

COMMISSION OF INQUIRY INTO STATE CAPTURE

HELD AT

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10

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PROCEEDINGS HELD ON 13 MARCH 2019

CHAIRPERSON: Good morning Mr Pretorius, good morning everybody.

ADV PAUL PRETORIUS: Morning Chair.

CHAIRPERSON: Yes Mr Pretorius.

ADV PAUL PRETORIUS: Chair before you is the application brought on behalf of Mr Thomas Moyane for cross-examination of Minister Gordhan. In chambers we discussed the various issues relating to condonation it is not necessary for you to be burdened with any such application for the purposes at least of these proceedings. You did on the 21 November last grant an application for condonation in regard to the late
10 filing of 3.3 applications that has been dealt with. So with your leave we may proceed with the application?

CHAIRPERSON: Okay thank you. That will be Mr Moyane's application now?

ADV PAUL PRETORIUS: Yes.

CHAIRPERSON: Yes.

ADV DALI MPOFU: Okay. Good morning Chairperson DCJ.

CHAIRPERSON: Good morning Mr Mpofu I guess you thought Mr Pretorius would take a little longer than he did.

ADV DALI MPOFU: Yes he caught me off guard I noticed.

CHAIRPERSON: Okay I am ready to deal with – to hear your argument in relation to
20 Mr Moyane's application for leave to cross examine Minister Gordhan.

ADV DALI MPOFU: Thank you very much Deputy Chief Justice. If I may just mention for housekeeping that I appear with my learned friends Ms Sibuku and Ms Daniel from the Johannesburg bar.

CHAIRPERSON: Okay thank you.

ADV DALI MPOFU: Thank you very much DCJ. Chair we will try to save as much time

as possible ...

CHAIRPERSON: Yes for what

ADV DALI MPOFU: Seeing that submissions.

CHAIRPERSON: Yes I am sorry. Just as I said in chambers I have read the written submissions submitted by both parties. I read obviously as can be expected the affidavits in both Mr Moyane's up founding application – affidavit. Mr Gordhan's answering as well as Mr Moyane's replying affidavit. So I am quite familiar what with – what is there. I have also read the comprehensive written submissions delivered by both parties. Mr Mpofu would like a few minutes to get your things in order?

10 **ADV DALI MPOFU**: Yes I think I would DCJ. One of the things I want to get is the stop watch so that I can time myself.

CHAIRPERSON: Yes do you need us to adjourn or I must just give you...

ADV DALI MPOFU: No, no just one second.

CHAIRPERSON: Alright.

ADV DALI MPOFU: I am indebted DCJ thank you very much.

CHAIRPERSON: Thank you. So I have read both comprehensive written submissions delivered by both parties so it is not really necessary to repeat everything said there. The idea is that this opportunity should be used to clarify whatever submissions or points that counsel might feel need to to be clarified or to be emphasised.

20 **ADV DALI MPOFU**: Thank you Chairperson.

CHAIRPERSON: Thank you.

ADV DALI MPOFU: Thank you. Chair in that spirit of saving time I would like to start by just putting certain things out of the way.

CHAIRPERSON: Yes.

ADV DALI MPOFU: Firstly that it is not our case and it cannot be in light of the

regulations and the rules that there is automatic right to cross examination.

CHAIRPERSON: Yes.

ADV DALI MPOFU: That the regulations are very clear on that.

CHAIRPERSON: Yes.

ADV DALI MPOFU: And I use the word automatic advisedly.

CHAIRPERSON: Yes.

ADV DALI MPOFU: Because that is how I read that regulation.

CHAIRPERSON: Yes.

ADV DALI MPOFU: Obviously once granted there is a right to cross examination

10 **CHAIRPERSON**: Yes.

ADV DALI MPOFU: But it is not automatic as it would be in a court of law.

CHAIRPERSON: Yes, yes.

ADV DALI MPOFU: The second aspect Chair which we again consider upfront is that these are not court proceedings.

CHAIRPERSON: Yes.

ADV DALI MPOFU: And therefore even when cross examination is allowed it is not going to follow.

CHAIRPERSON: Yes.

ADV DALI MPOFU: The exact tracks. So I will just so that I am not accused of that.

20 **CHAIRPERSON**: No I think that is important that you started with that because certain portions of the written submissions and the founding affidavit maybe the replying affidavit as well from Mr Moyane may give the impression

ADV DALI MPOFU: Yes.

CHAIRPERSON: Ja so it is important...

ADV DALI MPOFU: That is why I wanted to clear that ja.

CHAIRPERSON: Yes.

ADV DALI MPOFU: In other words when we talk about the right to cross examination we talking about it on the assumption that...

CHAIRPERSON: If it is – once it is granted.

ADV DALI MPOFU: Once it is granted. That is correct Chair.

CHAIRPERSON: Okay thank you.

ADV DALI MPOFU: Thirdly which gets closer to the meat because this raised in the heads of the other side is that we accept again that at best for us these proceedings are what one calls quasi adversarial in this context but largely they are inquisitorial. So
10 we have no qualms with that either so which also do not waste time on that. Where we start Chair is the definition of what cross-examination seeks to achieve in order to support our application to be granted to do so. And we start with the quotation that we put in our heads that from Wigmo's the leading international authority on this who said: "That cross examination is beyond doubt the greatest legal engine ever invented for the discovery of the truth." And we have attached a fuller version of that which we will hand up where they give examples of why that is so over the centuries that this is the greatest engine.

CHAIRPERSON: Yes.

ADV DALI MPOFU: And the emphasis really we want to put on that quotation is on the
20 truth. How do you find the truth in these kinds of proceedings whether you call them quasi adversarial or whatever. And one of the key safeguards is that for evidence to be accepted it must have been tested somehow and as I said the best – one of the best known ways to do so is cross-examination. Now the issue if we were in a normal court setting then obviously the two standards are relevance and credibility. So you may cross examine in terms of relevance and also as to credibility. Relevance in this

context obviously will relate to the terms of reference of this commission relate to the subject matter and so on on the one hand. On the other hand it will relate more specifically to the evidence of the particular witness subject to the caveat again which is now accepted that obviously a cross examiner has more leeway than the examiner in chief to cover issues which were not covered in the evidence. But obviously you cannot go on for two days asking the witness about where he was born and so on if that has nothing to do ...

CHAIRPERSON: Maybe not even half a day Mr Mpofu.

ADV DALI MPOFU: Maybe not even half an hour. That is correct Chairperson. So the
10 point is simply that there are limits to all these things. It is not as if you just have carte blanche. And that takes us Chair around these general issues to a very important issue namely the reason as we have put in our submissions, the reason why the president appointed a judge and not just a judge the most senior judge that could have been appointed because the Chief Justice could not appoint himself into – in this ...

CHAIRPERSON: Well I was about to say do not say the most senior.

ADV DALI MPOFU: That could be [indistinct] Chair. No I – no...

CHAIRPERSON: Yes.

ADV DALI MPOFU: But subject to that the point is that that is one of the safeguards because the president could have appointed anybody an accountant and or whatever
20 but the reason why there is a judge is so that those safeguards are almost guaranteed in a way because the judge will know when to curtail cross examination. So the big point is that the safeguard against let us say cross-examination that strays across the rules is not to have a wholesale ban on cross-examination which is what is being asked for. But it is simply to rely on the wisdom ok the Chair to – that he will when the time comes control the proceedings. The second safeguard Chair insofar as some issues

have been raised unfortunately about a choice of counsel is the two points there. 1. Is that of course the general legal rules apply. So every citizen has a right to counsel of their choice that goes without saying but more importantly a second safe set of safeguards is that there specific rules specified by the General Counsel of the Bar which makes – would make sure that a counsel is going to cross-examine within certain parameters and that then becomes a double safeguard because of course counsel now and again will stray but then the Chair – so it is a double barrelled safeguard.

CHAIRPERSON: Well you can take it Mr Mpofu that I do not think that you are here to do anything other than perform your duties as counsel.

- 10 **ADV DALI MPOFU:** I am indebted to the Chair. Then I will move on to something else. Now Chair what we really need to look are what I will – I will just specify a few well not a few but some of the issues that make this particular cross-examination important. Firstly Chair this is as we all know at the risk of stating of obvious this is the judicial commission on inquiry into allegations of state capture, corruption, fraud in the public sector including organs of state. It is not as maybe widely assumed. It is not the Gupta commission. It is a commission into allegations of state capture, corruption and fraud in the public sector and organs of state much wider. If it was the Gupta commission this commission would not have spent two weeks listening to Mr Agrizzo who said nothing about the Gupta's it is because it is a wider test. The next important thing Chair is that
- 20 there can be no doubt that Mr Gordhan implicates Mr Moyane and the emphasis of the word implicates is very important. That after all Chair is the reason why we were invited here. Remember Mr Moyane was not sitting at home watching TV and then saw Mr Gordhan and said oh there he is mentioning me let me rush to go and ask for cross-examination? No we were invited by this commission and the only reason this commission invited us was simply because we were an implicated party. Now the word

implicate ...

CHAIRPERSON: Well let me just say that I think that is a very important part of what – an important part of the application for leave to cross-examine.

ADV DALI MPOFU: Yes. Thank you Chair.

CHAIRPERSON: But before you proceed let me say this. You will have noticed that if you look at the relevant rule it enjoins the legal team to give Rule 3.3 notice to an implicated person if a witness's statement implicates or may implicate ...

ADV DALI MPOFU: That is correct. That is 3.3.1.

CHAIRPERSON: Now as – oh okay I am not there yet ja. The – my understanding is
10 that the reason why you have may implicate there is or is based on the acknowledgement that it may be difficult sometimes for the legal team to say whether a particular statement implicates or definitely implicates a particular person but they may look at it and say well somebody might say it does somebody might say it does not.

ADV DALI MPOFU: Yes.

CHAIRPERSON: So there is that possibility to be on the safe side.

ADV DALI MPOFU: Absolutely yes.

CHAIRPERSON: Let us give it to them and if they take the view as it has been taken by some witnesses in certain cases that they are not implicated.

ADV DALI MPOFU: Yes, no Chair we will accept that.

20 **CHAIRPERSON**: Ja you are a hundred...

ADV DALI MPOFU: Hundred percent ja.

CHAIRPERSON: Okay.

ADV DALI MPOFU: That the rule is broad enough to cover both – my submission with respect Chair is that in this case it is not the second leg. There was actual implication and insofar that the – whoever wrote the letter to us, the commission I will use it broadly

– the commission actually did site specific examples.

CHAIRPERSON: Yes.

ADV DALI MPOFU: And it used the word inter alia.

CHAIRPERSON: Yes.

ADV DALI MPOFU: It said you are implicated in this and that inter alia in the following

– and that is because there was in this case unlike in other cases maybe a comprehensive statement which had already implicated us.

CHAIRPERSON: Yes.

10 **ADV DALI MPOFU**: And I will go further to say Chair that indeed the statement in the box actually went further to implicate us even further than the written statement. So that there can be no doubt that we are an implicated party.

