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20

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CHAIRPERSON: Good morning Ms Hofmeyr, good morning everybody. Are you ready?

ADV KATE HOFMEYR: Indeed Chair thank you so much.

CHAIRPERSON: Yes.

ADV KATE HOFMEYR: We are continuing with the evidence of Mr Opperman who is still under oath from his evidence on Friday.

CHAIRPERSON: Yes.

ADV KATE HOFMEYR: And as my learned friend Mr Maleka indicated I will be dealing
10 with him on aspects of Brakfontein. Mr Opperman if we can...

CHAIRPERSON: Before you do that.

ADV KATE HOFMEYR: Yes.

CHAIRPERSON: Mr Opperman you will continue to be under the oath you took on Friday

MR GERT OPPERMAN: Correct.

CHAIRPERSON: And it will continue until you have finished your evidence in this session.

MR GERT OPPERMAN: Thank you Chair.

CHAIRPERSON: Thank you.

20 **ADV KATE HOFMEYR:** Mr Opperman could you just clarify for the Chair what your position was in Eskom in relation to the Brakfontein contract when it was concluded in 2015?

MR GERT OPPERMAN: I was still in the capacity as the Coal Supply Unit Manager so for the practice of this contract the contract manager. I was also responsible at the time for the coal supply to Majuba Power Station.

ADV KATE HOFMEYR: And we have heard evidence previously about the role of fuel sourcing as compared with the role of contract management. Could you please explain to the Chair what those different roles involved in relation to coal supply agreements?

MR GERT OPPERMAN: So Chair the fuel sourcing department is also part of the primary energy division equally so the coal operations department. The fuel sourcing department is the department that is responsible for the negotiation and the concluding of agreements with the suppliers. So they will facilitate the whole negotiation process until such time that the supply agreement is signed and then once it is signed off it will be handed over formally to coal operations and we will basically then execute the
10 contract. It will also – another function that they also play is in the life of the contract should there be a need to do any modifications to the agreement they will be consulted and they will liaise from a negotiation or commercial point with the suppliers and reach an agreement.

ADV KATE HOFMEYR: Mr Opperman your answer drew a distinction between negotiating a contract until it is signed and then the implementation of the contract.

MR GERT OPPERMAN: That is correct.

ADV KATE HOFMEYR: I would like to just probe a bit further on that because there are some contracts that are signed but are subject to what are called conditions precedent which mean that despite the fact that the contract is signed it will only
20 become operative once certain conditions are fulfilled. In that type of a contract when would fuel sourcing's responsibilities end and contract management's responsibilities begin?

MR GERT OPPERMAN: It will end at the point when the conditions precedent are met because only then the contract will come to life and it will come to the execution department for execution.

ADV KATE HOFMEYR: Thank you. Mr Opperman I would like to actually start where my learned friend Mr Maleka ended off on Friday in relation to this prepayment.

CHAIRPERSON: Sorry Mr Hofmeyr. Just the follow up to that last question from Mr Hofmeyr. The one department signs the contract?

MR GERT OPPERMAN: That is correct Chair.

CHAIRPERSON: And normally that is the end of their function in regard to the contract, is that right normally?

MR GERT OPPERMAN: Yes it is unless in the life of the contract there is a need to do any modifications then they will be engaged again.

10 **CHAIRPERSON:** Yes.

MR GERT OPPERMAN: Correct.

CHAIRPERSON: But normally all of that would be done – would have been done before?

MR GERT OPPERMAN: Correct.

CHAIRPERSON: Okay. Now if the – let us assume that after the signing of the contract there is going to be say a period of three months or more when some or all of the conditions precedent are supposed to happen before the contract gets implemented. Whose job is it to keep an eye on whether the conditions precedent get fulfilled and get fulfilled on time and properly?

20 **MR GERT OPPERMAN:** Chair if there is a certain terms that was agreed in the contract that needs to be complete within a certain time period then that process to that completion will fall under the coal operations department in order to make sure that it happens. So we will have routine engagements with the mine and we will track progress on those actions and monitor it and get it in place.

CHAIRPERSON: Okay thank you.

ADV KATE HOFMEYR: Mr Opperman I might have to ask a few follow up questions on that in relation to this specific contract. But let us do it I suggest when we looking at its terms. Chair with your leave I would like to just complete on the question of the prepayment because what we know from your evidence and the evidence of Mr Nagar is that it was the Brakfontein contract that was used to effect the prepayment to Tegeta in April of 2016, is that correct?

MR GERT OPPERMAN: That is correct yes.

ADV KATE HOFMEYR: Okay if you could go in your file which is U8 to those two payment control forms which we dealt with on Friday. Chair you will find them and Mr
10 Opperman beginning at page 422 of U8.

CHAIRPERSON: Thank you I have got them.

ADV KATE HOFMEYR: Mr Opperman what I am going to propose is that we compare the payment control form that appears at page 422 with the payment control form that appears at page 432. So most convenient would be to have them side by side. I would like us to start with the 432 payment control form because that is the one that came into existence earlier in time. Can you please tell us on that page what the invoice date is for this payment?

MR GERT OPPERMAN: The date that it was signed off was the 13 April.

ADV KATE HOFMEYR: Thank you and then I would like you to go down to the section
20 in the middle of that page where the contract number is entered in and then seems to have been rectified by hand. Can you see that?

MR GERT OPPERMAN: Yes I can.

ADV KATE HOFMEYR: What is that contract number?

MR GERT OPPERMAN: The changed one or the original one?

ADV KATE HOFMEYR: Let us go with the original first.

MR GERT OPPERMAN: The original contract number was a contract number that was issued by myself to Tegeta for coal supply from Arnot Colliery – from Optimum to Arnot Colliery and then this changed contract number is the contract number for Brakfontein which was also issued to – by myself way in advance and this was for coal supply from Brakfontein Colliery to Majuba Power Station.

ADV KATE HOFMEYR: Right so if you go to the top right hand portion of that page where...

CHAIRPERSON: Sorry Mr Hofmery.

ADV KATE HOFMEYR: Yes.

10 **CHAIRPERSON:** I took time to try and locate.

ADV KATE HOFMEYR: Apologies Chair.

CHAIRPERSON: The particular item on the page.

ADV KATE HOFMEYR: Yes.

CHAIRPERSON: I found it now. What was wrong with the original typed number? Why was it changed and what does it reflect? The old one what does it – the typed one what does it reflect and the amended one what does it reflect?

MR GERT OPPERMAN: Chair the original typed number in this control sheet reflected the order number that was given for volumes to be delivered under the Optimum contract to Arnot. So it is really the right account.

20 **CHAIRPERSON:** Yes.

MR GERT OPPERMAN: The correct account. The reason why it was scratched out and the Brakfontein order number was handwritten in there I am not too sure about. Later understanding revealed that it was changed because the monies that was payable at that time had to flow through the account that was – the banking account that was with Brakfontein Colliery and not the one that was with the supply from

Optimum to Arnot.

CHAIRPERSON: Oh so the contract number, the un-amended contract number related to Optimum.

MR GERT OPPERMAN: That is correct.

CHAIRPERSON: And it – the amended number namely now putting in the number – the digits by way of – that are handwritten then made the number to be that of Brakfontein?

MS NERADHOSHNI NAIDOO: That is correct Sir.

CHAIRPERSON: Okay alright thank you.

10 **ADV KATE HOFMEYR**: Thank you Chair and apologies for moving ahead. Mr Opperman just to clarify the evidence of Mr Nagar was consistent with your description. He indicated that because the funds had to be procured so speedily on the 13 April the only account from which those funds could be taken on the 13 April was the Brakfontein account, is that consistent with your understanding of what accounts were operative at that point?

MR GERT OPPERMAN: Correct.

ADV KATE HOFMEYR: And he explained that was the need for the change from Optimum and Arnot supply to Brakfontein supply. But on the face of this payment control form nonetheless the power station at the top right hand corner of the control
20 form remains Arnot, do you see that?

MR GERT OPPERMAN: I can yes.

ADV KATE HOFMEYR: So you have Arnot Power Station well linked to a contract from Brakfontein, is that correct?

MR GERT OPPERMAN: That is correct.

ADV KATE HOFMEYR: Albeit that Brakfontein was not supplying Arnot at that time?

MR GERT OPPERMAN: That is correct.

ADV KATE HOFMEYR: I would like you then to go the section that talks about authorised by which is just on the second half of the page next to the contract number. Can you please indicate who is reflected there as having authorised this payment?

MR GERT OPPERMAN: So what is maybe of relevance Ms Hofmeyr is that normally the names is typed in – it is not handwritten.

ADV KATE HOFMEYR: Well let us – let us just stop there.

MR GERT OPPERMAN: Okay.

ADV KATE HOFMEYR: Let us go to 422.

10 **MR GERT OPPERMAN:** Okay.

ADV KATE HOFMEYR: Because that creates a good reference point for us. Let us look at 422 on the second half of the page under authorised by. Is that what you mean by the people who need to authorise the payment being typed in?

MR GERT OPPERMAN: That is correct. So under authorised by there is details of five people and it is typed in as this is a control sheet that gets created as a control mechanism. So the names is typed in where compared to the payment control sheet on page 432 that name is handwritten which is not normal – it is – you will not find it like that normally.

ADV KATE HOFMEYR: And ...

20 **CHAIRPERSON:** I am sorry which name do you say is handwritten and is not normal?

MR GERT OPPERMAN: On page 432 Chair.

CHAIRPERSON: Oh are you back at 432?

MR GERT OPPERMAN: Yes.

CHAIRPERSON: I thought you were asked to go to 422. Okay ja at 432 what is this – just say again?

MR GERT OPPERMAN: Chair where there...

CHAIRPERSON: Under authorised by?

MR GERT OPPERMAN: Correct yes. There where you notice that the order number – the purchase order numbers was hand changed right next to it one can see that there is a handwritten name with a signature and a date there and I was just taking the attention to the fact that normally those names are typed in and then you – the individual will just sign and fix the date.

CHAIRPERSON: Yes. Thank you.

ADV KATE HOFMEYR: And Mr Opperman that is as it is reflected on 422. So would
10 you say 422 follows the standard form?

MR GERT OPPERMAN: That is correct.

ADV KATE HOFMEYR: And who are those people identified on 422? What responsibilities do they have in relation to coal supply contracts?

MR GERT OPPERMAN: I am going to start at the bottom because it sort of worked up from the bottom up Chair. So right at the bottom is the geologist. So the geologist's responsibility for signing of this is to give confirmation that the quality and the quantity of coal that was delivered is confirmed so the geologist will check the volumes that is invoiced in the quality sheet against what was recorded on our coal accounting system at the power station. The second two names is the management accountant and the
20 financial advisor and this team is responsible for the compilation of this invoice pack. So they will draft this cover sheet, they will make sure that the invoice attached is the correct invoice and it complies with all the requirements. They will affix for the signees a calculation sheet and then any other supporting documents that might be required for a specific payment sheet is the coal supply unit manager or the contract manager in this case myself and then above that is the coal supply manager which is then my

senior and he will also sign it off. So the last two signatories is really the signatories authorising the processing of this payment or correction whatever it might be at that specific point.

ADV KATE HOFMEYR: And will payment control forms under coal supply agreements usually have all of those signatures appended to them?

MR GERT OPPERMAN: They do not – yes usually they do have. It depends on what type of transaction it is. If it is a transaction that only relates to transportation the geologist will not sign because there is no qualities to be checked. And similarly for this processing there was no qualities. It is a prepayment so there is no qualities to be
10 checked and hence there was no signature on this control sheet from the geologist.

ADV KATE HOFMEYR: But there were at least the signatures at 422 of management accountant, financial advisor, coal supply unit manager and coal supply manager, is that correct?

MR GERT OPPERMAN: That is correct Chair.

ADV KATE HOFMEYR: Can we please compare that to who signed on page 432. First of all please can you indicate whose name is indicated there as the authorisor?

MR GERT OPPERMAN: It looks like Maya Bahm or Bahma.

ADV KATE HOFMEYR: And who was she?

MR GERT OPPERMAN: She was in the chief procurement officer – office at that
20 moment in time. I do not know exactly what position but I know she was in that office.

ADV KATE HOFMEYR: And was it customary for payment control forms to be authorised by a person sitting in the procurement office?

MR GERT OPPERMAN: Absolutely not.

ADV KATE HOFMEYR: Thank you. Mr Opperman I would then like to...

CHAIRPERSON: Maybe if – let us go back to 422. Under the authorised by column.

There is no signature for the geologist as you have indicated.

MR GERT OPPERMAN: That is correct.

CHAIRPERSON: And you have indicated that the reason for that is because there is no quality for him to check?

MR GERT OPPERMAN: That is correct.

CHAIRPERSON: Now this being a prepayment was there anything for all the others to do for which they were signing?

MR GERT OPPERMAN: Chair the management accountant and the financial accountant would have been – normally would have been the people that processed
10 this payment. We now know with this happening in May that this is after the effect almost like a month after the effect. So the signatories on this document, on this specific day would not really have done anything. It was merely the transfer of funds from the Brakfontein account to the Arnot – or to the Optimum account that agreement.

CHAIRPERSON: If the geologist had signed he or she would have made a misrepresentation because there would have been no quality of coal to check, is it not or not?

MR GERT OPPERMAN: I do not think so they – I do not even think they will get the payment document because there is nothing for them to check.

CHAIRPERSON: Ja but I am saying if whatever reason somebody had insisted that
20 the geologists signs because the form makes provision for him or her to sign and he or she agreed to sign would it not have been a misrepresentation because signing here must have been – signing this form for the geologist must have been preceded by checking the quality of the coal?

MR GERT OPPERMAN: Chair I think it is a fair deduction to make. I can go with that deduction yes.

CHAIRPERSON: So I am wondering whether anyone else who did sign here was not actually doing something they were not supposed to do because normally you are required to sign here because there has been genuine transaction services or coal delivered. I am trying to check that.

MR GERT OPPERMAN: Ja Chair the signatories on this control sheet on this day was required to perform the transfer of this funds from the Brakfontein contract to the Optimum contract. So the management accountant, my signature and my senior's signature were required from a control point of view to have the records where the funds were transferred from the Brakfontein contract where he was incorrectly paid a
10 month earlier to the Arnot contract where it belongs and from which the monthly deliveries volumes will be deducted as the coal was delivered over the next couple of months.

CHAIRPERSON: So your view is that for the others they signatures, their signing was legitimate?

MR GERT OPPERMAN: I believe so yes.

CHAIRPERSON: Okay.

ADV KATE HOFMEYR: Mr Opperman if I can follow up on that. Let us go to page 432 to begin with. You said it was highly irregular for a person sitting in the procurement office and not the people responsible for the coal supply agreement themselves to sign
20 authorisation for this prepayment, is that correct?

MR GERT OPPERMAN: That is correct yes.

ADV KATE HOFMEYR: It occurred on the 13 April the prepayment we know that, correct?

MR GERT OPPERMAN: That is correct.

ADV KATE HOFMEYR: Why could we not have waited for the correct people to sign

the payment control form which happened a month later?

MR GERT OPPERMAN: Advocate Hofmeyr I think with all respect those people might not have signed it.

ADV KATE HOFMEYR: And why not?

MR GERT OPPERMAN: Because it is irregular.

ADV KATE HOFMEYR: Yes. So there is a payment of half a billion rand that occurs on the 13 April authorised by someone who ordinarily would never authorise such a payment, is that correct?

MR GERT OPPERMAN: That is correct.

10 **ADV KATE HOFMEYR:** And it relates to alleged supply to Arnot Power Station, correct?

MR GERT OPPERMAN: Correct.

ADV KATE HOFMEYR: But from the contract linked to Brakfontein, correct?

MR GERT OPPERMAN: That is correct.

ADV KATE HOFMEYR: That was never supplying Arnot?

MR GERT OPPERMAN: No.

ADV KATE HOFMEYR: And nonetheless more than half a billion rand leaves Eskom and is paid into a Tegeta bank account, is that correct?

MR GERT OPPERMAN: That is correct.

20 **ADV KATE HOFMEYR:** And a month later Eskom tries to get its house in order, is that correct?

MR GERT OPPERMAN: Yes.

ADV KATE HOFMEYR: And it does so at page 422 whereas you have described it the people who should have been approving this originally seek to rectify the situation to attribute the payment to the correct contract and the correct power station, is that

correct?

MR GERT OPPERMAN: That is correct and it is an accounting exercise.

ADV KATE HOFMEYR: After the fact?

MR GERT OPPERMAN: After the fact yes.

ADV KATE HOFMEYR: Thank you. And that was to create the appearance of regularity, is that correct?

MR GERT OPPERMAN: I cannot say if that is what it is. It was purely from a point of view that this monies was deducted from a contract and then the coal will be delivered against a different contract so from an accounting management point of view you were
10 sitting with two separate accounts that you will never be able to balance out. Plus on the other hand is that the Arnot agreement was let us term it a short term agreement and the Brakfontein agreement was an agreement that was signed for ten years. So that funds or that expense could never remain under the Brakfontein contract it had to be corrected.

ADV KATE HOFMEYR: Mr Opperman I do not think we disagree. Do you accept that it was irregularly attributed to the Brakfontein contract?

MR GERT OPPERMAN: For sure.

ADV KATE HOFMEYR: And so you needed what happened at page 422 to regularise what had happened previously irregularly?

20 **MR GERT OPPERMAN:** Correct.

ADV KATE HOFMEYR: Thank you. Mr Opperman I would then like to take you to the Brakfontein contract itself. I said that we were going to look in particular at the condition precedent there and I would also like to have your comment in relation to the coal specifications. I would like you to move to Exhibit U4 for that purpose. You can put away U8 for now. And it will be File 4 of Exhibit U4. You will find...

CHAIRPERSON: And what page?

ADV KATE HOFMEYR: The coal supply agreement commences at page 856 of File 4 of U4. And the relevant clause I would like to take you to first is the condition precedent you will find that at page 879. You will see at the bottom of page 879 we have Clause 10 which is headed: Conditions Precedent. That clause reads as follows:

“The parties agree that this agreement will be subject to the fulfilment of waiver of the following conditions precedent.

10.2 In respect of the supplier by no later than 1600 hours on 31 March 2015 the supplier had completed and reported a
10 successful combustion test for coal supply to Majuba Power Station.”

The clause then goes on at 10.3.

“It is specifically recorded that if the conditions precedent are not fulfilled or waived on or prior to the applicable date referred to in Clause 10.2.1 the remaining provisions of this agreement shall never become effective. In such event neither party shall have any claim of any nature against the other.”

Mr Opperman is this a standard condition precedent in a coal supply agreement?

MR GERT OPPERMAN: Chair it is definitely not a standard condition. This was the
20 first time that I ever saw anything like this and I have managed multiple contracts. I think it is also supported through if I just go to the index of this contract one will see that item number 10 in this contract was labelled as qualities. Now if one just turn the page and look at page 880 Clause number 10 is still coal qualities. So this just is another example of poor drafting or formatting where a clause was just slipped in with the same numbering so it is definitely not standard.

ADV KATE HOFMEYR: Mr Opperman we will deal with Mr Bester about the speed with which this contract had to be produced which may explain why these clauses are inserted with the incorrect numbering. But for your purposes you have confirmed this is not a standard condition precedent?

MR GERT OPPERMAN: No it is not.

ADV KATE HOFMEYR: I would like to go back to your evidence a moment ago about the spheres of responsibility between fuel sourcing on the one hand where you did not sit and coal operations where you did sit. In the context of this contract and this condition precedent which indicated that despite signature which you will see occurred

10 on the 10 March. If you go to page 920.

MR GERT OPPERMAN: Yes.

ADV KATE HOFMEYR: There was something that had to happen under this contract before it would become operative, is that your understanding of Clause 10?

MR GERT OPPERMAN: Yes, yes.

ADV KATE HOFMEYR: And what was that?

MR GERT OPPERMAN: There had to be a combustion test completed and it also had to report that the combustion was successful to supply coal to Majuba Power Station.

ADV KATE HOFMEYR: By a very specific time.

MR GERT OPPERMAN: Correct.

20 **ADV KATE HOFMEYR:** On a very specific day?

MR GERT OPPERMAN: Yes 1600 on the 31st of March.

ADV KATE HOFMEYR: Who was responsible to confirm whether that took place?

MR GERT OPPERMAN: At this moment of contracting it will be a fuel sourcing function.

ADV KATE HOFMEYR: Why is that?

MR GERT OPPERMAN: Because the contract has not been handed over. It is not in operation yet. It is a condition precedent so before you can sign this agreement this is a condition precedent. It is not a condition that needs to be put in place after the contract has signed and need to be complied with.

CHAIRPERSON: Well I – I just want to make sure I understand. What is the purpose of a combustion test?

MR GERT OPPERMAN: Chair the combustion test is a process that we have got a pilot scale boiler in our test and research facilities. I think Mr Matshego explained a little bit in his – in his statement about it but what we basically do we take a sample of
10 the coal that is representative of this – of the coal supply that one typically will get. Take that coal to the combustion rig, combust it and from there look at the combustion characteristics of that coal. So this – this report will reflect on a lot of combustion specific parameters and not necessarily just the ash content and the CV and the AI and the normal specifications that we are used to. So once this report gets produced with these parameters like slagging propensities and burnout times and a lot of other aspects as well that report will then be used to liaise with the power station for which this coal is destined to. The combustion specialist at the power station itself will then consult that report that was drafted by the combustion specialist at RT and D and then based on that make a recommendation or accept the coal or accept it conditionally
20 whatever the case may be.

CHAIRPERSON: Does a combustion test help test the quality of the coal? Is it one of the steps aimed at testing the quality of the coal?

MR GERT OPPERMAN: Yes, yes it does.

CHAIRPERSON: So if a condition precedent is put into a contract that says a combustion test must be conducted first and an appropriate report must be made

available otherwise this agreement will not be operative. To me as a lay person that seems to say the parties regard the conducting of a combustion test as something quite essential without which they should not agree with the agreement. Is that the kind of thinking that people who work with these things would also think or is it just because I am a lay person on these things?

MR GERT JACOBUS OPPERMAN: Chair your deduction is perfectly correct. Performing a combustion test on a new source like what this was, so this was a complete new mine. Its very standard in the process of negotiation and conducting a suitability test and determining where coal supply will go.

10 **CHAIRPERSON:** Hm.

MR GERT JACOBUS OPPERMAN: So it is pretty standard.

CHAIRPERSON: Well my questions arise from the fact that I understood you to be saying to Ms Hofmeyr that it was not usual to have as I understood you this kind of condition precedent or did I misunderstand you?

MR GERT JACOBUS OPPERMAN: Chair the point to be made is that it is very usual to do a combustion test before a contract gets signed. It is unusual to put a condition precedent in a contract to stipulate that by a certain date and time such a test needs to be done and I think what is more important is the sentence just below to say that the coal must be suitable for Majuba Power Station and I think that is what makes it
20 relevant.

CHAIRPERSON: Oh, okay, but you say what is normal would be the conducting of a combustion test before a contract is even signed?

MR GERT JACOBUS OPPERMAN: That is correct Chair.

CHAIRPERSON: But here that provision was put in to a contract so the combustion test would be conducted after the signing of the contract in this case?

MR GERT JACOBUS OPPERMAN: It seemed like it, because the contract was signed on 10 March.

CHAIRPERSON: Yes.

MR GERT JACOBUS OPPERMAN: And between then and 31 March.

CHAIRPERSON: Yes.

MR GERT JACOBUS OPPERMAN: A test had to be done, yes.

CHAIRPERSON: Yes. So that is part of what you say is unusual?

MR GERT JACOBUS OPPERMAN: Correct.

CHAIRPERSON: Okay. Yes, thank you.

10 **ADV KATE HOFMEYR:** Just to follow up on the Chair's questions there Mr Opperman. We had evidence from Mr Mashigo and I would like your comment on it, because it sounds similar to what you are suggesting that in the ordinary course of Coal Supply Agreements the source would have been tested and confirmed as suitable for the power station to which it was going to be delivered before the contract was signed. Is that correct/?

MR GERT JACOBUS OPPERMAN: That is 100 percent correct.

ADV KATE HOFMEYR: So that is in the ordinary course of events?

MR GERT JACOBUS OPPERMAN: That is correct.

ADV KATE HOFMEYR: In this case we have a contract signed on 10 March at which
20 time there had been no successful combustion test from the Brakfontein resource. Chair we have had evidence on that previously and it is reflected in the reports. Both from Fundudzi and National Treasury. So as at 10 March there has not yet been a successful combustion test for coal from Brakfontein to be supplied to Majuba. Correct?

MR GERT JACOBUS OPPERMAN: I think I need to comment on something.

ADV KATE HOFMEYR: Hm.

MR GERT JACOBUS OPPERMAN: There is a test that was done in August 2014.

ADV KATE HOFMEYR: Correct.

MR GERT JACOBUS OPPERMAN: That the Fundudzi Report refers to.

ADV KATE HOFMEYR: Yes.

MR GERT JACOBUS OPPERMAN: And it does not state that it is accepted for Majuba, but there is some conditions to it. So I think the correction might be to say there has been tests, but it has not been suitable for Majuba yet. So there has been tests that were done, but at that moment in time on 10 March there was not a test that
10 clearly stated that this coal is suitable for Majuba that I can confirm.

ADV KATE HOFMEYR: Indeed and we will go.

CHAIRPERSON: Sorry, I am sorry Ms Hofmeyr. So normally when a combustion test is conducted would it be conducted in relation to a particular power station?

MR GERT JACOBUS OPPERMAN: Chair not necessarily. When the Sourcing Team source coal they have a certain power station in mind.

CHAIRPERSON: Yes.

MR GERT JACOBUS OPPERMAN: At this moment in time when the Sourcing Team were looking for coal there was a huge shortage of coal in the Eskom system. So at this moment in time what one will typically do is to combust the coal and then once the
20 coal is combusted look at where it is suitable for which power station. So one will typically find in those combustion reports that it will provide an indication under the conclusion section where it will state that it is suitable for the following stations. Maybe also reflecting on that it is marginally suitable or provisionally suitable for certain power stations.

CHAIRPERSON: Well you said the one thing unusual about Clause 10 about this

condition precedent was that it contemplates the conducting of a combustion test after the signing of the agreement whereas the norm is that it is conducted; that is a combustion test, it is conducted before the signing of a contract?

MR GERT JACOBUS OPPERMAN: That is correct Chair.

CHAIRPERSON: Yes. That was the one thing, but you also said as I understood you and you must tell me if I misunderstood you, you also said something to the effect that it was unusual that the condition precedent relating to the conducting of a combustion test was or related to was specific to Majuba or did I misunderstand you?

MR GERT JACOBUS OPPERMAN: Chair I think your understanding is correct.

10 **CHAIRPERSON:** Hm.

MR GERT JACOBUS OPPERMAN: What I wanted to say is that normally we will do a combustion test. It will come back and it will say it is suitable for power stations X, Y and Z. What is interesting here is that here the combustion test had to be done by a specific time and it had to be suitable for Majuba Power Station. So the expectation or my understanding from this was that the fuel sourcing team was looking at this reserve or this source or supply destined to Majuba Power Station and it had to be suitable for Majuba Power Station, correct.

CHAIRPERSON: But if the whole contract was in relation to Majuba would it not be normal to say when the combustion test is conducting they must do so to establish
20 whether it is suitable, the coal would be suitable for that particular power station?

MR GERT JACOBUS OPPERMAN: That is correct Chair.

CHAIRPERSON: Okay. So I am trying to understand why you seem to have a problem with the fact that it specifies this particular power station, the condition precedent in the context of how or when it was done, because you say it is not normal that you should normal that you should find this in a contract.

MR GERT JACOBUS OPPERMAN: *Ja.*

CHAIRPERSON: Because it would have been done before the combustion test. So I am trying to find out what it is that you thought was unusual about the specification of the power station in the context of this one.

MR GERT JACOBUS OPPERMAN: Chair I think this condition precedent could just have read that a combustion test needed to be done by 16:00 on the 31st from the supplier and that would have meant that a combustion test will be done. The results will come back and let us for a moment just say this coal is now suitable to go to Kendal Power Station for argument sake.

10 **CHAIRPERSON:** Hm.

MR GERT JACOBUS OPPERMAN: So the report might reflect that coal is only suitable for Kendal Power Station.

CHAIRPERSON: Hm.

MR GERT JACOBUS OPPERMAN: And it seems to me that at this time the Fuel Sourcing Team had something in mind. I cannot.

CHAIRPERSON: *Ja.*

MR GERT JACOBUS OPPERMAN: I will just speculate around it.

CHAIRPERSON: *Ja.*

MR GERT JACOBUS OPPERMAN: But I think that is the point that I wanted to make.

20 So it seems that it was not the fact that just a combustion test had to be done for the mere fact of just doing a test but it was, the purpose was to do a combustion test to identify the suitability of this product for supply to Majuba Power Station. I think from previous testimonies Chair you have heard that certain power stations have different specifications of coal.

CHAIRPERSON: Yes.

MR GERT JACOBUS OPPERMAN: And I think that is what I am trying to.

CHAIRPERSON: Ja.

MR GERT JACOBUS OPPERMAN: To emphasise here is that it cannot just go to any power station.

CHAIRPERSON: Yes. I am trying to remember was Brakfontein not about Majuba? Was there a contract not specific to Majuba?

MR GERT JACOBUS OPPERMAN: Yes it was.

CHAIRPERSON: So if a contract was specific to Majuba I fail to understand why you find something strange about them saying the combustion test must be conducted to
10 establish whether the coal is suitable for Majuba, because if those who conducted the combustion test found that the coal was suitable, but not for Majuba but for another power station that would be useless to the contract.

MR GERT JACOBUS OPPERMAN: Chair that is correct. However they.

CHAIRPERSON: So it was important for them to say the result must be, the result of the combustion test must be that the coal is suitable for Majuba.

MR GERT JACOBUS OPPERMAN: That is correct.

CHAIRPERSON: Because if the result of the combustion test is that coal is suitable for another power station and not Majuba then the condition precedent it will not help this particular contract. Is that right?

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

CHAIRPERSON: Okay.

ADV KATE HOFMEYR: Thank you. So just to clarify in the ordinary course you would only enter into the contract once the successful combustion test had been completed and the correct power station had been identified. Correct?

MR GERT JACOBUS OPPERMAN: That is correct as well as that the power station

that was identified has accepted that coal.

ADV KATE HOFMEYR: Indeed.

MR GERT JACOBUS OPPERMAN: Correct.

ADV KATE HOFMEYR: In the ordinary course all of that happens before the agreement is signed?

MR GERT JACOBUS OPPERMAN: That is correct.

ADV KATE HOFMEYR: Correct?

