optimum Coal Mine. Correct?

MR GERT JACOBUS OPPERMAN: That is correct Chair.

ADV VINCENT MALEKA SC: I do not know the coal specifications of Arnot, but did that coal meet the specifications of Arnot?

MR GERT JACOBUS OPPERMAN: Chair the coal that came from Optimum?

ADV VINCENT MALEKA SC: Yes.

MR GERT JACOBUS OPPERMAN: Yes it had.

10 **ADV VINCENT MALEKA SC:** Okay and it was going to be delivered via transportation?

MR GERT JACOBUS OPPERMAN: Yes, via road trucks.

ADV VINCENT MALEKA SC: And in paragraph 7.1 on page 356 you will see that the prices is expressed in terms of gigajoules as R20,41 per gigajoules. Do you see that?

MR GERT JACOBUS OPPERMAN: That is correct.

ADV VINCENT MALEKA SC: If you use your expertise what will be the Rand per ton conversion of that price?

MR GERT JACOBUS OPPERMAN: The conversion from Rand per gigajoule to Rand per ton one simply just multiplies it by the calorific value. So it will be that value of 24,01 multiplied by 20.41.

20 **ADV VINCENT MALEKA SC:** What does it give you?

MS KATE HOFMEYR: [Indistinct].

ADV VINCENT MALEKA SC: [Indistinct].

MR GERT JACOBUS OPPERMAN: I need to clarify that the calorific value recorded in that quality table at the top.

ADV VINCENT MALEKA SC: Yes.

MR GERT JACOBUS OPPERMAN: Is on air freight basis. It is not as received basis and normally the price is recorded in as received. So if one just continues reading that paragraph it will say:

“It is R20,41 per gigajoules on an as received basis excluding VAT.”

So that 24.01 which is air freight that figure needs to reduce slightly, but I think one is just looking for a ballpark figure. So if we call it 23.95 or something like that times 20.41 will give a Rand per ton.

ADV VINCENT MALEKA SC: Yes.

10 **MR GERT JACOBUS OPPERMAN:** Price.

ADV VINCENT MALEKA SC: The mathematics that Ms Hofmeyr comes down to on that method of calculation suggests that it is R488,58 per ton.

MR GERT JACOBUS OPPERMAN: That sounds more or less correct, yes.

ADV VINCENT MALEKA SC: Okay.

CHAIRPERSON: So Mr Maleka it looks Ms Hofmeyr is very good with figures.

ADV VINCENT MALEKA SC: Yes.

MS KATE HOFMEYR: I calculate it.

ADV VINCENT MALEKA SC: That same coal if it were to be supplied to Hendrina it will be far less in terms of price per tonnage. Correct?

20 **MR GERT JACOBUS OPPERMAN:** Yes Chair it will be. What needs to be noted however is that it is a different quality parameter which does make a difference and then I just looked in my records the January 2016 price was actually R469,50.

ADV VINCENT MALEKA SC: 400?

MR GERT JACOBUS OPPERMAN: 469,50.

ADV VINCENT MALEKA SC: Thank you for that detail. We know that that agreement

was extended later on for a further period of five months. Correct? You will find the extension in Annexure GJ36 and Chair you will find GJ36 on page 361.

CHAIRPERSON: I found it.

MR GERT JACOBUS OPPERMAN: Chair can I just clarify something?

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: *Ja.*

MR GERT JACOBUS OPPERMAN: I think this initial extension was only for three months. It was only for February, March and April not five months.

ADV VINCENT MALEKA SC: Oh, it was for three months. You mean the extension at
10 GJ36?

MR GERT JACOBUS OPPERMAN: That is correct. If one goes to page 382 it has got the contract coal supply schedule and in there one can see that the volumes were planned for February 2016, March and April 2016 for a total of 500 000 tons and 11.5 million gigajoules.

ADV VINCENT MALEKA SC: Alright. Then there is something wrong about your statement.

MR GERT JACOBUS OPPERMAN: I notice that as well.

ADV VINCENT MALEKA SC: Yes. So can we change five months in paragraph 83 to three months?

20 **MR GERT JACOBUS OPPERMAN:** Please.

CHAIRPERSON: What was the paragraph in the statement again?

ADV VINCENT MALEKA SC: Page 16 paragraph 83.