CHAIRPERSON: I would like to go to that letter because I think it is important.

ADV DALI MPOFU: Yes Chair.

CHAIRPERSON: Or it may be important.

ADV DALI MPOFU: It may be.

CHAIRPERSON: Where do I find it again?

ADV DALI MPOFU: Well Chair I was told that the pagination might not correspond.

On our pagination – oh yes it is – okay I will find it now Chair. It is attached to the answering affidavit. While I am looking Chair let me just say that the ...

20 **CHAIRPERSON**: Yes well we can come back to it but ja...

ADV DALI MPOFU: We can come back to it.

CHAIRPERSON: We can...

ADV DALI MPOFU: I can paraphrase it.

CHAIRPERSON: Ja.

ADV DALI MPOFU: While we are looking. What it says is routinely this is to notify you

that you may apply and so on and so on within fourteen days. You are implicated in the following way.

CHAIRPERSON: Yes.

ADV DALI MPOFU: And then it raises two specific issues. One is the tender fraud let us call it that in respect of an IT contract and then the second one is lying to Parliament which is the second leg. But the point I wanted to make is that even in that notice and when we find it we will – it says you are implicated inter alia.

CHAIRPERSON: Yes.

ADV DALI MPOFU: In this way. So it left...

10 **CHAIRPERSON**: Yes.

ADV DALI MPOFU: It open ended and I think that was a wise thing to do because you do not know what the witness might say or there might be other – and there were ten files we might have missed another reference to Mr Moyane in another place. The simple submission I wish to make Chair is that there can be no doubt and I do not even expect my learned friend Ms Le Roux to say that Mr Moyane is not implicated by ...

CHAIRPERSON: Well I think in her written submissions I think she says that.

ADV DALI MPOFU: No you will see.

CHAIRPERSON: If I understand it correctly.

ADV DALI MPOFU: You see that is very tentative. It says in most places and some of
20 the...so I think even she could not get herself to say ja.

CHAIRPERSON: Yes. Okay well maybe let us go to what ...

ADV DALI MPOFU: To the points yes.

CHAIRPERSON: Maybe the crux. I will – let me mention this. My reading of the irrelevant roles is that once – is that if you are going to bring an application for leave to cross-examine obviously you do so because you take the view that you are implicated.

ADV DALI MPOFU: Correct.

CHAIRPERSON: Because obviously even if the legal team of the commission can send you a Rule 3.3 notice saying you are implicated or may be implicated you are free to disagree with them and say I do not know what you are talking about.

ADV DALI MPOFU: Absolutely. Or the witness might actually exculpate him.

CHAIRPERSON: Exactly ja so you have got to take a view that you are implicated as far as you are concerned and then when you make your application I believe you must say, this witness implicates me when he or she says this.

ADV DALI MPOFU: Yes.

10 **CHAIRPERSON:** And then you need to then say whether you admit that but you explain or you deny that and put up a different version.

ADV DALI MPOFU: Absolutely.

CHAIRPERSON: Or whatever. Now when I was reading Mr Moyane's founding affidavit I struggled to find places other than maybe the reference to that IT contract I think you say it was.

ADV DALI MPOFU: Yes.

CHAIRPERSON: Other than that I struggle to find a place where or places where he was saying, this is the allegation that is in Mr Gordhan's statement or in his evidence before the commission this what he said about me and by making this allegation
20 against me he has implicated me in wrongdoing and this is my version. It is not true and here is my version or it is true but there is an explanation, this is the explanation.

ADV DALI MPOFU: That is it.

CHAIRPERSON: That is what I struggle to find.

ADV DALI MPOFU: Yes. Yes Chair let me – my reading of the rule may be slightly different.

CHAIRPERSON: Yes.

ADV DALI MPOFU: My reading of the rule Chair obviously the application must set out the pieces.

CHAIRPERSON: Yes, yes.

ADV DALI MPOFU: But when the rule, the relevant rule and I will find it now it says: You must set out the grounds.

CHAIRPERSON: Yes.

ADV DALI MPOFU: For the cross-examination. I read it as the – you know as you set out the ground let us say in a notice of appeal.

10 **CHAIRPERSON**: Ja.

MR IAN HAMISH SCOTT SINTON: You do not then traverse chapter and verse of the evidence but you said this is the ground the judge erred in this respect.

CHAIRPERSON: Yes.

ADV DALI MPOFU: So that is the one – let us call it a narrow reading. And while that reading would say you must then quote every word that the witness said and then say this

CHAIRPERSON: Yes.

ADV DALI MPOFU: What we did say Chair very much upfront was that we – when we put what we call the themes you remember we put the five...

20 **CHAIRPERSON**: Yes.

ADV DALI MPOFU: Cross-examination themes.

CHAIRPERSON: Yes yes.

ADV DALI MPOFU: In respect of each we then put the ground broadly of our disagreement or objection as the Chair say. Except I think when we talk about credibility because there you cannot really say sometime the credibility caution is by

omission rather than what the witness actually says ja.

CHAIRPERSON: Yes.

ADV DALI MPOFU: But if you – if Chair goes to page 2 I think it is page 2 on every pagination you will see the first one is the easy one let us say paragraph 5 of Mr Moyane's affidavit.

CHAIRPERSON: Yes.

ADV DALI MPOFU: As I said that is the easy one where it says "I was – it was therein pointed out to me that Minister Gordhan implicates me in two broad respects namely 1 my alleged participation in the awarding of a contract or tender to the New Integrated
10 Credit Solutions a company owned by my alleged friend Mr Mneyke and then the second one my alleged refusal to account to the Minister as the Minister and the finance on material issues the deteriorated relationship between the two us – you will remember that Mr Gordhan went on for a long time on that – alleged ongoing personal institutional attacks by me and Mr Gordhan and the relationship issues. One might add there on the ones that I say are easy the lying to...

CHAIRPERSON: I am sorry what paragraph is that?

ADV DALI MPOFU: 5, 5, 5 Chair yes.

CHAIRPERSON: Oh okay ja. Yes.

ADV DALI MPOFU: So 5.1, 5.2 so you might [indistinct] add a 5.3 which is the lying to
20 Parliament.

CHAIRPERSON: Yes.

ADV DALI MPOFU: Those are the easy, the easy areas of being implicated.

CHAIRPERSON: Yes.

ADV DALI MPOFU: And then we then upon a cursory reading of the statement of Minister Gordhan and other issues raised by him which directly or indirectly affects me

include and then we list I will not read them out – we list about 7 other what we call topics.

CHAIRPERSON: Yes.

ADV DALI MPOFU: And then – we then at paragraph 7 you will see we say there “additional issues which are related to the above but are not directly raised in the papers.

CHAIRPERSON: Yes.

ADV DALI MPOFU: And then we list another 7.

CHAIRPERSON: Yes.

10 **ADV DALI MPOFU**: That is why I say it is about 15 issues.

CHAIRPERSON: Yes.

ADV DALI MPOFU: And then – and then we say we will group them into five for convenience.

CHAIRPERSON: Yes.

ADV DALI MPOFU: Which is paragraph 8.

CHAIRPERSON: Yes.

20 **ADV DALI MPOFU**: Then we then say this is the basis of what we say – we say the general credibility and general attitude of Minister Gordhan characterised by a propensity to distort and spin the facts. So that is a ground on its own. You cannot develop more than that. Then the next ground we say is bias, hostility and vindictiveness as guiding attitude of the relationship between the two of us leaving no room for professionalism, objectivity and impartiality in our mutual dealings. And say this calls for any evidence given by Gordhan about me in any ongoing forum including this one needs to be taken with more than the proverbial pinch of salt. Then we say the distortion of the evidence in order to support his false narrative of devils and angels and

especially my alleged breach of procurement procedures. Then we say racism on his part and the unbecoming behaviour of Minister Gordhan towards me symbolises regrettable behaviour which has no place in the nation we are trying to build and in which there is no place for looking down upon African people. And then say the deep role of Minister Gordhan and the rogue unit saga also referred to as the Sunday evening project which was a form of state capture. Now the importance of those grounds as it were Chair is that the – well the last one is more explicit and I – if you Chair allows me I will come back to your question I just want to touch on the question of the rogue unit.

10 **CHAIRPERSON**: Yes.

ADV DALI MPOFU: On which Mr Gordhan obviously testified. Our take Chair and I need to say this just in case I forget to say it later – our take is this given the broadminded of this commission if – if Mr Gordhan as Mr Moyane suggests and we know that Mr Gordhan testified that Moyane went even as to lay a charge about this issue so obviously he believes this. If Mr Gordhan was involved in unlawful activity/criminal activity around the rogue unit issue that I am afraid is – comes directly to the remit of this commission why? Because state capture is just a phrase we have created in South Africa for ourselves. It is a cryptic phrase but state capture really talks about the creation or the alleged creation of a parallel state you know outside of the

20 parameters that we all know. Now there is no difference between that and setting up unlawfully a rogue unit to spy on citizens to spy on political opponents and all that. It is a parallel state that you are creating. It might be on a smaller scale than the grand state capture. So that falls squarely but squarely onto the issues and we know that that is one of the key issues that Mr Gordhan testified about in relation to Mr Moyane not just generally. Because he says I have been – there is a campaign a political campaign

to discredit me and so on and so on and it is characterised by you will remember there was a whole discussion about the 27 questions. The 27 questions – those 27 questions they genesis of the 27 questions is obviously the charges that were laid. Now here is the point of cross-examination. According to Mr Gordhan Mr Moyane's actions in laying those charges were motivated by malice and all this conspiracy and so on. According to Mr Moyane these were motivated by a real by the Sikhakhane Report which said that this thing is unlawful but the Croan Report which said thing is unlawful which Sikhakhane Report by the way was commissioned before Mr Moyane came to work at SARS and as he says, what reasonable SARS commissioner or CEO would

10 come into a place, find a report that says there has been criminal/unlawful activities and just do nothing. So these are two contesting theories. So it is either in the end the Chair will have to buy into one of those theories let me put it that way colloquially. In other words the Chair will either say the laying of those charges was part of some conspiracy long story or it was indeed the act of a reasonable commissioner. So that is a very good example of what we are talking about and there is no other way with respect Chair in which this other counter narrative so to speak can be presented to this commission without having cross-examined Mr Gordhan. You will remember Chair this – Chair will know this is a constitutional court decision in sarfu. In sarfu two things comes out of Sarfu one is that it is important for two reasons. It is a case where no less

20 than the president – President Nelson Mandela was prepared to be cross-examined. So if it is good for President Mandela surely it is good for Mr Gordhan. But the issue which was said in Sarfu was to restate the English principle that says that if a witness a witness does not just have a right to cross-examine but has a duty to so and because if you want a counter narrative as I have said to prevail then and you fail to cross-examine then you have nobody else to blame because the Chair will have no option but

to accept the one version so to speak. In other words if the Chair is only given this narrative that the laying of the charges was part of the conspiracy and Mr Moyane fails in his duty to challenge then he cannot later complain and say why did the Chair find that my laying of the charges was malicious? It is because you Mr Moyane you were invited, you were given an opportunity, you did not take it up and therefore what do you expect the Chair to do. So that is the crucial point about cross-examination and the second.