MR GERT JACOBUS OPPERMAN: That is correct.

ADV KATE HOFMEYR: In this case we know the agreement was signed, it was going
10 to supply coal to Majuba from Brakfontein. Correct?

MR GERT JACOBUS OPPERMAN: Correct.

ADV KATE HOFMEYR: But there had not yet been a successful combustion test for Majuba. Correct?

MR GERT JACOBUS OPPERMAN: Correct.

ADV KATE HOFMEYR: And so a condition precedent was inserted and you have clarified for us Mr Opperman that the responsibility within Eskom's divisions for confirming that that had taken place lay with Fuel Sourcing. Is that correct?

MR GERT JACOBUS OPPERMAN: That is correct.

ADV KATE HOFMEYR: Thank you. I would then like to take you to another clause of
20 the contract and that is where the quality specification is set out that is at page 890. Before we get to the questions in relation to the table on coal quality specification can you just assist us Mr Opperman? Where were the sources of coal that were going to be mined under this agreement with Tegeta?

MR GERT JACOBUS OPPERMAN: The Brakfontein Colliery is in close proximity to Delmas. It is, maybe a better explanation is between Delmas and Leandra. It is the

road that connects those two towns is the R35 and it was very close to another colliery that has been supplying coal to Eskom and also coal to Majuba Power Station for some time Kuyasa Colliery, Kuyasa Delmas Colliery was the colliery.

ADV KATE HOFMEYR: Thank you. I will ask you some questions about Kuyasa in due course, but you have referred only to the Brakfontein Colliery. Was there another source of coal that was covered by this agreement?

MR GERT JACOBUS OPPERMAN: Yes, it was also the Brakfontein Extension was also covered under the agreement.

ADV KATE HOFMEYR: And we have evidence previously from Mr Mashigo that those
10 two portions of land are separated by a road. Is that correct?

MR GERT JACOBUS OPPERMAN: That is correct. It is the R35.

CHAIRPERSON:

ADV KATE HOFMEYR: Right. So on the one side of the road you have got the colliery and on the other side of the road you have got the extension. Is that correct?

MR GERT JACOBUS OPPERMAN: That is correct.

ADV KATE HOFMEYR: As at March 2015 had the extension being mined yet/

MR GERT JACOBUS OPPERMAN: No.

ADV KATE HOFMEYR: So the only mining that was happening in March 2015 was of the colliery?

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

ADV KATE HOFMEYR: On the one side of the road?

MR GERT JACOBUS OPPERMAN: At Brakfontein, correct yes.

ADV KATE HOFMEYR: Thank you and yet the contract was for a source of coal from both portions. Is that correct?

MR GERT JACOBUS OPPERMAN: That is correct.

ADV KATE HOFMEYR: Okay. I would like to now look at page 890 where the quality specifications are set out. You will see under that table which Mr Mashigo has addressed in his evidence there is italicised insertions one of which is preceded by two asterisks. Could you read what appears after those two asterisks?

MR GERT JACOBUS OPPERMAN: “Full combustion test will be conducted on all proposed coal prior to delivery and acceptance by Eskom. The objective of the combustion test is to ascertain suitability of the coal for use by Eskom.”

ADV KATE HOFMEYR: Now Mr Opperman we engage with Mashigo in his evidence
10 about this provision, because it is over and above the condition precedent that we saw at Clause 10. He indicated that it would not be practically feasible to do a combustion test on all coal delivered under this contract, because that would be a combustion test on a daily basis. If that was impractical can you offer any other better understanding of what may have been intended by that asterisk?

CHAIRPERSON: Well maybe let us ask him first do you agree with that view by Mr Mashigo?

MR GERT JACOBUS OPPERMAN: Chair maybe I must, I just want to expand on his view. I think I do agree with it, but I think.

CHAIRPERSON: Yes.

20 **ADV KATE HOFMEYR:**

MR GERT JACOBUS OPPERMAN: One needs to expand on it.

CHAIRPERSON: Okay.

ADV KATE HOFMEYR:

MR GERT JACOBUS OPPERMAN: I agree that it is impractical to do a combustion test on each consignment. That is impractical. A consignment is a defined term in the

contract and that is impractical. I think what, for me my interpretation of this provision under this table focus on the word proposed that one reads in the first sentence. So I am just going to read it again and put some emphasis on it.

“Full combustion test will be conducted on all proposed coal prior to delivery and acceptance by Eskom. The objective of the combustion test is to ascertain suitability of the coal for use by Eskom.”

So what my understanding is from this is to say that should there be any additional coal proposed meaning the combustion test for the existing coal that is supplied is there. It
10 has been done. It is there. Should there be any other proposals then that coal needs to be combusted again and that was that is my understanding of this provision and that is the interpretation and it is perfectly in line with the practice that we follow.

CHAIRPERSON: When you say your; on the interpretation that you put on this provision you have in mind a situation where the extension on the other side of the road started mining coal and it was, if it was proposed that coal from coal from the extension be sold to Eskom is that what you think they are talking about?

MR GERT JACOBUS OPPERMAN: That is 100 percent Chair.

CHAIRPERSON: Okay, alright. In which case that would be practical you sy/

MR GERT JACOBUS OPPERMAN: Exactly.

20 **CHAIRPERSON:** And in line with standard practice?

MR GERT JACOBUS OPPERMAN: Correct.

CHAIRPERSON: Okay, but not if it was on the other interpretation?

MR GERT JACOBUS OPPERMAN: Correct.

CHAIRPERSON: Okay.

ADV KATE HOFMEYR: Thank you. When did you take over management of this

contract?

MR GERT JACOBUS OPPERMAN: The management of the contract was officially handed to me on 20 April.

ADV KATE HOFMEYR: Had deliveries to Majuba preceded that date?

MR GERT JACOBUS OPPERMAN: Yes.

ADV KATE HOFMEYR: Why then would you only have taken over management on 20 April?

MR GERT JACOBUS OPPERMAN: I, Chair I started consultation with my senior at the moment at that moment around 30 March already. I was involved every now and again in meetings with the Fuel Sourcing Team in the capacity of looking after Majuba with the source being destined to Majuba in my liaison with Majuba in terms of accepting this coal. So I was involved with the team with this, but what will normally happen is when a contract comes up for handover to Fuel Sourcing a Contract Manager will be identified in our team and that person will then take the lead and start managing that contract. So on 30 March I started enquiring about who will be managing this contract, because I have been involved with it up until now liaising with Majuba Power Station, but at that moment in time I have already been managing five other contracts. So we; I did not know how it will be handled. On 13 April I again made a follow up and my senior then reflected that they will work, look at the workload and then allocate it. On 20 April I again made a follow up via email and that day he indicated that he has consulted with his senior, our General Manager, and a decision was made that I will be the responsible lead on this contract and that is basically the day when I got to know I will now be managing this contract going forward.

ADV KATE HOFMEYR: So who was managing it before that?

MR GERT JACOBUS OPPERMAN: I would like to think that it was managed by the

Fuel Sourcing Team. I cannot say who managed it. The, *ja*.

CHAIRPERSON: Can I go back to 890 where we were talking about your interpretation and Mr Mashigo's interpretation? The one view may be that in regard to your interpretation to the extent that what you say this caters for is normal practice that would be followed all the time with new or proposed coal from a new mine. It may not have been necessary to write that down because that is normal. Everybody knows it, but I guess maybe the reason why they may have thought it necessary to put it in here is because the extension and the colliery being divided by just a road may be might have, they did not want anybody from Brakfontein to think well the fact that a
10 combustion test had been conducted in regard to the colliery.

MR GERT JACOBUS OPPERMAN: Hm.

CHAIRPERSON: Meant that there would be no need for a combustion test for the extension if it began to mine coal. So just to be on the safe side they put it in on your interpretation?

MR GERT JACOBUS OPPERMAN: That is correct Chair.

CHAIRPERSON: Okay.

ADV KATE HOFMEYR: When you took over management of the contract on 20 April did you know that a financial due diligence on Tegeta had not yet been done?

MR GERT JACOBUS OPPERMAN: No, I did not know it.

20 **ADV KATE HOFMEYR:** Would that be something you would ordinarily be responsible for checking?

MR GERT JACOBUS OPPERMAN: No, it is something that Fuel Sourcing must do.

ADV KATE HOFMEYR: Thank you. I would now like to move ahead in time to June 2015. So as I have it you have taken over contract management on 20 April and now we progress to June 2015 and for that purpose I would like to turn your attention in

U4 file 4 to page 816.

CHAIRPERSON: What is the page number again?

ADV KATE HOFMEYR: 816, Chair.

CHAIRPERSON: Thank you.

ADV KATE HOFMEYR: So by this stage we are a matter of months into the coal supply agreement that was concluded with Tegeta. Is that correct?

MR GERT JACOBUS OPPERMAN: That is correct.

ADV KATE HOFMEYR: Please will you tell us what is reflected in the first paragraph of this letter? Well let us begin with the letter. Who is, who sends the letter?

10 **MR GERT JACOBUS OPPERMAN:** It is Mr Ravindra Nath the Chief Executive of Tegeta Exploration and Resources.

ADV KATE HOFMEYR: Sorry, my question was who sent the letter. That seems to be the person who it is addressed to.

MR GERT JACOBUS OPPERMAN: Oh, pardon me. It is sent from Mr Bester and an enquiry is referred to Ms Nteta, Ayanda Nteta.

ADV KATE HOFMEYR: Thank you. So it is an Eskom letter going to whom?

MR GERT JACOBUS OPPERMAN: Tegeta.

ADV KATE HOFMEYR: Thank you and what does the first paragraph of the letter indicate its subject matter is?

20 **MR GERT JACOBUS OPPERMAN:** "Coal Supply offer Tegeta Brakfontein Colliery Extension".

ADV KATE HOFMEYR: Right and if you could just read those first two sentences of the letter for us.

MR GERT JACOBUS OPPERMAN: "We refer to the above and wish to thank you for your offer to supply an additional 100 000 tons

per month of coal to Eskom from your Brakfontein Colliery

Extension with effect from October 2015.”

ADV KATE HOFMEYR: And carry on.

MR GERT JACOBUS OPPERMAN: “This would potentially increase your
supply to Eskom to a total of 200 000 tons per month.

Following our meeting on 19 June 2015 Eskom wishes to
record some of the material terms the parties agreed on.”

ADV KATE HOFMEYR: Okay. Let us just stop there. In June 2015 were you aware
that Eskom was engaging in discussions with Tegeta to take another 100 000 tons of
10 coal from the Brakfontein Colliery Extension?

MR GERT JACOBUS OPPERMAN: Chair I cannot say that I was aware or was not
aware, but at that moment in time it was not something that I knew about.

ADV KATE HOFMEYR: Was the Brakfontein Colliery Extension being mined in June?

CHAIRPERSON: I am sorry Mr Opperman. You say you cannot say whether were
aware or not aware, but you cannot say that it was something you knew about. What
exactly do you want to tell us?

MR GERT JACOBUS OPPERMAN: It might have been that somewhere someone was
talking about this offer of Tegeta or engagement about it, but at that moment in time me
managing the contract having any engagement with the supplier at that moment in time
20 starting to prepare the operations for doubling the volumes and things that was not
definitely not happening.

CHAIRPERSON: So you were not involved in that way?

MR GERT JACOBUS OPPERMAN: No.

CHAIRPERSON: Yes, okay.

ADV KATE HOFMEYR: Was the Brakfontein Colliery Extension being mined in

June 2015?

MR GERT JACOBUS OPPERMAN: According to me, no.

ADV KATE HOFMEYR: So what do you make of a letter that is proposing to take 100 000 tons more from an extension that is not yet being mined?

MR GERT JACOBUS OPPERMAN: I do not know how they will do it. I mean if the box cut is not open and the coal is not out there which is something that does not happen in the month. That is a lengthy process. I do not know how they were going to do it. I think the offer is from October. We are now sitting at end June. So that gives you July, August, September three months. That will be tough to get it right.

10 **ADV KATE HOFMEYR:** As a matter of fact was the Brakfontein Colliery Extension mined even by October 2015?

MR GERT JACOBUS OPPERMAN: No, not according to my records.

ADV KATE HOFMEYR: And if it had not been mined I expect it certainly had not yet been tested?

MR GERT JACOBUS OPPERMAN: For sure.

ADV KATE HOFMEYR: If you had been engaged in June 2015 what views would you have had about the coal that might come from the extension?

20 **MR GERT JACOBUS OPPERMAN:** Well the first thing is I would have wanted to go to the mine and go and see a pit that is open, a box cut that was made, a section of open cast mine that is in production so that we can take a combustion sample and combust it. Get some results from that, look at the suitability of that coal. Coal needs to be processed, so somewhere there should have been a processing plant, all those things. So that would be my first point of view. I would like to ascertain is this practically achievable.

ADV KATE HOFMEYR: You mention Kuyasa Mine previously. What is its proximity to

the Brakfontein Extension/

MR GERT JACOBUS OPPERMAN: Other than a servitude an Eskom servitude for a high line that goes pass Brakfontein Extension these two mining reserves share the same boundary.

ADV KATE HOFMEYR: And what is your experience of the coal that comes from Kuyasa or came from Kuyasa at that time?

MR GERT JACOBUS OPPERMAN: At that time the coal that came from there had a high sulphur content.

ADV KATE HOFMEYR: Would that have been any reason to be concerned about the
10 coal that might come from the extension?

MR GERT JACOBUS OPPERMAN: Yes, definitely.

ADV KATE HOFMEYR: Can you also help us? At that time you said Kuyasa was a supplier to Majuba as was Brakfontein. We will come to this in the evidence of Mr Bester and so I am just moving forward in anticipation of it, but the price that was agreed and it is reflected in the CSA for the Brakfontein Coal Supply Agreement was a price of R13.50 per gigajoule. Can you tell us what Kuyasa was supplying Majuba at, at that stage?

MR GERT JACOBUS OPPERMAN: Chair I was not responsible for Kuyasa at that moment in time, but the price from Kuyasa would have been in the region of about
20 R10/R10.50 a gigajoule.

ADV KATE HOFMEYR: Thank you and then let us talk about how Kuyasa used to get its coal to Majuba as compared with how Brakfontein got its coal to Majuba. We understand from the evidence of Mr Mashigo that this can happen either by rail or by road. Is that correct/

MR GERT JACOBUS OPPERMAN: That is correct.

ADV KATE HOFMEYR: So please explain to us how Kuyasa supplying its coal to Majuba.

MR GERT JACOBUS OPPERMAN: Kuyasa Delmas has their own railway siding instead the mine boundary. so the trains will pass via the Harbour Klip Siding, through the Harbour Klip Siding into the mine itself and the mine will load the trains and the trains will then leave from Kuyasa Delmas directly to Majuba, Kuyasa Delmas also had the capability to do road transportation but it was done only at contingencies or very low volumes or when we had to take coal to a different destination, so at some stage Kuyasa Delmas was supplying coal to Kanden Power Station and we would then
10 typically take that coal from Kuyasa via road.

ADV KATE HOFMEYR: And can you please compare that to Brakfontein, how was Brakfontein getting its coal to Majuba?

MR GERT JACOBUS OPPERMAN: Brakfontein had two modes of deliveries, the one being via road, using a third party contractor so they were not responsible for the transportation, it was done through a company managed by Eskom, or alternatively via rail, via Harbour Klip Siding. This siding was not owned and operated by Tegeta, this siding is about 8kms away from the Colliery so there will be a short leg that we will do via road trucks to the siding at Harbour Klip. At Harbour Klip there is a contractor that's contracted to then load the Majuba trains and the trains will then depart from there to
20 Majuba.

ADV KATE HOFMEYR: Which is the more costly form of transport, rail or road?

MR GERT JACOBUS OPPERMAN: Road.

ADV KATE HOFMEYR: And at this stage if you compare Kuyasa and Brakfontein's transport costs which would have been higher?

MR GERT JACOBUS OPPERMAN: Brakfontein would have been higher because

they were on road and Kuyasa was on rail.

ADV KATE HOFMEYR: Thank you. So to clarify Kuyasa was supplying coal that was cheaper at a Rand per gigajoule rate and cheaper as to transportation.

MR GERT JACOBUS OPPERMAN: Correct.

ADV KATE HOFMEYR: Thank you. I would then like to move to July and August of 2015, as contract manager at that stage Mr Opperman can you tell us ...(intervention)

CHAIRPERSON: I'm sorry Ms Hofmeyr, are you on his statement now or where are you?

ADV KATE HOFMEYR: I'm not on his statement Chair.

10 **CHAIRPERSON:** Ja, okay.

ADV KATE HOFMEYR: The reason for that is that these aspects of the Brakfontein evidence are in fact not recorded in his statement, they were the product of engagements with Mr Opperman after he produced the statement, for the purpose of which documents have been included in the bundle.

CHAIRPERSON: Okay, alright.

ADV KATE HOFMEYR: So I'm having to work off the statement at this point and that is why I'm trying to move very carefully chronologically through it.

CHAIRPERSON: Yes, okay what page are you on now?

ADV KATE HOFMEYR: So we are now going to go to 824.

20 **CHAIRPERSON:** Thank you. I – maybe later when he is done we might just have to talk about how we – whether we leave things as they are in regard to the fact that part of his evidence is in his statement and part of it isn't there, or whether it might be convenient to have some supplementary statement that covers what could have been done earlier, we can just think about that, yes, okay.

ADV KATE HOFMEYR: We will make a note of that certainly. Mr Opperman and Chair

I directed you to 824 but I would actually like to proceed at 819. Mr Opperman what appears at page 819 of U4?

MR GERT JACOBUS OPPERMAN: This is a suspension of coal supply notice from Eskom to Tegeta.

ADV KATE HOFMEYR: Were you aware of this at the time?

MR GERT JACOBUS OPPERMAN: No I wasn't.

ADV KATE HOFMEYR: Were you aware – let's read the first paragraph of that letter if you will.

MR GERT JACOBUS OPPERMAN: "Eskom notes a significant increase in the
10 number of out of specification coal stockpiles from July to August 2015. During August 2015 50% of the stockpiles have been out of specification resulting in rejection. Further Eskom notes the inconsistency in the laboratory results as the outcome of coal samples provided by the mine."

ADV KATE HOFMEYR: Is that something you were aware of at the time?

MR GERT JACOBUS OPPERMAN: Yes.

ADV KATE HOFMEYR: So would it be correct to say that in July and August of 2015 there were issues arising in relation to the quality of coal coming from Brakfontein?

MR GERT JACOBUS OPPERMAN: Yes.

ADV KATE HOFMEYR: And then if you go to page 824 what is that?

20 **MR GERT JACOBUS OPPERMAN:** This is again a notice from Eskom to Tegeta, upliftment of the suspension of the coal supply so it's uplifting the suspension on the previous letter.

ADV KATE HOFMEYR: Were you engaged about this letter at all?

MR GERT JACOBUS OPPERMAN: No, not at all.

ADV KATE HOFMEYR: You've indicated you were aware of coal quality issues in July

and August. In your view was it appropriate to suspend the contract in the light of those issues?

MR GERT JACOBUS OPPERMAN: No not necessarily, I think there is other contractual means to deal with it.

ADV KATE HOFMEYR: And what would those means have been?

MR GERT JACOBUS OPPERMAN: Firstly if a stock pile, the coal is pre-certified Chair and I think that process has been explained by Mr Mashego so if a stockpile fails the results at a nominated laboratory the supplier or Eskom has the option to declare a dispute. Once that dispute is declared the results that will – well the sample, the
10 reference sample will go to a reference laboratory. Once that result becomes available that becomes final and binding. If the supplier then still feels aggrieved by that then contractually pretty much there's nothing that can be done the bottom line is that that stockpile has failed qualities, it is turned to reject coal according to the contract and the supplier then need to reprocess that coal or seek a different market or whatever, he can do with that coal whatever he wants to. There is a process in the coal supply agreement that clearly guides it in terms of the reprocessing of that coal, that you're not allowed to just resample it but it must be reprocessed.

ADV KATE HOFMEYR: But Mr Opperman 50% of stockpiles being out of specification in a month is that customary?

20 **MR GERT JACOBUS OPPERMAN:** Not that is a lot, but being mining one of my learned colleagues always refer to coal mining as that it is not a cheese factory, the inconsistency of this product that we work with as well as our inability to see what is happening there underground does sometimes take you to an area where you have these challenges, so it might be that in the advancement of the mine as you are progressing in this mining reserve that you get into a portion that is prone to a quality

parameter that does not fall in, within specifications and then one will do additional sampling and drilling, that's a mining expert or a geologist will know how to deal with it, so you will increase your sampling and things like that and I would like to say that is fairly common that you will hit these pockets and especially when we started experiencing these challenges many of them were on sulphur, so I was not extremely surprised that there were so many stockpiles that all of a sudden has failed on sulphur because the mining reserve from Kuyasa just next to it had similar issues.

ADV KATE HOFMEYR: Mr Opperman Eskom at the time didn't share your view, because they deemed it appropriate to suspend the agreement, that's what we saw at
10 page 819. If you go to page 824 however you've indicated that is a letter lifting the suspension, what is the date of the letter at 824.

MR GERT JACOBUS OPPERMAN: The 5th of September.

ADV KATE HOFMEYR: And the year?

MR GERT JACOBUS OPPERMAN: 2015.

ADV KATE HOFMEYR: And what was the date of the preceding suspension?

MR GERT JACOBUS OPPERMAN: 31 August 2015.

ADV KATE HOFMEYR: So a period of seven days, is that correct?

MR GERT JACOBUS OPPERMAN: Yes.

CHAIRPERSON: Why is the letter at 819 from Mr Matshela Koko to Tegeta written on
20 the basis and it's written on 31 August 2015, why is it written on the basis that Tegeta was supplying coal from both the Colliery and the extension because my understanding of your evidence earlier was that even as at October there was no mining taking place at the extension.

MR GERT JACOBUS OPPERMAN: Chair I think this is a standard description of this mine and the contract, if one goes and looks at the title of this contract it will read it's an

agreement between Eskom and Brakfontein and Brakfontein Extension, so I think it's just a reference to the supply agreement that's relevant.

CHAIRPERSON: And not to the extension on the other side of the road that we were told about as such.

MR GERT JACOBUS OPPERMAN: Correct, it does not relate to the physical mining of an area, it just refers to the title of the agreement.

CHAIRPERSON: Which I guess then in the light of your interpretation of that provision that we talked about may make it even quite understandable why that clause would have been put in on your interpretation.

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

CHAIRPERSON: Because the description itself might give rise to an interpretation that the extension is already covered.

MR GERT JACOBUS OPPERMAN: 100% Chair.

CHAIRPERSON: Yes okay.

ADV KATE HOFMEYR: If we just focus at 819 for the moment, you've indicated you may not have taken the step if you had been consulted about this to suspend the coal supply agreement, but the letter confirms a suspension is that correct?

MR GERT JACOBUS OPPERMAN: That is correct.

20 **ADV KATE HOFMEYR**: And the reason for it is given in the second paragraph if you could read that out please?

MR GERT JACOBUS OPPERMAN: "This is with great concern to Eskom that it now calls into question the extract nature and quality ...(intervention)

ADV KATE HOFMEYR: Exact, sorry.

MR GERT JACOBUS OPPERMAN: ...sorry "exact, that it questioned the exact nature and quality of the coal at Brakfontein Colliery and Brakfontein Colliery Extension

supplies to Eskom in terms of the Coal Supply Agreement.”

ADV KATE HOFMEYR: So there was concern on the part of Eskom about the quality of coal coming from Brakfontein, is that fair?

MR GERT JACOBUS OPPERMAN: Fair yes.

ADV KATE HOFMEYR: And then seven days later at page 824 that suspension is lifted, is that correct?

MR GERT JACOBUS OPPERMAN: Correct.

ADV KATE HOFMEYR: What in your view would need to have happened in those seven days to move it from a situation of great concern to one which would have
10 satisfied Eskom to continue with the contract?

MR GERT JACOBUS OPPERMAN: Chair over that period there was multiple retesting of samples that was done at different laboratories as well as the engagement from the research and development combustion specialists, the guys that’s doing the combustion test that we spoke about earlier in order to understand possible reasons for what has happened here.

ADV KATE HOFMEYR: And what would those tests had to have shown to re-engage the contract?

MR GERT JACOBUS OPPERMAN: Well firstly one would like to see that the retest of the sample reflects the same results as the original laboratory results because that will
20 confirm that there’s an issue in the ground, and if that then confirms that there is an issue in the ground then one can deal with the geology at that mining reserve.

ADV KATE HOFMEYR: Well let’s stop there because the evidence that has been presented already to the Commission through the statement of Dr van der Riet is that far from confirming the non-conformances when the results of the Sibonisewe Lab were then, well when the reserve sample from the Sibonisewe Lab that had failed 15 out of

30 samples was sent to SABS for reanalysis SABSA failed 29 out of the 30, would that have been a reason to re-engage the contract?

MR GERT JACOBUS OPPERMAN: Well one could re-engage the contract, it does not mean that the supply will commence again, but at least now one will know what the issue is, and one will then have to deal with it.

ADV KATE HOFMEYR: Is it fair to say there would be concern if the second laboratory found more non-conformances than the first laboratory?

MR GERT JACOBUS OPPERMAN: Yes, I mean that actually shows that the issue at hand is even worse than what one expected initially.

10 **ADV KATE HOFMEYR:** The evidence that has already been presented to the Commission has shown that the only stock pile that was testified between these two dates – well let me be more specific, between the 29th of August and the 7th of September which are two dates on either side of the sending of these letters, was a stockpile that was later found not possibly to have come from Brakfontein Colliery, are you aware of that?

MR GERT JACOBUS OPPERMAN: I later became aware of it yes.

ADV KATE HOFMEYR: If the only sample that was taken in this period was concluded by the technical experts at Eskom non to have come from Brakfontein Mine would you be concerned about any reliance being placed on that test for the purposes of re-
20 engaging the contract?

MR GERT JACOBUS OPPERMAN: Yes.

ADV KATE HOFMEYR: Thank you. Mr Opperman if you will turn over the page to page 824AA.1, Chair you will forgive the very unfortunate pagination at this point, it's only indicative of the rate at which these documents were becoming available and the need to insert them, so we do apologise for the AA.1.

CHAIRPERSON: No that's fine, I'm just trying to, I see the single A, I'm trying to find the AA.

ADV KATE HOFMEYR: Chair if you go to 824 alone and then just turn over the next page.

CHAIRPERSON: Yes.

ADV KATE HOFMEYR: After 824, that should be AA.

CHAIRPERSON: Oh yes, okay thank you.

ADV KATE HOFMEYR: Mr Opperman at 824AA.1 is an email, is that correct, or a train of emails?

10 **MR GERT JACOBUS OPPERMAN**: That's correct.

ADV KATE HOFMEYR: Are these emails that you provided to the Commission?

MR GERT JACOBUS OPPERMAN: Yes I have.

ADV KATE HOFMEYR: What is the date, if you go to A24AA.2 and you start at the bottom of that page as I have it that's the first of the emails in this train is that correct?

MR GERT JACOBUS OPPERMAN: That's correct.

ADV KATE HOFMEYR: What is the date of the email?

MR GERT JACOBUS OPPERMAN: 7 September 2015.

20 **ADV KATE HOFMEYR**: Can you please take the Chair through what happened before this email was received, what happened after it was received and follow that through as the email progresses up the train.

MR GERT JACOBUS OPPERMAN: So Chair the first email at the bottom is the email from SABS Laboratory where they're making available the results from a certain stockpile, at this moment in time this email will have an attachment with all the stockpiles analysed for the month to date, so that is the first email that he's referenced there. The second email at the top of that page ...(intervention)

CHAIRPERSON: I'm sorry, the first email you are referring to is it the one that purports to come from you?

MR GERT JACOBUS OPPERMAN: No, no it's on the next page at the bottom, it's from ...(intervention)

CHAIRPERSON: Are you at 824AA2?

MR GERT JACOBUS OPPERMAN: That's correct Chair.

CHAIRPERSON: Oh, okay I thought she had directed you to 824AA1, so I was looking at that page. You moved to 824AA2, that is you were talking about the email at the bottom that comes from Zinzi Bhandu is that right?

10 **MR GERT JACOBUS OPPERMAN:** That's correct Chair.

CHAIRPERSON: Okay, just repeat what is that email about?

MR GERT JACOBUS OPPERMAN: So Chair that is an email from SABS laboratory reporting on the results of a stockpile that was analysed and then the email just above that is about half an hour later on the same date, also on the 7th of September, from Mr Mudaliar from Tegeta, addressed to myself and he – the email reads:

“Hi, please find attached results as required by you.

Looking forward to hear from you.”

CHAIRPERSON: Yes.

20 **MR GERT JACOBUS OPPERMAN:** So at this moment in time I was engaged by Mr Roux, which was also copied on that email from Mr Mudaliar to dispatch a stockpile and the stockpile is the stockpile number that's referenced on that page 824AA.1 as BKFSPB0609, so it's right there at the bottom of the page on the right hand corner. I was asked by Mr Roux that if they can dispatch this stockpile to Majuba Power Station. What made it out of the ordinary is the fact that one of the quality parameters on this stockpile did not meet the contractual specifications, so according to the contract this

coal will now be termed reject coal, it is not contract coal and hence it cannot be dispatched. As contract manager I don't have the authority to make a decision to dispatch this coal, I can't do it and I immediately told him you cannot dispatch this coal, I cannot support it, you need to either declare a dispute or you need to reprocess the coal, you've got one of those two options. Mr Roux was not pleased with my response and we disconnected the phone call and then soon thereafter I received a phone call from Mr Koko asking me that I must please engage the Majuba Power Station to accept this project. I then engaged my senior at the time, Mr Ngcube, and I asked him what must I do. This is now an instruction that I must perform outside the mandate of the
 10 contract and he encouraged me to engage the power station. I then did engage the power station and that is the email at the bottom of page 824 is what I drafted as a follow up and it reads:

“Following on our telephonic discussion this email seeks your written support to dispatch stock pile”

And I did reference it;

“...from Brakfontein to Majuba Power Station. We will appreciate your earliest response.”

And then Majuba Power Station then respond at the email right at the top of that page at 524 agreeing that the stockpile can be dispatched. What's of importance is that the
 20 quality parameter, or what's of note, maybe not of importance, of note is the quality parameter that was out of specification on this stockpile was on the size fraction, I think we spent a lot of time on this size fraction on Friday but this time it was on the top size, not on the fine size, so this contract has a limit that coal a grade bigger than 50mm, five zero, may not exceed 5%. So in this analysis not more than 5% may be bigger than 50mm, and for this specific stockpile this stockpile was 5.4% so it was only .4% out of

specification but it was out of specification. So Majuba Power Station agreed to accept this let's term it for now coarser coal and the stockpile was dispatched.