MR GERT JACOBUS OPPERMAN:

CHAIRPERSON: So we cross out three and insert five?

ADV VINCENT MALEKA SC:

MR GERT JACOBUS OPPERMAN: Chair can I maybe just assist? Paragraph 83.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC:

MR GERT JACOBUS OPPERMAN: Reads that the contract with Tegeta was extended for a further three months in February. So in February it was extended for three months. It was February, March, April and then again it was extended for another five months in May.

ADV VINCENT MALEKA SC: Yes.

MR GERT JACOBUS OPPERMAN: For May, June, July, August.

10 **CHAIRPERSON:** Oh, we should simply add.

MR GERT JACOBUS OPPERMAN: So it reads fine. It reads fine.

CHAIRPERSON: So we do not change anything in paragraph 83?

MR GERT JACOBUS OPPERMAN: No.

ADV VINCENT MALEKA SC: So we do not change anything?

MR GERT JACOBUS OPPERMAN: No we do not need to.

CHAIRPERSON: Oh, okay.

MR GERT JACOBUS OPPERMAN: Okay.

ADV VINCENT MALEKA SC: Alright. Chair nothing much turns on the terms of the extension. I have looked at them. Again subject to further guidance from Mr Opperman

20 the price is the same? Do you confirm?

MR GERT JACOBUS OPPERMAN: That is correct.

ADV VINCENT MALEKA SC: Yes.

MR GERT JACOBUS OPPERMAN: That is correct.

ADV VINCENT MALEKA SC: Yes and then you say something in paragraph 85 on page 16. If I may read it aloud? You say:

“My concern at the time and as the Contract Manager responsible for Hendrina Power Station was that OCM could not supply sufficient coal to Hendrina Power Station as was required, but it is supplying coal to Arnot Power Station through a contract with Tegeta during the period January 2016 to September 2016.”

Do you see that?

MR GERT JACOBUS OPPERMAN: Yes I do.

ADV VINCENT MALEKA SC: And you refer to GJ37 which is at page 414.

10 **CHAIRPERSON:** Yes.

ADV VINCENT MALEKA SC: You will see that the term of that further extension Mr Opperman is set out on page 417 paragraph 8. Correct?

MR GERT JACOBUS OPPERMAN: That is correct.

ADV VINCENT MALEKA SC: So your concern as far as I understand it articulated in paragraph 85 is that there were these short term agreements extended from time to time by [intervenes].

CHAIRPERSON: I am sorry Mr Maleka.

ADV VINCENT MALEKA SC: Yes.

20 **CHAIRPERSON:** You are referring to paragraph 4 of this agreement under which there is a reference to Clause 8?

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: Ja, okay.

ADV VINCENT MALEKA SC: So Chair the [indistinct] from January 2016 to at least September 2016 there were short term supply agreements concluded between Tegeta and Eskom to lift coal from Optimum Coal Mine to supply Arnot. When at the same

time for that period Optimum could not supply sufficient coal to.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: To Hendrina.

CHAIRPERSON: Hendrina.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: Ja.

ADV VINCENT MALEKA SC: And Mr Opperman says he had some concerns in that regard.

CHAIRPERSON: Yes.

10 **ADV VINCENT MALEKA SC:** He articulates the concern in paragraph 85. Do you see that?

MR GERT JACOBUS OPPERMAN: Yes sir.

ADV VINCENT MALEKA SC: Mr Opperman there must be a reason why you were concerned and I suggest to you that one of the reasons related to the price of coal which Tegeta would fetch by supplying to Arnot instead of supplying to Hendrina?

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: So Eskom allows the same supplier who has a contractual obligation on a long term agreement to choose where it will get higher prices for the same coal. Do you agree?

20 **MR GERT JACOBUS OPPERMAN:** Yes that is correct.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: Actually would it be correct Mr Opperman to say in regard to exactly that point that Eskom ought not to have allowed Tegeta to supply coal to Arnot when it could supply coal sufficiently to Hendrina?

MR GERT JACOBUS OPPERMAN: I think I need to put context to it.

CHAIRPERSON: Yes, do.

MR GERT JACOBUS OPPERMAN: And I want to make reference just too where Hendrina was at that moment in time.

CHAIRPERSON: Yes.