CHAIRPERSON: Hm.

ADV DALI MPOFU: I am sorry Chair if I can just finish this part.

10 **CHAIRPERSON:** Yes.

ADV DALI MPOFU: The other issue which again maybe we were making assumptions. We do not think that Mr Moyane just simply from this affidavit is just going to come and testify. Remember Mr Moyane has volunteered that he will give evidence. He will expand on his version. Now one expects that that process will involve us, it will involve the evidence leaders and so on and the matter be, statements that are taken and then more expansion on some of the issues. Ours at this stage is to highlight the grounds on which such cross-examination will be done. Chair, okay I will move to this after your question.

CHAIRPERSON: If you are not going to forget the point you want to make that is fine.

20 **ADV DALI MPOFU:** Yes. No, I will not.

CHAIRPERSON: You see what I was looking is the issue of the grounds that you are talking about. You see my understanding of the rules are that when you apply for leave to cross-examine.

ADV DALI MPOFU: Hm.

CHAIRPERSON: You must make it clear what parts of the witness' statement evidence

you dispute.

ADV DALI MPOFU: Yes.

CHAIRPERSON: And you must say what your version is in regard to those parts.

ADV DALI MPOFU: Yes.

CHAIRPERSON: So that is the main thing.

ADV DALI MPOFU: Okay.

CHAIRPERSON: Now there is reference to the grounds. This is dealt with in Rule 3.4.

ADV DALI MPOFU: Yes.

CHAIRPERSON: It says:

10 “An application in terms of Rule 3.3.6...”

Which is an application for among other things leave to cross-examine.

“An application in terms of Rule 3.3.6 above must be submitted
in writing to the Secretary of the Commission within...”

It says with, but it should be within.

“...14 calendar days from date of the notice referred to in Rule
3.3.”

ADV DALI MPOFU: Correct.

CHAIRPERSON: Then it says:

20 “The application must be accompanied by a statement from the
implicated person responding to the witness’ statement...”

ADV DALI MPOFU: *Ja*.

CHAIRPERSON: “...insofar as it implicates him or her.”

ADV DALI MPOFU: Correct.

CHAIRPERSON: And then it says:

“The statement must make it clear what parts of the witness’

statement are disputed or denied and the grounds upon which
those parts are disputed or denied.”

ADV DALI MPOFU: Yes.

CHAIRPERSON: Now you have dealt with the question of grounds.

ADV DALI MPOFU: Yes.

CHAIRPERSON: But it seems to me.

ADV DALI MPOFU: And [intervenes].

CHAIRPERSON: Subject what you might say, it seems to me that when the rules say:

10 “The application must be accompanied by a statement from the
 implicated person responding to the witness’ statement insofar
 as it implicates him or her.”

It seems to me that that is the part where we expect the Applicant to put up his or her
version.

ADV DALI MPOFU: Yes.

CHAIRPERSON: So.

ADV DALI MPOFU: That is true Chair. That is not disputed.

CHAIRPERSON: Yes, you have no problem with that?

ADV DALI MPOFU: No, I have no problem at all.

CHAIRPERSON: Okay.

20 **ADV DALI MPOFU:** All I am saying is that.

CHAIRPERSON: Yes.

ADV DALI MPOFU: That statement it is not as if, it is not a mechanical thing where.

CHAIRPERSON: Yes.

ADV DALI MPOFU: We must now have a separate statement.

CHAIRPERSON: Yes.

ADV DALI MPOFU: That statement must be incorporated in the affidavit.

CHAIRPERSON: Yes.

ADV DALI MPOFU: [Intervenes].

CHAIRPERSON: No, no that is true, *ja*.

ADV DALI MPOFU: So if we are together on that.

CHAIRPERSON: Yes.

ADV DALI MPOFU: Then my next submission is that.

CHAIRPERSON: *Ja*.

ADV DALI MPOFU: This is exactly what we have done in the sense that.

10 **CHAIRPERSON:** Yes.

ADV DALI MPOFU: We have identified, I have said at paragraph 5 we have identified the parts. At paragraph 6 we have identified the parts. At paragraph 7 we have identified even the parts that are not clear to the naked eye where we say there are.

CHAIRPERSON: The problem that I have with how that has been dealt with.

ADV DALI MPOFU: Hm.

CHAIRPERSON: Is that when I read it, it is not like when for example you do an answering affidavit.

ADV DALI MPOFU: Yes.

CHAIRPERSON: You know where you say.

20 **ADV DALI MPOFU:** But.

CHAIRPERSON: Now I am responding. I am responding to this allegation.

ADV DALI MPOFU: *Ja*.

CHAIRPERSON: It becomes clear.

ADV DALI MPOFU: No.

CHAIRPERSON: So for example when Mr Moyane refers somewhere in his affidavit to

Mr Gordhan talking about his participation in the ITC.

ADV DALI MPOFU: Yes.

CHAIRPERSON: Issue, you know.

ADV DALI MPOFU: Hm. Then it is clear.

CHAIRPERSON: I do not know, I do not think I saw anything in his affidavit. I may be wrong that says well I did participate, but in this way and not in that way.

ADV DALI MPOFU: Yes.

CHAIRPERSON: Or I did not participate at all. I might have seen I do not know.

ADV DALI MPOFU: Yes. It is there. I.

10 **CHAIRPERSON:** I might have seen something that says he was not involved at all.

ADV DALI MPOFU: Yes, he does.

CHAIRPERSON: Ja.

ADV DALI MPOFU: I will.

CHAIRPERSON: But maybe it is not put as clearly.

ADV DALI MPOFU: I understand what the Chair says.

CHAIRPERSON: As one wants, because part of the reason why the rules contemplate an implicated person putting up his version is to enable me to see the gap between the version of the one, of the witness and the implicated person. How much area is disputed?

20 **ADV DALI MPOFU:** Yes.

CHAIRPERSON: Between the two statements and that may inform also the time I set for the cross-examination.

ADV DALI MPOFU: 100 percent Chair, but Chair please I think the only problem that I have is that maybe we are moving two steps ahead of where we are. Where we are now Chair all we need to do is as I say almost as a grounds of appeal is to put the

grounds and make it clear that we, what we contest which we will set out in paragraphs 5, 6 and 7. Maybe what created the impression that the Chair is talking about is our zeal to simplify this by using the thing of themes. So we said okay these are the 15 things, but we are not going to discuss each of the 15 things. We are going to put them in five themes to make it easier to deal with and maybe that is, that trying to simplify it is what complicated it, but we did that deliberately after listing the 15 or 20 things. That is the first thing. The second thing Chair is that and this is the point about maybe we are jumping a step ahead. The assumption of course is that there are three things that are going to happen before Mr Moyane ever puts his version in the broad sense now of

10 talking, sitting there. There will be this application. There will be a statement taken by the evidence leaders or at least in conjunction with them and then there is obviously the evidence itself that he must lead and my humble submission Chair will be at the point, at the second stage once the evidence leaders have interacted in some form. It is only then that the Chair will then say okay I am giving this a day, I am giving half a day or whatever it is. Not necessarily now. Now the only function for the Chair is to allow in broad principles the issue of cross-examination. Whether that cross-examination is going to be one minute or 10 days is it not at this stage the issue before you.

CHAIRPERSON: Well.

ADV DALI MPOFU: But.

20 **CHAIRPERSON:** The approach of separating, I will allow you just now.

ADV DALI MPOFU: Yes.

CHAIRPERSON: The approach of separating the issue of the grant of the.

ADV DALI MPOFU: The right.

CHAIRPERSON: Grant or refusal of the leave to cross-examine and the determination of the duration of the.

ADV DALI MPOFU: The nature, *ja*.

CHAIRPERSON: Of cross-examination maybe one approach.

ADV DALI MPOFU: Yes.

CHAIRPERSON: Of dealing with him, but I prefer to deal with all.

ADV DALI MPOFU: [Intervenes].

CHAIRPERSON: At the same time.

ADV DALI MPOFU: Fair enough.

CHAIRPERSON: *Ja*.

ADV DALI MPOFU: That is.

10 **CHAIRPERSON:** So.

ADV DALI MPOFU: I accept that. There is no.

CHAIRPERSON: *Ja*.

ADV DALI MPOFU: I am not submitting.

CHAIRPERSON: Yes.

ADV DALI MPOFU: Chair that.

CHAIRPERSON: *Ja*.

ADV DALI MPOFU: If you do so it would be wrong.

CHAIRPERSON: No, no, no.

ADV DALI MPOFU: I am simply saying that there are ways.

20 **CHAIRPERSON:** But where.

ADV DALI MPOFU: Of doing it.

CHAIRPERSON: Where I think it might, it might be important for us to look at that is the point you make which is made in the, in Mr Moyane's affidavit, one of his affidavits if not both or even the written submissions namely that after I have granted leave to cross-examine if I grant it there would be a process of taking of statements.

ADV DALI MPOFU: Yes.

CHAIRPERSON: I want that the statements should be in.

ADV DALI MPOFU: Yes.

CHAIRPERSON: When I grant the.

ADV DALI MPOFU: Yes.

CHAIRPERSON: The leave if I grant it and as I see it that flows from the Rule 3.4 when it says the implicated person must give.

ADV DALI MPOFU: Yes.

CHAIRPERSON: A statement dealing with the allegations implicating him. So in other
10 words not just broadly.

ADV DALI MPOFU: Yes.

CHAIRPERSON: But to say this is my version, *ja*.

ADV DALI MPOFU: That I accept Chair. Except to say this, well at least this Commission where it has granted or at least being willing to grant leave the approach that has been taken as I understand it I read specifically the Gupta refusal.

CHAIRPERSON: Yes.

ADV DALI MPOFU: Was that the Chair actually was inclined to say look.

CHAIRPERSON: Hm.

ADV DALI MPOFU: Except for this thing of you wanting to do it.

20 **CHAIRPERSON:** Yes.

ADV DALI MPOFU: Overseas which I understand is not acceptable.

CHAIRPERSON: Yes.

ADV DALI MPOFU: I am going so far as to say.

CHAIRPERSON: Yes.

ADV DALI MPOFU: I will grant you.

CHAIRPERSON: Yes.

ADV DALI MPOFU: If you remove that.

CHAIRPERSON: Yes.

ADV DALI MPOFU: In other words simply because you have been implicated, simply because you are disputing at a broad level. I do not at this stage have anything from you Mr Gupta, but because at a broad level you are implicated. I will grant you and that is why we assumed if, let us assume the Guptas then said okay we will come back and do it then obviously what would follow is what we suggest. They would interact with evidence.

10 **CHAIRPERSON:** No.

ADV DALI MPOFU: [Intervenes].

CHAIRPERSON: No in the Gupta they put up their version fully.

ADV DALI MPOFU: Yes.

CHAIRPERSON: Ja, in regard to the allegations that were made by the specific witnesses.