ADV KATE HOFMEYR: Thank you. Can we just go back to the phone call you received from Mr Koko. Was it usual for him to call you about pre-certified coal that had not met quality specifications under a coal supply agreement?

MR GERT JACOBUS OPPERMAN: No it was not usual.

ADV KATE HOFMEYR: Had he ever done so before?

MR GERT JACOBUS OPPERMAN: No not at this time.

ADV KATE HOFMEYR: And in relation to any other contract?

10 **MR GERT JACOBUS OPPERMAN:** No, not.

ADV KATE HOFMEYR: Did you ...(intervention)

CHAIRPERSON: I'm sorry, was – it's important to understand exactly what he said to you, okay, was what he said to you that you must talk to the power station to persuade them to accept coal that should not actually be accepted, was that the effect of what he said and it's important to say exactly what you understood him to be saying to you.

MR GERT JACOBUS OPPERMAN: Chair that was exactly the effect, the exact words I can't recall but the intent was for me to engage the power station and get the power station approval to accept this coal.

20 **CHAIRPERSON:** Ordinarily if you took the view that this coal did not meet the requirements, the specification, that would be the end of that unless there was, one, there was either a dispute declared and then what would happen would depend on the outcome of that dispute or there was – I don't know whether you said a reprocessing or renewal or reprocessing of the coal, is that what would normally be the position?

MR GERT JACOBUS OPPERMAN: Yes Chair that's the position.

CHAIRPERSON: So what he was saying to you was something unusual to be done, or

was it usual?

MR GERT JACOBUS OPPERMAN: Yes, no it was unusual.

CHAIRPERSON: Ja, and I assume that for you to comply with his instruction if that was an instruction in regard to talking to the power station you would have had to come across to the power station as somebody who thought that this coal should be accepted when in fact your own view was that it should not be accepted, is that right, or am I wrong?

MR GERT JACOBUS OPPERMAN: Chair I can only work within the boundaries of the contract.

10 **CHAIRPERSON:** Yes.

MR GERT JACOBUS OPPERMAN: So my view, if it should be accepted or not I think it's immaterial, the boundary of the contract does not allow me to approve dispatch of this product, so if this happens to me my answer to any supplier is you can't dispatch this coal, you need to dispute it or reprocess it.

CHAIRPERSON: Yes but isn't the position that you look at whatever is before you to see whether the specifications are met or are complied with, is that right?

MR GERT JACOBUS OPPERMAN: That's correct.

CHAIRPERSON: And if your conclusion is that the specifications are not complied with you reject the coal?

20 **MR GERT JACOBUS OPPERMAN:** That's correct Chair.

CHAIRPERSON: Ja, so what I'm saying is here you had concluded that this coal should be rejected.

MR GERT JACOBUS OPPERMAN: That's correct.

CHAIRPERSON: But here was Mr Koko now giving you a call and in effect saying you must talk to the power station with a view to something being done which you believed

was contrary to the contract, is that right?

MR GERT JACOBUS OPPERMAN: That's correct Chair.

CHAIRPERSON: So do you accept that what he wanted you to do was something that as far as you were concerned was not in accordance with the contract?

MR GERT JACOBUS OPPERMAN: Yes that's correct.

CHAIRPERSON: Okay, thank you.

ADV KATE HOFMEYR: Mr Opperman if we can then go over to the next document which is at 824A.1.

CHAIRPERSON: Before you go there let's just maybe complete this, you told me that
10 after Mr Koko had spoken to you, you spoke to your senior and I think you said your senior was a Mr Ngcube, is that right?

MR GERT JACOBUS OPPERMAN: That's correct Chair.

CHAIRPERSON: And as I understood your evidence you were – you wanted to tell and you did tell Mr Ngcube what I think was your predicament arising out of this call from Mr Koko, is that right?

MR GERT JACOBUS OPPERMAN: That's correct Chair, I made it clear that this coal is out of specification and that we cannot move it, and I have now received this request to engage the power station to make deliveries and I mean I can't do it, and he then said to me that I need to honour the request and engage the power station.

20 **CHAIRPERSON:** Well that's precisely what I wanted us to canvas, to hear more about the exchange between yourself and your senior, so from what you have told me, you have just told me your senior was left in no doubt that your view was that this was wrong?

MR GERT JACOBUS OPPERMAN: Correct.

CHAIRPERSON: In other words to do what Mr Koko was asking you to do.

MR GERT JACOBUS OPPERMAN: Correct.

CHAIRPERSON: And in regard to your concerns that this was wrong what view did your senior take, did he agree with you that it was wrong but nevertheless it should be done because it was coming from Mr Koko, somebody senior, or what was his view, was his view that he didn't agree with you that this was wrong?

MR GERT JACOBUS OPPERMAN: Chair I think Mr Ngcube agreed with me that within the boundaries of the contract our function was that we could not dispatch this coal, it wasn't that Mr Ngcube told me but you don't know what you are talking about, why are you being difficult or something like that, there was not that type of discussion.

10 **MR GERT JACOBUS OPPERMAN:** There was a discussion to say well here's an issue, you had an instruction to do this, better do it, you know it pretty much came down to that.

CHAIRPERSON: When you were speaking to Mr Koko I assume that you had told him that you thought that the coal was – should be rejected or was a reject coal and that it should not be accepted or did you not tell him that?

MR GERT OPPERMAN: Chair I cannot recall that I told him that.

CHAIRPERSON: Yes.

MR GERT OPPERMAN: But I can recall from the discussion that when he phoned me he realised that this coal cannot move. So I..

CHAIRPERSON: Yes.

20 **MR GERT OPPERMAN:** I could sense that he had an engagement from somebody.

CHAIRPERSON: Yes.

MR GERT OPPERMAN: I can only speculate who that was

CHAIRPERSON: Yes.

MR GERT OPPERMAN: But he had an engagement he understood my position was that I did not approve the coal to leave the mine and I was now asked to engage the

power station to get permission to move this coal.

CHAIRPERSON: So you say that when he spoke to you your understanding was that he knew that your position was that this coal was – did not comply with the specifications and should be rejected.

MR GERT OPPERMAN: Yes.

CHAIRPERSON: But you did not – the two of you did not specifically speak about that?

MR GERT OPPERMAN: No we did not specifically talk about it.

CHAIRPERSON: Yes.

10 **MR GERT OPPERMAN**: Chair discussions with Mr Koko normally was very short.

CHAIRPERSON: Is there any particular reason why you did not say to him, but Mr Koko why should I speak to the power station now about this coal because this coal is – should be rejected in terms of the contract?

MR GERT OPPERMAN: Chair I did not ask Mr Koko that no.

CHAIRPERSON: Ja I want to understand why because you were quite clear in your mind on the evidence – on – in your mind on the evidence you have told me. You were quite clear that this coal should be rejected and here was somebody from higher up effectively saying go against what you believe to be right.

MR GERT OPPERMAN: Chair my expectation with engaging my senior.

20 **CHAIRPERSON**: Yes.

MR GERT OPPERMAN: Was to fulfil that function.

CHAIRPERSON: Yes.

MR GERT OPPERMAN: Mr Koko at that moment in time were a couple of levels in management above me.

CHAIRPERSON: Yes so...

MR GERT OPPERMAN: Three, four levels above me.

CHAIRPERSON: Yes so you preferred to talk to your senior so that maybe if you persuaded your senior that this was wrong then he could escalate the whole concern?

MR GERT OPPERMAN: That is exactly it. My expectation was engaging my senior to say this is our situation my senior knew the contract, the contract content.

CHAIRPERSON: Yes.

MR GERT OPPERMAN: He knew – he was hundred percent aware of what is the implication of us doing this. It means that at the end of the month we will receive a payment back where both us will have to sign off coal that was out of specification. And
10 somewhere, somehow there would have had to be some supporting documentation that authorised us to make this payment.

CHAIRPERSON: Yes.

MR GERT OPPERMAN: So he was – he was very much aware of what the impact of this is. So my expectation is then that my senior will engage his senior who will engage his senior who will engage Mr Koko on this and that will typically would have been my expectation.

CHAIRPERSON: So part of the understanding between yourself and you senior was that if steps were taken to get the power station to accept this coal in accordance with Mr Koko's instruction or suggestion there may be trouble later on when certain
20 documents have to be signed.

MR GERT OPPERMAN: For sure.

CHAIRPERSON: That was part of your concern.

MR GERT OPPERMAN: For sure, for sure.

CHAIRPERSON: But you – once you understood that your senior was approving also that the power station be engaged you thought well he will know how to deal with that

situation when it comes, is that what you are saying?

MR GERT OPPERMAN: That is correct Chair.

CHAIRPERSON: Yes. But it is nevertheless quite important for me to try and understand why people who knew that something was wrong would nevertheless do it because some of the things that have happened which are wrong have happened because people and maybe good people allowed themselves to be party to wrong things that they would preferably not have allowed themselves to be party to. So I go back to my question to say why do – why do – did you go along when you knew that this was wrong and if you are able to speak for Mr Ncube you can also say in case
10 based on your discussions it is clear why both of you decided to go along with something that you both were quite clear was wrong.

MR GERT OPPERMAN: Chair I do not know how to answer that question. I think my – my view point from the onset when I was confronted was not to go along with it. And that is why I was very firm when I told Mr Roux which at that time was the CEO of Tegeta which is a senior person that I will with a lot of respect and told him Sir respectfully we cannot move this coal and for me that – that was the end of it. I never at that moment in time when we had that discussion had the – envisaged that there will be some call from somewhere to deal with it different. In my line of work we deal with it that way and then that is the end of it. You declare a dispute, it comes back, it is in
20 spec, you ship it, it is out of spec, you reprocess it. That is how we deal with it. So when I received this call firstly I was extremely surprised that Mr Koko phoned me and then I get this instruction to do it and my expectation was really when I engaged Mr Ncube to say, I mean I do not support this, I do not agree with this, what do I need to do? And I would have loved Mr Ncube saying to me, do not do it and him then taking the brunt for it because I mean he would have had to go to Mr Koko and tell him, listen

we are not going to do it, that is my expectation but that was not the advice that I got. I think talking about Mr Koko's management style and the way that he will threaten or talk to people I mean all of those things at that moment in time it is part of your life. You – when you in the corridor you hear how people is treated, people goes on suspension, other people gets dismissed, things like that so at that moment in time you trying to be – be reasonable and do the right thing but you can only operate within the boundary of the contract and that is – that is where my extent of responsibility ended or authority ended for that matter and that is why I engaged my senior. These type of decisions I will not say I make on a daily basis but I make them very regular and it is not an issue

10 to make that type of decisions shipping and stock pile is a couple of million rand so you at the drop of a coin you make a decision, sorry you go and reprocess this coal or it is good to go. So on this day it worked out different. It is not an easy decision. It is definitely not an easy decision. It is easy to say no that is easy the next step to come that came around from it to say engage the power station and then everything that happened there that is – it is not – it is not comfortable. I for one worked very hard at building up a relationship with my client at the power station and it is not good to – to engage your client on something that you really know it is wrong and you need to persuade them to say, but take it and I think earlier on you tried to get me to talk a bit about it and I mean I can talk a lot about why potentially this was not a bad idea to take

20 this coal. It is irrelevant. The governance of this coal supply agreement did not allow me the opportunity to apply my mind and think what is good for the organisation or think what is good for the mine or either way.

CHAIRPERSON: Well I just mention this that why it is important for me to understand what your thinking may have been when you were faced with this situation is this that certain wrong things not just maybe at Eskom maybe elsewhere and maybe in the

country as well in terms of what this commission is looking at certain wrong things may not have happened if people who knew that these things were wrong stood their ground or stood up to leaders to people who are senior to them and say, but this is wrong. And the question that at some stage I may have to deal with is, for the future how – what are the measures that should be put in place in a place such as Eskom or any parastatal to make sure that if at some stage in the future anybody tried to get wrong things to be done and approved and implemented good people at Eskom will be able to say no. In other words is there an environment that made it difficult for good people to stand for what is right? And if there was an environment that made it difficult for people who did

10 not want to be party to wrong things – if there was an environment that made it difficult for them to take a stand what is it that can be put in place to make sure that next time if something similar happens they will – they will be in an environment that will enable them to say no and not allow themselves to be party to wrong things and in that way hopefully save Eskom's save parastatals, save the country a lot of money. You understand?

MR GERT OPPERMAN: I do thank you Chair.

CHAIRPERSON: Okay thank you.

ADV KATE HOFMEYR: Thank you Chair I see we close to the tea time. I have just one or two follow up points on this.

20 **CHAIRPERSON:** Yes, yes.

ADV KATE HOFMEYR: If I may. When you engaged the power station Mr Opperman did you motivate for the acceptance or did you indicate your discomfort about it?

MR GERT OPPERMAN: I did indicate my discomfort about it. I definitely did not motivate it. I put it on the table and I told – I was engaging with the coal manager and I told him this is the stock pile, this is the volume, all the other quality parameters is fine.

This one quality parameter is out of specification. This is the risk of this quality parameter being out of specification so that he could go back and engage and his seniors and make an informed decision. There was not a lot of engagement around it. The coal management immediately understood what I told him. He was very knowledgeable and he had the engagement on his side.

ADV KATE HOFMEYR: Thank you. You also spoke about something around the environment at Eskom at the time and what you hear in the corridors. You mentioned people being suspended. At that date the 7 September 2015 were you aware that Doctor Van Der Riet and his team had been suspended six days earlier?

10 **MR GERT OPPERMAN:** I cannot say that I was – yes I was aware. People talk. Mr Van Der Riet sat in very close proximity to me. So his colleagues and things you notice. People is not at the office and things like that and people talk. We did not know what it was about or anything like that. So yes it definitely was then.

ADV KATE HOFMEYR: Did you know however that he and his team were looking precisely at quality issues arising from the coal from Brakfontein?

MR GERT OPPERMAN: No that I did not know.

ADV KATE HOFMEYR: Thank you.

CHAIRPERSON: Let us go back to your discussion or engagement with the power station pursuant to your discussion with Mr Ncube and Mr Koko's call to you. You have
20 said that you made your position clear what the position was about this coal and you have said that you did not motivate for it. But did you say something along the lines that Mr Koko called me or – to say you must accept it or that I must engage you or that Mr Koko wants it to be accepted by you or anything to that effect?

MR GERT OPPERMAN: Yes Chair I did mention it that I received an instruction for Mr Koko to engage them.

CHAIRPERSON: Yes.

MR GERT OPPERMAN: I did not indicate to accept it.

CHAIRPERSON: Yes.

MR GERT OPPERMAN: I did indicate to the coal manager that I got an instruction to engage them.

CHAIRPERSON: Ja.

MR GERT OPPERMAN: And that he please do an assessment, make an assessment and come back to me.

CHAIRPERSON: Okay. So just this so that we know.

- 10 1. You did not motivate for its acceptance by the power station.
2. You did say that you got an instruction from Mr Koko and you did say what the instruction was.

MR GERT OPPERMAN: Correct.

CHAIRPERSON: And

3. You did make it clear what your view was of the coal?

MR GERT OPPERMAN: Correct.

CHAIRPERSON: Okay thank you.

ADV KATE HOFMEYR: Thank you. Chair I am moving onto another topic so it may be an appropriate time to take the tea adjournment.

- 20 **CHAIRPERSON:** Yes we will take the tea adjournment and we will resume at half past eleven. We adjourn.

INQUIRY ADJOURNS

HEARING RESUMES

CHAIRPERSON: Yes you may proceed Ms Hofmeyr.

ADV KATE HOFMEYR: Thank you Chair. Before the tea adjournment Mr Opperman

we were dealing with what had happened on 7 September and the interactions between you, Mr Koko and Majuba Power Station about that particular stockpile that had not passed its precertification. What I would next like to take you to is the next document in U4 which is at page 824A.1. Can you please tell us what that document is?

MR GERT JACOBUS OPPERMAN: Chair this is a document from.

CHAIRPERSON: I am sorry. I missed the page. What page?

ADV KATE HOFMEYR: Chair it is 824A.1 and it appears just after that set of emails that we were dealing with, with Mr Opperman.

CHAIRPERSON: With a single A?

10 **ADV KATE HOFMEYR:** With a single A and a point one. It is a letter of 7 October 2015.

CHAIRPERSON: Okay. I found it. Thank you.

ADV KATE HOFMEYR: Thank you so much. What is this letter Mr Opperman?

MR GERT JACOBUS OPPERMAN: Chair this is the letter from Mr Ncube from Eskom addressed to Mr Jacques Roux at Tegeta Exploration requesting an independent audit on the coal precertification process at Brakfontein Colliery.

ADV KATE HOFMEYR: Why was this letter sent to Mr Roux?

MR GERT JACOBUS OPPERMAN: Chair this letter followed our concerns about the event that happened on the day, but this was also a requirement from the audit report
20 that was presented by RT&D following all the stockpiles that had filed. So in that window of suspension there was a report issued by RT&D and one of those actions read that the contracted laboratories had to be audited and the sample procedures had to be assessed. So it was in line with that action.

ADV KATE HOFMEYR: And let us just go through what Mr Ncube was requesting be done in the course of the audit of the Brakfontein Colliery. Can you take us through

what the audit would comprise?

MR GERT JACOBUS OPPERMAN: Yes Chair I can read the letter.

“Eskom is reviewing its precertification process and has appointed an independent service provider to assist with conducting an audit. The audit will comprise of three things. The first one auditing the entire coal processing value chain from the point where a run off mine coal is proceeded through to the creation of stockpiles. Number two, a collection and analysis of representative sample and then the last one a video recording of the entire process and then we close off by saying please indicate when the Auditing Team may be accommodated as well as any safety requirements.”

ADV KATE HOFMEYR: Was your view at the time that this audit was necessary?

MR GERT JACOBUS OPPERMAN: Definitely yes.

ADV KATE HOFMEYR: And what happened after this letter was sent on 7 October 2015?

MR GERT JACOBUS OPPERMAN: There has been a number of efforts to then get this audit done with engagements between myself and the Operations Team on site as well as the Technical Services Team that was facilitating this and then what soon follows is a lot of changes at Brakfontein with relevance to laboratory services being terminated and things like that.

ADV KATE HOFMEYR: Was the audit processed with?

MR GERT JACOBUS OPPERMAN: No, it was not Chair.

ADV KATE HOFMEYR: Why not?

MR GERT JACOBUS OPPERMAN: On 19 October I received an instruction from

Mr Ncube to send out an email to Mr Roux cancelling this audit.

ADV KATE HOFMEYR: Okay. Let us go back a bit. Did Mr Ncube support the need for the audit?

MR GERT JACOBUS OPPERMAN: Yes.

ADV KATE HOFMEYR: He is the author of the letter of 7 October. Is that correct?

MR GERT JACOBUS OPPERMAN: Correct.

ADV KATE HOFMEYR: So why did he say to you it must be cancelled?

MR GERT JACOBUS OPPERMAN: I think he was instructed to cancel it.

ADV KATE HOFMEYR: Well did he say that he was instructed to cancel it?

10 **MR GERT JACOBUS OPPERMAN:** I cannot recall that.

CHAIRPERSON: Did you ask him knowing what his view was namely that he wanted this audit done? When he asked you to cancel it did you ask him why?

MR GERT JACOBUS OPPERMAN: Chair I do recall a conversation between ourselves. I recall it was somewhat late that evening or afternoon of the 19th when I had to send the email on the cancellation of it and it was made clear that he received an instruction to do it. I cannot recall explicitly that he told me that the instruction came from Mr Koko or from any specific individual, but he was clear that there was an instruction that we need to stop it. In fact that evening when I sent out the email I sent out an email indicating that the audit is postponed and I then was soon phoned, soon
20 after that email phoned to ask to please retract that email and make it clear that the audit is cancelled. It is not postponed.

CHAIRPERSON: And who phoned you to say you must do that?

MR GERT JACOBUS OPPERMAN: Mr Ncube.

CHAIRPERSON: Mr?

MR GERT JACOBUS OPPERMAN: Ncube.

CHAIRPERSON: Oh, okay.

ADV KATE HOFMEYR: Mr Opperman that is a fundamental shift in the position that was being taken within your division. Do you agree with that?

MR GERT JACOBUS OPPERMAN: Yes.

CHAIRPERSON: Let me just go back to the earlier question. You sent an email saying the audit was postponed. Did your email say that because that is what you understood you had been asked or instructed by Mr Ncube to do namely that the audit was postponed or did you understand quite well that he had said to you it was to be cancelled and you should say it has been cancelled but you for some reason preferred
10 to say postponed/

MR GERT JACOBUS OPPERMAN: Chair between the 7th and the 19th when the email was sent there was consultation with the mine to set this up and if I recall correctly the site visit with the Auditing Team was imminent. It was the following day maybe within two days. I do recall Mr Ncube telling me that it is cancelled and he was very clear on it. My, maybe English not being my first language but also with the hope and the expectation that we can still do something to get this audit done, because it was important for us as the Cooperation's Team to get it done. I wrote the email to Mr Roux indicating that it is postponed with the view that we might have an engagement on the following day and a discussion with whoever made this decision to cancel it and try to
20 persuade them and get it turned around if I can say it like that.

CHAIRPERSON: Well you have given two reasons why you said it was postponed. The latter reason namely you hoped that there might be engagement that would produce the results that it could still be done later and not cancelled. That reason I understand better. I have listened to you give your evidence in English. I think your English is very good. So I am surprised when you say well maybe your English not

being good cancel something and postpone something is something that you would clearly have understood. Is it not?

MR GERT JACOBUS OPPERMAN: Yes, I will.

CHAIRPERSON: Okay.

ADV KATE HOFMEYR: By that stage of the 19th had everything been readied for the audit to take place?

MR GERT JACOBUS OPPERMAN: Chair I was not personally facilitating the audit. It was done through Technical Team, but my view was yes that it was ready. The audit was definitely not cancelled because of certain parties not being ready.

10 **ADV KATE HOFMEYR:** And are there costs associated with conducting an audit of this nature.

MR GERT JACOBUS OPPERMAN: *Ja*, there would be costs involved especially the fact that it was an independent party, but our Technical Services Department have contracts with service providers like that. So it is something that they would have dealt with.

ADV KATE HOFMEYR: And the arrangement of video recording is that an unusual feature of an audit?

MR GERT JACOBUS OPPERMAN: Yes, *ja*. This would have been the first time that we will do something like that. I have not been party to an audit like this where video
20 footage was taken, yes.

ADV KATE HOFMEYR: But then why include it?

MR GERT JACOBUS OPPERMAN: Well that was part of the Auditing Team, the advice from the Technical Services. I would not know if it was maybe advice from the late Mr van der Riet. Maybe somewhere with his experience and his knowledge that he felt that it was important, because there was a couple of things that they wanted to

achieve with analysis and resting and things like that. I do not know if that was maybe of relevance and then the intention of any audit is to learn from it and improve your processes. So I think it is valuable to have something afterwards to have a look at and say well okay here and there we can improve on somethings.

ADV KATE HOFMEYR: Mr Opperman this is a month after the previous instruction to act outside the terms of the contract that were inconsistent with its good management. Do you accept that?

MR GERT JACOBUS OPPERMAN: Yes.

ADV KATE HOFMEYR: What did you do about it, if anything?

- 10 **MR GERT JACOBUS OPPERMAN:** During this time there was a lot of engagements with my senior, Mr Ncube, as well as with our Acting GM at that moment, Mr Mazibuko. One needs to realise that in our organisation there is, we sit very close to one another and we talk a lot. So I think when it gets to the point where one reduces something to writing. It must express the desperateness of ones effort to just get something out of it and, so by the time that you go and sit and you go and write an internal note to your senior or to your General Manager one needs to appreciate that this was not you just waking up one morning and thinking hey today I am going to write a letter to my boss. By this time you are actually so frustrated you do not know where to go, what to do and you just feel that you need to just somehow express this in some or other way and that
- 20 is what we started doing. So there was a lot of engagements at this moment in time both with the Technical Team and within our Cooperation's Team and one also needs to appreciate that at this moment in time Majuba still needed that coal. At this moment in time Majuba had a shortfall of over 3 million tons for that financial year. So ultimately our function is to get coal to the power station, but we need to make sure that what gets there we know is of the right quality and that we get value for money. So it was really

frustrating circumstances.

ADV KATE HOFMEYR: But then why stand for it? Why not raise it with Mr Ncube that this would materially disadvantage Eskom in the further performance of this contract?

MR GERT JACOBUS OPPERMAN: Advocate Hofmeyr and Chair with respect Mr Ncube knew this. Mr Ncube is a learned person. He understands what the content is and we all shared it. It was just such difficult circumstances you know being under this management of this Executive Team and what was happening at that moment in time. It was difficult.

CHAIRPERSON: So are you suggesting that there was nothing you needed to tell
10 Mr Ncube about this being wrong, because you both knew it was wrong?

MR GERT JACOBUS OPPERMAN: Chair we had a lot of discussions around it.

CHAIRPERSON: Hm.

MR GERT JACOBUS OPPERMAN: We definitely spoke about it.

CHAIRPERSON: Hm.

MR GERT JACOBUS OPPERMAN: And we both knew that this was the right thing to do.

CHAIRPERSON: Hm.

MR GERT JACOBUS OPPERMAN: At that moment in time if I just look at the way that things were done around the office most probably Mr Ncube has over that period of
20 time spent some time in Mr Koko's office and he was called to the third floor to ask and explain what is going on here. Why do you want to do this and things like that, but this is now me just talking on Mr Ncube's behalf, but that was typically what was at the order of the day this would have happened.

ADV KATE HOFMEYR: You mentioned an internal memorandum that you prepared. If you go over to page 824A.2 is that the memorandum you are referring to?

MR GERT JACOBUS OPPERMAN: Yes.

ADV KATE HOFMEYR: Why did you write this memorandum?

MR GERT JACOBUS OPPERMAN: Chair this memorandum was written in a desperate measure just to put context to the preceding aspects to this audit being cancelled and although it did not deal with the audit itself the subject of the memo does read that this is a narrative information relating to the cancellation of the precertification audit and it was dated 22 October, but in this document my aim is to set out what has been happening at this colliery from inception of this contract when I had to start managing it. Where is the frustrations? What is the things that on a daily basis on an operational level, the Operational Team is challenged with and then also efforts that we have made in trying to get coal moving from this mine.

ADV KATE HOFMEYR: Mr Opperman you have actually anticipated one of my concerns about this internal memo, because you write that the subject refers to narrative information relating to the cancellation of precertification audit, but the text does not actually refer to that all. Does it?

MR GERT JACOBUS OPPERMAN: No.

ADV KATE HOFMEYR: But why would it not? This is why you were writing. You were concerned as I have your evidence that the precertification audit had been cancelled. Why does that not find its way into the text?

20 **MR GERT JACOBUS OPPERMAN:** I cannot answer that for now. I do not know why it was excluded specifically from the text. I do not know.

ADV KATE HOFMEYR: If you go over to page 824A.4 as I have it this is the section of the memo that starts to deal with the issues about coal quality, because that is in the penultimate paragraph. As I have it you say there:

“Since the inception of this contract and up to 21 October there

have been close to 150 stockpiles created at Brakfontein Colliery. Of those 150 stockpiles around 29 failed to meet the coal quality specification.”

If you were going to deal with the audit is it fair to say this is where it should have come in the internal memo?

MR GERT JACOBUS OPPERMAN: Yes.

ADV KATE HOFMEYR: And you decided not to include your concerns about its cancellation?

MR GERT JACOBUS OPPERMAN: Yes.

10 **ADV KATE HOFMEYR:** That paragraphs concludes with the following:

“This number of stockpiles failing seems unusual and on 22 October Eskom reallocated the analysis on the payment sample to the coal laboratory at Kendal Power Station.”

You see that?

MR GERT JACOBUS OPPERMAN: Yes.

ADV KATE HOFMEYR: Tell me how you came to learn that the coal quality was now going to be tested at Kendal Power Station.

MR GERT JACOBUS OPPERMAN: Chair I received a letter that was signed by then Head of Technical Services just indicating that the service from SABS Laboratory has
20 been terminated and that the analysis will now be done at Kendal Laboratory.

ADV KATE HOFMEYR: Is Kendal Laboratory an accredited laboratory in accordance with the Coal Supply Agreement?

MR GERT JACOBUS OPPERMAN: No, it does not comply too the ISA Standard.

ADV KATE HOFMEYR: So were you concerned to learn that a laboratory that was not accredited was now going to be testing the quality of coal from Brakfontein?

MR GERT JACOBUS OPPERMAN: I was concerned with it. I do recall having a discussion about it with the Head of Technical Services as well as with our GM, Mr Mazibuko at the time and we were informed prior to this change that Mr Koko had a view of changing the payment point for the Coal Supply Agreements to be at the power station. Meaning that at the power station one will analyse the coal and then make payment based on those quality parameters that was reported and we felt that this was maybe moving in line with that strategy if I can say it. The second thing is that at this moment in time we came through a process where we had a number of stockpiles failing. We had different laboratories analysing coal giving different results and for us
10 as the Eskom Team it gave some sense of comfort to know that this coal will now be analysed internally to Eskom. So the alleged tampering with results or tampering with samples and all those things would have been something from the past, because now it will be, I mean it is my colleague. It is my brother that is looking after my interest now. We are working for the same organisation. I would like to believe that there must have been reluctance on the mine side to accept it, because one could argue that how independent is this laboratory at Kendal now. So for us as the Coal Management Team even though it came through a way where Mr Magwaza just informed us that this is the way that it will be done in a way we felt comfortable with it, because it was now done in-house, if I can say it like that.

20 **ADV KATE HOFMEYR:** But it was in breach of the agreement?

MR GERT JACOBUS OPPERMAN: Yes, it was.

ADV KATE HOFMEYR: And this.

MR GERT JACOBUS OPPERMAN: It was not independent, pardon me.

ADV KATE HOFMEYR: Well not only was it not independent it was not accredited?

MR GERT JACOBUS OPPERMAN: Correct, yes. My understanding at the moment in

time was that the coal analysis from Brakfontein will go to Kendal Laboratory. Kendal Laboratory will only split the sample and then that sample will be analysed at Duvha Power Station at the laboratory at Duvha Power Station and that laboratory was ISO compliant.

ADV KATE HOFMEYR: Was that set out in the instruction?

MR GERT JACOBUS OPPERMAN: It was not set out in the letter from Mr Magwaza, but we did have a meeting at the power station with the responsible team on the 28th where we discussed this and it was made clear that that is the way that it will happen, yes.

10 **ADV KATE HOFMEYR:** But formally it was going to an unaccredited laboratory. Is that correct?