MR GERT JACOBUS OPPERMAN: So if we go back to February 2016 the Hendrina stock base was very high. The stock base was around 52 days.

CHAIRPERSON: Yes.

MR GERT JACOBUS OPPERMAN: Which is abnormally high for Hendrina.

CHAIRPERSON: Huh-uh.

- 10 **MR GERT JACOBUS OPPERMAN:** However during that period in time if one looked at the burn that the station was burning and for February itself it was fine, but from March onwards we see that the volumes that Optimum delivered versus what the station is burning there is a slight shortfall which in principle is not a big problem if you have high inventory levels which we had at this moment in time.

CHAIRPERSON: Huh-uh.

- MR GERT JACOBUS OPPERMAN:** But what we have, what I have seen is that where we started at 52 days in January at the end of this period in September when these short term agreement ended to Arnot the Hendrina stock based ended a 29 days. So it was very clear that the coal that was supposed to go to Hendrina did not go to
20 Hendrina, because we had to use our inventory. So the 29 days is still not that of a big concern. It is manageable, but what I wanted to try and bring across with this statement was to say that during this period when Optimum was supplying coal to Arnot it was clear that the coal supply to Hendrina Power Station reduced.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: Just repeat that last statement.

MR GERT JACOBUS OPPERMAN: It [intervenes].

CHAIRPERSON: It was clear.

MR GERT JACOBUS OPPERMAN: It was clear that the coal supply to Hendrina Power Station reduced.

CHAIRPERSON: Yes.

MR GERT JACOBUS OPPERMAN: So they did not meet the burn requirement on a month to month basis from January to September 2016. We; it was not a huge risk, because we had high inventory levels, but I just wanted to bring that across that the Arnot deliveries were made at the cost of coal supply going to Hendrina. I think the
10 more important is what Mr Maleka has touched on was the one end you are sitting with a cost, with Rand per ton around R470 versus a price on the other hand which was around R200. So that is a huge difference. So one could argue why not take the additional coal under the Hendrina Agreement at the Hendrina price.

ADV VINCENT MALEKA SC: Indeed and my understanding of your CSA with Optimum allowed you to take even stock more than the minimum or the maximum in that case. You had the option to over buy and that option if you exercised it would have helped Eskom to reduce the cost of buying directly from Tegeta to supply to Arnot.

MR GERT JACOBUS OPPERMAN: It could have been possible Chair.

ADV VINCENT MALEKA SC: Yes.

20 **MR GERT JACOBUS OPPERMAN:** However what is important to note is that the coal that went to Arnot was of a higher grade than the coal that went to Hendrina Power Station. So just buying the Hendrina speckle at R200 a ton will most probably not, would have been accepted by Arnot as a delivery, because the coal that went from Optimum Colliery to Arnot was the portion of the coal that they actually allocated to their export business. So they were making that export coal available to actually take that to

Arnot.

ADV VINCENT MALEKA SC: No, let us not go there. Please I am sorry to interrupt you. We have undisputed evidence of Mr Ephron about when they closed the export market. You are aware of that date?

MR GERT JACOBUS OPPERMAN: Yes.

ADV VINCENT MALEKA SC: Yes. So there was no export market for Hendrina at that point in time?

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: Yes. In fact what was existing is that at that point in time
10 when this supply directly by Tegeta from Optimum Coal Mine to Arnot you had relaxed the sizing specifications for the benefit of Tegeta. Correct?

MR GERT JACOBUS OPPERMAN: At Hendrina?

ADV VINCENT MALEKA SC: Yes.

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: Yes. So it is the same coal with a relaxed specification going to a different mine at a higher price.

CHAIRPERSON: Well before you answer Mr Opperman you were saying something and Mr Maleka said let us not go there. Now some evidence had been heard by this Commission from other witnesses you mentioned that does not that is not intended to
20 suppress your evidence in case you have knowledge of something that might be in conflict with what another witness says. So if it is something that you have personal knowledge on and you are able to say it even if another witness has said something else you can say it. So I just do not want.

MR GERT JACOBUS OPPERMAN: Yes.

CHAIRPERSON: You to have any perception that maybe you are not allowed to say

something just because another witness said something else. He did intend to say that.

MR GERT JACOBUS OPPERMAN: Thank you Chair.