ADV DALI MPOFU: Yes, Chair.

CHAIRPERSON: Ja.

ADV DALI MPOFU: And even in the case of, what is his name, Mr Duduzane Zuma.

CHAIRPERSON: Mr Duduzane Zuma.

20 **ADV DALI MPOFU:** Which you have granted. I know.

CHAIRPERSON: Ja.

ADV DALI MPOFU: I have looked at.

CHAIRPERSON: Yes, at the affidavit.

ADV DALI MPOFU: At the documents, yes.

CHAIRPERSON: Yes.

ADV DALI MPOFU: Let me just move from this point by saying Chair.

CHAIRPERSON: Yes.

ADV DALI MPOFU: I take you to page 6, paragraph 16. So maybe one does not use the word version, but here is the version.

CHAIRPERSON: Yes.

ADV DALI MPOFU: We say, actually we would even use the word version. At paragraph 12, *ja*.

10 “Under this thing my version is that Minister Gordhan’s affidavit is more significant for what it omits than what it says. The omitted facts will give a truer picture of the Commission about what actually went on behind the scenes. The truth...”

Again that is the way of saying my version.

“The truth is that Minister Gordhan was an ardent supporter of President Zuma and was in fact twice entrusted by him into what is according to Gordhan himself the most strategic ministry in the state capture project. It requires some exploration so as to distil its impact and meaning.”

20 Let us just pause there. Chair anybody reading those two paragraphs would understand that Mr Gordhan’s entire posture, let me put it that way, was that he is an anti-state capture buster or something like that. Now the point we make here is that you cannot have that when the version that we are going to put is that even according to the same witness at the centre of the state capture project is the Treasury, the Ministry of Finance and actually at a prima facie level people are assumed to be once they are there whether you are Van Rooyen or Gigaba or Nene you are a Gupta person. So miraculously Mr Gordhan is the only one who is in that Ministry, twice

appointed twice but by no less than the person he says was the kingpin of state capture. To be in charge of this very Ministry. So there is the version. Then we say in his affidavit [intervenes].

CHAIRPERSON: That does not indicate at least as far as I recall he is, it is prompted by what statement that he made.

ADV DALI MPOFU: Yes.

CHAIRPERSON: That implicates.

ADV DALI MPOFU: The next paragraph.

CHAIRPERSON: Mr Moyane.

10 **ADV DALI MPOFU:** The next paragraph.

CHAIRPERSON: *Ja.*

ADV DALI MPOFU: The next paragraph says and this is about [indistinct] by the way:

“In his affidavit the Minister Gordhan seeks to downplay the impact of the history labelling himself as an “unwitting” member of the Cabinet which was oblivious of what was going due to being “manipulated, lied to and abused”. These two call for exploration.”

Those quotes Chair come directly, Gordhan’s affidavit we do not reference them. They come literally.

20 **CHAIRPERSON:** Yes.

ADV DALI MPOFU: From the mouth of.

CHAIRPERSON: Hm.

ADV DALI MPOFU: Of, so.

CHAIRPERSON: Hm.

ADV DALI MPOFU: You can either say well you have not identified exactly where he

says unwittingly.

CHAIRPERSON: Hm.

ADV DALI MPOFU: Then we can find it.

CHAIRPERSON: Yes.

ADV DALI MPOFU: In the record.

CHAIRPERSON: Yes.

ADV DALI MPOFU: But it does exactly what the Chair says.

CHAIRPERSON: Yes.

ADV DALI MPOFU: Needs to be done.

10 **CHAIRPERSON:** Yes.

ADV DALI MPOFU: You put a version.

CHAIRPERSON: Hm.

ADV DALI MPOFU: Your problem with it.

CHAIRPERSON: Hm.

ADV DALI MPOFU: And then you identify what he said.

CHAIRPERSON: Hm.

ADV DALI MPOFU: Now more than that with respect an Applicant cannot do and then paragraph 16 the same thing. We say:

“Under this...”

20 This is the anti Moyane bias and bias of course Chair knows is a very important issue for cross-examination.

“Under this we seek to demonstrate that the levels of acrimony hostility and underline hostility.”

Because Mr Gordhan actually used that word here.

“Enmity and [indistinct] by Minister Gordhan towards me as a

person are sufficient to disqualify him as an impartial dispassionate commentator on any issue I am allegedly involved now here. The documented and unchallenged history of racist and other forms of abuse of power in the hands of Mr Gordhan will be provided as the basis for the conclusion postulated in the preceding paragraph.”

And then we refer directly in the next page Chair to.

CHAIRPERSON: I am looking at you.

ADV DALI MPOFU: Oh, yes.

10 **CHAIRPERSON:** If I look at the [intervenes].

ADV DALI MPOFU: I know, I know Chair. I know.

CHAIRPERSON: *Ja*.

ADV DALI MPOFU: But if the Chair was.

CHAIRPERSON: *Ja*, let us try and wrap up.

ADV DALI MPOFU: And I appreciate the engagement, *ja*.

CHAIRPERSON: *Ja*, okay.

ADV DALI MPOFU: Now just jump to paragraph 19 then Chair, just for, so that we do not waste time. Paragraph 19 you will see there that we do not just say this is our version and this is what is wrong. We take you, we say go to the affidavit Annexure
20 TMZ1 and we say go to Annexure TMZ22 to this affidavit. Now that is a version. The fact that we do not call it a version, but it is there. We actually say here is, there is a transcript of a telephone call by Mr Gordhan to Mr Moyane which Mr Moyane found to have racist connotations and undermining towards him. For example it is verbatim, he says to Mr Moyane, grow up and Mr Moyane says what do you mean I must grow up? I am not a little boy and we know the connotation in South African context of referring to

somebody as a boy. We are almost the same age. You cannot talk to me like that and so on. It is even to you Chair in verbatim transcript form. So where is your version? It is at TMZ1. It is TMZ22. Then the next one we say is common course. Well if it is common course we do not have to refer to it. So the whole thing is littered and even if you go to paragraph 20. We say:

“It is common cause that Minister Gordhan was the first ever witness called in the SARS Enquiry about [indistinct].”

And then we say towards the end there:

10 “These are false and self-claims in pursuit of the Moyane removal claim. The undisputed evidence is that my performance by far outperformed his own. I also did not form an illegal intelligence structure as the rogue unit outside the parameters of the law.”

Well for that you cannot say, if he says it is in the negative. I did not do this. You do not say well where is your version. That is his version. That is what I.

CHAIRPERSON: What may, what I may have to consider is whether I should not ask you to put up, to file maybe a supplementary affidavit that makes this job easier rather than me having to try and look for them all over. If you do like an answering affidavit. You say in his statement paragraph so and so this is what he has said and this is what
20 we say.

ADV DALI MPOFU: *Ja.*

CHAIRPERSON: Or in his evidence the transcript shows this is what he says and this is what we say.

ADV DALI MPOFU: Okay.

CHAIRPERSON: It might make it easier.

ADV DALI MPOFU: Well Chair.

CHAIRPERSON: In time and.

ADV DALI MPOFU: Yes.

CHAIRPERSON: Time saving.

ADV DALI MPOFU: Yes, thank you Chair.

CHAIRPERSON: *Ja*, okay.

ADV DALI MPOFU: Maybe in the end.

CHAIRPERSON: *Ja*.

ADV DALI MPOFU: But I would like the Chair to just give me an opportunity to
10 demonstrate that that actually is what we have done.

CHAIRPERSON: Hm.

ADV DALI MPOFU: Here is the one we were looking for Chair.

CHAIRPERSON: Yes.

ADV DALI MPOFU: Paragraph 21.

CHAIRPERSON: Huh-uh.

ADV DALI MPOFU: We say:

“In further pursuance of the aforesaid vengeful and racist
agenda Gordhan has made direct accusations that I one,
improperly participated in the award of a tender of my friend.

20 That is the one you are not sure if it was that.

CHAIRPERSON: Yes.

ADV DALI MPOFU: [Indistinct] and two.

CHAIRPERSON: Yes.

ADV DALI MPOFU: “Lied to Parliament about such involvement.”

Okay. So that is the.

CHAIRPERSON: *Ja.*

ADV DALI MPOFU: The problem.

CHAIRPERSON: Yes.

ADV DALI MPOFU: Where is the version? We then move. We say:

“Then it is not clear where Gordhan made these remarks and they are not included and so on.”

Okay. 23:

“In any event I deny these accusations and will accordingly put questions to Gordhan to demonstrate their falsity in support thereof...”

10

CHAIRPERSON: *Ja, [intervenes].*

ADV DALI MPOFU: “...I instructed my attorneys to obtain the necessary records of Hansard. In other words the raw verbatim evidence of what I said in Parliament. In this regard I will ably demonstrate that it is a deflection, because it is Gordhan himself who secured lucrative multibillion Rand IT contracts without following proper procedures. The Commission will be referred to specific examples of such contracts and their relevant documents and so on.”

20 And then [intervenes].

CHAIRPERSON: Of course, I am sorry, of course.

ADV DALI MPOFU: I am sorry Chair.

CHAIRPERSON: Of course if it is a statement not made in a, if it is an allegation made outside of the Commission and not in his statement against Mr Moyane and not made in the witness box in the Commission we may have to look obviously.

ADV DALI MPOFU: No, it is not.

CHAIRPERSON: It is not?

ADV DALI MPOFU: No, it is not.

CHAIRPERSON: So.

ADV DALI MPOFU: That allegation Chair.

CHAIRPERSON: Yes.

ADV DALI MPOFU: Is dealt with extensively, but extensively.

CHAIRPERSON: *Ja*.

ADV DALI MPOFU: In what Mr Gordhan attached himself in his own statement.

10 **CHAIRPERSON:** Yes.

ADV DALI MPOFU: From page 527.

CHAIRPERSON: Yes.

ADV DALI MPOFU: To page 598.

CHAIRPERSON: Yes.

ADV DALI MPOFU: Of the, of his bundle.

CHAIRPERSON: Okay.

ADV DALI MPOFU: Where he goes and talks about this specific contract. In the answering affidavit he goes further.

CHAIRPERSON: *Ja*.

20 **ADV DALI MPOFU:** To say to quote chapter and verse.

CHAIRPERSON: Oh, it is not in the affidavit, but it is in an annexure?

ADV DALI MPOFU: No, no. It is in, *ja* it is in an annexure which he refers to and which he.

CHAIRPERSON: Yes.

ADV DALI MPOFU: Testified about one.

CHAIRPERSON: Yes, okay.

ADV DALI MPOFU: Two, which I could not.

CHAIRPERSON: Yes.

ADV DALI MPOFU: I could not find it.

CHAIRPERSON: Yes.

ADV DALI MPOFU: I subsequent found it.

CHAIRPERSON: Ja.

ADV DALI MPOFU: Secondly, in the answering affidavit Chair will see there may be four or five pages of quoting the Nugent findings on this very issue. So there can be no

10 doubt.

CHAIRPERSON: Hm.