MR GERT JACOBUS OPPERMAN: For the sample preparation, yes, but the analysis done at Duvha Power Station was done through an accredited laboratory.

ADV KATE HOFMEYR: No, Mr Opperman let us go back a moment. As I understand the instruction it was that the analysis was going to be done at Kendal. That is what Mr Magwaza has told us in an affidavit before this Commission. We can go it.

MR GERT JACOBUS OPPERMAN: Okay.

20 **ADV KATE HOFMEYR:** So the instruction on 21 October was that Kendal would be doing the analysis going forward of coal from Brakfontein. Is that consistent with your recollection?

MR GERT JACOBUS OPPERMAN: I cannot, I do not have the content of that letter exactly, but I, if that is what he shared then I go with that. My understanding and if I say my understanding it was the understanding of me as well as my Technical Team that accompanied me to Kendal Power Station on the 28th was that it was clear that only the sample preparation will be done at Kendal and that the analysis will be done at

Duvha Laboratory. So that was our understanding.

ADV KATE HOFMEYR: Have you subsequently learnt whether that analysis was done at Duvha or at Kendal?

MR GERT JACOBUS OPPERMAN: I have subsequently learnt that I do not think it was done at either of those two.

ADV KATE HOFMEYR: Where do you understand that it was done?

MR GERT JACOBUS OPPERMAN: At a laboratory called UAS and this I am saying from third party information. It is not something that I have.

ADV KATE HOFMEYR: Okay. So let us just be clear about what we do know. We do
10 know that on 21 October an instruction was given to test coal from Brakfontein going forward under this contract at the Kendal Laboratory. Is that correct?

MR GERT JACOBUS OPPERMAN: Yes.

ADV KATE HOFMEYR: And that the Kendal Laboratory was not accredited nor was it independent?

MR GERT JACOBUS OPPERMAN: Correct.

ADV KATE HOFMEYR: And yet did you do anything about that?

MR GERT JACOBUS OPPERMAN: I did not escalate it and talk to my seniors about it, no. There was no formal action taken. As I say we met with the team on the 28th to ensure that they are compliant to the procedure in the C2MP in terms of the reporting of
20 the results and all of that. There has been gap analysis done in terms of what needs to be compliant with. Multiple efforts were made to do audits on the laboratory on Kendal. Those were the things that we did, yes.

ADV KATE HOFMEYR: But at the time it was not accredited?

MR GERT JACOBUS OPPERMAN: No, it was not.

ADV KATE HOFMEYR: If we go over the page to 824A.5 can you just tell us what that

letter is?

MR GERT JACOBUS OPPERMAN: This is a letter from Mr Ncube dated 26 October addressed to Mr Jacques Roux and this now formally cancels that independent audit that we tried to achieve on the letter that was dated 7 October.

ADV KATE HOFMEYR: Thank you and that follows as I have your evidence your email which referred to a postponement?

MR GERT JACOBUS OPPERMAN: Correct.

ADV KATE HOFMEYR: We do not have that email. Is that something you can provide to us in due course?

10 **MR GERT JACOBUS OPPERMAN:** I can.

ADV KATE HOFMEYR: Thank you.

CHAIRPERSON: So the email that you signed and this letter from Mr Ncube are they talking to the same thing?

MR GERT JACOBUS OPPERMAN: Yes Chair.

CHAIRPERSON: Okay.

ADV KATE HOFMEYR: And then if we go over the next.

20 **CHAIRPERSON:** I am sorry Ms Hofmeyr. I am wondering why Mr Ncube may have considered it necessary to send this letter cancelling the audit if he knew you had already sent an email cancelling it or had you not sent the cancelling it? You had only sent the one postponing it?

MR GERT JACOBUS OPPERMAN: Chair no I did send two emails. The first one postponing it and the second one cancelling it.

CHAIRPERSON: Ja.

MR GERT JACOBUS OPPERMAN: I think Mr Ncube was merely trying to close the loop with the formal communication from his letter dated the 7th.

CHAIRPERSON: Okay, alright. Thank you.

ADV KATE HOFMEYR: If you can then go over the page to 824A.6. This is also an email trail. Is that correct?

MR GERT JACOBUS OPPERMAN: Yes.

ADV KATE HOFMEYR: Can you please tell us the context for and background to this interaction?

MR GERT JACOBUS OPPERMAN: Chair so this incident is similar to the previous incident on 7 September, if I recall. Yes that is correct, where a stockpile is out of specification. It is again out on the top size. This time it is out by 0.9 percent. So the
10 five percent rejection limit is 5.9 percent. All other parameters are all within limits and it is fine. I again get a phone call from Mr Roux requesting to dispatch the stockpile. This time it is much easier for him, because he just tells me you did it the previous time so why do you not do it again. I again tell him that I cannot authorise it and he cannot move that stockpile. Soon thereafter again I get a phone call from Mr Koko requesting me to engage the power station and to seek acceptance. I again consulted with Mr Ncube and he again proposed that I follow the instruction. This time around the approval does not come that easy. In fact what happens is that.

CHAIRPERSON: The approval by who now?

MR GERT JACOBUS OPPERMAN: By the power station.

20 **CHAIRPERSON:** Oh, okay [intervenes].

MR GERT JACOBUS OPPERMAN: Let me say the acceptance.

CHAIRPERSON: Okay. With the first one I do not know if I missed it, but my recollection was you spoke to whoever you spoke to in the power station and you said he understood what you were conveying.

MR GERT JACOBUS OPPERMAN: Correct.

CHAIRPERSON: Quite clearly, but you are saying ultimately the power station accepted the coal?

MR GERT JACOBUS OPPERMAN: That is correct.

CHAIRPERSON: On the first occasion?

MR GERT JACOBUS OPPERMAN: Correct.

CHAIRPERSON: This time you say acceptance did not come easily?

MR GERT JACOBUS OPPERMAN: It does not come easily.

CHAIRPERSON: *Ja*, tell us more about that.

MR GERT JACOBUS OPPERMAN: With the previous incident I take it that the Coal
10 Manager did engage his team on sight whoever he engaged with, but an answer came quickly, if I can say it like that. This time around the Coal Manager engaged the General Manager of the power station Mr [indistinct]. Mr [indistinct] phones me enquiring about what is happening. So now I have explained this whole thing to the Coal Manager. Now the GM phoned me and he asked me what is happening and he ultimately does not phone my senior, but he phones the SGM at that time which was Mr Mashigo and they even have a consultation amongst one another. Ultimately I do get an approval that this stockpile can be shipped and it is followed with an email and on this very same page right at the top one can see the email from Mr Makwaye, at that moment in time the General Manager or the Power Station Manager of the Power
20 Station where he makes the comment where he says:

“Hi all,

I suppose this is the end of this coal.”

So I think from that statement one can sense the level of frustration around where – what is happening. So this is again a stockpile that’s out on top-size which ultimately the station gives permission for and coal gets released to be moved.

CHAIRPERSON: So what you did in regard to this occasion was exactly the same as what you had done in regard to the first occasion, is that right?

MR GERT JACOBUS OPPERMAN: Correct Chair.

CHAIRPERSON: Both in terms of getting a call from Mr Koko and speaking to your senior Mr Ngcube and speaking to Mr Roux, is that right?

MR GERT JACOBUS OPPERMAN: Mr Ngcube correct yes.

CHAIRPERSON: No you spoke to Mr Ngcube?

MR GERT JACOBUS OPPERMAN: Yes.

CHAIRPERSON: And then speaking to the power station.

10 **MR GERT JACOBUS OPPERMAN**: That's correct, to the Coal Manager at the power station.

CHAIRPERSON: Yes, yes, the only difference is simply that the acceptance from their side didn't come easily this time.

MR GERT JACOBUS OPPERMAN: Correct.

CHAIRPERSON: And then there was the involvement this time of more people's need.

MR GERT JACOBUS OPPERMAN: That's correct, so the Coal Manager engaged the power station manager, or the GM, Mr Makwaye, and he then also had an engagement over this period with Mr Mashego at that moment in time so the previous time it was sort of dealt with at a level above me and this time it is clear that it is now
20 going to a level even beyond that.

CHAIRPERSON: But ultimately it was accepted.

MR GERT JACOBUS OPPERMAN: Correct Chair.

CHAIRPERSON: Okay thank you.

ADV KATE HOFMEYR: Did Mr Makwaye remain as the Manager at Majuba much beyond this?

MR GERT JACOBUS OPPERMAN: No ma'am.

ADV KATE HOFMEYR: Why was that?

MR GERT JACOBUS OPPERMAN: I can't say, I don't know.

CHAIRPERSON: You don't know or – you mean you don't know why or you do know why but you don't want to say?

MR GERT JACOBUS OPPERMAN: No I really don't know Chair, I really don't know, I don't know if Mr Makway resigned or what he did, I don't know.

CHAIRPERSON: Okay.

ADV KATE HOFMEYR: I would like to just close off an aspect we were discussing
10 previously about the Kendall Laboratory, I indicated to you that we had received an affidavit before the Commission that made it clear that the analysis of the samples was going to take place at Kendal, I would like to just draw your attention to that and Chair it's at – in the same file at page 505, it is an attachment to the affidavit of Mr Makway to whom you made reference earlier Mr Opperman and it is the letter that he indicates he was instructed by Mr Koko to send out and if we read 505 it's a letter from Mr Makway to Mr Roux at Brakfontein and if you wouldn't mind just reading into the record what the letter says?

MR GERT JACOBUS OPPERMAN: The content of the letter:

20 "This letter serves to inform you that PED has appointed Kendall Power Station Laboratory as a contractual lab to analyse your coal samples from 21 October 2015. This is an initiative to improve our precertification process. You are welcome to contact me to discuss this."

ADV KATE HOFMEYR: So there's no suggestion there that anyone other than Kendall is going to be doing this analysis, correct?

MR GERT JACOBUS OPPERMAN: That's correct.

ADV KATE HOFMEYR: And you wouldn't have been satisfied would you with Kendall doing the analysis?

MR GERT JACOBUS OPPERMAN: No because it is not compliant no.

ADV KATE HOFMEYR: Right. Mr Opperman I would then like to take you to 2016, because in the middle of that year it seems from some of the records the Commission has obtained that possible coal mining of the extension at Brakfontein was coming online, is that consistent with your knowledge?

MR GERT JACOBUS OPPERMAN: That's correct.

ADV KATE HOFMEYR: If we go to 824.7 which is a few pages after that email we
10 were just on, can you please tell us what this document is?

MR GERT JACOBUS OPPERMAN: Chair this is a combustion test report that is done at our research testing and development facility, the same report that we spoke about earlier, that is the combustion report that precedes any coal contracting.

ADV KATE HOFMEYR: Right, and what coal source is being tested here?

MR GERT JACOBUS OPPERMAN: The title of this ...(intervention)

CHAIRPERSON: Sorry, I just want to double check that I'm on the right page, did you say 824.7

ADV KATE HOFMEYR: No point 7.

CHAIRPERSON: 824?

20 **ADV KATE HOFMEYR:** Point 7.

CHAIRPERSON: Okay I think I'm in the right place, okay.

ADV KATE HOFMEYR: It's headed Sustainability Division Chair.

CHAIRPERSON: Ja.

ADV KATE HOFMEYR: And Mr Opperman I just asked you what coal source was being tested here?

MR GERT JACOBUS OPPERMAN: Chair under the title that is clarified as the Brakfontein Extension open cast coal assessment.

ADV KATE HOFMEYR: So for laymen this is coal coming from Brakfontein Extension, correct?

MR GERT JACOBUS OPPERMAN: That's correct, that's correct.

ADV KATE HOFMEYR: If you go over to the conclusion of the document which you will find at 824.13 could I ask you please to first read for us what the conclusion is and then possibly assist those of us who are not coal experts with some explanation of it. If you will begin with the conclusion?

10 **MR GERT JACOBUS OPPERMAN:** So point number 5 is the conclusion in the report it reads:

“Brakfontein extension box cut sample was comparable mineralogical and combustion properties as the previous Brakfontein S4U, S4L that is for Seam 4 Upper and Seam 4 Lower blends and again S4U and S4L samples analysed. Partial devolatilisation of Brakfontein Extension has increased the burnout time and the elevated proportion of pyrite could severely influence the total sulphur content. More data and information is required before procuring Brakfontein Extension for any power station.”

20 **ADV KATE HOFMEYR:** Mr Opperman I read that to say Eskom should not take coal from the Extension for any power station until more data and information is obtained. Is that a fair understanding of what is said there?

MR GERT JACOBUS OPPERMAN: That is correct.

ADV KATE HOFMEYR: And it's quite specific it says it shouldn't be taken for any power station, is that accurate?

MR GERT JACOBUS OPPERMAN: That's correct.

ADV KATE HOFMEYR: And is this the document that Eskom would rely on in order to determine whether it wanted to source coal from the Brakfontein Extension?

MR GERT JACOBUS OPPERMAN: Yes correct.

ADV KATE HOFMEYR: There's no other source of this information within Eskom?

MR GERT JACOBUS OPPERMAN: No Chair this is it.

CHAIRPERSON: Is it in effect a combustion report?

MR GERT JACOBUS OPPERMAN: That's correct Chair.

CHAIRPERSON: Okay.

ADV KATE HOFMEYR: Are you aware that shortly after this report from the technical
10 division was produced Eskom sought to extend the coal supply agreement with Brakfontein to take coal from the extension?

MR GERT JACOBUS OPPERMAN: Chair I was aware of engagements, those engagements happens in the fuel sourcing department, I was aware that there was engagements around additional coal but as for the detail of it I was not aware of it.

ADV KATE HOFMEYR: Okay, I would like to take you to the documents that reflect the request that Eskom had to make to National Treasury in order to extend the contract, but I would just like to orientate ourselves in the evidence that's already been received. Chair you will recall that in April 2016 National Treasury issued a circular that we looked at previously which provided that any amendments to existing agreements
20 above 15% of the value would have to be approved by Treasury, we saw that in the course of Mr Mashigo's evidence, and so the need for this approval to be obtained from National Treasury was a product of that, and the letter that goes to National Treasury occurs in August of 2016, and you will find that at 833.1

CHAIRPERSON: Yes, got it.

ADV KATE HOFMEYR: Have you seen this letter before Mr Opperman?

MR GERT JACOBUS OPPERMAN: No Chair.

ADV KATE HOFMEYR: So as I have it this is a letter from the Chief Procurement Officer, Mr Mabalane, to the Chief Director of Supply Chain Management Governance Monitoring and Compliance and National Treasury. It's dated the 19th of August 2016 and it refers to the very note that I've referenced Chair about requiring approval for variations of existing contracts and if we go over the page you will see the submission that was presented to Treasury in order to seek its approval. Mr Opperman from this document at 833.2 can you tell us in that first table on the page what the value was going to be of this approval that was sought in the line item referred to as second addendum?

10

MR GERT JACOBUS OPPERMAN: It's R2.9billion.

ADV KATE HOFMEYR: R2.9billion?

MR GERT JACOBUS OPPERMAN: Correct.

ADV KATE HOFMEYR: And what does that constitute as a percentage increase over the existing value of the Brakfontein contract?

MR GERT JACOBUS OPPERMAN: According to the commenting that table constituted 77.42% increase.

ADV KATE HOFMEYR: Thank you, and then what I'm particularly interested in is what appears at paragraph 2.2.3 of that page, will you read out what Eskom was telling National Treasury in this paragraph of the letter.

20

MR GERT JACOBUS OPPERMAN: Item 2.2.3:

"The supplier has commissioned the Brakfontein Colliery Extension and he is ready to supply coal from the source. Eskom has since validated the reserve base in the Brakfontein Colliery Extension and has confirmed that the offer from the supplier meets its coal quality and quantity requirements for the

duration of the coal supply agreement.”

ADV KATE HOFMEYR: Is that true?

MR GERT JACOBUS OPPERMAN: Not according to my knowledge no.

ADV KATE HOFMEYR: Is it consistent with the technical report that Eskom received two months earlier from its technical division?

MR GERT JACOBUS OPPERMAN: No.

ADV KATE HOFMEYR: I would also like to go through a few other aspects of this submission to National Treasury. For that purpose I need to go back to some of the internal documents that were presented to the Board Tender Committee in order to
10 seek approval for this extension of the agreement so that approval could then be sought from National Treasury for it, and what I’m interested in there is page 831 which is a few pages back in that file.

CHAIRPERSON: 831?

ADV KATE HOFMEYR: Correct. The document Chair just to orientate you actually begins at 829, so this is a document as I have it to the Board Tender Committee dated 8 August 2016 and it’s prepared by Mr Ngcobe, is that correct, as the compiler, if you go to page 829.

MR GERT JACOBUS OPPERMAN: That’s correct Chair.

ADV KATE HOFMEYR: Would Mr Ngcobe have known that the technical report of two
20 months earlier had advised that no power plant of Eskom’s should yet take coal from the Brakfontein Extension?

MR GERT JACOBUS OPPERMAN: Chair it’s pretty standard procedure to consider the combustion report before contracting so I would like to think that he would have known. What’s also of interest is that this is the same Mr Ngcobe to whom I reported at some stage but in this capacity he has now moved to the Fuel Sourcing Division, he is

no longer in Coal Operations.

ADV KATE HOFMEYR: Thank you. If we go to page 831, you'll see at the top of that page a cost comparison of coal being delivered to Majuba, as I read this document it is included in the submission to the Board Tender Committee because some motivation is being made for procuring 10.8million tons of coal from Brakfontein Extension as opposed to other suppliers. Is that a fair reading of this document?

MR GERT JACOBUS OPPERMAN: That's correct.

ADV KATE HOFMEYR: If you go to that table at the top of 831 what you will see there is a comparison is made between some of the suppliers who were delivering coal to
10 Majuba and you will see in that table that Tegeta, Brakfontein, is identified twice in that table, once because of rail as the mode used, that's in the second line of the table Chair and then at the bottom Brakfontein Road because that was the second mode of transport used, is that correct?

MR GERT JACOBUS OPPERMAN: That's correct.

ADV KATE HOFMEYR: And then will you please read for us what the bottom of that table reflects about this analysis that was done?

MR GERT JACOBUS OPPERMAN: "The cost comparison above indicates that delivered price paid for Brakfontein Coal by rail is in line with supplies going into Majuba, while by road it is marginally on the high side.

20 **ADV KATE HOFMEYR:** Okay well let's look at those delivered coal prices, if you look at the rail column, at least line, for Brakfontein, what is its delivered coal price?

MR GERT JACOBUS OPPERMAN: R523.03.

ADV KATE HOFMEYR: And what is the delivered road price?

MR GERT JACOBUS OPPERMAN: R586.47.

ADV KATE HOFMEYR: And of the supplier's who are reflected in that table how does

Brakfontein's road price compare to the other suppliers?

MR GERT JACOBUS OPPERMAN: It's about R3 more than the second highest.

ADV KATE HOFMEYR: So it's the most expensive?

MR GERT JACOBUS OPPERMAN: It's the most expensive.

ADV KATE HOFMEYR: This is August of 2016, what method of transport was Brakfontein using mainly to get coal to Majuba, was it by road, or was it by rail?

MR GERT JACOBUS OPPERMAN: The original plan intended it to be more via rail than via road but in reality what has happened was a 50/50 split or in this stage it was more on road than on rail.

10 **ADV KATE HOFMEYR:** How much more?

MR GERT JACOBUS OPPERMAN: About a third on the rail and two thirds on the road.

ADV KATE HOFMEYR: So you actually have to read this table I would suggest by appreciating that the majority of the coal from Brakfontein extension is going to come via road at that stage, is that correct?

MR GERT JACOBUS OPPERMAN: That's correct.

ADV KATE HOFMEYR: And it is the most expensive source of coal compared to this table.

MR GERT JACOBUS OPPERMAN: Correct.

20 **ADV KATE HOFMEYR:** And despite that this was the source that was identified for another 10.8million tons of coal, is that correct?

MR GERT JACOBUS OPPERMAN: Yes.

ADV KATE HOFMEYR: At a value of R2.9billion?

MR GERT JACOBUS OPPERMAN: Yes.

ADV KATE HOFMEYR: Were you involved in this decision making at all to select

Brakfontein Extension for this further coal source?

MR GERT JACOBUS OPPERMAN: No not at all.

ADV KATE HOFMEYR: I then would like us to move to the follow up to the June technical report because you will recall Chair that the June technical report concluded on the basis that more borehole data and information was required before any coal was taken from the extension to a power plant. If we can go to 834.1, that as I have it is the next technical assessment of the Brakfontein Extension.

CHAIRPERSON: What was the date of the other one if you remember?

ADV KATE HOFMEYR: June 2016.

10 **CHAIRPERSON:** Okay thank you.

ADV KATE HOFMEYR: So just to get the chronology right, June 2016 the technical department advises not to take coal from the extension, in August of 2016 the Board Tender Committee is asked to approve nonetheless an extension to the existing contract to take 10.8million tons more coal from the extension and a representation is made to National Treasury that all is fine and well if we take this coal from the extension because it's passed our technical analysis. I would like to see what happens in November 2016 when that coal is again tested and that is the document Mr Opperman as I have it at 834.1, is that correct?

MR GERT JACOBUS OPPERMAN: That's correct yes.

20 **ADV KATE HOFMEYR:** Can you just confirm that it relates to the extension again?

MR GERT JACOBUS OPPERMAN: Yes Chair on that page 834.1 the title is Brakfontein Extension, Open Cost Coal Assessment.

ADV KATE HOFMEYR: Thank you and then if you go to 834.9 that contains the conclusion again, and if you will tell us what was concluded by Eskom's technical team at that stage.

MR GERT JACOBUS OPPERMAN: So I will read item number 6:

“Conclusion

Recommending Brakfontein Extension for Majuba, Tetuka and Matla Power station based on the borehole data provided is not advisable. If Eskom is already contractually obliged to take this coal then PD must expect pre-certified stockpiles to exceed Majuba dry base as calorific value, total sulphur and probably abrasive index. This contract has to be carefully managed to mitigate the risk of contractual disputes and Majuba Power Station stopping delivery of the coal.”

10 **ADV KATE HOFMEYR:** Mr Opperman I'm interested in that second sentence, that starts:

“If Eskom is already contractually obliged to take this coal, I want to ask you a few questions about that, because my understand is that Eskom ought not to be contractually obliged to take coal until it's technical department has told it that it's coal will meet the requirements of a power plant is that correct?

MR GERT JACOBUS OPPERMAN: That's correct.

ADV KATE HOFMEYR: So why would the technical department be saying if Eskom is already contractually obliged to take this coal?

MR GERT JACOBUS OPPERMAN: Chair I have got no idea why this is put into this
20 report, I can speculate that they maybe had line of sight or have been informed about some negotiations or something, I don't know, I can only speculate.

ADV KATE HOFMEYR: But that would be irregular would it not?

MR GERT JACOBUS OPPERMAN: Correct yes.

ADV KATE HOFMEYR: Thank you. Mr Opperman there are two further aspects that I would like to deal with in your evidence, the first is the Fundudzi Report, because the

Fundudzi Report made a finding against you in relation to your management of the Brakfontein Contract and I would like to ask you for your comment on that finding. You will find the report in the 5th file, so EXHIBIT U4 File 5 and if you go to page 1199 of that file.

CHAIRPERSON: Will you please make sure that somebody ensures that the files are appropriately marked in terms of what exhibits they are, the only file that I have here that refers to five, is that five?

ADV KATE HOFMEYR: Yes, so it's EXHIBIT U4 but file 5 of EXHIBIT U4.

CHAIRPERSON: Ja, oh okay., ja now I see there's the one that is marked like that, but
10 there is another one simply marked 45, and I think that was causing confusion.

ADV KATE HOFMEYR: Indeed.

CHAIRPERSON: And it has no indication what exhibit it is, so it's very important to know what exhibit number all the files are, but just causing confusion because it's got 5, but I've got the right one, EXHIBIT U4 File 5.

ADV KATE HOFMEYR: And the relevant finding in that report Chair is at page 1199.

CHAIRPERSON: Double one, double nine?

ADV KATE HOFMEYR: Correct. This is a section of the Fundudzi Report which commences at page 1114. Chair we looked at this report in the earlier evidence of Mr Mashigo, and portions of it, but the relevant part on this page, 1199, is towards the
20 bottom at paragraph 6.14.38.9.

CHAIRPERSON: Yes.

ADV KATE HOFMEYR: That paragraph Mr Opperman is dealing in a Section of the report with non-compliance with drainage test requirements, you will see that as the heading on the page, and what Fundudzi determines in this paragraph from a review of the minutes of the monthly technical liaison meetings is that the CSA, that's the Coal

Supply Agreement, was a standing agenda item on the previously mentioned meetings, they say we note, we however noted that contrary to the above assertion by Opperman issues of non-compliance with clause 22.10 of same were never discussed in any of the said meetings. Mr Opperman there's a lot going on in that paragraph, let's start with Clause 22.10. What does that Clause deal with in the contract?

MR GERT JACOBUS OPPERMAN: It deals with the drainage test that needs to be conducted on this contract, within 30 days from commencement date.

ADV KATE HOFMEYR: And as I read the finding here Fundudzi is finding that contrary to your assertion that this issue had been taken up at the monthly technical liaison meetings they say the item was never discussed, is that as you understand their finding?

MR GERT JACOBUS OPPERMAN: That's how I understand it.

ADV KATE HOFMEYR: And what is your response to that?

MR GERT JACOBUS OPPERMAN: It is false, I did discuss it, Chair our first meeting, monthly liaison meeting that was held on this contract was held on the 13th of May and it will reflect on deliveries that happened in April, Advocate Hofmeyr I don't know if it's an attachment to the ...(intervention)

ADV KATE HOFMEYR: It is, let me assist you. If you go to file 4 back where we were you will find the relevant minutes that you're looking for at page 804.1.

20 **CHAIRPERSON:** 804.1?

ADV KATE HOFMEYR: Correct. Can you take us through what that document is Mr Opperman?

MR GERT JACOBUS OPPERMAN: So Chair this is the minutes that is compiled by myself, as I indicated this is the first meeting under this contract, held on the 13th of may, I think there is a lot of administrative recordings so if we can page three pages to

page 804.4, sub-section 10 deals with the abbreviation CQMP which is the Coal Quality Management Procedure.

CHAIRPERSON: I'm sorry you said turn to page?

MR GERT JACOBUS OPPERMAN: 804.4.

CHAIRPERSON: Okay.

MR GERT JACOBUS OPPERMAN: Item number 10, the heading is CQMP.

CHAIRPERSON: Yes.

MR GERT JACOBUS OPPERMAN: And then the second bullet that's noted there deals with this assertion and here it is stated that the drainage test date needs to be
10 scheduled.

ADV KATE HOFMEYR: Now Fundudzi found that that item was not included in the monthly technical liaison meetings, but as we have it from this document it was included, is that correct?

MR GERT JACOBUS OPPERMAN: That is correct, and it was also included in subsequent meeting minutes.

ADV KATE HOFMEYR: However it doesn't reflect compliance with the clause does it?

MR GERT JACOBUS OPPERMAN: No it doesn't at this moment in time it still indicates that the test needs to be done.

ADV KATE HOFMEYR: Correct. Do you have any other comment to make in relation
20 to the Fundudzi Report?

MR GERT JACOBUS OPPERMAN: No I think it is fine thank you Chair.

ADV KATE HOFMEYR: Mr Opperman were you invited to attend any events by Tegeta during your management of this contract?

MR GERT JACOBUS OPPERMAN: Yes Chair I was.

ADV KATE HOFMEYR: What event was that?

MR GERT JACOBUS OPPERMAN: It was an event of the Media, I think AM7 or something like that, I can't recall exactly what it was.

ADV KATE HOFMEYR: And do you recall when the invitation was?

MR GERT JACOBUS OPPERMAN: No I can't.

ADV KATE HOFMEYR: And did you accept the invitation?

MR GERT JACOBUS OPPERMAN: No I did not.

ADV KATE HOFMEYR: Why not?

MR GERT JACOBUS OPPERMAN: I don't attend things like this with suppliers, it's – I don't need to go there, it's not work related.

10 **ADV KATE HOFMEYR:** Thank you. Mr Opperman I have come to the end of the series of questions on the Brakfontein contract however in due course we will be making submission to the Chair in relation to this contract and so I would like to give you an opportunity to comment on some of those submissions, insofar as you may wish to differ from what appears to be disclosed in the evidence that we've heard thus far. Chair, and Mr Opperman, we will submit in due course that Eskom was compromised as a consequence of entering into this agreement with Tegeta for the Brakfontein coal and it was compromised in three respects, and I would like your comment on those three. Mr Matshego gave evidence that as a consequence of Tegeta going into business rescue in February 2018 Majuba lost 24 days of coal in relation to its stock
20 reserves. And we will submit that that is an instance of the respect in which Eskom was compromised as a result of entering into this agreement. Do you have a comment on that?

MR GERT OPPERMAN: I support it.

ADV KATE HOFMEYR: We will also submit that as a consequence of this contract Eskom probably received out of specification coal to Majuba from Brakfontein. Do you

have a comment on that?

MR GERT OPPERMAN: I think a lot of analysis were done over the life of this contract to ascertain if that is what has happened. What has subsequently come to evidence is that it most probably did so I need to support it yes.

ADV KATE HOFMEYR: We will also submit that without the Brakfontein contract there would have been no Optimum contract with Tegeta and the reason for that is that the final condition that had to be met by the 13 April 2016 in order for Tegeta to take over Optimum Coal Mine was a payment of R600 000 sorry ...

MR GERT OPPERMAN: 600...

10 **ADV KATE HOFMEYR:** R600 million odd that had to be paid into the trust account held by the business rescue practitioners. That we know from what happened around that prepayment came from the Brakfontein contract. So would you accept a conclusion that said without Brakfontein there would not have been an Optimum in the hands of Tegeta?

MR GERT OPPERMAN: Chair most probably yes or other creative payments would have been sought but at that moment in time this was the only vehicle where funds could have flown to Tegeta was the Brakfontein contract so that is correct.

ADV KATE HOFMEYR: And Mr Opperman we will also submit in due course that Tegeta was unduly favoured in the implementation of this contract. The first example of
20 that is that there was no successful combustion test completed before the 4th – before four o'clock on the 21 April.

MR GERT OPPERMAN: 31st.

ADV KATE HOFMEYR: 31st March 2015. Do you have a comment on that?

MR GERT OPPERMAN: No that is true.

ADV KATE HOFMEYR: Failed stock piles from Brakfontein were allowed to be

delivered to Majuba. Do you accept that that indicates an unfav – a favoured position for Tegeta in relation to this contract?

MR GERT OPPERMAN: I do accept it. But as I have clarified at the time the results that was shared with the team showed that the coal was within specifications. We have later learnt that that might not have been the case.