CHAIRPERSON: So you can go back to his question. Mr Maleka I think you did put a question.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: I am looking at the statement of Mr Ephron and Chair for your notes you can record that it is at page 5 paragraph 22.

CHAIRPERSON: Thank you.

10 **ADV VINCENT MALEKA SC:** And he elaborated on this.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: When explained how they close an open [indistinct] because of the decline in.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: The spot price of coal in the export market.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: Yes. No, no that is fine. I just wanted to make sure.

20 **ADV VINCENT MALEKA SC:** And again Mr Opperman that is not new information to you, because you have referenced that report by what is the name of that consulting company again? Meridian.

MR GERT JACOBUS OPPERMAN: Meridian.

ADV VINCENT MALEKA SC: Yes. They talk about the export market.

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: The decline and when Glencore stopped exporting in

regard to at least this mine, Optimum Coal Mine. The undisputed evidence, you can dispute it if you want to but as far as we know the owners of the mine have told the Chairperson that they closed the export market around 2012. Is your information different?

MR GERT JACOBUS OPPERMAN: Chair I would rather reserve my comment on that since the owner of the mine made a comment on it I will just be talking around my understanding on the processing plant and how it works, which in my view afforded an opportunity to get a higher grade coal spec out of that same plant, the plant that was currently in operation, but let me rather not talk about it, let the specialists talk about it around their own mine.

CHAIRPERSON: Okay.

ADV VINCENT MALEKA SC: There's a last topic that I would like to explore with you and it begins at page 86, sorry paragraph 86 on page 16. You say in that paragraph during my interview with the Hawks I was shown a Primary Energy Division Supplier Payment Control form issued to Tegeta for prepayment in the amount of R578.5million for Arnot and supported by invoices, so you mention them there, do you see that?

MR GERT JACOBUS OPPERMAN: Yes sir.

ADV VINCENT MALEKA SC: It seems to me that you acquired knowledge of these things for the first time when the Hawks show you these documents, is that a fair reading of your statement?

MR GERT JACOBUS OPPERMAN: Chair that is not so, I do not keep records of these payment control sheets, just in my line of work these control sheets I do sign them, it was not the first time that I see it, but I do not keep record of them.

ADV VINCENT MALEKA SC: No I understand, so when did you get to know that there was this prepayment made by Eskom to Tegeta?

MR GERT JACOBUS OPPERMAN: I got to know about it on the 3rd of May Chair.

ADV VINCENT MALEKA SC: 3rd of May which year?

MR GERT JACOBUS OPPERMAN: 2016.

ADV VINCENT MALEKA SC: 2016?

MR GERT JACOBUS OPPERMAN: Yes.

ADV VINCENT MALEKA SC: Okay, we know that the prepayment was made around the 13th of April 2016, correct?

MR GERT JACOBUS OPPERMAN: Chair I think it was made on the 18th of April.

ADV VINCENT MALEKA SC: Of April?

10 **MR GERT JACOBUS OPPERMAN:** Yes.

ADV VINCENT MALEKA SC: Let's work with the date that you have.

MR GERT JACOBUS OPPERMAN: I'm just reading from the payment sheet so I'm just reading the date that's on it.

ADV VINCENT MALEKA SC: Chair we will for now just work with the date of Mr Opperman, our date is totally different for obvious reasons.

CHAIRPERSON: Oh, okay.

ADV VINCENT MALEKA SC: But let's work with the 18th of April. So you become aware of that prepayment a month after it had been made.

MR GERT JACOBUS OPPERMAN: That's correct Chair.

20 **ADV VINCENT MALEKA SC:** Yes, and again the basis of that prepayment was a prepayment agreement concluded between Eskom and Tegeta for the supply of coal to Arnot which Tegeta gets from Optimum Coal Mine.

MR GERT JACOBUS OPPERMAN: That's correct Chair.

ADV VINCENT MALEKA SC: Yes. So effectively this was an extension of the previous short-term agreement we have talked about?

MR GERT JACOBUS OPPERMAN: That's correct yes.

ADV VINCENT MALEKA SC: Yes. Were you aware of the prepayment agreement that sought to establish the legal basis for this prepayment?

MR GERT JACOBUS OPPERMAN: Not at all Chair.

ADV VINCENT MALEKA SC: When did you become aware for the first time of that prepayment agreement?