ADV DALI MPOFU: Whatsoever that that is the version of Mr Gordhan.

CHAIRPERSON: But are you not talking now about his answering affidavit when you refer to him quoting the Nugent Commission?

ADV DALI MPOFU: Yes. That is exactly what I am saying. I am saying.

CHAIRPERSON: Hm.

ADV DALI MPOFU: One, you will find it in the annexure to his affidavit in the written statement to this Commission and two you find it even more substantiated in his answering affidavit [intervenes].

20 **CHAIRPERSON:** Okay.

ADV DALI MPOFU: So there is no doubt whatsoever that it was.

CHAIRPERSON: Hm.

ADV DALI MPOFU: It was part of this.

CHAIRPERSON: Huh-uh.

ADV DALI MPOFU: So again it is exactly the, I mean maybe it is a question of time,

but the format is.

CHAIRPERSON: Hm.

ADV DALI MPOFU: What did he say?

CHAIRPERSON: Hm.

ADV DALI MPOFU: Where is it?

CHAIRPERSON: Hm.

ADV DALI MPOFU: What is wrong with it? What is your version?

CHAIRPERSON: Hm.

ADV DALI MPOFU: It cannot be anything more than that Chair and then the; so issues
10 of style aside the issue is that if the Chair at this stage, there are two standards. One,
is the evidence okay broadly speaking relevant as I defined earlier. Is it necessary and
does it advance the cause of the Commission.

CHAIRPERSON: Hm.

ADV DALI MPOFU: And with the greatest respect unfortunately this thing that I have
been wanting to read unfortunately we could not get to it.

CHAIRPERSON: Ja.

ADV DALI MPOFU: But we have listed here more than 10 instances of the so called
implication.

CHAIRPERSON: Hm.

20 **ADV DALI MPOFU:** Chair let me paraphrase it, because we do not have time.

CHAIRPERSON: Ja.

ADV DALI MPOFU: What we are really saying is that Mr Gordhan the things that he
implicates Mr Moyane in.

CHAIRPERSON: Hm.

ADV DALI MPOFU: Most of them amounts to criminal activity.

CHAIRPERSON: Hm.

ADV DALI MPOFU: Right?

CHAIRPERSON: Hm.

ADV DALI MPOFU: So let us put that aside.

CHAIRPERSON: Hm.

ADV DALI MPOFU: And if that is the case really then at the highest level.

CHAIRPERSON: Hm.

ADV DALI MPOFU: The only way that Mr Moyane can defend his integrity.

CHAIRPERSON: Hm.

10 **ADV DALI MPOFU:** And his rights.

CHAIRPERSON: Hm.

ADV DALI MPOFU: Against such accusations.

CHAIRPERSON: Hm.

ADV DALI MPOFU: Of just take any example.

CHAIRPERSON: Hm.

ADV DALI MPOFU: Of the, what I term as criminal activity, can but only be done in cross-examination. Now whether the extent and all that of that cross-examination are matters.

CHAIRPERSON: *Ja.*

20 **ADV DALI MPOFU:** That as I say will be determined by the Chair.

CHAIRPERSON: *Ja.*

ADV DALI MPOFU: Sometime even in the.

CHAIRPERSON: Yes.

ADV DALI MPOFU: Live proceedings.

CHAIRPERSON: *Ja.*

ADV DALI MPOFU: But nobody in their right mind can say at this stage.

CHAIRPERSON: Hm.

ADV DALI MPOFU: That the right to challenge someone who has implicated you.

CHAIRPERSON: Hm.

ADV DALI MPOFU: In criminal activity.

CHAIRPERSON: Hm.

ADV DALI MPOFU: Let us take this example Chair.

CHAIRPERSON: Hm.

ADV DALI MPOFU: The other said says for example in its heads.

10 **CHAIRPERSON:** Shall we agree that I give you five minutes and you wrap up within five minutes?

ADV DALI MPOFU: Yes.

CHAIRPERSON: We, I think we.

ADV DALI MPOFU: Okay.

CHAIRPERSON: It has been.

ADV DALI MPOFU: I will.

CHAIRPERSON: We are at 10 o' clock. We have should have finished.

ADV DALI MPOFU: [Intervenes].

CHAIRPERSON: Everything by 10 o' clock, but.

20 **ADV DALI MPOFU:** I know Chair.

CHAIRPERSON: Yes, okay.

ADV DALI MPOFU: Well it is the questions from the Chair which I appreciate, *ja*.

CHAIRPERSON: Yes.

ADV DALI MPOFU: But let me just make this example then. You are told for example in the heads that you must take into account the so called high level panel report the

recent one about the parallel state that was stated at intelligence. Now that report incidentally says that the people who were involved in that parallel state creation must be charged. I think with treason something dramatic like that. Now here we are saying, Mr Moyane is saying Mr Gordhan was involved in similar exactly similar conduct in respect of a rogue unit, but the impression you are given is that the other people who did exactly the same thing must be charged with treason, but Mr Gordhan must be given a hug you know for doing the exact same thing. Now that, I mean, is a self-evident point that says that if it is true and again I use a big if, because I cannot pre-empt, again Mr Moyane cannot also be as arrogant as Mr Gordhan to think his

10 version is unassailable, but if his version is correct then it destroys that entire and actually you might find that it is Mr Gordhan who must be charged with treason, because he did the exact same thing that the high level panel says was done on a smaller scale maybe but, and in a different context but as far as the crime is concerned if is exactly the same thing. So that is the one thing. So it is the criminal, let us call it criminal [indistinct]. The second issue Chair and that goes to the quotation that we make and that deals with this issue of whether even if it is inquisitorial this Commission that very well-known quotation from Lord [indistinct].

CHAIRPERSON: Yes.

ADV DALI MPOFU: That says that even if it is completely inquisitorial the, I am sorry

20 Chair. It is at page 11 of our submissions.

CHAIRPERSON: Yes.

ADV DALI MPOFU: No, page 13. This is a classic quotation which has been accepted by our courts in the Du Preez v TRC matter and I think in the [indistinct] matter which I was involved in that is the Marikana Commission, because these arguments were always said that look and the point really, the big point Chair is that the stand of

fairness.

CHAIRPERSON: Hm.

ADV DALI MPOFU: Is not the sole preserver of adversarial proceedings.

CHAIRPERSON: Hm.

ADV DALI MPOFU: Here Lord [indistinct] in his typical flowery language said.

CHAIRPERSON: *Ja.*

ADV DALI MPOFU: “This enquiry was not a court of law. It was an investigation in the public interest in which...”

Like this one.

10 “...in which all should surely cooperate as they promise to do.”

As this one.

“It is true of course that the inspectors are not a court of law.”

We can put there this Commission.

20 “Their proceedings are not judicial proceedings. They are not even quasi-judicial for they decide nothing. They only investigate and report. They sit in private, but this should not lead us to minimise the significance of their task. They may if they think fit make findings of fact which are very damaging to those whom they name. They may accused some. They may condemn others. They may ruin reputations or careers. Their report may lead to judicial proceedings. It may expose persons to criminal proceedings or civil actions seeing that their work and report may lead to such consequences. I am clearly of the opinion that the inspectors must act fairly.”

And all we are saying is that the fairness in this context.

CHAIRPERSON: *Ja.*

ADV DALI MPOFU: Surely must include granting somebody who has been accused not just for reputation and careers.

CHAIRPERSON: Hm.

ADV DALI MPOFU: But of such [indistinct] of prison basically.

CHAIRPERSON: Hm.

ADV DALI MPOFU: Or being part thereof, of a right to cross-examination.

CHAIRPERSON: Hm.

ADV DALI MPOFU: One last point.

10 **CHAIRPERSON:** Hm.

ADV DALI MPOFU: The references to the Nugent Commission with the greatest respect it is completely irrelevant. This Commission has got its own task and it cannot rely, although the rules of evidence must not be applied mechanically, but it cannot rely on the opinion of another Commission no less one that is the subject of a review application by Mr Moyane. When there is evidence of other Commissions that have found otherwise which have never been challenged. We know what the law is in relation to that.

CHAIRPERSON: Hm.

20 **ADV DALI MPOFU:** So insofar as that is made as a point it must just be kicked out and we make the point that most of this defence is almost 80 percent on what was said in the Nugent Commission and to that extent it must just be expunged and not be considered at all. All in all Chair.

CHAIRPERSON: Yes.

ADV DALI MPOFU: What we say is that there is enough more than enough, even if you do not take all the allegations made. Take four or five of them.

CHAIRPERSON: Hm.

ADV DALI MPOFU: And say in principle.

CHAIRPERSON: Hm.

ADV DALI MPOFU: Does Mr Moyane have the right to cross-examine the person who implicated him, yes or no.

CHAIRPERSON: Hm.

ADV DALI MPOFU: If he does then of course at least and appreciate that the Chair says.

CHAIRPERSON: Hm.

10 **ADV DALI MPOFU:** You want to do it comprehensively.

CHAIRPERSON: Hm.

ADV DALI MPOFU: Then of course we should assume that there other procedures which must be followed to cut the cloth as it were to fit.

CHAIRPERSON: Hm.

ADV DALI MPOFU: The Commission.

CHAIRPERSON: *Ja*.

ADV DALI MPOFU: But there can be no doubt whatsoever in our respectful submission that the entitlement or rather the discussion.

CHAIRPERSON: Hm.

20 **ADV DALI MPOFU:** Of the Chair which is really what this is about.

CHAIRPERSON: Hm.

ADV DALI MPOFU: Ought to be exercised in favour of granting that right under.

CHAIRPERSON: *Ja*.

ADV DALI MPOFU: Good cases that show that a denial of, because that is what is being asked of a denial. A denial of cross-examination *ipso facto*.

CHAIRPERSON: Hm.

ADV DALI MPOFU: Is a serious irregularity admittedly in court proceedings, but even in general. It would, a complete blanket denial is just unfathomable.

CHAIRPERSON: Can I stop you now?

ADV DALI MPOFU: You can.

CHAIRPERSON: Okay. Let me hear.

ADV DALI MPOFU: I appreciate Chair. I appreciate the engagement and the.

CHAIRPERSON: Thank you.

ADV DALI MPOFU: And the extra time.

10 **CHAIRPERSON:** No thank you very much. Counsel for Mr Gordhan?

ADV MICHELLE LE ROUX: Thank you Chair, good morning.

CHAIRPERSON: Yes, good morning.

ADV MICHELLE LE ROUX: Chair I think we should emphasize three submissions in these oral submissions, given that we have made full written argument already and the three submissions I would like to stress this morning are the following; the first is that Mr Moyane has not laid a foundation identifying specific aspects of Minister Gordhan's evidence that he disagrees with and disputes and the grounds for that dispute. The second submission is that the purpose on his own terms for this application is not a proper purpose for the cross-examination application and the third is to say that if we
20 understand the purpose of cross-examination before you by an implicated person the application should be denied in its entirety.