ADV KATE HOFMEYR: We might be missing each other. You told us about two incidents in September.

MR GERT OPPERMAN: Okay those – okay.

ADV KATE HOFMEYR: And in November where coal that was – that did not meet the
10 requirements of the contract were nonetheless delivered to Majuba.

MR GERT OPPERMAN: Correct.

ADV KATE HOFMEYR: We will argue in due course that that constitutes favourable treatment to Tegeta. Do you accept that?

MR GERT OPPERMAN: Correct.

ADV KATE HOFMEYR: We will also submit in due course that Eskom misrepresented to National Treasury when it sought to motivate for the approval of the extension of the contract with Tegeta that the coal from the extension complied with the requirements of Majuba Power Plant. Would you agree with that submission?

MR GERT OPPERMAN: Yes.

20 **ADV KATE HOFMEYR:** Thank you Chair. Those are my questions.

CHAIRPERSON: Thank you. Thank you very much Mr Opperman. Should there – should a need arise you will be asked to come back but for now you are excused.

MR GERT OPPERMAN: Thank you Chair.

CHAIRPERSON: Thank you.

ADV KATE HOFMEYR: Chair we have about half an hour before the lunch break.

CHAIRPERSON: Yes.

ADV KATE HOFMEYR: And we do have our next witness available. So if it suits you I would suggest that we call him now to give evidence.

CHAIRPERSON: Yes if he is available let us – let us use this time before one o'clock. Which of these files will I still need for purposes of the next witness?

ADV KATE HOFMEYR: Chair the bad news is all of them. But we are going to begin with File 3 which contains Mr Bester's statement.

CHAIRPERSON: Okay.

ADV KATE HOFMEYR: So it is Exhibit U4 File 3.

10 **CHAIRPERSON:** Yes. Registrar please administer the oath or affirmation.

REGISTRAR: Please state your full names for the record?

MR JOHANN ANDRIES BESTER: Johann Andries Bester.

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

MR JOHANN ANDRIES BESTER: No.

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

MR JOHANN ANDRIES BESTER: Yes I do.

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

20 **MR JOHANN ANDRIES BESTER:** So help me God.

REGISTRAR: Thank you.

CHAIRPERSON: Thank you. Yes you may proceed.

ADV KATE HOFMEYR: Thank you Chair. Mr Bester just to orientate you, you have a set of files next to you. They are Exhibits U8 which contains Mr Opperman's statement I do not propose to deal with that file in relation to your evidence. And then there are

three other files which are identified as Exhibit U4. If you take File 3 of Exhibit U4 out I would like to take you to the third page there. The pagination appears in the top right hand corner with the appendage Brak. What you have is an insertion at the beginning of the document. So you must page past that a bit and go to Brak003. That is the first page as I have it of an affidavit that you deposed to, is that correct?

MR JOHANN ANDRIES BESTER: This is my affidavit yes.

ADV KATE HOFMEYR: And if you go to page 21 you will see a signature on that page can you confirm whether that is your signature?

MR JOHANN ANDRIES BESTER: That is my signature.

10 **ADV KATE HOFMEYR**: And can you confirm that you deposed to this affidavit before a commissioner of oaths on the 16 January 2019 as is reflected in the bottom half of that page?

MR JOHANN ANDRIES BESTER: Yes I did.

ADV KATE HOFMEYR: And in so doing you confirm that the contents of this affidavit were true and correct?

MR JOHANN ANDRIES BESTER: True and correct. I have subsequently found some grammatical errors and one factual error.

ADV KATE HOFMEYR: Well let us deal with those. Let us go to...

CHAIRPERSON: Before you do so Mr Hofmeyr.

20 **ADV KATE HOFMEYR**: H'm.

CHAIRPERSON: For some reason I do not have the last page – the last page is 18 of 19.

ADV KATE HOFMEYR: Oh that is – must be a printing error Chair. We will get you a copy of page 19.

CHAIRPERSON: Ja okay.

ADV KATE HOFMEYR: Do you then jump to Brak22?

CHAIRPERSON: Yes.

ADV KATE HOFMEYR: Okay that must be a printing error. We will sort that out if we may over the break?

CHAIRPERSON: Okay.

ADV KATE HOFMEYR: I will make sure not to deal in substance with that page.

CHAIRPERSON: Ja.

ADV KATE HOFMEYR: Until after the break.

CHAIRPERSON: Okay.

10 **ADV KATE HOFMEYR:** Thank you. Mr Bester I would like to begin with some background information. What position did you hold in Eskom in 2014/2015?

MR JOHANN ANDRIES BESTER: During most of that period I would have been the general manager for fuel sourcing within primary energy.

ADV KATE HOFMEYR: And who did you report to in that role?

MR JOHANN ANDRIES BESTER: At the beginning of 2014 I was reporting to Ms Kiren Maharaj and probably towards the middle of 2014, July, August Mr Mboweni would have been appointed as the acting divisional executive.

ADV KATE HOFMEYR: And are you still with Eskom?

MR JOHANN ANDRIES BESTER: No.

20 **ADV KATE HOFMEYR:** When did you leave Eskom?

MR JOHANN ANDRIES BESTER: The last day of my physical presence there was the 18 August 2015.

ADV KATE HOFMEYR: And what had – what resulted in your departure from Eskom?

MR JOHANN ANDRIES BESTER: Several things. I think at the end of the day excuse me for being totally honest Chair. At the beginning of...

CHAIRPERSON: Well that is what you are supposed to be.

MR JOHANN ANDRIES BESTER: I am supposed to be. In around about March 2015 my wife told me she would leave me if I did not leave Eskom and a lot of things had resulted in me getting – into getting to that conclusion.

CHAIRPERSON: Was that because there were lots of things that were happening in Eskom that made you unhappy at Eskom and she was aware of your unhappiness?

MR JOHANN ANDRIES BESTER: She was aware of my unhappiness and I would bring my unhappiness home.

CHAIRPERSON: Okay. Thank you.

10 **ADV KATE HOFMEYR**: When did you give notice that you wanted to resign from Eskom?

MR JOHANN ANDRIES BESTER: That was the 20 July, the day Mr Koko came back from his suspension.

ADV KATE HOFMEYR: Okay Mr Bester we will go through some detail in the course of your evidence about these events that you describe as unhappy. If I fail to deal with any one of them I will make a note that we should come back at the end of your evidence to make sure that we have not missed any of them out.

MR JOHANN ANDRIES BESTER: Okay.

20 **CHAIRPERSON**: I also just want to say Mr Bester it may or may not be that those are events that you would have preferred not to have to talk about them because they were not happy events but I just want you to appreciate that it is very important that I know the full extent of any unhappiness that may have been caused to people within Eskom by certain events. Okay.

MR JOHANN ANDRIES BESTER: Understood Chair.

CHAIRPERSON: I thank you.

MR JOHANN ANDRIES BESTER: If I feel that we have not gone into those in sufficient detail I will bring them up.

CHAIRPERSON: Okay thank you.

ADV KATE HOFMEYR: And Mr Bester please can you indicate to the Chair what your qualifications are?

MR JOHANN ANDRIES BESTER: I have an engineering degree and a masters in engineering and a MBA.

ADV KATE HOFMEYR: Mr Bester I would like to just begin with some background to fuel sourcing and how that works within Eskom. We have had some evidence from Mr
10 Mashego about it but it is key to understand your evidence to be able to place it in the context of the role of fuel sourcing and the planning that goes on to ensure that the power plants of Eskom can produce the electricity that the country needs. So I would like to begin with asking you to give to the Chair a description of how that planning within fuel sourcing works?

MR JOHANN ANDRIES BESTER: Right so I think Mr Mashego did explain that we have an integrated planning department that integrates with the generation department and they – we – there is quite a complex spreadsheet mainly excel driven but there is a - I gather there is a few more programmes behind that that looks at the burn that Eskom requires and that as Mr Mashego did explain gets broken down in power station by
20 power station. That gets fed into a model and that predicts – and all the contracts that have been concluded would be in that model so that model would predict when we would require coal at certain power stations. Obviously that is in quite a level of detail for the next two years and then as the maybe into five years it is more of a high level model and then it even goes as far as predicting what coal we need for the life of power station. But that is in a more generic level. So that informs us what we require and

where we need to focus.

ADV KATE HOFMEYR: So if a supplier of coal does not perform in terms of the contract I imagine that has an impact on the integrated planning, is that correct?

MR JOHANN ANDRIES BESTER: Correct.

ADV KATE HOFMEYR: And what would those impacts be?

MR JOHANN ANDRIES BESTER: So maybe if I do not answer correctly maybe just repeat the question. I think I have understood it – if the quality being delivered to the power station is of a lower grade than should be supplied then the power station would require a higher volume of coal to what it was contracted for. So if the calorific value or
10 the energy content including the volatiles were lower than what was contracted then he would have to burn a higher tonnage for the same energy supplied to the grid.

ADV KATE HOFMEYR: And if there was a supplier contracted for ten years who could not perform after three years in terms of the contract how would that impact the integrated planning?

MR JOHANN ANDRIES BESTER: Ja I am trying to think of an example where that – we would have to replace that coal. Yes so there are – there were contracts, long term contracts that were not performing for various reasons. Maybe infrastructure development, access to coal and even delivery constraints and if that could not be managed we would have to replace that coal from an alternative source.

20 **ADV KATE HOFMEYR:** Because I assume on the basis of what you have said that the plan anticipates that contracts will be performed until their conclusion, is that correct?

MR JOHANN ANDRIES BESTER: Yes.

ADV KATE HOFMEYR: So a short default on a contract would have a knock-on effect of needing to fill that gap so to speak in the integrated plan?

MR JOHANN ANDRIES BESTER: A shortfall but if you refer to a short term – a

shortfall that could often be managed but a shortfall would have to be replaced from somewhere else.

ADV KATE HOFMEYR: Thank you. I would then like to ask you to go to one of the annexures in your statement which is in File 4 at page 23. It is the first annexure and it is an organogram of the primary energy structure.

CHAIRPERSON: Did you say Exhibit 4, U4?

ADV KATE HOFMEYR: Exhibit U4 in File 3. I might have said File 4 as I recall.

CHAIRPERSON: Ja I think you said File 4.

ADV KATE HOFMEYR: Apologies to.

10 **CHAIRPERSON**: At 3 is the one that has got his statement.

ADV KATE HOFMEYR: Is to. His statement indeed and so it is the first of the annexures to the statement that I am wanting to address at the moment. That you will find at Brak023. And what I am interested in there is the roles of fuel sourcing and coal supply operations in this organogram. Because we have received some evidence this morning from Mr Opperman about the interface between those two divisions within Eskom. As I understood his evidence fuel sourcing is responsible for fuel sourcing and negotiating the coal supply agreements. And once those agreements are in place the coal operations division is responsible for implementing the contract. Do you agree with that?

20 **MR JOHANN ANDRIES BESTER**: I agree with that and there would be a hand at this – once a contract is concluded there would be a handover and the departments involved in that negotiation would hand over to the relevant coal supplier manager. So there would be – so it has been mentioned that on this contract there – it was – would have been preferred to put this coal on a rail so there would have been an individual from the logistics team which would discuss that with the coal supply manager. There

would – there should be a member from the technical team that would have described to him any technical potential variations with a normal – with the normal qualities. Those things would have – any differences from a standard contract should have been conveyed to the coal supply manager.

ADV KATE HOFMEYR: Right and at the time of negotiating these contracts I understand from Mr Mashego's evidence there are a number of other divisions feeding into fuel sourcing, is that correct? Divisions such as technical and legal, is that the ordinary practice?

MR JOHANN ANDRIES BESTER: We would typically almost have a coordinating –
10 coordinating role. We would prefer not to start negotiations or commence negotiations unless the environmental for example that would probably would be one of the first steps. We would not want to put resources aside to negotiate with the supplier unless they had a water use licence or a – were environmentally compliant, had a mining right for example. So there would be a number of different departments that would potentially be involved before we started negotiations. So we would coordinate in a way that we would not resume negotiations until all of that – we were satisfied that all of that was in place.

ADV KATE HOFMEYR: Mr Bester the Brakfontein contract was not a product of an open tender process was it?

20 **MR JOHANN ANDRIES BESTER:** Correct.

ADV KATE HOFMEYR: And why was that not the case?

MR JOHANN ANDRIES BESTER: The – we found that the open tender process most often did not yield us with any new suppliers because the gatekeepers are quite restrictive so you would not – you would not offer coal to Eskom unless you had a water use licence and unless you had a mining right. But – because we were of the view that

by the Eskom's last power station closes down we will probably have burnt every single tonne of coal that is available in Mpumalanga. We had a pipeline of potentially 50 suppliers at any one time and we kept quite a good data base as to where they were, how they were progressing. And those that were closer to – to being in a position the critical part of that would have been a mining right for them have done sufficient exploration to be able to convey to the technical team what their potential qualities were. So we – we managed – we almost managed although obviously miner has to manage themselves, we almost managed that pipeline and focussed our attention on those suppliers that were near term.

10 **ADV KATE HOFMEYR:** Mr Bester are you aware of Section 217 of The Constitution?

MR JOHANN ANDRIES BESTER: I am not – you would have to...

ADV KATE HOFMEYR: Sure.

MR JOHANN ANDRIES BESTER: It may be familiar to me but I am not aware what the number is.

ADV KATE HOFMEYR: It is a provision of the constitution that requires organs of state to procure goods and services in accordance with a competitive cost effective and transparent process. The process that you have described does not sound as though it meets that requirement because it is not open and it is not competitive. So if you procure coal in ways other than that which the constitution requires how do you ensure

20 that you are getting the best deal for Eskom?

MR JOHANN ANDRIES BESTER: We have – well Eskom has quite extensive data base in terms of what pricing is available in the market. So there we – we at any one time would be able to look at what other potentials suppliers are and what other suppliers that we are negotiating with and we would choose the best option.

ADV KATE HOFMEYR: So open procurement was not the norm when you were at

Eskom for coal supply?

MR JOHANN ANDRIES BESTER: We did run two or three open tenders to gather data and to see if there was anybody that would tender that we had missed in the process. What – I think the correct number is within Eskom procurement system the procurement policy 320 does allow for unsolicited offers.

ADV KATE HOFMEYR: In what circumstances?

MR JOHANN ANDRIES BESTER: When there is a required – a requirement and the need can be – can be satisfied by that offer.

ADV KATE HOFMEYR: So the procurement system anticipates that an unsolicited bid
10 is an exception, is that correct?

MR JOHANN ANDRIES BESTER: The general procurement practice yes.

ADV KATE HOFMEYR: But within coal it sounds like the exception was the norm, is that fair?

MR JOHANN ANDRIES BESTER: That is because of the – so maybe I need to – I need to go back a step. When Eskom normally builds a new power station it does goes out on open tender and it – there would be several mining companies that would – that would tender for the process. And Eskom would first satisfy itself that that mine is sufficient to supply that power station before building that power station. For example at the New Kusile Power Station being built it would have gone out on tender. There
20 would have been a number of suppliers that tendered to that – that tendered for that one. As you may know Anglo American was successful in that tender. The team at the time it was before my time would have satisfied themselves that the reserve was large enough to supply a new power station and for that reason the power station was located where the successful tenderer was. From around about 2000 and it was probably mainly as a result of the mines supplying the Duvha Power Station failing that

and Dan Mashego described it that they tried to keep – get that mine running for about a year and a half and kept failing. There were geological conditions that the mining company at the time did not foresee. They subsequently that was almost the start of what was referred to as the medium term mandate. A special mandate was sought from the board to start supplying power stations on road and on rail. Not from dedicated mines I think that is the key point. So there is a – there is a mandate and I think it has been referred to you a number of times the 2008 to 2018 mandate and the subsequent revision thereof to buy coal using that methodology.

ADV KATE HOFMEYR: Thank you. Mr Bester just to confirm in the course of the
10 engagement your evidence is actually for the benefit of the Chair more than anyone else in the room.

MR JOHANN ANDRIES BESTER: Yes.

ADV KATE HOFMEYR: So if I may request that you direct your answers to him I will supply the questions. But Mr Bester can we just focus on the medium term mandate for a moment. You are correct it has been referred to in the evidence thus far. You will find it in Exhibit U4 File 4 at page 693.

MR JOHANN ANDRIES BESTER: Apologies mine goes up to 400 and something.

ADV KATE HOFMEYR: Sorry so you will need to be in File 4.

MR JOHANN ANDRIES BESTER: It is probably this one.

20 **ADV KATE HOFMEYR:** And it is...

CHAIRPERSON: Of Exhibit U4.

ADV KATE HOFMEYR: Of Exhibit U4 indeed Chair.

CHAIRPERSON: And page?

ADV KATE HOFMEYR: 693. Mr Bester and Chair I am conscious of the fact that we close to the lunch break but I will just conclude on this point with your leave?

CHAIRPERSON: Okay that is fine.

ADV KATE HOFMEYR: This is the medium term mandate we dealt with it in the evidence of Mr Mashego. What is important given the prior questions that I have asked you is that this is an exception to the rule that ordinarily procurement must occur in an open competitive process, do you accept that?

MR JOHANN ANDRIES BESTER: Correct.

ADV KATE HOFMEYR: If you go over the page to 694 that is made clear in paragraph 3.1 of the mandate. The first paragraph on that page talks about an emergency being declared at effective power stations on the 9 January 2008. Were you at Eskom at the
10 time?

MR JOHANN ANDRIES BESTER: No I was not.

ADV KATE HOFMEYR: But are you aware of this emergency having been declared?

MR JOHANN ANDRIES BESTER: It has been referred to before but I am not specifically aware of it.

ADV KATE HOFMEYR: As I understand this mandate it was that emergency that then precipitated the authority given to procure on an unsolicited basis if you go back the page to 693 up to a particular volume of coal and up to a particular value of contracts, is that correct?

MR JOHANN ANDRIES BESTER: Correct that is my understanding why it was
20 promulgated if that is the right word.

ADV KATE HOFMEYR: And you will see that reflected at 2.1 on page 693. The required volume that could be procured in this manner not pursuant to open competitive tendering was up to a value – a volume of 490.8 million tonnes and up to a value of R164 418 million, is that correct?

MR JOHANN ANDRIES BESTER: That is my understanding yes.

ADV KATE HOFMEYR: And then you referenced the fact that this mandate was extended in 2010. For your reference you will find that at page 738 of that same file. And just to orientate us what Mr Mashego explained about this extension was that whereas the previous mandate had allowed procurements only between the years of 2008 and 2018 this extension in 2010 allowed contracts to be procured for the life of a mine as opposed to having to come to an end in 2018, is that consistent with your understanding of this extension?

MR JOHANN ANDRIES BESTER: Yes that is my understanding, but I am not sure that we are on the right page.

10 **ADV KATE HOFMEYR:** The page is at 742 of that document.

MR JOHANN ANDRIES BESTER: Apologies.

CHAIRPERSON: Well I was at 738.

ADV KATE HOFMEYR: Yes that is where it starts Chair apologies.

CHAIRPERSON: Okay.

ADV KATE HOFMEYR: And then the relevant clause of the document I should have mentioned that previously is at 742.

CHAIRPERSON: Okay.

ADV KATE HOFMEYR: You will see at the bottom of that page at paragraph 3 what was granted was:

20 “Approval to negotiate and conclude contracts with suppliers for the life of the mine that have resources that extend beyond the original mandate period ending on 31 March 2018 within the pricing parameters of the approved mandate and Eskom’s long term coal strategy.”

Is that the clause you were looking for?

MR JOHANN ANDRIES BESTER: Yes. I was maybe trying to refer to a specific clause that says for the life of mine, but it is mentioned in several places in the document.

ADV KATE HOFMEYR: Yes. Paragraph 3 does refer to the life of the mine.

MR JOHANN ANDRIES BESTER: Yes. I see that now, with suppliers for the life of the mine that have resources.

ADV KATE HOFMEYR: Thank you. So when Eskom acts in terms of these mandates it is not acting according to open competitive processes. It is acting as a consequence of a mandate given arising out of an emergency to ensure coal supplied to power
10 stations. Is that accurate?

MR JOHANN ANDRIES BESTER: My understanding maybe it is just the whole interpretation. It is, the emergency was referred to give background and context and I think this, there was no intention for this to be an emergency procurement mandate, but it refers to that and give it context and it says going forward there will be an ongoing requirement and I think it, at the time it was put together very quickly and when the team that actually dealt with this the 2010/2018 mandate the original mandate as they engaged with suppliers they realised that there could have be one or two improvements to be made. I would imagine, I cannot take credit for it. I was not there yet. I had however started when this was submitted, but the compilation I cannot take credit for,
20 but I do agree with it that some of the suppliers would have said we can offer you better terms in terms of Rand per ton if we supply you for the life of the mine and the other consideration would have been that if we had at any time there would have been about 20 of these contracts in place. If all of these contracts expire on 31 March 2018 there would be a massive workload which probably would not be, place Eskom in the best position to negotiate.

ADV KATE HOFMEY: Thank you. Chair I will move onto another topic shortly if it is convenient to take the lunch adjournment.

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

REGISTRAR: All rise.

HEARING ADJOURNS

HEARING RESUMES

CHAIRPERSON: You may proceed Ms Hofmeyr.

ADV KATE HOFMEYR: Thank you Chair. Just as a matter of housekeeping that page
10 that you were missing from your file.

CHAIRPERSON: Yes.

ADV KATE HOFMEYR: We have been able to make a copy.

CHAIRPERSON: Yes.

ADV KATE HOFMEYR: If I could just hand it through to your registrar.

CHAIRPERSON: Okay, thank you.

ADV KATE HOFMEYR: That will be in file 3 of EXHIBIT U4. It is page 21.

CHAIRPERSON: Well Ms Hofmeyr it now looks like I did have it, but in a wrong place.

ADV KATE HOFMEYR: Okay.

CHAIRPERSON: I do not know who put it in a wrong place. It is page 19, but it comes
20 before, it appears before page 18.

ADV KATE HOFMEYR: Ah that was.

CHAIRPERSON: Instead of after.

ADV KATE HOFMEYR: That was the error.

CHAIRPERSON: So.

ADV KATE HOFMEYR: At least it has been identified.

CHAIRPERSON: Okay. You may proceed.

ADV KATE HOFMEYR: Thank you so much. Mr Bester we were dealing with the medium term mandate and its extension before the lunch break and we had established that this was a mandate that originated in 2008 in order to allow for procurement of coal to occur on a one to one basis as opposed to an open tender scenario and what I want to move to in that context is what sort of protections were then put in place to ensure regularity in the process of this one on one contracting? What sort of measures did Eskom develop to ensure that they were getting the best value for money, they were following all the correct procedures prior to procurement?

- 10 **MR JOHANN ANDRIES BESTER:** Chair I think the medium term and at both the first one and the subsequent extension thereof went into some detail where it said in order to protect Eskom it wanted Eskom to procure the coal legally and so there were various provisions in there that said it wanted to ensure that the company was in fact properly established. So there would have been a KYC process or FICA process in other words. You would have to establish the company in fact existed. Those would be the basics, environmentally compliant. These are all things in a way also to protect Eskom's risks. You would not want to contract with a supplier that was not complaint and would subsequently be shut down through something beyond Eskom's control. So it only made sense that we did some form of risk management in order to make sure that the
- 20 supply complied with the laws of the country and then obviously pricing was, is of key consideration. As I said previously we would at any time be engaging with a number of suppliers and we had a pretty good database on what we envisaged as being a fair price. So that would be determined in two probably key ways where, well maybe three. The mandate number one gave clear guidelines as to within which price parameters you were allowed to pay for coal. I think that is probably the most important one and as

long as we could show and I used to give an update to the Board every six months on how we were procuring coal against that mandate noting that it did specifically mention what price. The one other thing that came out in the revision of the mandate is, if I remember correctly the first mandate gave an overall delivered price whereas the second mandate tried to specifically split out the cost of the coal and the cost to deliver. So that I guess is one of the key parameters. The other one is we would have a very good understanding depending on where the reserve was whether it was an underground mine, whether it is an open cast mine, what the cost of producing coal from that resource should be. That also depending on the coal qualities. It is not an

10 exact science because some of these suppliers would be exporting the coal and some suppliers would only be supplying Eskom. So if they were exporting the coal and they were making an additional margin from the export coal we would automatically know that we could probably negotiate harder with the supplier. It was our intention that each of our suppliers should be sustainable as well because it benefits both parties. So we applied a margin and if, without going into confidential information we applied a band of a fair margin to what we understood their costs to be. We would often try and get our supplies if they were not happy with the negotiations to convince us of what costs they were actually incurring. However the third and probably the final one that we benchmarked each of the suppliers against other suppliers that we were contracting

20 with that were potentially able to supply us. So at any one time as I said we might have had a half a dozen to a dozen suppliers who were negotiating with for various sources. So we could also look at our supplier plan for example the one in question the Brakfontein Contract. It had the potential to go to Kendal. It is an obvious one, because the specification is quite low, but we did not need coal for Kendal. So would have required it to supply coal consistent with the Majuba specification. So we would

look at what other potential suppliers we had for Majuba and in that way had I had, had we had better alternatives, had we had cheaper options yes then the rule would always be going to go to the cheaper option.

ADV KATE HOFMEYR: Could I ask you to go in EXHIBIT U4 to file 4? Right at the end of the file you will see a page 961. That is a document entitled in handwriting at the top Tegeta Brakfontein Colliery?

MR JOHANN ANDRIES BESTER: Correct.

ADV KATE HOFMEYR: And what it appears to be is a checklist of various aspects of the coal supply agreement that is required to be satisfied. In relation to the contract
10 you will see the first relevant line is commercial and financial documents. The next is supply development and localisation. The third is environmental and legal documents. Fourth is technical documents. The fifth is health and safety requirements and the sixth is logistics. Is that a checklist you are familiar with?

MR JOHANN ANDRIES BESTER: Yes and that is almost trying to replicate what was the recommendation in that medium term mandate.

ADV KATE HOFMEYR: Indeed. So this is what you are checking against to ensure regulatory in the procurement process.

MR JOHANN ANDRIES BESTER: Correct.

ADV KATE HOFMEYR: Is that correct?

20 **MR JOHANN ANDRIES BESTER:** Correct.

ADV KATE HOFMEYR: Right and that checklist envisages amongst other things that there would be technical compliance from the sole source in relation to meeting the coal quality specifications as well as financial assessment having been done of the supplier. Is that correct?

MR JOHANN ANDRIES BESTER: That is correct, but the financial assessment and I

think it may come out later specifically it does not refer to the assessment. It refers to the financial statements being collected.

ADV KATE HOFMEYR: Correct.

MR JOHANN ANDRIES BESTER: In hindsight that would probably have been a better one to have added to that. However this was probably drafted in relation to the medium term mandate, but the financial assessment that you refer to is clearly spelt out in the Procurement Policy.

ADV KATE HOFMEYR: Indeed and there would be no utility to receiving three years of financial statements if you were not going to analyse them. Would it?

- 10 **MR JOHANN ANDRIES BESTER:** Yes, except the one area yes would be to establish whether the company had actually been operating, but the financial assessment should tell you that.

CHAIRPERSON:

ADV KATE HOFMEYR: Thank you. I would now like to go into your statement Mr Bester with that background in place and if we could begin at page 7 of file 3 of EXHIBIT U4.

MR JOHANN ANDRIES BESTER: Through Chair should I page to that or can I refer to my copy?

ADV KATE HOFMEYR: I think it will be convenient.

- 20 **CHAIRPERSON:** Preferably check, use the file.

MR JOHANN ANDRIES BESTER: Sorry, which file is it?

ADV KATE HOFMEYR: So it is file 3.

CHAIRPERSON: So that we are all on the same page and same file.

MR JOHANN ANDRIES BESTER: I have got.

CHAIRPERSON: U4, EXHIBIT U4, file 3?

ADV KATE HOFMEYR: Correct Chair.

CHAIRPERSON: And you want page 7?

ADV KATE HOFMEYR: On page 7, exactly and I pick it up at what is paragraph 13 of your statement which appears on that page, because it is here that you begin to talk about the approaches that had been received by Eskom from Tegeta albeit that you begin talking about the year 2011 where as I understand from the rest of your statement the approaches went in the guise of Tegeta *per se*, but its predecessors. Can you please talk to the Chair about those approaches? When they commenced and what coal supply was the subject matter of those engagements?

- 10 **MR JOHANN ANDRIES BESTER:** Chair I need to maybe, because I have taken, help with if I get the name wrong, but we were originally approached for supply from another source other than Brakfontein, but from the same supply.

ADV KATE HOFMEYR: Yes.

MR JOHANN ANDRIES BESTER: Was my understanding. It was Vlakfontein or something.

ADV KATE HOFMEYR: Vierfontein Colliery.

MR JOHANN ANDRIES BESTER: Vierfontein.

ADV KATE HOFMEYR: You will see that in paragraph 14 on that page.

MR JOHANN ANDRIES BESTER: Correct.

- 20 **ADV KATE HOFMEYR:** In the second line.

MR JOHANN ANDRIES BESTER: Thank you. So my understanding is that Vierfontein was offered to us first and I could pick up from records that the first time it was offered would probably have predated November 2011. That is because as I said we ran a database and the first time I could, I did a search for Vierfontein the first time I picked them up was a reference to November. They may have approached one of, I

am not actually where the approach came from. It could have been one of my team members. They would have noted it down in that supplier database.

ADV KATE HOFMEYR: You had concerns about Vierfontein Colliery. Did you not?

MR JOHANN ANDRIES BESTER: *Ja.* So the first thing that was done there was an environmental assessment done on that site. So representatives from the Environmental Department would have gone to site and they wrote a report, it is not clear to who they wrote it, potentially to the Division Executive my boss at the time Ms Kieran Maharaj. So they had probably, well I am familiar with the report now. They said to her that there were serious environmental transgressions. If I recall correctly
10 there was a wetland that they appeared to have mined through and a river diversion and our expectation was that if the transgressions had been to that extent then it would be in Eskom's best interest not to even consider contracting from them. What we also did later on and it was, I cannot remember if it was specifically because of that. We did procure an independent legal opinion. I am not sure if we will go to that later or if I should describe it now.

ADV KATE HOFMEYR: You can deal with it now.