MR GERT JACOBUS OPPERMAN: I first became aware of it Chair on the 5th of May when I was handed the payment sheet for signature, for my signature and in my view payment processing and on that date I requested supporting documentation. Initially
10 when the management accountant brought me the payment back I immediately went to Mr Mazibuko and I said to him that I don't carry any knowledge of this, how do we need to deal with it, we had a look at it and we agreed that we need supporting documentation. The supporting documentation was provided, after which we signed it off and basically my signing on that control sheet was basically as Mr Nagar, as indicated to move the funds from the then purchase order that was used under the Brakfontein contract to the purchase order under the Optimum order to get the Arnot contract.

ADV VINCENT MALEKA SC: Chair the same problems that arose with Mr Nagar, I think they are now unravelling.

20 **CHAIRPERSON:** Yes.

ADV VINCENT MALEKA SC: From a different perspective, but the simple point is this that someone again usurp your functions and duties to go and execute a prepayment agreement without even talking to you.

MR GERT JACOBUS OPPERMAN: That's correct sir.

ADV VINCENT MALEKA SC: Is there any reason why or any reason that you can

favour to the Chairperson why someone would take over your functions and duties without talking to you on such a fundamental matter relating to prepayment, advance payment for coal stock which you have not yet received.

MR GERT JACOBUS OPPERMAN: Mr Maleka, Chair, I can't provide an answer for it, I will just speculate, I ...

ADV VINCENT MALEKA SC: But is it not a matter of concern to you?

MR GERT JACOBUS OPPERMAN: It is a matter of concern.

ADV VINCENT MALEKA SC: Did you ask Mr Nagar, did you ask Mr Mazibuko when they come to you a month later in May and say please authorise payment, did you ask
10 them but why are you taking over my line function and duty?

MR GERT JACOBUS OPPERMAN: Chair I did not ask them that, what I did ask them is at the time when I had to sign the transfer of these funds between two different accounts I was extremely reluctant to sign this document and that's why I immediately went to Mr Mazibuko and said to him that we need to get supporting documents. It was at that point in time that the Minutes of the Board decision was provided and I think the position just is that if the Board made the decision then surely I can't stand in their way. At least by that time we also realised that the payment were done, the accountant told me that the payment was done, so ...

ADV VINCENT MALEKA SC: So you are formulating paperwork to cover your tracks
20 after the fact of payment?

MR GERT JACOBUS OPPERMAN: Not covering my tracks sir, with respect.

ADV VINCENT MALEKA SC: No, well explain it to me, why are you doing things after the fact?

MR GERT JACOBUS OPPERMAN: The reason why I signed this document was because the monies had to be transferred out of the Brakfontein account into the

Optimum account and that is the reason why this was signed.

ADV VINCENT MALEKA SC: And that's the point Mr Opperman, that you used a totally different contract number to rectify at best for you a prepayment for a totally different contract.

MR GERT JACOBUS OPPERMAN: Sir with all respect Chair I never used that different contract number to process the payment, the payment was processed by somebody else, without my knowledge again an order number that I created, that I need to admit, because the order numbers gets created quarterly, so I did create that order number but I never used the wrong order number to process that payment.

10 **ADV VINCENT MALEKA SC:** No, no, no I am asking you this because you are the best person to help us now. At that point in time when you begin the paperwork the payment had been made on your version?

MR GERT JACOBUS OPPERMAN: That's correct yes.

ADV VINCENT MALEKA SC: The paperwork repeats the mistake which Mr Nagar has told us about, you use the Brakfontein contract in order to do the paperwork?

MR GERT JACOBUS OPPERMAN: No that is wrong.

ADV VINCENT MALEKA SC: Okay, explain that?

MR GERT JACOBUS OPPERMAN: At this moment in time when I did this transaction there was no order number for this activity, there was a payment made under the
20 Brakfontein contract, so that payment, the incorrect account was used to make that prepayment so at this moment in time when this document came to me and I had to transfer the funds under the correct contract I had to go into our accounting system, into our SAP system and create a purchase order in order for this to take effect and that is also the document that's attached, that's one my annexures.

ADV VINCENT MALEKA SC: I understand and so I go back to my question, payment

had been done under a wrong contract number.

MR GERT JACOBUS OPPERMAN: Correct.