And let me perhaps start with that final point, because my learned friend I was obviously appreciative to hear accepts that there is no automatic right to cross-examine in this Commission, that it is in your discretion. What he failed to address you on though is the test, that's the regulation and the rules set for the exercise of that

discretion and there are two elements that must be the loadstar for any decision that you take.

The first question is whether the cross-examination is necessary, and the second is whether it's in the best interests of the work of the Commission. So if we could put that a different way, is it necessary and does it progress the work of this Commission if it digresses into the issues listed in Mr Moyane's application, and for all of the reasons submitted in the answering affidavit and in the written submissions we would submit that it does not, because Chair if we understand Mr Moyane's application, and I am indebted to my learned friend for identifying and stressing that the contents of

10 paragraphs 5, 6 and 7 of the founding affidavit are what he wants to cover and the grounds on which he wants you to grant him leave to cross-examine, all of that falls into three categories.

The first category are SARS related issues, he wants to resuscitate the so-called rogue unit narrative, he wants to traverse his appointment and removal as the Commissioner of SARS and he tries to attribute some motive and I mean the language of the founding affidavit is obviously quite extreme, if not hysterical, it talks about Mr Gordhan having a vendetta and that it's his life's work to try to remove Mr Moyane, of course as the Minister testified his life's work has been to work for a non-racist, non-sexist, free South Africa, but the point is that all of these SARS related issues are the

20 work of the completed Nugent Commission. The Nugent Commission and I have given you the references in the heads and in the answering affidavit at length, and we've provided you with the two reports of that Commission headed by a very senior and a distinguished judge.

Judge Nugent looked at this question of the rogue unit, he looked at it and he concluded that there was nothing there, that there was no basis to say that an unlawful

unit had been established within SARS. He goes at length through how the Sunday Times reports were all complete fabrications resulting in an apology and their retraction. He goes through how the Sikhakhane Report had been discredited but in any event overtaken by events. He had Judge Kroon come before him and disavow the findings of his enquiry and Justice Nugent looked at this issue and he said I can see no reason why this so-called rogue unit, but of course we know it's called the High Risk Investigation Unit, why anyone says it was unlawful and why Minister Gordhan should be criticised in any way for having played the small part he played in its establishment.

What we then know is that Justice Nugent recommended that it be re-established, he recommended that a unit with those powers to investigate and combat the illicit trade and look at the tax affairs of politically prominent people be re-established and we know that that's currently taking place.

So all of the SARS related issues have been dealt with by Justice Nugent and what this application essentially amounts to, with respect to the SARS allegations, you're being asked to redo or review Justice Nugent. The first ...(intervention)

CHAIRPERSON: Well maybe putting it like that is not accurate, but what maybe accurate is to look at the same issues that he looked at, to consider the same issues.

ADV MICHELLE LE ROUX: Yes Chair.

CHAIRPERSON: Or some of the issues that he considered.

20 **ADV MICHELLE LE ROUX:** Yes.

CHAIRPERSON: Ja, without putting a label about review on it.

ADV MICHELLE LE ROUX: Sorry, so let's not talk about a redo or a review, but you're certainly being asked to traverse the identical terrain and you're being asked to come to the opposite conclusion of that reached by Justice Nugent, you're being asked to find that there was an unlawful unit, Justice Nugent has found there was no such thing. So

let's assume you take up this invitation to look at the same issue that Judge Nugent is finished with, let's assume you come to a different conclusion to him, you put that in a report to the President, what is the President to do with competing reports from two Commissions of Inquiry that go in different directions, it's an untenable position that you're being asked to occupy, because what you would then have to do, what you would have to do is expand your own terms of reference to accommodate the terms of reference of Judge Nugent's Commission and we say that all of the SARS related issues identified by Mr Moyane were the work of Justice Nugent's Commission, he has completed that work, he has made the findings he has made, and if Mr Moyane is

10 unhappy with that he has recourse, he can review that panel's findings explicitly, he has not as far as I am aware done that. He has attacked the process, he's attached decisions taken by the President on the basis of the reports issued by Justice Nugent, he has not actually as far as I'm aware launched a review of the Nugent Commission, and if he wants to disagree with its findings that's the avenue he should pursue, not asking you to look at the same issues.

So Chair on this first category of everything SARS related it is not irrelevant that Justice Nugent spent a lot of time and attention coming to very carefully reasoned conclusions based on a body of evidence. Then we have a category of issues that at best could be described as personality issues. The language again of Mr Moyane's

20 papers, he talks about racism, he talks about acrimony, he talks about hostility and hate and grudges and vendettas. Chair I go back to the question that you have to answer today, is it necessary and in the best interest of the work of this Commission to entertain that? Let's assume you grant leave on those topics, Mr Moyane's legal representatives will cross-examine Mr Gordhan about Mr Moyane's dislike of the man, how does that help you fulfil your terms of reference, we submit that it does not. It

doesn't take your work any further, and Chair I must say that this Commission with the hundreds of millions of rands being spent on it and the very limited time that you have been given to cover an enormous set of terms of reference should not be - time should not be spent and money should not be spent on consoling Mr Moyane's feelings or airing his personal grievances, it's not going to get you any closer to fulfilling your mandate.

And the final category of what's in Mr Moyane's papers is a political campaign, so it's all of this – these allegations about Minister Gordhan not being an angel, and Minister Gordhan actually being part of the State Capture Project, and as I
 10 understand my learned friend's argument this morning somehow because he was made Minister of Finance twice and we know that Treasury was an important target of the State Capture campaign that somehow it turns him from the man that we all know into some central architect of the State Capture Project, but as your questions have pointed out this morning there's no link, there's no evidence put before you as to why Mr Moyane says that. It's very easy to throw out allegations, very easy to throw mud and worse and hope that something sticks to Minister Gordhan, and we understand it's election season out there, we understand the political campaign against him because he testified about what he has endured and what his family has endured, but the question is does it help this Commission is it necessary and in the best interests of the
 20 work of your Commission to entertain what quite frankly are outlandish and baseless political theories about Minister Gordhan and we would submit that that is not a way to spend the taxpayers' money and your time.

So if we then look at the actual implication that was raised by the Commission's notice, the Commission identified only one item, and yes it used the word *inter alia*, but it only actually identified one issue for you, and for Mr Moyane, and it's

the issue of him misleading Parliament about his personal involvement in the appointment of Mr Monyeki's firm, NICS, as a debt collection agency, it's not an ICT contract Chair, it's a debt collection contract with SARS. The way it came up in Minister Gordhan's evidence was that he provided you with the affidavit to which he deposed in the disciplinary enquiry launched by the President against Mr Moyane before Senior Counsel Bam. One of the charges there was that Mr Moyane has misled Parliament. Why? Because he said to Parliament at one of its committee hearings that he had played no role in the appointment of NICS at SARS. One of the disgruntled debt collection companies launched litigation. In his answering affidavit on oath Mr Moyane

10 said yes I approved these contracts including the one of NICS.

So there's a competing version, you told Parliament you played no role, you told the Court you approved their appointment. There's a discrepancy, there's a contradiction, one of them was an untrue statement.

All Minister Gordhan gave you was that affidavit. He said this is what you told Parliament, this is what we know to be a statement you made you made elsewhere, there's a discrepancy, Advocate Bam was going to enquire into that. Obviously the disciplinary fell away following it being stayed because of a High Court case, and then obviously Mr Moyane's termination ended any need for discipline.

So this NICS contract again has been the topic of the Nugent Commission.

20 Justice Nugent looked at this and we've given you the references and the papers, he looked at the issue and he said no Mr Moyane was untruthful when he told Parliament he played no role, because he played this role of being the final approval, and he participated in that process, and Justice Nugent goes into NICS and Mahobe which is another Monyeki company and how it all fitted together and Chair it links to the allegations that were made against Mr Makwakwa, Judge Nugent looked at all of this

and made findings that there was an untruth told.

So let's assume you say no it's necessary and in the best interest of my commission to cross-examine on the topic that Nugent has already looked at. Minister Gordhan isn't going to be able to assist you. Minister Gordhan wasn't there appointing contracts, he wasn't in Parliament making statements so it's not going to assist the work of the Commission to cross-examine on the one issue that the Commission identified as a potential implicated issue, so there is no link between the evidence and what Mr Moyane would want to cover.

CHAIRPERSON: To the extent that anyone of the issues on which leave to cross-examine is being sought, any one or more, is or are issues that in respect of which the
 10 Nugent Commission has made findings to the extent that when I look I might find that some of the issues are issues that have – in respect of which there's already been findings by the Nugent Commission what may arise is whether Mr Moyane is going to accept those findings and leave the matter there, which is one thing, another approach, another is whether he is going to challenge those findings. If he is not going to challenge those findings the one attitude might be to say well if he doesn't challenge that it means he accepts that, and if he is going to challenge them it may be that it's not appropriate, I am using appropriate because maybe that might be a more neutral word to use, for this Commission to seek to make findings on the same issue because if he
 20 challenges those findings of the Nugent Commission involving that issue we don't know what will happen in that review application. If he is successful and those findings are set aside it may well be that the review court depending on the grounds of review that may be relied upon it may well be that the review court says well those findings are set aside completely, or it may be that if for example one of his complaints is that he was not allowed an opportunity to cross-examine and the review court concludes that he

should have been allowed the opportunity to cross-examine it may be that the review court might say well I'm setting them aside and he must be given that opportunity to cross-examine. Is that one of the – are those some of the possible scenarios?

ADV MICHELLE LE ROUX: Chair with respect I think you've identified that there is this world of uncertainty if Mr Moyane were to exercise his right to challenge the Nugent findings squarely, a direct attack on these findings and it may have an impact on your process and how you evaluate things, but where we stand today on the basis of this application I would make three submissions in this regard. The first is that Minister Gordhan only testified about this issue of you misled Parliament because under oath
10 somewhere else you said the complete opposite. That's the extent of Minister Gordhan's evidence.

CHAIRPERSON: Ja you say he has no personal knowledge of any ...(intervention)

ADV MICHELLE LE ROUX: No personal knowledge of any of the underlying facts and events that led up to this appointment, all the Minister's evidence is about is in Parliament you said this, and that's a public record, and in an affidavit filed in court, another public record, you said the opposite, so there's no factual dispute that Mr Moyane can rise with the Minister's evidence because it's about Parliament transcription tells me this, affidavit copy tells me the opposite.

CHAIRPERSON: Ja.

20 **ADV MICHELLE LE ROUX:** That's all he says, so cross-examining the Minister isn't going to advance your process and settle that explanation, which brings me to my ...(intervention)

CHAIRPERSON: That might be a case where it becomes important to say – to deal with the issues, you know sometimes you deny, sometimes you confess and avoid to put a version to say well I have seen the transcript from Parliament, it says t his is what

I said, that's not true or it is true but the context is the following, and this what he said in the affidavit is what is true.