MR JOHANN ANDRIES BESTER: We did something we do not normally do, because we had an idea as to who the potential and beneficiary shareholders of this contract were at the time. We already had a suspicion that it was linked to the Gupta owners
20 although, sorry the Gupta family and because we wanted to be very carefully in how we responded to that. We sought a legal opinion from Webber Wentzel and we worded it carefully in order to protect our own interests as well. We wrote to them and engaged with them and we said to Webber Wentzel we would like to contract from this source but please advise us what the risk is if we should contract from them. We did subsequently get a report from them. It is rather voluminous and it does talk about the

environmental provisions etcetera, but it does conclude that Eskom would probably be taking on some risk although that risk does ultimately sit with the miner and the transgression with the mining company. Not referring to it now, I think we were comfortable that it was clear that it was their opinion that we should not contract with Vierfontein. I do not recall that it specifically talks about Brakfontein.

ADV KATE HOFMEYR: No, it does not.

MR JOHANN ANDRIES BESTER: I apologies.

ADV KATE HOFMEYR: It refers to Vierfontein, but we can conclude the aspect on Vierfontein. Why was there a sense that you need to take care if there was an
10 association with the Gupta family in relation to this mine?

MR JOHANN ANDRIES BESTER: *Ja*, we already under pressure that the request to engage from them, my boss at the time Kieran Maharaj may have known about this, did not just come from a normal application. It may have come from above that she was weary about this. I remember at the time as well we even had to go to, it is not in my affidavit, apologies but this is some of the things that have come to me subsequently. We, I recall that I went to, with Ms Kieran Maharaj I went to Mr Brian Dames' house. I think he was ill at the time and we had to give an answer why we were not procuring from, why we had no interest in pursuing this contract. I went there with the Head of Environmental.

20 **CHAIRPERSON:** Did to whom did you go?

MR JOHANN ANDRIES BESTER: We went to Mr Brian Dames who was then the CEO of Eskom.

CHAIRPERSON: Oh.

MR JOHANN ANDRIES BESTER: We went to his house to explain.

CHAIRPERSON: Yes.

MR JOHANN ANDRIES BESTER: To give him comfort that we that we were acting correctly.

ADV KATE HOFMEYR: So that is insofar as Vierfontein is concerned and Chair just for your reference the Webber Wentzel opinion is at page 38 of that file. It is one of the annexures to Mr Bester's affidavit and as Mr Bester has indicated in his evidence it ultimately concludes that there would be risks associated.

CHAIRPERSON: Yes.

ADV KATE HOFMEYR: With contracting for the Vierfontein coal source.

CHAIRPERSON: Okay.

- 10 **ADV KATE HOFMEYR:** So if we can return to Brakfontein and the approaches in relation to it, because it was slightly different to Vierfontein. Was it not?

MR JOHANN ANDRIES BESTER: Correct.

ADV KATE HOFMEYR: And who, from whom did the approaches in relation to the Brakfontein coal source initially come? You can, for your reference to page 7 at paragraph 13. In the middle of that paragraph you say:

“Tegeta was not the initial name of the entity used. They used
the names Goldridge, Arctos and Idwala Crypts.”

Is that correct?

- MR JOHANN ANDRIES BESTER:** Correct. If I am looking paragraph, sorry I found
20 that. I was looking at the previous reference. There was also a reference earlier I think in paragraph 13, but I apologise which paragraph?

ADV KATE HOFMEYR: Well in paragraph 13.

MR JOHANN ANDRIES BESTER: Yes.

ADV KATE HOFMEYR: On page 7, you will see the middle of the way down of that paragraph in the last.

MR JOHANN ANDRIES BESTER: yes, I have it now.

ADV KATE HOFMEYR: Section of the line you record there that:

“Tegeta was not the initial name of the entity used. They used the name of Goldridge, Arctos and Idwala Crypts...”

MR JOHANN ANDRIES BESTER: Yes.

ADV KATE HOFMEYR: “...and two different companies and sets of frontmen were used to offer Eskom coal from their Vierfontein and Brakfontein Collieries.”

MR JOHANN ANDRIES BESTER: Yes.

10 **ADV KATE HOFMEYR:** And what happened with the approach in relation to Brakfontein/

MR JOHANN ANDRIES BESTER: If I, look I have it in my, without specifically referring to an incident there, my recollection is that because Brakfontein did not have a water licence we did not engage with them any further.

ADV KATE HOFMEYR: And this is in about 2012. Is that right?

MR JOHANN ANDRIES BESTER: It probably was yes. I think very shortly after Vierfontein, we closed the Vierfontein matter another supplier potential supplier came on board. We did initially struggle to figure out who was behind the offers. They seem to have come from two different companies, from two different representatives.

20 **ADV KATE HOFMEYR:** And then you mention the reference to the water use licence. If you go over the page to page 8 and in the bottom paragraph on that page paragraph 16 the first sentence there says:

“Tegeta’s environmental issues and lack of water use licence was eventually sorted out by the time the Brakfontein supply contract was signed.”

Can you please tell the Chair about the developments in relation to that water use licence? When eventually was Brakfontein granted a water use licence?

MR JOHANN ANDRIES BESTER: I think it is in the file. So, but I recall it quite well. It was 22 December 2014 and it is pretty much after that that pressure to contract with them really started in earnest again and probably at the start of January when we returned from leave.

ADV KATE HOFMEYR: Okay. Let us go to the water use licence. It is at page 54, 5-4 of that file. It is an annexure to your statement and as you have reflected already the date of issue was 22 December 2014. In your statement you indicate that you were
10 surprised by that date. Why is that?

MR JOHANN ANDRIES BESTER: I mentioned it to a colleague. I was surprised that something as important as that would be signed off when most of us were on holiday. So I was suspicious of that and my colleague at the time warned me if I am not overreaching and raising suspicion on that. Noting to me that for my own benefit it is not wise to question that. Let the right, let the appropriate people question that. I mean clearly I might have been, I would have struggled to justify properly why I was suspicious of that. I mean it is not to say that the relevant person did not sign off appropriately.

ADV KATE HOFMEYR: At this stage of your affidavit Mr Bester the impression that
20 one gets and I want to put this to you so you can correct me if you regard my impression as wrong, is that you were reluctant to contract with Tegeta first in relation to Vierfontein and then in relation to Brakfontein. Is that a fair reading of your affidavit?

MR JOHANN ANDRIES BESTER: I was reluctant and I think at that time already we had, there was some technical tests done and it was likely that the coal would be marginal as a supplier.

ADV KATE HOFMEYR: This is referring to Brakfontein in particular?

MR JOHANN ANDRIES BESTER: To Brakfontein in particular.

ADV KATE HOFMEYR: And as a supplier to Majuba?

MR JOHANN ANDRIES BESTER: As a supplier yes specifically I think at that stage we had not decided where to take the coal. I think the initial test, but I am going on recollection here. The coal could have gone to Kendal and to Kriel, some of the Kriel Units that run on a low specification, but we did not have a requirement for that. So in order to meet the power stations that have a high quality requirement it would have been marginal.

10 **ADV KATE HOFMEYR:** You also refer in your affidavit to pressure being exerted at this time. You have already told us about having to go and report to Mr Dames about why you were justified in not contracting in relation to Vierfontein, but your affidavit also talks about an event in March 2014 when you were summonsed with your colleagues to the auditorium at Eskom. If I could just take you there in your affidavit. It is at page 10 and it is paragraph 21 on that page. Can you please tell the Chair about that event in March 2014?

MR JOHANN ANDRIES BESTER: Chair it was a very surprising turn of events. At the time I was Acting Divisional Executive. My boss or the person I reported to Ms Kieran Maharaj who was usually the Divisional Executive she had been seconded to
20 the cost saving initiative and she had been seconded there for probably the best part of nine months. So I was initially asked to act in her position and that to my recollection came to an end at the end of the financial year. That is pretty much when Ms Maharaj's work was also wrapping up. So what I do recall and I think I tried to recall the date specifically, but I remember that Ms Maharaj came to that specific meeting to support me. I am not sure how she was notified of that and it is my recollection that I think it

was the day or two before she resumed her role as the permanent Divisional Executive. What was surprising to me is to be addressed for me to pull at the time since I was the Acting Divisional Executive I was required to bring my entire team together. Obviously as you heard this morning from Gert Opperman he is an Operational manager. So he would have been situated in Witbank and with short notice he probably would not have made the meeting. So we have several people across Mpumalanga, but all in all there is 143 people at the time that would have work for Primary Energy. We were told we all had to there, all of us that could be there and the Chairman at the time, Mr Tsotsi addressed us and he complained about two things specifically. That we were

10 frustrating the transporters and we were putting Eskom at risk and that we were frustrating emerging miners. He did not mention any specifics. He did not give us an opportunity to reply. As I said I was glad that Ms Maharaj was there. She indicated to me that I do not need to respond to that and she took it upon herself to respond to that. She told me that well as I have indicated I am not going to read to it now, because I recall it in any case by memory, is that she indicated to the Chairman that she would do her best and that Primary Energy would pull up their socks. As we walked out of that meeting Ms Maharaj told me that at the moment there was a lot of toxicity amongst the Executive Team and that we all had to be very careful.

ADV KATE HOFMEYR: At paragraph 21 of that page you also talk about an interaction

20 you had with Suzanne Daniels.

MR JOHANN ANDRIES BESTER: yes.

ADV KATE HOFMEYR: Can you please tell the Chair about that?

CHAIRPERSON: Before you do so Mr Bester what did you understand Ms Maharaj's statement that among the executives there was a lot of toxicity?

MR JOHANN ANDRIES BESTER: From Ms Maharaj it was not surprising having

worked for her she is a very – I learnt to know her as a boss that was very particular or
 – I can't think of the right word here, it will come to me, but very principled and that she
 – I mean it's, I'm not sure how long her career was at Eskom but it was almost her first
 – she had worked at one other employer very shortly and she – she was – she doesn't
 have children and she dedicated almost every waking hour she had to Eskom, I haven't
 encountered people as dedicated and she lived and breathed and – Eskom almost day
 and night and she expected the rest of us to as well. She was very – she was a very
 tough lady to work for and we respected her for that. So she also – because of that, I
 suspect over the years had made many enemies as well because she wouldn't turn a
 10 blind eye to wrong doing.

CHAIRPERSON: So what did she mean was happening at executive level?

MR JOHANN ANDRIES BESTER: She didn't elaborate on that but I know that she
 had made enemies on her way up to that senior position.

CHAIRPERSON: Oh you say you know that she had made enemies at that level
 herself because of how principled she was?

MR JOHANN ANDRIES BESTER: Correct.

CHAIRPERSON: Okay, did you have your own reading of the situation at executive
 level and are you able to tell me what it was, in your own assessment, anything
 connected with what she was trying to convey to you?

20 **MR JOHANN ANDRIES BESTER:** There were many matters and as I reflect, maybe
 later even at the time one of them was specifically the coal transporters issue and I
 know that one of the – and I had personal discussions with Mrs Maharaj and I think
 there were – I'm not exactly – I think it was maybe that we were trying to push through
 a cost saving of around 15% on the rates that we were being charged by the – under
 that transport contract and I think I've subsequently read that maybe the rate that we

were trying to – the saving that we were trying to push through was between thirteen and 15% and I had long discussions with Mrs Maharaj on that and I actually, on a personal level encouraged her to rather make it 5% per annum over the next three years, not to push for 15% but Mrs Maharaj was very much driven and I think that's one good example of where she didn't see eye to eye with the rest of the executive and I think I've seen it on another record and I'm led to believe that's what was her own doing eventually. So it was issues like that where she was very principled and very determined to achieve certain things and she was eventually called in that she was – I think she was – and it appears and I don't have this first hand that the Board had
10 actually told her to back down of that demand and she refused to and she was eventually asked to leave because of that.

CHAIRPERSON: Would it be quite close to a correct description of what she may have meant to say – or what you understood the position to be at executive level, which she was trying to describe to you, to say there were tensions at executive level maybe between those who wanted the right things to be done and those who might have wanted the wrong things to be done?

MR JOHANN ANDRIES BESTER: Chair that is my impression that, that was the kind of pressure that she was under, that she didn't get the support from her, maybe direct superiors at the time.

20 **CHAIRPERSON:** Okay thank you.

ADV KATE HOFMEYR: Chair just to relate Mr Bester's evidence at this point to the evidence that we've heard from Mr Nagar, Mr Nagar also made reference in the course of his evidence to things being ugly at Eskom and it was in that context that he referred specifically to Ms Maharaj and the stand that she took in relation to the transporters. So this is a further confirmation of that element within Eskom.

CHAIRPERSON: Thank you.

ADV KATE HOFMEYR: We were dealing with what Suzanne Daniels said to you after this meeting in the auditorium and you record that at the second half of the paragraph 21 on page 10, can you please tell the Chair about what Ms Suzanne Daniels told you was the source of the unhappiness that was expressed at that meeting?

MR JOHANN ANDRIES BESTER: She couldn't – Chair she, Ms Suzanne Daniels, I don't think she could be specific because – but she operated more closely to executive and she said that file she had – that she had been dealing with, that the Chairman may have been concerned about, led her to believe that, that is actually what he was
10 speaking to. I, at the time, I had a good rapport with Ms Daniels and I expect that she would have given me that information from her own good.

ADV KATE HOFMEYR: And if we go higher on that page to paragraph 20 you talk in the middle of that paragraph about Mr Mbeweni and the regularity of his engagements with you, particularly over the course of late 2014 and early 2015 in relation to the Brakfontein contract. Can you please explain to the Chair what the nature of that engagement was?

MR JOHANN ANDRIES BESTER: See Chair I'm not sure if you're referring to how I set it out or my specific engagement with Mr Mbeweni.

ADV KATE HOFMEYR: No what I'm talking about is – let's go to the sentence in the
20 middle of paragraph 20 you say there:

“From time to time Mr Mbeweni would call me, even on the weekend to check on progress with sampling and site visits. Although I knew who was probably behind the calls I told him that he shouldn't entertain suppliers and that he should let the team deal with matters”.

What does that relate to?

MR JOHANN ANDRIES BESTER: Yes I'd been aware that – I mean obviously (indistinct) only recently started in that position and so I think our relationship was a little bit different at the start and I was – I knew Mr Mbeweni wasn't all that well health wise and I think I was really trying to give him some advice at that stage, that he shouldn't – that these kind of instructions shouldn't come from the top, he should let the team and those responsible for their work do the work without being pressurised – without feeling the pressure. It's very important in the environment that we were working in because Eskom is very hierarchical and I realised that the day I was made acting Division Executive I got a lot more out of people than I did previously. There was

10 a lot of respect for that hierarchical culture and if instructions come from the top people do their best to try and deliver on that but I did warn him, maybe I wasn't thinking about that as much at the time but in hindsight I did warn him that he needed to let the process run itself out and he wanted to follow up on sampling. I myself didn't even interact with the technical team except the head of the technical team so I wouldn't even have had the phone numbers of the people to phone, to sort that out and I said he must let the people responsible to do that kind of work, to do it appropriately and when it was scheduled because I actually did make – after the phone call I did make a couple of enquiries and my direct reporter who was responsible for that specific contract, did tell me that it was actually the supplier, the sample wasn't ready on the Friday when it

20 should have been. You know that wastes his time and it wastes my time but it also puts pressure on people maybe to cut corners and maybe to do things under pressure and I preferred – that's not the way I managed.

ADV KATE HOFMEYR: Thank you, so can I understand from your description of that interaction that your sense from Mr Mbeweni was that people above him in the hierarchy were putting pressure on him to follow up about the Brakfontein contract?

MR JOHANN ANDRIES BESTER: Correct I'm not sure if it was that specific incident – instance I was referring to but there was another mine that he also got pressure on which is unrelated.

ADV KATE HOFMEYR: Which one was that?

MR JOHANN ANDRIES BESTER: I mean off the top of my head I know it was a supplier from Wescoal and he – I think one of the owners is well connected and made a few phone calls and the pressure came from the top and I really just wanted Mr Mbeweni to be aware that he should try and not to tolerate that.

ADV KATE HOFMEYR: Thank you, I'd now like to get into the detail of the actual
10 negotiations between Tegeta and Eskom and this will track from the latter part of 2014 through to the actual conclusion of the agreement in March 2015. As I have it, the first written record of an offer from Tegeta, you'll find at page 91 of the file in front of you, it's an annexure to your affidavit and it's a letter of the 23rd of September 2014. Just in terms of the persons identified on this letter, it is addressed to a Ms Ayanda Nteta, who is she?

MR JOHANN ANDRIES BESTER: So she was one of my direct reports so I had about 24/25 people working for me and I split them into three different teams. So there was a senior manager who was responsible for each one of those teams. Ms Ayanda Netyanga, I had specifically tasked with assisting with the transformation, she had a lot
20 of experience previously in some of her previous work with transformation contracting. So I had a team, specifically looking at our long-term contracts and I had another gentleman looking after some of our existing medium-term contracts and then I specifically wanted Ms Netyanga (indistinct) to specifically focus on driving our emerging black owners' strategy. So this would have fallen under that, so that is why she was dealing with this one specifically.

ADV KATE HOFMEYR: And just to be clear on the names Ms Ayanda Netyanga is the same person as Ms Ayanda Nteta whose name we will see in the course of the rest of the documents we go through is that correct?

MR JOHANN ANDRIES BESTER: Correct, during her employ I think she went back to her maiden name.

ADV KATE HOFMEYR: Thank you. So if we look at this offer that is reflected on the letter dated the 23rd of September 2014, I'd just like to highlight a few aspects of it, was this the first written offer you received from Tegeta in relation to Brakfontein?

MR JOHANN ANDRIES BESTER: It's the only one that I have reference to but as I
10 said there were previous offers from different companies. I wouldn't have dealt or filed each of these myself, there may have been others. I am aware, and as I mentioned in my affidavit that I think the first price that was offered was R17.50, whether that was on email or whether that was verbal I don't recollect.

ADV KATE HOFMEYR: Okay because this letter refers to an offer price of R17.00 per ...(intervention).

MR JOHANN ANDRIES BESTER: Correct.

ADV KATE HOFMEYR: I think the MJ is an error in line 4 of that letter.

MR JOHANN ANDRIES BESTER: Correct.

ADV KATE HOFMEYR: And just to be clear what seam were they offering?

20 **MR JOHANN ANDRIES BESTER:** Yes, that is – it's very good to point that out at this stage, they were offering the 4 lower seam. I would have to refer to some of the – to the technical reports but it may have been that the geology – the geologist or one of the technical members had already probably engaged with them and they probably knew that it was only the 4 lower seam that was suitable.

ADV KATE HOFMEYR: Right, so the offer begins with the lower seam which we've

understood from previous evidence is of a higher quality than the upper seam and there was a particular quantity offered, can you take us through that?

MR JOHANN ANDRIES BESTER: Yes, interestingly – I'm just looking at that now it doesn't say over what period though.

ADV KATE HOFMEYR: I'm aware of that.

MR JOHANN ANDRIES BESTER: So it would probably have – one would think, judging by the volume that it would be referring to a monthly volume.

ADV KATE HOFMEYR: Yes.

MR JOHANN ANDRIES BESTER: Anything smaller than that, we would probably
10 not engaged if it was an annual quantity.

ADV KATE HOFMEYR: And the monthly minimum as a habit is 40 000 million tons and the monthly maximum was 70 000 million tons, is that correct?

MR JOHANN ANDRIES BESTER: No sorry not – in this instance I would think that they were referring to a metric ton.

ADV KATE HOFMEYR: Sorry, of course yes, a million would have taken us into serious coal delivery.

MR JOHANN ANDRIES BESTER: Then this contract would have had to go to Board.

ADV KATE HOFMEYR: Yes indeed and then the rate was R17.00 is that correct?

MR JOHANN ANDRIES BESTER: Correct and as you correctly point – that should
20 have been in reference to R17.00 per gigajoule.

CHAIRPERSON: I'm sorry Ms Hofmeyr are you still at page 91?

ADV KATE HOFMEYR: Yes indeed.

CHAIRPERSON: I'm looking for R17.00, I can't see it on my one.

ADV KATE HOFMEYR: It's right at the bottom of the table under point 4, you will see there, rate offered, it really is an error it should be per GJ, gigajoule and that is the

R17.00.

CHAIRPERSON: Oh so that M should be a G?

ADV KATE HOFMEYR: Correct.

CHAIRPERSON: Okay thank you.

ADV KATE HOFMEYR: Then just to orientate us, this is September 2014, you've already indicated in your evidence that on the 22nd of December 2014, Tegeta receives a water use license for the Brakfontein colliery and then you refer, in your statement to a meeting that was held on the 30th of January, I'd like to take you there. That is at paragraph 26 of your statement which you'll find at page 12.

10 **MR JOHANN ANDRIES BESTER**: Paragraph 27, yes, I have that in front of me.

ADV KATE HOFMEYR: Indeed, and let's – with reference to the actual note that was prepared after that meeting, just go to it that you'll find at page 93, it's the next annexure to the letter we were looking at.

MR JOHANN ANDRIES BESTER: Yes I have that.

ADV KATE HOFMEYR: Now can you please take the Chair through what happened at that meeting, what position you took in relation to the offer that had been received and where the discussions ultimately ended up?

MR JOHANN ANDRIES BESTER: May I – Chair may I first give some context. It is unusual for me to have attended this meeting without seemingly to overstate my role
20 there. I had teams who negotiated these in detail and when they did get stuck and obviously when my direct reports required my assistance they would ask me to give that. In this case I was instructed to intervene by Mr Vusi Mbeweni and then – and the other interesting thing is, our negotiations would happen within the Primary Energy Division part of the building. If you're familiar with Megawatt Park you'll know that it is quite a big site Primary Energy had a separate wing, it was really I would – to an extent

to protect confidential – confidentiality, so it wasn't a normal walk through. These negotiations happened at the Executive Suite level that was the two things that were unusual here. I was instructed by my boss, he shouldn't have even have known that we had problems there and the negotiations, it's abnormal for – at my level to have discussions in the Executive Suite. So I was asked to intervene, so I knew this meeting was coming up and I knew the stakes were quite high, so I didn't even discuss my strategy I played – I played a few scenarios over in my mind – sorry I'm not referring to this, I'm trying to recollect as it happened.

I knew, as I mentioned earlier, I knew the stakes were quite high and Mr
 10 Mbeweni had actually called me in, and I'm not sure if I mentioned this somewhere but I do mention the R15.00 a gigajoule. He had told me, don't agree to anything higher than R15.00 a gigajoule, which is interesting he did – to his credit he said, don't agree to anything higher than that. I didn't really respond to that and I think it was later on in that day or the next day I met with him and I had run a few scenarios over in my head without engaging with my direct report or anybody else on this. I figured I would put a price to them which myself, as the – as a General Manager of fuel sourcing could be comfortable with in terms of the other suppliers we had going to Majuba Power Station, by that time I had already decided that if we were going to – if we were going to buy it for anywhere in Eskom, the best option for us would be to take it to Majuba. So I
 20 walked in there, I made some brief introductions and I discussed the safety procedure and then I just jumped into it. I didn't really – I really wasn't interested in pleasantries and I said to them – I may have even used the words, we all know what the stakes are here, I'm prepared to offer you R12.50 and I showed him a graph and I showed him that if we were to offer you R17.00 a gigajoule it would – and I think I may have used the words, it's going to stand out like a sore thumb and we all know – and it's not all

minuted because I had to be careful not to minute specifics like that, we all know it – obviously controlled the minutes – that it's going to stand out like a sore thumb and we both know that this contract will be scrutinized and that people will ask questions about it, so I said I'm prepared to ask you R12.50.

It reflects in the minutes that they walked out, that they didn't even respond they got up and they walked out. I must say I was very – I wasn't surprised but I was very nervous, I thought I had maybe overplayed my hand and I went back to my office. About half an hour later Ayanda came to my office and she said there had been a lot of unhappiness, a lot of people had been screaming at each other at the Executive Suite, 10 by that time – I'm not sure where in my affidavit I mention that I was already uncomfortable by the fact that Ms Nteta or Netyanga at this stage was being called to Mr Koko's office and Mr Mbeweni's office. I know that she was called, she used to tell me that she's been called to the Executive Suite again. She was never specific and I never pushed her and I think that I say that in my affidavit, I can't say for a fact – it may even have been the Chairman's office I wouldn't know, I never asked her for specifics. That she came to call me and I said – and she told me that they were prepared to make a counter-offer. I went back and they countered at R13.50, I had expected and had run that, it was at the top end but if it was to be taken on rail it would not be – it would almost match the most expensive contract. It wouldn't quite be the most expensive – I 20 was clever enough not to show them the delivered cost. If I had shown them the delivered cost they wouldn't have stood out as far so I only showed them the actual cost for the coal. They didn't actually even – I mean normally when you engage with supplier, they have every single iteration and answer ready for you. I also suspect that maybe the team that engaged with me hadn't prepared themselves very well. So when they agreed to that, they never specified that it would be – later on they tried to claw

back some of the positions by referring to 4 upper and 4 lower it may come out in some of the later correspondence but they agreed to that, they said R13.50 and I wasn't going to assist...(intervention).

CHAIRPERSON: But didn't they counter offer you to agree to it?

MR JOHANN ANDRIES BESTER: I beg your pardon, they did counter offer yes...(intervention).

CHAIRPERSON: Yes you were the one who was supposed to say whether you agreed or didn't agree to that isn't it?

MR JOHANN ANDRIES BESTER: I agreed to that yes but what we may have been
10 remiss of and it's maybe them not having experience or maybe having thought through it, when they replied and accepted the R13.50 – sorry when they offered the R13.50 they never made it specific that it was for the 4 upper and the 4 lower. So if you recall that the offer letter they had made was specifically a high price for the 4 lower which would expected, you would want a higher price for the better quality seam. If you were to blend the two then you may – then I would expect that the price would be lower. I offered them a lower price but in my mind it was for the 4 lower seam. They – when they replied and they responded with the R13.50 they were not specific and the assumption was that it was for the 4 lower seam that they had responded. I don't think I minuted that...(intervention).

20 **ADV KATE HOFMEYR:** No, you did and I don't think it's entirely accurate, if you go to page 94 the third bullet from the bottom in the technical discussion say that:

“Tegeta are proposing to supply 65 kilo tons a month of the blended product seam 4 upper and seam 4 lower”,

So it seems at that meeting that a blended product was already on the table and that if you go to the second bullet on that page what I understand to be reflected

there is that RN who is Rivinda Narr as you see the attendees on the front page who was the Tegeta representative came back with the price offer of R13.50 per gigajoule for a five year contract of approximately 65 kilo tons per month from the Brakfontein resource, is that accurate?

MR JOHANN ANDRIES BESTER: Yes, and you're correct yes, the latter part of the discussion does refer to a blend so that may have been the understanding then that we left with.

ADV KATE HOFMEYR: Thank you and the other thing that is fairly important on this record of the meeting is the second last bullet. That bullet records that the proposed
10 start date would be 1st of April 2015 subject to a successful combustion test, why was that included?

MR JOHANN ANDRIES BESTER: It would be, specifically since it follows on the next one, I would imagine it's because – I think in August 2014 there had been a burn test already but there had not been a burn test that successfully accepted a blend of the two seams.

ADV KATE HOFMEYR: Correct, so we're now in – at the end of January 2015, you don't yet have a successful combustion test for this source but there's a meeting between Tegeta and Eskom at which they start at R17.00, you counter at R12.50, they walk out, there's a screaming match, they return and they offer you R13.50 and you
20 accept that, is that a fair summary?

MR JOHANN ANDRIES BESTER: Correct.

ADV KATE HOFMEYR: And you accept it for a five year contract is that correct?

MR JOHANN ANDRIES BESTER: Well that was all that was offered at the time, is my understanding.

ADV KATE HOFMEYR: Right and it is in relation to a blended product that had not yet

been identified as suitable so that had to be subject to a combustion test, is that correct?

MR JOHANN ANDRIES BESTER: Correct and then there was – I’m not sure if it refers to that, there was some discussion on Brakfontein Extension already that came in or additional volumes.

ADV KATE HOFMEYR: Yes if you go to the third bullet on that page 94, what is also recorded there is that Eskom agreed to accept the price, provided that Eskom has the right – the first right of refusal for additional coal resources at Brakfontein Extension, furthermore the coal must meet the technical and combustion requirements of Majuba

10 Power Station, is that consistent with your recollection?

MR JOHANN ANDRIES BESTER: Correct.

ADV KATE HOFMEYR: Thank you. This was followed by another letter from Tegeta and for that purpose we need to go to file 4, you refer to this letter in your affidavit but did not attach it and so we managed to find a copy of it. If you go in file 4 to page 786.2 you’ll find that letter.

CHARIPERSON: What’s the page again?

ADV KATE HOFMEYR: 786.2.

CHAIRPERSON: 786.2?

ADV KATE HOFMEYR: Indeed Chair.

20 **CHAIRPERSON:** Thank you.

ADV KATE HOFMEYR: So I’d like to highlight some aspect of this letter, this is a letter written by Tegeta to yourself, is that correct?

MR JOHANN ANDRIES BESTER: Correct.

ADV KATE HOFMEYR: And it’s dated the 3rd of February which is a few days after the meeting on the 30th of January. It refers to a letter of the 30th of January, I can’t say

that we've seen that but you've confirmed that those minutes reflect, accurately what was discussed at that meeting, is that correct?

MR JOHANN ANDRIES BESTER: Yes and it is likely that I would have captured it in a letter.

ADV KATE HOFMEYR: Some...

MR JOHANN ANDRIES BESTER: Ja sorry Chair. Ja I think what I tried – what I – it is a pity I do not have the letter but I recorded specifically it dealt with that – with the volume and the price and then that item but it reflects accurately in the minutes that I said that we wanted the right to be able to call for – the first right of refusal to call for
10 coal from Brakfontein not to have to take it.

ADV KATE HOFMEYR: Right so let us see what happens on the 3 February. The 3 February the offer seems to be increasing in terms of volume at least from a point in the contract. So if you see the first bullet point so I understand at what Tegeta is saying there is they are happy to supply 65 000 tonnes per month from 1 April 2015 but they would like to supply up to 100 000 tonnes per month from the 1 October 2015 because they record that the Brakfontein Colliery would be operational by then. Do you see that?

MR JOHANN ANDRIES BESTER: I do.

CHAIRPERSON: Well it does not say as the extension of Brakfontein. Colliery would
20 be operational by then. I think you said Brakfontein – Brakfontein Colliery but I am under the impression here this is where they mean the extension?

ADV KATE HOFMEYR: Indeed. Apologies Chair if I read it...

CHAIRPERSON: Ja.

ADV KATE HOFMEYR: Incorrectly what they clearly are seeking to convey and correct me if I am wrong Mr Bester is that from 1 October the extension of the Brakfontein

Colliery would be operational and so they want to supply increasing volumes, is that correct?

MR JOHANN ANDRIES BESTER: Yes.

ADV KATE HOFMEYR: And they would keep it at the same price of R13,50, is that accurate?

MR JOHANN ANDRIES BESTER: Correct.