ADV VINCENT MALEKA SC: You now do the paperwork to rectify the situation.

MR GERT JACOBUS OPPERMAN: Yes.

ADV VINCENT MALEKA SC: And that is after the fact?

MR GERT JACOBUS OPPERMAN: Yes.

ADV VINCENT MALEKA SC: Yes. Chair I think I have explored all the questions that I wanted to put to Mr Opperman. Mr Opperman the rest of the things they talk about, a new CSA, I'm not going to raise those issues with you, unless you want to talk to them,
10 these are the matters that begin at page 88, sorry paragraph 88 on page 17 up to the end of your statement.

CHAIRPERSON: I think he is asking whether you have anything that you want to say in regard to those paragraphs because from his side he doesn't think he wants to ask you any questions about what you say in those paragraphs.

MR GERT JACOBUS OPPERMAN: Chair I'm fine, thank you very much.

ADV VINCENT MALEKA SC: You are fine. Last question Mr Opperman, what is the lesson that you yourself have learnt from all of this, that you can share with us so that the Chairperson has the comfort of your evidence when he considers making recommendations. You can think carefully on that question and if you decide to answer
20 it please answer it on a considered basis via a supplementary affidavit.

MR GERT JACOBUS OPPERMAN: Okay.

CHAIRPERSON: You said Mr Opperman when you were required to sign in regard to this payment, this prepayment, you were reluctant, why were you reluctant? What made you reluctant?

MR GERT JACOBUS OPPERMAN: Chair I was initially only handed a cover, a front

page with an invoice and had to sign that, when I sign invoices it always has supporting documentation. The fact that this was a prepayment amount obviously made it different so you will not have quality sheets and payment calculation sheets and maybe supporting documentation out of the contract and so, but for me signing of this significant big amount on two documents made me very reluctant and it was at that point then that the Board Minutes were presented and all those approving and supporting documents and once that was attached and Mr Mazibuko and myself read through it we decided that we will sign it.

CHAIRPERSON: In terms of what was before you at that time was there any reference
10 to this payment being a pre-payment, in other words the documentation that you had in front of you at that time did it reflect that this was a prepayment?

MR GERT JACOBUS OPPERMAN: Mr Chair no it did not reflect that it was a prepayment, if one look at the invoice it's a normal invoice with volumes on it, but me being responsible for this contract I knew that there was not such payment like this due, so I knew that this payment is out of the ordinary, that I did not know yes.

CHAIRPERSON: Yes, is that part of what made you reluctant or not really?

MR GERT JACOBUS OPPERMAN: Correct, correct.

CHAIRPERSON: Yes, so you knew that there were no services or there was no coal that had been provided for which this was payment?

20 **MR GERT JACOBUS OPPERMAN:** That is correct yes.

CHAIRPERSON: Yes and that worried you.

MR GERT JACOBUS OPPERMAN: Correct.

CHAIRPERSON: And the documentation that was given to you after you asked for more documentation what documentation was it again?

MR GERT JACOBUS OPPERMAN: Mr Chair it's the documentation that's currently

attached to this document so it was an extract of the shareholders and Tegeta exploration meeting that was held where the decision was made for this prepayment and how the coal will be supplied to recover it as well as the minutes or the extract from the minutes that was from Board teleconference that was held on the 11th of April approving this prepayment.

CHAIRPERSON: And up to that point or rather was it – or how often did you at Eskom within your portfolio did you have to deal with prepayments, how regular was that, or how regular is, in the sense of how often would it happen that you come across a situation where prepayment had to be made?

10 **MR GERT JACOBUS OPPERMAN**: Chair in my nine and a half years in this capacity this was the first time.

CHAIRPERSON: This was the first time?

MR GERT JACOBUS OPPERMAN: Yes.

CHAIRPERSON: And after that has there been another one?

MR GERT JACOBUS OPPERMAN: No.

CHAIRPERSON: Ja. And obviously you were concerned that there was something irregular about this, or not really?

MR GERT JACOBUS OPPERMAN: The moment that I ...(intervention)

20 **CHAIRPERSON**: Because there were no services that had been granted, that had been given to Eskom and there were no, there was no coal grant given to Eskom for which this was payment and this is something that had never happened in your entire time when you were working at Eskom that should have worried you as this is something that is probably not regular and not correct?