ADV MICHELLE LE ROUX: And Chair that leads me precisely to my second response, which is under your rules, and it's rule 3.3.6 in particular that empowers you in this way, there are three outcomes possible today, the one is cross-examination of Minister Gordhan by Mr Moyane's representatives, the other is Mr Moyane testifies, and the third is somebody else testifies because somebody else can advance your work. These are the three outcomes because again the test is what's necessary and in the best interests of your Commission's work, so Mr Moyane may want to put up a version and
 10 come and testify and tell you what happened with this contract why he told Parliament that he hadn't played a role, why he then on oath said the opposite. Mr Moyane may be able to assist you, but his lawyers cross-examining the Minister isn't going to assist on this actual dispute, and Chair the third submission about this issue is that in the notice the Commission identified that this question may relate to your terms of reference 1.4 and 1.9, broadly speaking those are the ones about government contracts.

Now again to the extent your Commission is interested in this government contract at SARS it's for Moyane, possibly Mr Makwakwa, possibly some others from SARS, to come and help you to understand what happened there. Mr Moyane's
 20 lawyers cross-examining Minister Gordhan isn't going to get you anything falling into 1.4 and 1.9, so on the only issue identified in the notice the application would have to fail. So Chair what this application would actually amount to, with respect to all of this SARS related material, and quite frankly also with respect to the political and personal issues that are identified, this is an example of what we would call forum shopping, because Mr Moyane is hoping that you will buy what at least five other sets of Presiding

Officers haven't. He's trying to hope – he is hoping that you will do what Advocate Bam didn't do when he said it's premature for you to cross-examine at this stage, the Constitutional Court, your Court, twice has refused Mr Moyane on the basis of him having no prospects of success, where he tried to challenge and raised all of these identical issues. He has been refused twice, and then of course Judge Fabricius in the High Court similarly entertained these questions about whether Mr Moyane was in fact to be vindicated and found against him, and what's important to stress, and it's in the heads of argument, when Judge Fabricius dismissed Mr Moyane's application challenging all of the steps taken against him that culminated in his removal, Judge

10 Fabricius imposed a punitive cost order and you've seen the reasoning of the Judge as to why, and then the Constitutional Court confirmed that, saying you've got no prospects of an appeal here.

CHAIRPERSON: Are you there any issues relating to the application for leave to cross-examine that were the subject of that High Court judgment?

ADV MICHELLE LE ROUX: Chair the High Court judgment in effect, the High Court judgment was a series of declarators and a series of mandatory relief. I don't have the notice of motion with me but what it essentially was about is you know draw a line through the Nugent reports, the President mustn't have any reliance on those reports and take any decisions to suspend and ultimately terminate me on the basis of them, I

20 should be allowed to come and make my submissions in the way I see fit and you can't take a any action against me until that's all ventilated.

By implication when the Constitutional Court turned down that case when it was tried to be brought as a case of first instance and then when it confirmed the High Court's rejection of these arguments the Constitutional Court is saying Judge Nugent's process was proper and the President's reliance on that process, the decisions he took,

suspension, disciplinary before Advocate Bam and the removal ...(intervention)

CHAIRPERSON: Yes, but my question is are there issues relating to the application for leave to cross-examine that were covered by the High Court judgment?

ADV MICHELLE LE ROUX: Chair the process of Nugent we would say was the subject of those cases, obviously there was one declaratory sought against Minister Gordhan, that declaratory is the one that the Constitutional Court rejected twice, it was the declaratory that said Minister Gordhan should not have played the role of deposing to the affidavit that set out the charges against him, that was the declaratory sought against the Minister.

10 **CHAIRPERSON**: Yes.

ADV MICHELLE LE ROUX: The reasons given in the Court papers which are attached to this application, the reasons given were the same thing, Minister Gordhan doesn't like me, he's being racist towards me, the transcript of the phone call was attached.

CHAIRPERSON: I didn't see the High Court judgment here, I would like to have a look at it to the extent that it may enlighten me on any issues that may or may not be relevant.

ADV MICHELLE LE ROUX: Chair I'm sure we can arrange that ...(intervention)

CHAIRPERSON: Okay, arrangements can be made afterwards ja, okay.

20 **ADV MICHELLE LE ROUX**: ...it finds its way to you. But we would just say that there were two aspects that were the same in the litigation strategy followed and what's before you now. The basis for all of the declaratory relief sought against Minister Gordhan is the same, it may not be an exact mirror image in terms of the precision but I know that the transcript of the phone call was there, the accusations about dislike and vendettas and grudges and acrimony and bias and all of those allegations from Mr Moyane's personal view, those were all ventilated there.

Chair the other important issue ...(intervention)

CHAIRPERSON: It may well be that I might, I don't know how big the High Court papers were, it may well be that I should have them available should I want to have a look at what was placed before the High Court by the parties and what was placed before the Constitutional Court by the parties. It may be that it's not worth it, but it might be that if I want to have a look I should be able to have a look.

ADV MICHELLE LE ROUX: Yes Chair I'm sure we can get the full set of those papers to you and I would just highlight again that the High Court confirmed by the Constitutional Court imposed a punitive costs order because it said that the way those
10 proceedings were run and we've quoted the paragraph in our heads of argument, it's all strikingly similar to the invective and the bile that you see in the papers here against Minister Gordhan.

So what this application is trying to do is hoping to sell you on something that Advocate Bam, Judge Nugent, Judge Fabricius and the Constitutional Court twice have said this is not an appropriate use of the process.

CHAIRPERSON: And you need to also make sure I know what the first application to the Constitutional Court was about, what this and what the second one was about so that I have a complete picture because otherwise I just hear that this was dismissed but I don't know exactly what it was.

20 **ADV MICHELLE LE ROUX**: Yes Chair very briefly they went straight to the Constitutional Court with a Part A to pause everything essentially, Part B was a whole lot of declarators about the processes followed. That included the one about Minister Gordhan and the affidavit and the grounds for that declaratory are similar to the personal and political attacks here. Concourt rejected those, then he went to the High Court ,Judge Fabricius dismissed, then they went back on appeal to try to have

essentially Part B decided at the time, the Concourt rejected again including the confirmation of the punitive cost order for having done this, because Chair Mr Moyane ... (intervention)

CHAIRPERSON: So if I could have the whole file, I don't want to make one decision and find afterwards that had I had access to all of that maybe I might have dealt with the matter differently.

ADV MICHELLE LE ROUX: Chair I am sure we can get you all the papers the two Constitutional Court orders as well as the High Court's order, because Chair where all of this goes is Mr Moyane very explicitly tells you that he is here to rehabilitate his
10 reputation and career prospects, he's asking for your help to rehabilitate his discredited name, and when you read the Nugent reports, when you read Judge Fabricius' decision what you will see is the grounds on which Mr Moyane has been discredited and disgraced so he comes to you asking for rehabilitation, but again rehabilitation is not the purpose of this Commission. He has a legal avenue he can take, he can take these things on review, he can't come to you asking you to help him to rehabilitate his name and his career prospects, that's not within your terms of reference, and it's not a useful expenditure of public resources.

So if we then look at the other factual issue that was ever raised in this case it's this whole issue about the criminal charges, so initially there was some confusion
20 because it seemed that Mr Moyane denied being the complainant, it was clarified in reply that he just said no, no I did it as a reasonable SARS Commissioner and anyone in my position would have done the same thing and it wasn't out of malice.

Chair on that Mr Moyane's motivations are not relevant they are not going to help you in your work to understand why he did it, because let's remember what the Minister's evidence in this regard was, he said I was reappointed following the then

President's reversal of his appointment of Mr van Rooyen as Minister of Finance. From the moment I arrived it appeared as if there was then regret at the fact that I was back, and I then endured a campaign, 27 questions, the charges, the political campaign, the social campaign, which of course continues in various forms to this day against Minister Gordhan. That was his evidence, so Mr Moyane coming and saying I was a reasonable person when I went and filed charges isn't meeting the evidence, it doesn't implicate Mr Moyane's motives, so it is not actually an issue on which Mr Moyane must vindicate some right as an implicated person. The fact is he was the complainant as he has now clarified. The fact is that Minister Gordhan's evidence was that it was one instance of

10 this pressure and this campaign and what I had to endure. So why the charges were brought...

CHAIRPERSON: Well assuming – assuming that it is an issue that I should entertain his motive may be relevant if Mr Gordhan's evidence was to the effect or suggested that in laying the complaint against him Mr Moyane knew that there was really no case. But he was doing so for ulterior motives.

ADV MICHELLE LE ROUX: Chair let me say to two things in response to that. The first is again Judge Nugent has looked at this. Judge Nugent has looked at this and said Mr Moyane arrives, Minister Gordhan gets appointed, these charges are brought, they baseless, they are withdrawn, it is all – it is all rather suspicious and seems to

20 have been politically motivated. So Justice Nugent has looked at this. The second point is this. If you decide that Mr Moyane's motivations to file charges – to file complaint that ultimately led to charges against the Minister is relevant necessary and in the best interest of the work of the commission. Then again Mr Moyane should come and tell you about his motives and be subject to cross-examination on those motives and test his theory about why he says it was reasonable to do what he did. It does not

help to cross-examine the Minister about Mr Moyane's mind set.

CHAIRPERSON: Well if the Minister in giving evidence suggested that there was an ulterior motive on the part of Mr Moyane in laying those charges then there should be nothing wrong with the Minister being cross-examined on whether his attribution of that motive to Mr Moyane is correct or justified but that is if I were to accept that the issue is one that should be dealt with here.

ADV MICHELLE LE ROUX: With respect correct Chair so let us go back. Is it necessary and in the best interest of your work to delve into this question? We would submit not. If you were going to the Minister has testified and said, this was the
10 campaign that I endured and the charges were one element of it and my perception is that it was a political campaign. Mr Moyane's cross-examination is saying no, no I was just being a sensible commissioner. Does that re – there is no factual dispute that that cross-examination resolves for you. It is not like I was at Saxonwold, no I was not. Factual dispute, cross-examine, come up with evidence and it takes your commission forward because you establish some facts. This is two people who disagree about why something happened and both of them can be right. One can say I was just being sensible in laying charges and the Minister says I endured a campaign and I saw this as part of it. It does not help your job to resolve that.

CHAIRPERSON: Well the one may be saying – the one may be saying the motive for
20 this one doing this is part of state capture and the other one might be saying it is not part of state capture it is just a bona fide decision that any citizen would have taken – any citizen in my position would have taken.

ADV MICHELLE LE ROUX: And Chair let me...

CHAIRPERSON: And once we go to that level then I would have to say well because I need to establish people who were participants in you know conduct that may constitute

state capture. But again that is if that issue is an issue that I entertain but I think you have made the points you wanted to make on that. You may be ready to go to the next point.

ADV MICHELLE LE ROUX: Yes and Chair let me just – let me just say finally on this point. That again and it is – it arises out the questions you posed to my learned friend this morning. Mr Moyane needs to put up a version.

CHAIRPERSON: Ja.