ADV KATE HOFMEYR: Let us deal with the second bullet point in relation to black ownership. What was the issue around black ownership?

MR JOHANN ANDRIES BESTER: I mean I can speak in general about the black ownership targets but I am trying to pick up a specific issue I am not sure what they actually meant by we seek favourable consideration for a ten year supply agreement as a reserve support the supply of volumes required for this period. I am not sure what they actually were asking for there. I think...

ADV KATE HOFMEYR: Well hang on we have not got to that yet.

MR JOHANN ANDRIES BESTER: Okay.

ADV KATE HOFMEYR: The second bullet on the page is dealing with black ownership. It says:

“In our numerous interactions we have requested Eskom to allow us to increase our black ownership to 50% plus 1 share in a phased manner over a period of three years.”

Why were they dealing with this aspect in the letter?

MR JOHANN ANDRIES BESTER: We – I think what – the minutes are either this one or another set of minutes would have referred to the fact that we had a target to transform Eskom’s coal procurement. We had a target to try and achieve I think it was either 63 or 65% of our coal procurement to coming from black owned suppliers by

2018. So it is not – so this would have – so the team – Ms Ntete and her team would have conveyed that – that desire or requirement to them.

ADV KATE HOFMEYR: And then the third paragraph is the one that you had gone to where they say:

“Due to our commitment to the increased ownership coupled with Eskom’s and the DPE’s commitment to support the sustainable growth of majority owned junior miners we seek your favourable consideration for a ten year supply agreement as our reserves support the supplier volumes required for this period.”

10 What did you understand that to mean?

MR JOHANN ANDRIES BESTER: As I said reading – even reading it now I do not see any specific concession required there. They were offering additional coal and they were saying we will – we will endeavour to support your – your black ownership targets etcetera so look at this favourably. I mean it is not – it would not surprise me that a supplier would write along those veins.

ADV KATE HOFMEYR: But just in reference to the meeting you had had a few days previous. A few days previous they were talking about five years, speaking about one would assume the same source and a matter of days later they talking about ten years, was that not something you wanted to interrogate further?

20 **MR JOHANN ANDRIES BESTER**: It is not surprising though but it – one would – one would probably want to know why all of a sudden they want to move from five to ten years but there is – ja I cannot say I specifically applied my mind to why they would want to go from five years to ten years. It stands to reason that they would want to have a long term contract and it makes sense if you have the reserves to rather offer it for ten years than five years. So I mean in hindsight you may say yes they got the foot

in the door and they wanted to open the door properly but it is our role to buy coal and if there is a requirement there should not really be an issue with that.

ADV KATE HOFMEYR: Mr Bester your response to this was on the 12 February.

MR JOHANN ANDRIES BESTER: Right.

ADV KATE HOFMEYR: If you go back to File 3 at page 98 you will find it there.

CHAIRPERSON: What page at?

ADV KATE HOFMEYR: 98.

CHAIRPERSON: File 3 98.

ADV KATE HOFMEYR: 98 Chair. I am interested in the duration of the contract
10 because on the 30 January they are offering five years, on the 3 February they offering
ten years but your response on the 12 February seems to and again you must correct
me if my reading of this letter is inaccurate but it seems to me to want to keep Eskom
committed to the five years but not yet commit Eskom to the second five years and
rather have an option in relation to the second five years. And I take that from the
second paragraph on this page because what is recorded there is that Eskom has
agreed to take 65 000 tonnes from Brakfontein Colliery further Tegeta will offer to
Eskom at the same commercial terms as set out herein from their Brakfontein
Extension Colliery and Eskom has the option to enter into an offtake agreement for the
additional coal from Brakfontein Extension Colliery. Is that a fair reading of what you
20 were conveying?

MR JOHANN ANDRIES BESTER: Yes I – it maybe from my intention initially when we
met with them on the 30th that they – that they had mentioned to us that they had
additional coal and I wanted that to be at Eskom's election not at their behest or
demand.

ADV KATE HOFMEYR: Right and that is confirmed over the page at page 99 because

under point 5 on page 99 where you refer to the duration of the contract you say:

“An initial five year duration with an option to extend for an additional five years for a total duration up to ten years for a maximum tonnage of 12 million tonnes.”

Is that correct?

MR JOHANN ANDRIES BESTER: That is correct.

ADV KATE HOFMEYR: You also added a number of conditions to this letter. Well before we do that if we could just go back to page 98. You will have seen in the evidence this morning with Mr Opperman I placed some reference on the two asterisks
10 that found their way into the coal supply agreement under the coal quality specifications. As I have it it actually makes its first appearance in this letter of yours on the 12 February because under the coal specification table that you have reflected there you have also included that double asterisk. What I would like to ask you is your comment on the debate that Mr Opperman had with the Chair about the thinking behind that asterisk which talks about full combustion tests will be conducted on all proposed coal prior to delivery and acceptance by Eskom. Did you follow that debate between the Chair and Mr Opperman?

MR JOHANN ANDRIES BESTER: I did but it might help maybe just repeating my understanding. So it would be – it would not be the intention of this clause to do a burn
20 test on every stock pile that was created by the supplier. It would in this context it would be fair to assume that that refers or that the intention here was to refer to any coal resource being offered to Eskom to first having to pass the burn test whether that be a blend or whether that be from Brakfontein Extension this was to cover Eskom that it was in fact compliant with the proper burn test being done.

CHAIRPERSON: So it – so it was intended for coal being proposed that came from a

different mine than the one from which the coal that was already being supplied to Eskom was coming from? In other words...

MR JOHANN ANDRIES BESTER: Yes.

CHAIRPERSON: It was intended to apply to coal coming from a mining operation that has had not yet supplied Eskom with coal?

MR JOHANN ANDRIES BESTER: Correct. So these letters would not only be drafted by myself and if I reflect on this it looks like it is exactly a similar version I am sure Ms Hofmeyr can assist me with that but it seems a very similar or the same version as what was finally included in the original coal supply agreement. So in drafting of these
10 letters the – we would have been assisted by legal and but legal would not have drafted that technical paragraph and legal may not have necessarily come up with all that wording so hence the mistake may have crept in. We may not have applied our minds to that properly and exactly how that read but our intention I am clear that that was our intention. So it may have been drafted by someone in the technical team.

ADV KATE HOFMEYR: Well Mr Bester can I suggest to you that that is confirmed by what you record on the next page, page 99 because under the conditions you will see at paragraph 6 you set out in effect in summary of what I understand your evidence to be today. At B you say:

20 “The coal proposed to be supplied from namely Brakfontein and Brakfontein Colliery Extension must comply with Eskom’s technical requirements and Eskom’s coal supply requirements including but not limited to Eskom’s full combustion test for the avoidance of any doubt. If these requirements do not render compliance for supply to Eskom’s Majuba Power Station Eskom shall outright reject the proposal and no coal supply agreement

shall be entered into.”

That is quite a position to be taking up in relation to this coal supply. Why did you think this condition was necessary?

MR JOHANN ANDRIES BESTER: At the time there was not yet a full combustion test for the blend and it is critical. I think it is quite clear from some of the earlier technical reports that – and even from our – my own knowledge and other people may support this is that seam 4 lower is generally acceptable across Mpumalanga where the qualities go high there are suppliers that do blend in the seam upper whether Eskom always agrees to that is another matter. Sometimes Eskom is not knowledgeable about
10 that but here specifically they wanted to contract for seam upper and for seam 4 lower so it was very important that we were very clear into what the blend should be. Very difficult to police other than proper stock pile certification as Dan and Mashigo and Mr Opperman indicated. But here because they specifically want – they were pushing very hard to supply the 4 upper and the 4 lower seam and a blend of that out technical guy, technical team would not sign off on it. They would not be expected to sign off on it. And they would not take it to the power station manager to sign off on it unless they were satisfied that that coal met Eskom’s requirements. And I needed to protect against that.

ADV KATE HOFMEYR: Thank you. Your letter was then forwarded to Tegeta. You
20 made – you were not copied on this set of emails but I would like to draw your attention to them. Chair these are emails that have previously been disclosed through the Gupta leaks and we have copies of them from the hard drive. There will be other emails that have not yet previously been disclosed but this is one that has. If you go in File 4 to page 789. You will see that Ms Ntshanga forwarded this letter of yours to Mr Nath and Mr Moodley are and copied you and I take that from the bottom of page 789. Mr Bester

do you have that?

MR JOHANN ANDRIES BESTER: Yes I am not very – I have read it before once somewhere yes again it surprises me this Eskom shall – the grammar is wrong but I guess Eskom shall have the option to enter into an offtake agreement. And it is clear that he was not happy.

ADV KATE HOFMEYR: We will go to that in a moment.

MR JOHANN ANDRIES BESTER: Sorry.

ADV KATE HOFMEYR: Let us just orientate ourselves in the email if we may. The email that appears at the bottom of page 789 who is that from?

10 **MR JOHANN ANDRIES BESTER:** Are you asking me this – it appears to be from Ravindra.

ADV KATE HOFMEYR: No below that is another email that begins original message sort of a three quarters of the way down the page.

MR JOHANN ANDRIES BESTER: Yes so three quarters down Ms Ayanda Ntshanga sends an email to

ADV KATE HOFMEYR: Mr Nath.

MR JOHANN ANDRIES BESTER: Oh yes it is underneath – to Ravindra Nath yes he would have – I think he was the CEO or General Manager for Tegeta.

ADV KATE HOFMEYR: And as the letter reads, as the email reads:

20 “Good day please find attached letter for your consideration.
Should you wish to discuss or collect the original please advise
accordingly.”

And I can confirm for you what was attached to that email although we did not duplicate it in the file is your letter.

MR JOHANN ANDRIES BESTER: Right.

ADV KATE HOFMEYR: Of the 12 February.

MR JOHANN ANDRIES BESTER: And I see I have been copied though.

ADV KATE HOFMEYR: And you were copied on the sending out of the letter.

MR JOHANN ANDRIES BESTER: Yes.

ADV KATE HOFMEYR: But you were not copied on what is then reflected in the middle of that page which is Mr Nath's email to Mr Essa copying Mr Tony Gupta which occurred at 26 minutes past 3 on that afternoon of the 12 February and will you please read into the record what Mr Nath says to Mr Gupta in that email.

MR JOHANN ANDRIES BESTER:

10 "Dear Tony G the letter from Eskom enclosed. I am not very
happy with the wording. Eskom shall and I assume he meant
have an option to enter into an offtake agreement for the
additional coal. Further option to extend for further five years."

And there quotes text that I used it is in inverted commas:

"Option to extend. This shows that there is no commitment on
the part of Eskom. Regards R Nath."

ADV KATE HOFMEYR: Right and that is then followed with an email later that day
which appears at the top of the page between Mr Nath and Mr Tony Gupta and as I
read that Mr Nath is making recommendations for a response to the letter, is that as
20 you understand that email?

MR JOHANN ANDRIES BESTER: Page 791?

ADV KATE HOFMEYR: Well 789 still has a later email at the very top of it which...

MR JOHANN ANDRIES BESTER: Yes there is a response.

ADV KATE HOFMEYR: Where certain recommendations are being made for a
response to your letter of the 12 February. And where that all ends up because it is

difficult navigate through these emails so to be of assistance if you go to 793. You will see what Mr Nath sends back to Ms Ntshanga after an engagement between him and Mr Gupta about how they should be responding to this lack of commitment on the part of Eskom because as he read your letter you were not willing to commit to ten years you were only willing to commit to an option for the second five years. You will see Mr Nath's response to Ms Mtshanga at the bottom of page 793. Can you please record there what is said to Ms Mtshanga. You can read the text from "kindly recollect our discussions."

MR JOHANN ANDRIES BESTER: I am referring to kindly refer to your letter?

10 **ADV KATE HOFMEYR:** Yes that is fine.

MR JOHANN ANDRIES BESTER:

"Kindly refer to your letter reference 722983 dated 12 February.

Kindly recollect our discussions in which I mentioned that we want a ten years contract to satisfy our funders as the loan period is going to be more than seven years. Further I explained you that in the initial five years or so we would be supplying 65 000 tonnes from Brakfontein Colliery and the remaining coal will come from Brakfontein Extension Colliery and afterwards once the resources of Brakfontein Colliery have been depleted the whole 100 000 would be supplied from Brakfontein Extension Colliery. If we have two different contracts then this purpose would not be solved. In the light of these facts all for the sustainability of the mines we request that you kindly consider the following changes favourably."

20

ADV KATE HOFMEYR: Thank you and then we do not need to go into the drafting

suggestions that are made. The upshot is that they wanted a ten year commitment from Eskom for proposed volumes of 65 000 tonnes initially to be increased to 100 000 tonnes from October 2015. Mr Bester is that what was eventually contracted for?

MR JOHANN ANDRIES BESTER: I recollect that that we did contract for 100 000 tonnes from later on in the contract it was probably October and the price was the same and that most of that would probably come from Brakfontein Extension.

ADV KATE HOFMEYR: And you did not retain the option for the five years you committed to the ten year agreement?

MR JOHANN ANDRIES BESTER: Correct the CSA was signed for ten years yes.

10 **ADV KATE HOFMEYR:** Why did you make that change?

MR JOHANN ANDRIES BESTER: It probably seemed reasonable to me at the time but again we I think the contract was clear that the Brakfontein Extension still needed to undergo a proper burn test.

ADV KATE HOFMEYR: Well let us just probe that a bit further. The reason offered for wanting the ten years was that Tegeta needed to satisfy its funders. Why would that have been a concern to Eskom?

MR JOHANN ANDRIES BESTER: The – for Tegeta but not having engaged with them I would ass – assuming that – that they were engaging with funders it would make sense to me that it would be more sustainable and more justifiable for a lender to – to
20 lend you money for a longer period. It would make more sense.

ADV KATE HOFMEYR: But did you interrogate the issue?

MR JOHANN ANDRIES BESTER: No.

ADV KATE HOFMEYR: Why not?

MR JOHANN ANDRIES BESTER: Because it seem – probably seemed reasonable at the time.

ADV KATE HOFMEYR: I am not sure why that would be so because a day earlier you had resolved to only commit Eskom to an option for the second five years. So what happened between the 12th and the 13th that made a commitment for ten years more reasonable or appropriate?

MR JOHANN ANDRIES BESTER: So because they had not specifically insisted on ten years I still preferred that to be an option. I mean it is always better to have an option than have a – than have a commitment.

ADV KATE HOFMEYR: Indeed but then why contract for the commitment?

MR JOHANN ANDRIES BESTER: Because if – if it made sense and there was a
10 requirement then there should not be an issue with committing for a longer term contract.

CHAIRPERSON: Well I think Mr Hofmeyr is trying to understand the change of attitude on your part to the request for the contract to be for ten years as opposed to five years. Initially your attitude as I understand the position was that it should be for five years with an option if I understand correctly. But later on you agreed to ten years and she says the reason why they wanted the contract to be for ten years they told you why they wanted to satisfy their funders. But from Eskom's point of view why was it better to have a contract of five years the one day and then later it changed to be better to have a contract for ten years.

20 **MR JOHANN ANDRIES BESTER:** When they initially offered the coal they offered it for five years Chair so when they requested that they wanted to supply us additional coal the best negotiating position for me was to say yes that is fine if we do need it we will take it. But yes they clearly changed it and they wanted the contract for ten years but in my mind now I cannot reflect specifically the conversation I had but even sitting here today in hindsight there should not be any reason if the coal complies to the

specification and if Eskom has the requirement – so I cannot recall if there was a – if there were specific – what the specific conversation was. I do recall now that I have read it again that there may have been a discussion around them being securing funding. It did not seem – it still does not seem unreasonable to me.

CHAIRPERSON: Well in terms of Eskom's needs for coal as at that time and with whatever projections into the future Eskom may have made was it better from that point of view to have a long term – a longer term contract as long as the supplier was a credible and acceptable supplier?

MR JOHANN ANDRIES BESTER: Chair correct yes. But if I was able to keep the
10 position I had earlier and they had not picked up on it clearly if Eskom – if it is at Eskom's election they would probably still have been the best option for us to be able to call on the coal when we needed it and not to – then it is still an option. If we want the coal it is there and we can require them to supply it.

CHAIRPERSON: So it is better to have an option rather than an obligation?

MR JOHANN ANDRIES BESTER: It would always – it just stands to reason that it would always be better to have an option.

CHAIRPERSON: Because I think that is where Ms Hofmeyr is – that is the point on which she is on to say it makes sense if you say for now we will contract for five years but we will include an option so that it will be up to us to extend by another five years.
20 So in other words when the time comes you as Eskom can look at your requirements and look at the whole situation and if at that time it is in the best interest of Eskom to extend then you have the option and the right to extend. But if at that time you look at the whole situation and you conclude that it would not be in the best interest of Eskom to extend the period with that supplier then you decide not to extend. But if you – if you commit yourself as Eskom to ten years in other words you do not go for an option to

extend you have already committed yourself for ten years and logically one thinks it is better to have an option rather than to have a commitment as you said earlier on but you seem to think well maybe there was not much wrong with having a commitment. Maybe from the point of view of the needs of Eskom maybe the distinction between having an option and having a commitment in that context maybe was not too big?

MR JOHANN ANDRIES BESTER: Chair maybe if I can put it a different way. I do not think it is necessarily if there is a requirement for Majuba and we can show that there is a requirement I think at the time there was still maybe 400 000 tonnes of coal, there was the shortfall for the remaining period of that year. We had identified another
10 requirement for additional amount of over a million tonnes of coal for the subsequent year and that requirement increased – increased further. So it did correspond with the supplier plan that we got from management. So in itself if you were comfortable with the supplier, if you happy with the supplier and the coal and the price and the quality and the supplier could meet that in itself there is nothing wrong with it but as a negotiator – as an experienced negotiator yes if I could – if I could negotiate a position where Eskom has a right at its own election yes that is – that is a better position to have but that is a negotiated position. So even though these are letters and we not negotiating face to face it is a negotiated position and in itself again even as I sit here today in hindsight there would not have been any good reason not to – not to contract
20 for a longer period. And again that is probably why we made absolutely sure – I mean if I recall I do not think the – the additional coal had been properly signed off in terms of its qualities.

ADV KATE HOFMEYR: Mr Bester I would like to follow up on that last statement you made that there was no good reason not to contract for the longer period. I want to suggest to you that there were two good reasons not to contract for the longer period.

The first of those is that at February 2015 no financial assessment had yet been done of Tegeta. Is that not correct?

MR JOHANN ANDRIES BESTER: I am not aware that one has been done. I have been shown, yes that it has been done. I have been shown a report that was done subsequent to that yes.

ADV KATE HOFMEYR: But you were not aware in February 2015 of the financial position because that report was only done at the end of April 2015. Is that not correct?

MR JOHANN ANDRIES BESTER: I would probably have seen their financial statements when they were available out of interest.

10 **ADV KATE HOFMEYR:** So just be clear to us, did you consider the financial position before committing Eskom to the 10 years?

MR JOHANN ANDRIES BESTER: I may have, but it is not, it is not my call.

ADV KATE HOFMEYR: Are you aware that the financial assessment that was done did not recommend contracting with Tegeta for the Brakfontein [intervenes]?

MR JOHANN ANDRIES BESTER: I am aware that that was the conclusion, yes.

ADV KATE HOFMEYR: So that would have differed from the ad hoc conclusion you made in February 2015?

MR JOHANN ANDRIES BESTER: So the; it is not for me to have reached a conclusion or to advice that the contract can be entered into on that basis, no.

20 **ADV KATE HOFMEYR:** Right. So I said I would give you two reasons why it would not have made sense at the time to contract for 10 years. The first was that either the financial position was not known or if it was known any view formed at that stage that it made sense to contract with Tegeta would have been contradicted by the later view of the Financial Department which said the contract should not go ahead. That was the first. The second is that there were two mining rights relevant to the Brakfontein

Colliery and the Brakfontein Colliery Extension. Are you aware of that?

MR JOHANN ANDRIES BESTER: Not specifically, but I have been told about that.

ADV KATE HOFMEYR: Okay. They are referred to in the Coal Supply Agreement. I would like to deal with them briefly Chair particularly because it is an aspect of the National Treasury Report which in fact appears on our investigations to be incorrect, but it is relevant to this point about the reasonableness of the 10 year contract. So if we could go to those mining rights. They appear in file 4. The first of them is at page 749 and the second of them just for your reference is at 774. I am mindful of the time Chair and so I would like to deal with this fairly swiftly.

10 **CHAIRPERSON:** Ja.

ADV KATE HOFMEYR: The first mining right 749 is a mining right that was granted in 2010 and would expire in 2020. In other words expire after the first five years of the contract if you were concluding it in 2015. Do you accept that?

MR JOHANN ANDRIES BESTER: Ja. Maybe you should repeat that. I am not specifically looking at.

ADV KATE HOFMEYR: Sure.

MR JOHANN ANDRIES BESTER: So the contract, the mining right was granted in 2010 and it would have expired.

20 **ADV KATE HOFMEYR:** Let us go to 754 in fairness. This is a mining right for the colliery not the extension.

MR JOHANN ANDRIES BESTER: Right.

ADV KATE HOFMEYR: And you will see in Clause 3.1 on page 754 it says:

“This mining right shall commence on 26 October 2010 and will be enforced for a period of 10 years ending on 25 October 2020.”

MR JOHANN ANDRIES BESTER: Right.

ADV KATE HOFMEYR: That was the reference I made. So it is a 10 year duration that is going to expire after the first five years of the contract which was going to be entered into in 2015. Do you see that?

MR JOHANN ANDRIES BESTER: I do see that.

ADV KATE HOFMEYR: Right. The second mining right which you will find at page 774 related to the Brakfontein Extension. Remember the extension is not even been mined in March or February 2015. That was the evidence of Mr Opperman at the moment and yet the CSA was conclude both for the colliery and for the extension. The colliery had a
10 mining right attached to it for five years until 2020. The extension you will see would go on beyond that because at page 779 this mining right at Clause 3.1 would commence on 6 March 2014 and run for a period of 10 years ending 5 March 2024. I suggest to you that there was a second good reason to maintain an option in relation to the second five years rather than committing to a 10 year agreement for Eskom and I said that one of those reasons might have lain in these mining rights, because there was only a mining right for the first five years in respect of the colliery that was being mined at the time and in respect of which combustion tests could be done, but there was no mining right beyond the first five years for that source of coal that was being mined.

MR JOHANN ANDRIES BESTER: Correct.

20 **ADV KATE HOFMEYR:** The extension was the only thing that could take you beyond five years in terms of the mining right, but it had not been mined and no coal had been tested from it yet. So was it not sensible and prudent in the context of these mining rights to keep the agreement to five years plus an option for five years, because you did not know what you would be getting from the extension.

MR JOHANN ANDRIES BESTER: Correct, it would be more prudent.

ADV KATE HOFMEYR: And none the less a 10 year agreement was concluded?

MR JOHANN ANDRIES BESTER: Correct.

ADV KATE HOFMEYR: Thank you.

CHAIRPERSON: At the time you agreed to a 10 year contract had you satisfied yourself that this was the position namely in respect of the extension there was no operation, mining operation taking place as yet. In respect of the colliery there was, although there was an operation going on the mining right was for a much more limited time than the 10 years.

MR JOHANN ANDRIES BESTER: Chair I was not specifically aware of those
10 timelines. There is a cross functional team that checks these matters.

CHAIRPERSON: Yes.

MR JOHANN ANDRIES BESTER: I would not have specifically applied myself to the.

CHAIRPERSON: Yes.

MR JOHANN ANDRIES BESTER: [Intervenes].

CHAIRPERSON: So you would have relied on them having done their job?

MR JOHANN ANDRIES BESTER: I would have relied partly on legal and, but mainly on the Technical Team. The Technical Team.

CHAIRPERSON: Hm.

MR JOHANN ANDRIES BESTER: Would have applied their minds to this.

20 **CHAIRPERSON:** But would they have, would you not have had to see documents to, emanating from whatever team to say this has been ticked, this is okay, this is okay or did they have or was the position that you did not have to look at that. The mere fact the contract came to your level meant that everybody who had to deal with anything prior to the contract coming to you was satisfied and therefore you could make your own decision on the understanding that everyone else had no problem had checked

what needed to be checked.

MR JOHANN ANDRIES BESTER: Chair the, I think the way that it is structured is yes there is a number of cross functional teams and at the end of the day we all report to the Divisional Executive. So my function is very clear and I think it is set out very clearly if we go to that. The memo I wrote to Mr Mboweni on the 10th under advice from the legal team member advised me to be very careful about what I had negotiated, what I had concluded and to apply myself to my part of the business which is negotiating for a certain price, a certain volume and a certain time. The qualities included in the report are provided by the Technical Team. We referred earlier to a
10 checklist. That checklist would have been signed off by somebody. I would not myself have looked at the mining right and that recommendation and that checklist would have gone to the Divisional Executive who has the signing authority to conclude. So I wrote him a memo on 10 March the day that he signed the contract to say that I have done this and this and this and there should have been a full, by that he should have been supplied with a full checklist with all the supporting documents if he so required it and the sign off from the various departmental Managers.

CHAIRPERSON: Okay, thank you.

ADV KATE HOFMEYR: I do want to go that briefing note, but there are aspects of your statement that we need to deal with in advance of it, because you deal in your
20 statement with the requirement that Mr Mboweni placed on you to conclude this agreement within 48 hours and I would like to take you there in your statement. If you go to page 13 in file 3. Chair just before we go there I recall I must just conclude the point on the National Treasury Report.

CHAIRPERSON: Yes.

ADV KATE HOFMEYR: I indicated that there was in an error in relation to it and it

relates to the mining rights. What National Treasury found and I will give you the reference Chair. I do not suggest we go there right now. Their report is in the fifth file and you will find the reference at page 1098 at paragraph 6.3. National Treasury when it looked at this agreement had clearly only seen the first mining right and so National Treasury's conclusion was that this entire agreement was irregular because it was a 10 year supply agreement in respect of a mining resource for which there was only a licence for five of the 10 years.

CHAIRPERSON: Yes.

ADV KATE HOFMEYR: We have subsequently.

10 **CHAIRPERSON:** Yes.

ADV KATE HOFMEYR: Found the second mining right.

CHAIRPERSON: Yes.

ADV KATE HOFMEYR: Through our engagements with Eskom.

CHAIRPERSON: Hm.

ADV KATE HOFMEYR: But as we have traversed previously the second mining right was in respect of the extension.

CHAIRPERSON: Yes.

ADV KATE HOFMEYR: That had not yet been mined.

CHAIRPERSON: Yes.

20 **ADV KATE HOFMEYR:** And in respect of which the suitability of the coal had not yet been determined.

CHAIRPERSON: Yes, thank you.

ADV KATE HOFMEYR: But Mr Bester I would like to go back to page 13, because you start to talk about significant pressure and focus starting in 2015 and this is also where you refer to some of the evidence you gave earlier about your awareness that Ms Nteta

was being engaged directly by Mr Koko although she reported to you and you say in the fifth line:

“Mr Koko never directly put pressure on me, but he did put pressure on her.”

That is a reference to Ms Nteta and then you go on to say:

“Mr Vusi Mboweni at one stage instructed me to finish off the commercial pricing negotiations before the end of the week and a number of weeks later he told me to get the agreements ready to sign within 48 hours or he will find someone else to do it.”

10

MR JOHANN ANDRIES BESTER: Apologies can you just make sure we are on the same page. I am aware of the interaction and the discussion, but I would like to follow. I am on page 13.

ADV KATE HOFMEYR: Yes at paragraph 30 of your statement.

MR JOHANN ANDRIES BESTER: Okay.

ADV KATE HOFMEYR: So it is in the middle of the paragraph that I was reading there that Mr Mboweni both instructed you to finish off commercial pricing negotiations before the end of the week and then a number of weeks later he told you to get the agreements ready to sign within 48 hours or he would find someone else to do it. What did you understand that to mean?

20

MR JOHANN ANDRIES BESTER: That he would replace me with someone who he was comfortable to do what he wanted. So I mean the other thing that is important there is I told him that I might not have said it specifically, but I do refer to that these are lengthy contract agreements. So we cannot even expect our counterparty since we agreeing to those terms on 30 January. It is, it would be, we would not expect to sign a

contract within even three months with a supplier that is not experienced with our contracts. It would have been probably the first time they have seen it. The [indistinct] agreement on its own plus 60 pages then there is several annexures which I myself do not even know to the back of my hand, because it is very technical and it refers to sampling procedures, transportation and invoicing and it is very important that you engage. So for both parties I said to him, I tried to indicate to him that he is rushing this and his expectations are unfair and it does not surprise me that things did not, I mean if you read the agreement you will see there are several mistakes even in that.

CHAIRPERSON: So he must have taken the view that you were not acting as quickly
10 as he expected you to do in concluding the agreement. Is that right?

MR JOHANN ANDRIES BESTER: Chair my expectation is that even though in his mind he may have not thought that. I think he was under pressure and he may have been told that I needed to do it. It is not in the evidence, but I subsequent read in the publication that or it was in a statement I think. I think in the draft Fundudzi Report he does say that the Chairman had told him that he should run the negotiations himself and get it done. I was not aware of that obviously at the time, but I was really, I was very surprised. We were making progress and as I said to you again Chair as I said earlier with the incorrect pressure being applied it is likely that people do not apply their minds properly. It is not surprising that maybe that the Technical Team and I am not
20 sure, I did not engage with them myself directly, whether they knew that that was the case or whether they did not know whether they got pressure from Mr Mboweni or even from Nteta. I did not engage with them directly on this matter.

CHAIRPERSON: So are you suggesting that when he put pressure on you the way he did saying you must conclude or sign the agreement or have the agreement concluded within 48 hours otherwise he would find somebody else are you suggesting that you did

not necessarily think that that came from him as such that you did not necessarily think that he thought you were too slow, but you thought it could be that it was just because of pressure from above him, pressure on him that came from above him?

MR JOHANN ANDRIES BESTER: Absolutely Chair. At the time I had no doubt that the pressure was coming from above. It was, I was assuming that Mr Mboweni probably was not yet comfortable with the role he was in.

CHAIRPERSON: Hm. Okay and at that stage whatever pace the negotiations were taking you were not reluctant to conclude them. You were just want to make sure that everything was done properly in terms of not making mistakes in terms of the contract
10 or were you reluctant to, at that stage to have this contract concluded?