MR GERT JACOBUS OPPERMAN: Definitely, it is not regular and it did worry me, but as I say I sign multiple payments like this on a monthly basis, this was the first time that

I had and it really did make me feel very uncomfortable, that's why I immediately went and engaged my senior on it and consulted with him.

CHAIRPERSON: When you were provided with further documentation that further documentation did not remove the fact that no goods or services had been provided to Eskom for which this was payment isn't it?

MR GERT JACOBUS OPPERMAN: That's correct.

CHAIRPERSON: That remained to be the – that remained the position?

MR GERT JACOBUS OPPERMAN: That's correct yes.

CHAIRPERSON: And still it was a first time after many years that you are working at
10 Eskom that this was, you had been asked to do this?

MR GERT JACOBUS OPPERMAN: That's correct yes.

CHAIRPERSON: Were you concerned in any way that you might by signing you might be allowing yourself to be party to something irregular?

MR GERT JACOBUS OPPERMAN: Mr Chair when I read the agreement that was attached to the payment pack I could see that Eskom will get the value for that prepayment, it was obviously something that I would have to manage because it now meant that there was a payment made up front and we will now get the coal delivered and I sort of will work on a rebate account the whole time until the whole money has been recovered, so it was definitely doing things back to front, but when I read the
20 agreement I felt comfortable that we will get the value for what was paid. Yes it is putting trust in people delivering, and maybe one could question that, but ja, that's it.

CHAIRPERSON: But if you gave, if you were party to a transaction in terms of which a supplier was to be given a prepayment of this size and something happened and then Eskom didn't get any value then there would be a problem isn't it?

MR GERT JACOBUS OPPERMAN: Yes I think there would have been yes.

CHAIRPERSON: There would be a problem and as a manager it would be part of your duties to look after the interest of Eskom in that kind of situation to say you don't want Eskom to be put at great risk for that kind of situation isn't it?

MR GERT JACOBUS OPPERMAN: For sure.

CHAIRPERSON: Yes, but did you raise with your – the person senior to you that you talked about it to say but why should I sign this thing because there seems to be something irregular here and so on, did you put your concern at that level?

MR GERT JACOBUS OPPERMAN: I did, I definitely did it, I did it the moment that I got the payment pack for approval, normally I will just sit at my desk, I will work through
10 the normal documentation, sign it, it will go to my senior and he will sign it, and this day when it happened I immediately took the whole pack and I went to his office and I immediately discussed it with him.

CHAIRPERSON: And what did he say about this concern?

MR GERT JACOBUS OPPERMAN: I cannot recall what he said, no.

CHAIRPERSON: You can't recall, and what was his name again?

MR GERT JACOBUS OPPERMAN: Mr Petros Mazibuko.

CHAIRPERSON: Sorry, Mazibuko?

MR GERT JACOBUS OPPERMAN: Mazibuko yes.

CHAIRPERSON: Oh okay, thank you.

20 **ADV VINCENT MALEKA SC**: Chair thank you, Chair it is almost half past. Mr Opperman is not done yet. Ms Hofmeyr will deal with the rest of his evidence relating to Brakfontein on Monday.

CHAIRPERSON: On Monday, okay.

ADV VINCENT MALEKA SC: Yes, we propose to start at nine thirty again.

CHAIRPERSON: I think on – except on Wednesday when we will start at nine every

day next week we will start at nine thirty and we will finish at four thirty. Going forward we might increase that time to starting at nine and finishing at five because there is still a lot of work to be done.

ADV VINCENT MALEKA SC: Yes Chair.

CHAIRPERSON: Yes, so Mr Opperman we will come back on Monday.

ADV VINCENT MALEKA SC: Mr Opperman you are aware that you have to finish the Brakfontein leg of your testimony.

MR GERT JACOBUS OPPERMAN: That's correct Chair.

ADV VINCENT MALEKA SC: And it's on Monday.

10 **MR GERT JACOBUS OPPERMAN:** That is fine.

CHAIRPERSON: Okay on Monday we will start at nine thirty.

MR GERT JACOBUS OPPERMAN: 100%.

CHAIRPERSON: Yes okay, so we are going to adjourn for today and we will resume on Monday at nine thirty. We adjourn.

INQUIRY ADJOURNS TO 11 MARCH 2019