MR JOHANN ANDRIES BESTER: Chair there were, the part of my functionality I declared it quite clearly. There were two areas that concerned me. I was not aware of the mining rights. So I did not raise that and it was, one of them in particular as has come across quite regularly is that the [indistinct] test had not yet been completed to agree to a blend and I think the other one was that I knew that we and just from my team's interactions with the Supply Development Team that is one of the things that my department took care of. We would engage with, because we were the liaison between supply development and the supplier. It was very seldom that supply development engaged directly with our suppliers. Most of the other functional groups because of the
20 complexity of understanding Technical Team would interact directly with Tegeta. The Transport Team when it, everything normally worked very well if everybody had the time to go to site and check what was there etcetera. So the one, there were two aspects I highlighted that, is that we had not had signoff from supply development. Supply development wanted us to, I think it was either to force Tegeta to be at 50 plus one already or to have that agreement. I think I have seen some correspondence that will

help me. That they were at the end of the day they were happy that an agreement had been reached that they would achieve the 50 plus one by 2018, but that was not finalised yet. So I highlighted that in my note to Mr Mboweni, but I did not highlight the financial position to him. The Finance Department and then I have my own view on the sustainability of the contract which is why I probably did not highlight it as a risk. Yes, even from the financials and I cannot say that was my recollection whether it is because I have looked at them recently, but it is clear that they made losses in the first two years, but in my experience that would not have surprised me, because it was a mine that was not yet supplying sustainable volumes to anybody. They had tried clearly

10 and when you are developing a mine it is not surprising that you sustain losses during your [indistinct]. So I would not have highlighted that specifically and also it sounds like I am protecting myself, but I would not, it was not, I was not the functionary reporting that part to Mr Mboweni. Finance did not report to me. Finance in fact did not report to Mr Mboweni either. They reported as now indicated to a [indistinct]. However some organisations refer to it as a dotted line reporting. So they were a support function to Mr Mboweni. So they would have given him that report. It is unfortunate that that report was not given to him timeously, but I would have had he raised the report to me I would have probably have told him that it is likely that with a contract of this magnitude and this volume and the fair price and it is still my believe that we negotiated a fair price

20 that it should be sustainable and then other matter the one that I particularly knew was not finalised was the coal qualities. It is really not my responsibility, but the coal qualities was not signed off by the Technical Team. So we had to, I had to caveat that.

CHAIRPERSON: Okay. Oh that is fine.

ADV KATE HOFMEYR: Mr Bester I have just been informed from the transcribers would you mind just speaking a little bit further back.

MR JOHANN ANDRIES BESTER: Sorry.

ADV KATE HOFMEYR: In fact no, usually we have to ask witnesses to go closer to the microphone. So this is a rare occasion where there is some interference just because of your proximity to the mic.

CHAIRPERSON: Otherwise if there is still space you can move the mic a little bit away from you. That is another way of doing it. *Ja*, okay.

ADV KATE HOFMEYR: Mr Bester you have spoken a bit in your most recent reflections for the Chair about the role of the financial assessment. You made it clear earlier in your evidence that that is not your responsibility. It is not your domain. Is that
10 correct?

MR JOHANN ANDRIES BESTER: Correct.

ADV KATE HOFMEYR: And the, but were you aware at the time that you did your briefing note for Mr Mboweni that a financial assessment had not yet been done by those who were responsible for doing it?

MR JOHANN ANDRIES BESTER: No, I was not aware of that.

ADV KATE HOFMEYR: So tell me how that would factor in though because you were given a 48 hour ultimatum to conclude this agreement. Would it not be part of your briefing to him to identify I have not seen a financial assessment yet amongst other things or is that not how it works?

20 **MR JOHANN ANDRIES BESTER:** No. That is not how, when we were reporting to Kieran Maharaj all the functionaries reported directly to her.

ADV KATE HOFMEYR: So what is the purpose of your briefing note of 10 March then? Let us go to it so you can have it in front of you. It is at file 4 page 796. So let us just orientate ourselves. We know you got a 48 hour ultimatum to conclude the drafting of the contract. We also know that the contract was signed on 10 March 2015 by

Mr Mboweni. So what role does that briefing note play in relation to that period?

MR JOHANN ANDRIES BESTER: It is unusual. Whether I came up with that idea myself or whether I was advised by my legal counsel at the time I cannot recall, but we felt it best to set out what I had or what my department had agreed to and what had not been agreed to in my mind. So yes it was to cover myself and to brief Mr Mboweni on the high level terms and conditions. So I guess it had two reasons, but I cannot deny that it was partly to cover me.

ADV KATE HOFMEYR: But it did not flag the absence of a financial assessment. Is that because in the course of 10 March you assumed he would go looking for that before signing the agreement?

MR JOHANN ANDRIES BESTER: I assumed he should get that control sheet and he would have, no but it is not on the control sheet. As I said in hindsight he would, he may not have been aware to check for that and yes I was not aware that it was not available. It should have been available in the normal course of business it would have been available timeously. I was surprised I actually had not, do not have a copy of it. It is not in the list of documents I had seen. So I was actually surprised to see that it was done in April.

ADV KATE HOFMEYR: Right.

CHAIRPERSON: Is that, on that briefing note paragraph 1B is that reference to Brakfontein Colliery in the last line or should it be Brakfontein Colliery Extension there where it says:

“The [indistinct] volume is commencing at 65 000 per month from 1 April 2015 increasing to 100 000 per month from 1 October 2015 when coal from Brakfontein Colliery is available and the contract conditions have been met.”

MR JOHANN ANDRIES BESTER: Chair.

CHAIRPERSON: Do you understand the question?

MR JOHANN ANDRIES BESTER: Chair, yes you read that correctly. So there in hindsight I should have referred to the Brakfontein Extension as well, but it is referred to later on again.

CHAIRPERSON: Yes. No, I just mention it because I think when Mr Opperman was giving evidence at some stage I was not sure how the distinction was made between Brakfontein Colliery and the extension and in terms of the contract as Ms Hofmeyr pointed out I think if you look at the contract they use extension as part of the name,
10 but it is clear from that memo I think from paragraph 1A that you make this distinction between Brakfontein Colliery and Brakfontein Colliery Extension, but when I read B, it seemed to me that it would not make sense unless you intended extension, but I think you are confirming that you intended extension in B.

MR JOHANN ANDRIES BESTER: Correct.

CHAIRPERSON: Hm.

MR JOHANN ANDRIES BESTER: It should have been there if it referred to the high volume.

CHAIRPERSON: Okay. I think I am going to just amend it so that at least for me it is clear when I read it some other time in the future that it is the extension that you are
20 intended. Okay, thank you.

MR JOHANN ANDRIES BESTER: Chair if it assists even the line above refers to both. It is maybe an oversight not for us to have included it again in A.

CHAIRPERSON: In A? In A you have Brakfontein Colliery and Brakfontein Colliery Extension. Can you see that?

MR JOHANN ANDRIES BESTER: Yes Chair.

CHAIRPERSON: Are you saying there should be some amendment there as well?

MR JOHANN ANDRIES BESTER: No Chair I am saying we should have repeated that similarly probably in the next paragraph in B.

CHAIRPERSON: Correct, *ja*. Thank you.

ADV KATE HOFMEYR: I would then like to deal with the reference you did make in this memo to the need for the successful combustion test, because that is the second suspensive condition that you refer to right at the bottom of the page where you say at B there under two:

10 “Prior to acceptance of the supplier coal for both Brakfontein
and Brakfontein Extension the supplier must meet Eskom’s
environmental and technical requirements which include but not
limited to a full combustion test.”

Mr Bester I dealt with Mr Opperman on this, this morning. You are aware that that was included as a condition precedent?

MR JOHANN ANDRIES BESTER: Yes.

ADV KATE HOFMEYR: In the agreement and we reflected this morning on its odd arrangement in the Coal Supply Agreement, because it actually is a duplicate Clause 10. Is fair to conclude that that is a product of the speed at which that contract had to be put together?

20 **MR JOHANN ANDRIES BESTER:** Yes Chair and the fact that I – I mean when you may recall Ms Hofmeyr that when you brought that to my attention previously I hadn’t recalled that so it’s a clause that I had forgotten about and it is a clause that I must give credit to our legal representative on the team who would have built in, I’m not sure, I can’t remember at the time I even would have phoned her and I would have said I need this and this and this, and she would have assured that she has put certain protections

into the agreement, specifically I cannot recall having actually read it, I think I would have picked up that there was a wrong pagination.

ADV KATE HOFMEYR: Well it's one thing to include it in the agreement, it's another thing to make sure it gets implemented.

MR JOHANN ANDRIES BESTER: Correct.

ADV KATE HOFMEYR: Now this agreement was signed on the 10th of March. The agreement would not have become operative according to that clause.

MR JOHANN ANDRIES BESTER: Correct.

ADV KATE HOFMEYR: Unless a successful combustion test was done by four pm on
10 the 31st of March. After the contract was signed who was going to check that?

MR JOHANN ANDRIES BESTER: Yes that's an important clause so I mean in hindsight I should have kept my eye on that, so the normal cause of procedure is for once a contract is concluded for there to be a handover as Gert – so the team that would have negotiated that so that would have been Ms Ayanda Ntete should have sat with Gert Opperman and there would have been some of the other functionaries probably present as well, there should have been someone from technical and there should have been someone from – who had engaged with the logistics part of the contract and they should have conveyed to Gert any – specifically any deviations from the norm in that and my understanding is that that probably wasn't done timeously, nor
20 was that done to that level of detail, because he seems to be unaware of that.

ADV KATE HOFMEYR: Well the challenge that we face in the implementation of this contract is that it appears no one checked whether on the 31st of March that condition precedent was met? Was anyone asked not to check?

MR JOHANN ANDRIES BESTER: I'm not aware that nobody was asked not to check.

ADV KATE HOFMEYR: But you accept that you ought to have kept your eye on this

aspect?

MR JOHANN ANDRIES BESTER: That would have been an important aspect, it may have been that my understanding and what was captured, because I reflect that I wrote another note to Mr Mbuweni on the 4th of April, I'm not sure whether you have that, I only have an electronic copy of that, I wrote him a note and at the time the reason I wrote him the note was that I had been alerted to the fact that the Sunday Times and the Mail & Guardian were going to run an article on the agreement that had been concluded. I wrote to him to bring him up to speed and I said to him that as far as I'm aware the burn test, as far as I was aware the coal, from what I could establish the coal supply had not yet been commenced with and that the burn test which specified the –
10 should have specified the ratio between seam four upper and seam four lower would be supplied had not been completed, so it's clear that I did not highlight the 31st of March issue to Mr Mbuweni.

ADV KATE HOFMEYR: The contract didn't come into existence because that condition precedent wasn't satisfied, but I am not aware of this memo but was that not something you should have brought to his attention on the 4th of April.

MR JOHANN ANDRIES BESTER: Had it been in the top of my mind I would have, I should have brought it to his attention yes, that's a material matter yes.

ADV KATE HOFMEYR: Thank you. Mr Bester I then would like to move to an amendment to this agreement that occurred shortly after it, that is an amendment on
20 the 12th of May 2015, I will find you a reference to it in a moment, if you go in file 4 to page 804, can you tell us what that document is?

MR JOHANN ANDRIES BESTER: It amends the coal quality specification, without comparing it to the contract I can go on memory and from my recollection we may have tightened up on it.

ADV KATE HOFMEYR: I think that's fair, that was the evidence Mr Mashigo but what I'm interested in is the omission of the two asterisks that appeared both when you first wrote to Tegeta about this agreement on the 12th of February, which was then included in the coal supply agreement that was concluded on the 10th of March 2015 and which the evidence before this commission has been it was a further protection for Eskom because it required a full combustion test to be done on all proposed coal but now this section of the agreement is amended to remove those two asterisks, do you see that, because, and it might be useful just to compare it to the coal supply agreement because the coal supply ...(intervention)

10 **CHAIRPERSON:** I'm sorry, are you at 804 or ...(intervention)

ADV KATE HOFMEYR: Yes, 804 Chair is a letter but it's a letter amending the coal supply agreement.

CHAIRPERSON: Okay well I see that I am at 804.4, so these points are causing some confusion.

ADV KATE HOFMEYR: They are, they are dreadful.

CHAIRPERSON: Yes, I am at 804 now.

ADV KATE HOFMEYR: Now in this letter Mr Bester you've confirmed that you amend the quality spec of the coal supply agreement and just so that we can compare it to the quality spec in the agreement you can also have reference to page 890 of that file,
20 because that's the clause within the CSA that was concluded on the 10th of March, and what I want to ask is why those two asterisks under the quality spec table at page 890 which specified that full combustion tests would be conducted on all proposed coal prior to delivery and acceptance by Eskom was then removed when this provision was amended on the 12th of May.

MR JOHANN ANDRIES BESTER: So I don't recall the instance specifically so

applying my mind to that it could be that the intention is only to replace the table and that – so had it been appended as a proper amendment I guess that would be the fuller answer, had it been properly amended it should be an amendment signed by both parties but the legal team are normally quite specific in this and they say that this replaces that specific, so in hindsight there may not have been a specific intention to remove that clause because if you simply replace the quality table maybe there was no intention of doing that, but I can't say that was the intention because I don't recall that specific instance.

ADV KATE HOFMEYR: But at least you – I understand you to be saying you don't
10 recall specifically wanting to remove it, or intending to remove it with the amendment on the 12th of May.

MR JOHANN ANDRIES BESTER: Correct, but I would assume that the amendment wouldn't necessarily be removed, I would hope not.

ADV KATE HOFMEYR: Thank you.

CHAIRPERSON: Well the first paragraph at 804 says you are amending you say in that paragraph you are amending the contract specification as indicated below and you say the coal supplied from the Brakfontein Colliery shall comply with the specification below, I think the two asterisks that Ms Hofmeyr was referring to at 890 do they not
20 relate to something that needed to be done even before you get to the specifications or not really?

MR JOHANN ANDRIES BESTER: Chair not really.

CHAIRPERSON: Not really.

MR JOHANN ANDRIES BESTER: If you note as well the line underneath that, that refers to the hard grove index there appears to be a change there as well in the contract it refers to there's a less than 55 where the single asterisk is and I see that's

replaced with a greater than 50, I think the sign is incorrect but those, but the entire table on its own and that reference to the hard grove index are quality specification. The double asterisk is I would say that it could be argued that it was not the intention to replace that but merely to replace the table and the specifications, as they relate to the power stations requirement and that the burn test would still be a requirement, but again I'm trying to apply my mind in hindsight, I do not recall specifically the discussion here, but I would argue that there should not be an intention to replace that.

CHAIRPERSON: Well I didn't realise what I see now that the single asterisk that we find at 804 is or appears to be the same single asterisk that we find at 890, which
 10 means that anyone would be entitled to say if you meant to in 8 instead of 4 to just deal with the specifications in terms of quality why include the single asterisk but not the double asterisk unless you intended no longer to – unless you intended to exclude the double asterisk. So it creates that impression, anyone who puts the two documents together and understands that the one is an amendment of the other would see that one of the things that's not there in the one, the condition relating to the two asterisks, and it's not there in the other one and then there may be room for somebody to infer that it was no longer the intention that it should continue to apply.

MR JOHANN ANDRIES BESTER: Chair I would say that that can be a fair
 ...(intervention)

20 **CHAIRPERSON:** Yes, okay.

ADV KATE HOFMEYR: Mr Bester just jumping ahead a bit, want to underscore the significance of that, we heard evidence from Mr Opperman that that clause would have had a particular relevance in relation to the extension because it would have been the protection for Eskom that as and when that extension became available as a source there would be a contractual requirement that a full combustion test be done and it be

successful, so it is a clause I would suggest to you of some importance in protecting Eskom under this agreement, do you accept that?

MR JOHANN ANDRIES BESTER: I do accept that, yes, that would be the intention.

ADV KATE HOFMEYR: It would be the intention and as the Chair has indicated to you that the concern is then that it goes on the 12th of May and it's no longer a protection for Eskom in relation to coal supplied from the extension, do you accept that?

MR JOHANN ANDRIES BESTER: I do accept that but this is not yet the contract to be amended, it's an agreement to amend the contract, it should have been a proper amendment to the contract.

10 **ADV KATE HOFMEYR:** Was it ever properly amended?

MR JOHANN ANDRIES BESTER: Not that I'm aware of, I haven't seen any other documentation with another annexure no.

ADV KATE HOFMEYR: But were these revised quality specifications the ones that were applied?

MR JOHANN ANDRIES BESTER: We would have to check that with the Operations Manager.

ADV KATE HOFMEYR: Chair I do see that we are past four o'clock, we are at quarter past four. I have three more topics to deal with, with Mr Bester, I can continue now, alternatively we can do it in the morning, I just am concerned about the sort of seepage
20 into the rest of the days of our evidence and the impact that it's going to have potentially on other witnesses, but we're entirely in your hands on that.

CHAIRPERSON: Well I think Mr Maleka, or was it you or both of you asked for an arrangement last week in terms of which we would finish at half past four instead of four o'clock so I'm happy that we continue until half past four at least.

ADV KATE HOFMEYR: Thank you Chair.

CHAIRPERSON: Okay.

ADV KATE HOFMEYR: Mr Bester we have dealt with that amendment in May 2015, I would then like to take you to a series of interactions between Tegeta and Eskom that occurred in June 2015, because in June 2015 Tegeta approaches Eskom a few months into this supply agreement to start providing more coal than that which was contracted four and you will pick that up at page 808 of file 4, which is the one we've been dealing with. As I have it this engagement starts on the 19th of June 2015, can you tell us what that document is at page 808?

MR JOHANN ANDRIES BESTER: It's really in summary refers, in the letter Tegeta are
10 offering additional coal to Eskom, and to – if I read it correctly to increase their supply to 200 000 tons, it could actually read that they would supply an additional 200 000 tons.

ADV KATE HOFMEYR: And they say they want to do that from the month of October 2015, is that correct?

MR JOHANN ANDRIES BESTER: Correct.

ADV KATE HOFMEYR: Now as we understand it from the letters we will look at shortly there was a meeting held with Tegeta pursuant to this letter, do you recall that meeting?

MR JOHANN ANDRIES BESTER: No I don't recall engaging directly with Tegeta,
20 other than the 30th of January.

CHAIRPERSON: Pursuant to date or prior to it, are we looking at different letters, I'm look at the one at 808 which refers to a meeting that had taken place.

ADV KATE HOFMEYR: Apologies Chair, thank you, I am referring to one that was held on the same day as this letter, so the 19th of June and the reason why I say there was a meeting, yes, so they start off "we kindly refer to the meeting we had with Eskom

today.”

CHAIRPERSON: Yes, no, no I think what I was picking up on is you said that you are referring to a meeting that was held pursuant to this letter and I was saying to pursuant to or in advance of.

ADV KATE HOFMEYR: Or in advance of, indeed Chair, that is my error, it was prior to because the first sentence of the letter refers to the meeting had on that day. Mr Bester you also wrote to Tegeta after that meeting and that is a letter that I have appearing at 810, but just to be clear you don't recall that meeting, is that right?

MR JOHANN ANDRIES BESTER: I don't recall meeting them again other than on the
10 30th of January, so I assume that I wouldn't have been there.

ADV KATE HOFMEYR: Alright, your letter, just confirm for us at 811 is that a letter that you drafted and signed.

MR JOHANN ANDRIES BESTER: Sorry 810.

CHAIRPERSON: The one starting at 810.

ADV KATE HOFMEYR: The one starting at 810 and if you go over the page to 811 it appears to be a letter signed by you, is that correct?

MR JOHANN ANDRIES BESTER: Yes, correct.

ADV KATE HOFMEYR: Do you recall this letter?

MR JOHANN ANDRIES BESTER: I do recall them offering additional terms, I can't
20 remember exactly when, and I remember maybe answering it to the extent they required it, I don't recall the letter specifically no, but I can look at it again.

ADV KATE HOFMEYR: That's fine, what I'm interested in is the last sentence of that first paragraph because the last sentence of that first paragraph says “following our meeting on the 19th of June 2015 Eskom wishes to record some of the material terms the parties agreed on”, to the reader that suggests that you were at that meeting, is that

incorrect?

MR JOHANN ANDRIES BESTER: I don't recall the meeting.

ADV KATE HOFMEYR: But it could have happened?

MR JOHANN ANDRIES BESTER: It could have happened yes.

ADV KATE HOFMEYR: Fine.

CHAIRPERSON: But if you had not been part of that meeting is it likely you would say following our meeting, in other words would you refer to it as our meeting if you had not been part of the meeting?

MR JOHANN ANDRIES BESTER: Chair it may have been an oversight of me, the
10 language in the letter I often didn't draft my own letters, I was supported by my team so it's likely that Ayanda would have written it and it may have been written in the first person and I may not have picked up the error, but I think – I don't recall being at a meeting and I'm not sure there's any minutes to reflect that but even if I was at the meeting I don't dispute the fact that I signed the letter.

CHAIRPERSON: Is the possibility that you might not have been at the meeting but other people were at the meeting who subsequently reported to you and when you wrote the, and then you decided to confirm what took place in a meeting that you did not attend, but your referred to it as our meeting, is that likely?

MR JOHANN ANDRIES BESTER: Absolutely Chair, to my recollection I only
20 remember meeting them the one time.

CHAIRPERSON: And is that something that used to happen sometimes where the confirmation of what was agreed to would be provided by somebody who was not at the meeting, was that something that normally happened?

MR JOHANN ANDRIES BESTER: Chair what was normal is that I used to pen official correspondence under my name, so my ...(intervention)

CHAIRPERSON: Not other people in the team, in your team, in other words even if it was your team members who were present at the meeting when it came to corresponding with people outside of Eskom you would write and not them?

MR JOHANN ANDRIES BESTER: Correct Chair, they would brief me and I would if I was comfortable with the content I would sign it off.

CHAIRPERSON: Okay.

ADV KATE HOFMEYR: The letter as I read it refers to this proposed additional 100 000 tons that was to come from Tegeta, and then it records the material terms that the parties agreed on, and then those terms are set out under points 1, 2, 3 and then over
10 the page. What is recorded in relation to the coal specification for this additional 1 000 tons per month?

MR JOHANN ANDRIES BESTER: It must comply with Eskom's technical requirements and Eskom coal supply requirements, but not limited to Eskom's full combustion test, including – sorry – but not limited to, so there's an expectation that the additional tons so I would imagine reading from this that since they indicated that the coal would come from Brakfontein Extension it stands to reason that we would have included this because there wouldn't have been a full combustion test yet.

ADV KATE HOFMEYR: Indeed. So the proposal is to get 100 000 more tons from October 2015 from a resource that hasn't yet been tested and so the coal specification
20 is that there must be a full combustion test successfully completed before Eskom takes that coal, is that a fair summary?

MR JOHANN ANDRIES BESTER: Correct.

ADV KATE HOFMEYR: And it even goes so far as to say over the page at 811 that Eskom will outright reject the proposal if that is not satisfied, is that correct?

MR JOHANN ANDRIES BESTER: Correct.

ADV KATE HOFMEYR: The other thing is that it talks about the volumes under point 2
...(intervention)

CHAIRPERSON: I'm sorry, before that paragraph 1 under co-specification you make it clear that there should first be a successful completion of a full combustion test, as I recall doesn't that take us back to those two asterisks that we talked about earlier and if it does, does it not then reflect the idea that the amendment to which we referred earlier on was not intended to do away with the two asterisks?

MR JOHANN ANDRIES BESTER: Thank you for that Chair, if ...(intervention)

CHAIRPERSON: Ja, but I just want to confirm with you whether my thinking is correct,
10 whether that's what – whether it supports that proposition? The fact that you were including it here as one of the terms that had been agreed at this meeting of the 19th, that there should be a full successfully completed combustion test, whether that doesn't mean that indeed the fact that the two asterisks provision was not included in that amendment, it did not mean that it was intended to be done away with?

MR JOHANN ANDRIES BESTER: Chair I would support that but I think it should have still been at the top of everybody's mind that it would be a new resource that had yet – to that – at that date not yet been subjected to a full combustion test, my expectation is they probably haven't mined there yet, and there probably wouldn't have been coal available, so yes I think it supports what I said earlier that there should have been no
20 intention of doing away with that clause in the original contract.

CHAIRPERSON: And to the extent that what you wrote here under one, coal specification, in relation to the combustion test, to the extent that you accurately reflected what both parties agreed on, agreed upon at the meeting of the 19th of June it must mean that everybody understood that that requirement continued to apply?

MR JOHANN ANDRIES BESTER: That would be the reason for capturing that Chair.

CHAIRPERSON: Yes because if the intention had been on the part of say for example Tegeta if their understanding was that that letter of amendment sought to do away with the condition that had two asterisks then they may have said no, no, no that's been done away with, you can't bring it back here, which it seems they didn't say.

MR JOHANN ANDRIES BESTER: Yes Chair I think it's clear here that the intention still was to try and uphold that combustion test which had not yet been done.

CHAIRPERSON: Okay.

MR JOHANN ANDRIES BESTER: Chair maybe another interesting point here is that what is interesting and maybe is not that relevant but the Eskom specification will be
10 determined once the full combustion test is successfully completed. I'm not sure what the relevance of including that is that may have been under technical advisement that if the – because otherwise we would have normally just said the Majuba Power Station specification be required with maybe – maybe there was an expectation as Gert had said that there might be a deviation on the sulphur that we might need to – but I'm speculating, it's just surprising to see it in that way.

CHAIRPERSON: Okay Ms Hofmeyr you can take it further if you can.

ADV KATE HOFMEYR: Thank you Chair, I will take it further because this is an important point as this develops because we will see in due course that Tegeta is not happy with that first paragraph, so that we will wait to see, however can I just pick up
20 the point that the Chair raised with you Mr Bester, and you confirmed at this point the extension is not mined, wherein in June of 2015 that was Mr Opperman's evidence this morning, so you haven't tested the resource, you don't know whether it's going to be suitable for Majuba, why would Eskom be agreeing three months into this contract to take another 100 000 tons of coal from a Colliery that had not yet even been mined nor the quality of the coal assessed?

MR JOHANN ANDRIES BESTER: Chair I can only try and speculate that what our intention was at the time and maybe what my state of mind was at the time, is that, and reading it now that is not a contract, it's – it refers to their coal supply offer, however their letter if I can refer to that, so in my mind if I read it now, it's a reflection of – it's a recordal of the meeting, they write it as a coal supply offer and we acknowledge that offer.

ADV KATE HOFMEYR: Well can we just pause on that for a moment. What you record in the last sentence of the first paragraph is following our meeting on the 19th of June 2015 Eskom wishes to record some of the material terms the parties agreed on,
10 that reads to me not as an acknowledgement, it's a recordal of the material terms the parties agreed on. Should we not read it in that way?

MR JOHANN ANDRIES BESTER: Apologies, can I refer to that?

ADV KATE HOFMEYR: Yes of course it's 810. You'll see at the last sentence of the first paragraph, just to orientate ourselves Mr Bester I understand you to be saying that this might only have been an acknowledgment of their offer and I'm querying that because the last sentence of the first paragraph says

“following our meeting on the 19th of June Eskom wishes to record some of the material terms the parties agreed on.”

MR JOHANN ANDRIES BESTER: Agree yes.

20 **ADV KATE HOFMEYR:** So it's not an acknowledgment, it's recording the material terms that were agreed.

MR JOHANN ANDRIES BESTER: Correct yes.

ADV KATE HOFMEYR: Thank you. So it's in agreement to take 100 000 more tons a few months later from an extension that has not yet been mined and the coal of which has not yet been assessed, is that correct?

MR JOHANN ANDRIES BESTER: It's an agreement yes that should all those conditions be met yes.

ADV KATE HOFMEYR: But why would Eskom be doing that? I'm just struggling to understand why it commits, it's already entered into a CSA agreement a matter of months earlier to take from October 113 000 tons a month from Brakfontein, the extension hasn't even been mined yet, why would it want to agree to take another 100 000 tons from an un-mined resource?

MR JOHANN ANDRIES BESTER: It doesn't – again there may have been a requirement but I seem to recall that we did include a paragraph and I know it does
10 disappear later, including a requirement for the volume at the relevant power station we do appear to cover ourselves initially that to the extent that we have a requirement and I think at the time I may have been trying to push back on agreeing to that and saying subject to us requiring it at a later stage.

ADV KATE HOFMEYR: But Mr Bester why did you need to be pushing back at this point? What were you pushing back against?

MR JOHANN ANDRIES BESTER: Because it is a new supplier and for them to be – to have – to be supplying this volume yes.

ADV KATE HOFMEYR: But then why not just say no thank you ...(intervention)

CHAIRPERSON: I'm sorry, could you just repeat that answer, because?

20 **MR JOHANN ANDRIES BESTER:** It is a new supplier ...(intervention)

CHAIRPERSON: The question just to recap the question was why did – what were you pushing against, why did you have to push back, you know what were you pushing back against and then you said because – I just want you to repeat what you said.

MR JOHANN ANDRIES BESTER: To take 200 000 tons a month I may have needed to satisfy myself that we needed it, we may have needed to satisfy ourselves that the

supplier could actually supply it.

ADV KATE HOFMEYR: But Mr Bester why entertain it at all?

MR JOHANN ANDRIES BESTER: My view is now and as I said I don't know what my frame of mind was at the time, my view is that this serves as an acknowledgment from what was discussed and agreed in the meeting and we do, we do cover ourselves by saying that should we have a requirement, I know it spells it out differently, including a requirement on the volumes and on – in paragraph 2, subject to all the required Eskom approvals including a requirement for the volumes at the relevant power stations, and then at the end of the letter on the next page what I included in there Eskom shall bear

10 no liability for any costs and liabilities incurred by supplier on the basis of this offer.

ADV KATE HOFMEYR: Mr Bester I do have a few follow up questions in relation to that but I do see that we are past four thirty Chair, I am in your hands as to whether we should complete it or resume tomorrow.

CHAIRPERSON: I would have liked us to complete, I don't know how much more time you have, I do have a five o'clock meeting that I need to attend in chambers, but how long do you think you need to complete?

ADV KATE HOFMEYR: We can complete this letter fairly swiftly but there will be the further letters that follow it that I will need to traverse tomorrow.

CHAIRPERSON: Yes, well maybe if we are going to go into tomorrow we may as well
20 just maybe adjourn till tomorrow, just make a note of where you stopped, and then we can – and before we take the next witness how much more time do you think you may need with Mr Bester?

ADV KATE HOFMEYR: Chair this is the last topic before some concluding aspects that I would like to have his comment on, so I don't envisage more than half an hour.

CHAIRPERSON: Oh okay, so if we start as half past nine as we intend to that should

be fine.

ADV KATE HOFMEYR: Indeed Chair.

CHAIRPERSON: Okay that's fine then. Thank you Mr Bester we will adjourn now, please come back tomorrow, we will continue at half past nine in the morning.

MR JOHANN ANDRIES BESTER: Thank you Chair.

CHAIRPERSON: Okay.

INQUIRY ADJOURNS TO 12 MARCH 2019