ADV MICHELLE LE ROUX: That can be tested. So even if you did think that this would advance your work and for the reasons I have already explained it does not but if
10 you were inclined to entertain it you need a version from Mr Moyane first in order to test which we simply do not have. So Chair finally let me – let me conclude by saying that the Minister had nothing to hide from this commission. The Minister as he has repeatedly said is willing to assist you. If there is further information that you require from him he will come and continue to assist and support the important work of this commission. But the reason why he is opposing this application is because it is either airing personal vendettas and grievances which are not part of your terms of reference and do not advance your work Or it is part of some political campaign and the – the reliance, the explicit association of Mr Moyane with the narrative run by certain political opponent of the Minister in his papers by attaching their papers shows that there is a
20 political element to this that they are trying to introduce into your proceedings. And finally everything SARS related has been dealt with by Justice Nugent. So for – on the three things they want to try to do here we would submit it is not necessary and it is not in the best interest of the work of the commission to do that. And it is the best interests of the commission for another reason. Because this kind of abuse of your process which is what we would say this would allow that is the reason why people will not

come and take up your invitation to come and give you information. If they have to endure their political detractors and people that used to work with them being able to come and air personal grievances why would anyone put themselves before you? Why would you put yourself through that? So there is a chilling effect that is possible on the commission here and so when you are thinking through is it necessary and is it in the best interest of the commission entertaining this application is likely to have a detrimental effect on the willingness of participation in this commission. And given that you have very little time left if we actually look at the calendar and what is left to do we would submit that it would not be the best use of your public resources. Chair other
10 than – if there are any other questions those were our submissions.

CHAIRPERSON: No questions. Thank you. Mr Mpfu I do not know whether Mr Pretorius wants to say anything for five minutes or he want to come after you? Okay.

ADV DALI MPOFU: Thank you Chair I will ...

CHAIRPERSON: This time I will be strict with you.

ADV DALI MPOFU: I know, I know. Ten or fifteen minutes.

CHAIRPERSON: So any reason to give you more than seven minutes?

ADV DALI MPOFU: Yes Chair because we agreed on ten which I wanted to increase but I am happy with the ten. No Chair I will be very quick ja.

CHAIRPERSON: Ja. Very briefly.

20 **ADV DALI MPOFU**: Well Chair I mean really I think that I just want highlight those issues over which there is an attempt to pull the wool over the eyes of this commission.
1. Anybody who says we simply do not have – my learned friend just said, we simply do not have a version as to whether Mr Moyane was bona fide, the debate that you just had. What? We have attached this Sithakhane Report. We have referred to the Kroon Report. We have referred to the KPMG Report. We have referred to the IGI, Inspector

General Report all of which say that Mr Gordhan's activities were unlawful or criminal. So it – to say there is no version is just a – the only counter version is that of the Nugent Commission which we have said Chair explicitly in our replying affidavit we are challenging in court. So the Chair with respect said if he is going to – it is not if. He has said under oath that he is going to challenge that it is part B. My learned friend says that it was the = all these court cases she refers to were part A. So it is disingenuous with respect to then think that part B has just disappeared into the ether because the part B is still alive and Mr Moyane tells you Chair in this application that he even says I am taking advice whether I should pursue part B as it was or issue a fresh

10 challenge to the Nugent Review or rather Report because now remember there is a final report. So it might go wider than whatever he was contemplating last year. But he says one thing I can tell you Chair is that I am going to review this and we are still within the time within which that is going to be done. There is no doubt about that. There cannot be any doubt in the mind of any lawyer. Now and my learned friend says part B says you must draw a line through the Nugent Report. So what is that if it is not a review? Draw a line through the report that means you Chair should not consider that report because – and we do not want to talk about prospects of success or whatever 50/50 leave it at 50.50. 50% it might be – it might stay, 50% it might be set aside. That is all the Chair has to take into account and therefore to suggest that this commission

20 can rely even if it was not being challenged for that matter when there four other reports which have never been challenged by maybe twenty people and then one report which is being challenged by three or four other people. I mean it is actually a racist attack on this commission to suggest that this commission must suddenly you know [speaking Xhosa] there is no such thing. The Nugent Report has got the same status as any other report and the other reports of Sikhakhane and other people which have never

been challenged even though Mr Gordhan – let us take the Kroon thing for example. I am sorry Kroon J. They come here and say Kroon J disowned the – his report. That panel had about seven people. The – if one of them disowns the report who cares? Because it might well have been that the report in any event was 52 or 43 or 62 or whatever we do not know. The report stands nobody has ever discredited it. Nobody has ever reviewed it and it says that Gordhan should be investigated for criminal charges or rather no that is the IGI Report. But it says it was unlawful and so does Kekane and so does KPMG and so on. So this is just trying to mislead this – and I am glad the Chair has asked for the papers because the other red herring is this thing, oh

10 no there have been this court cases. Though all those court case I know because I drafted them. All those cases – the first one was about whether there was direct access. The constitutional court made it clear it says you may go to another court. So what has that got to do with the price of milk? It has nothing to do with the merits it said you must go to the high court. That is just one example. The other one it said no prospects of success on part A and the Chair will know there may be an array of reasons for example the fact that it was only an interim finding that is being attacked and so on. So all that is just to confuse to at least an attempt to confuse this court and the Chair will clear it out when he gets the necessary copies. The other red herring oh no Mr Moyane now that he has lost these cases wants you Chair to rehabilitate him and

20 so on. I cannot say it in open court what I think of that submission. Because the sequence of events is very clear. When Mr Moyane came here Chair in front of you I came here on the 19th or 20th November and said we are applying to cross-examine. None of these judgments that my learned friend is talking about were out at that stage – Zero. So how could it be that we are motivated by those judgments which had not happened when I was standing right here on this podium saying that we were going to

ask for cross-examination? That is just you know an attempt to obfuscate the issues. Then what – we are told that it is hysterical to suggest that there was a vendetta by Mr Gordhan. Well the funniest thing is that at page 390 and 91 Mr Gordhan says and I am not sure if the pagination works at 12.3 Mr Moyane using the platform to denigrate me and my record public service through cross-examination by his legal representatives,. It is outlandish theories, racist and populist script and in the pursuit of a personal vendetta against me. So if it is hysterical to say Mr Moyane is – has a personal vendetta against him why is not hysterical in his case? What is so special about him? So the – and he can accuse people of racism and by the way Chair with the greatest

10 respect if nothing else you remember that I say on this point is this. Specific in the papers you will see that there is a specific reference to the racism issue there are even transcripts and so on. Mr Gordhan who was cited did not oppose never filed a single affidavit in those cases. When you receive the papers you will see to say Mr Moyane for three or four pages says I was racist him says I was calling him a boy... He says I was condescending towards him. He said I was denigrating, I humiliated him I insulted his dignity and I say he is wrong. Zero till today. He has never – a person who is accused of such serious issues as racist in the context of South Africa would have just put even a one page affidavit to say look I do not want to get involved in the employment issues but I just want to put on the record that I am not a racist, I never

20 called him a boy. He is making it up. The transcript is wrong it was manufactured and doctored somewhere, never. So those are the facts but the last point Chair is what the Chair put to my learned friend which as I – as far as I am concerned decides the issue. The issue is this if Mr Gordhan in his wisdom sat here and Mr Pretorius no less than Mr Pretorius put this to Mr Gordhan which is the discussion here Chair you were having. At page 56 of 115 of the transcript of Mr Gordhan's evidence this is the whole thing

about the laying of the charges by Mr Moyane and the 27 questions what with you which went at length. Says Mr Pretorius is there not an argument that could be put to you that these were genuine investigation in relation to matters of potential unlawful activity? Is the point that the Chair was making that if there is a counter narrative and then Mr Gordhan gave some long convoluted answer which did not deal with that. But that shows exactly the – the only reason Mr Pretorius would have asked that question it is because it would be relevant as to the motive that was being attributed to Mr Moyane by Mr Gordhan which Mr Moyane disputes as being – and if that is not a question for cross-examination then nothing is because cross-examination as to motive

10 let alone the questions of bias is legitimate. So even on that narrow issue there is no doubt but no doubt Chair that the issue of cross – rather cross-examination should be – should be given. And my learned friend maybe was not listening I did articulate the test of necessity and mandate and I said I use the mandate deliberately because it is the wider test. It say: is it necessary 1 and is it – does it advance the mandate of the commission because that is how it has been – it is articulated I think in Rule 6.1. The point we simply want to make is that it is – if anything is going to discredit – can discredit this commission it is the idea obnoxious as it is that is being suggested here that it is acceptable for Mr Gordhan who is the boss to come here and denigrate Mr Moyane and cast aspersions on his character and his motives. But it is not acceptable

20 for Mr Moyane the subordinate to come here and defend himself against that and also to assert issues which are relevant to state capture on the part of Mr Gordhan that is the most ridiculous submission I have ever heard in my life. Because if that is what this commission is going to be communicating to the world out there that you can be denigrated you can be called all this and the other but you will not be given an opportunity to put your side of the story. That is what will discourage people from

coming here. Not granting what is the obvious right of Mr Moyane to refute the disparaging remarks and the criminal imputations which have been put upon him. I am sorry Chair I am so sorry. Two seconds.

CHAIRPERSON: Okay.

ADV DALI MPOFU: I just – this is a – just had a reference.

CHAIRPERSON: Yes.

ADV DALI MPOFU: I will not even motivate.

CHAIRPERSON: Yes.

ADV DALI MPOFU: The – in the – in the invitation of the commission to us.

10 **CHAIRPERSON**: Rule 3.3 Notice.

ADV DALI MPOFU: The 3.3 Notice that is correct Chair.

CHAIRPERSON: Ja, ja.

ADV DALI MPOFU: The – on my pagination it starts at page 270 I am told that Mr Pretorius tells me that our pagination also appears so even if it is wrong.

CHAIRPERSON: Oh.

ADV DALI MPOFU: Ours would be the koki pen one.

CHAIRPERSON: Okay.

ADV DALI MPOFU: Yes. And so 271 of the koki pen [indistinct] rather pagination paragraph 4 Chair I just wanted to highlight that.

20 **CHAIRPERSON**: Yes.

ADV DALI MPOFU: To say the commission said so we do not even have to come and say to you Chair this is how it is relevant in terms of the terms of reference. The commission says to us you are implicated in this – in the following ways inter alia bla, bla, bla and then it says: these allegations fall within the investigation of the commission as envisaged in its terms of reference and in particular paragraph 1.4 and

1.9 thereof. Case closed.

CHAIRPERSON: I just want to say that I will look at that. What is put there in a Rule 3.3 Notice is the legal teams view on the position as opposed necessarily of the Chairperson.

ADV DALI MPOFU: No, no Yes Sir.

CHAIRPERSON: Usually I have not even seen the statement by the time –

ADV DALI MPOFU: No Chair I think that is an important – that is an important – we spoke about it in chambers. No it is very important.

CHAIRPERSON: Ja yes ja we do ...

10 **ADV DALI MPOFU**: We do not at all impute any of these utterances to the Chair. As I said in chambers we regard as in the high court as analogy.

CHAIRPERSON: Yes.

ADV DALI MPOFU: As if they come from the registrar.

CHAIRPERSON: From the registrar ja.

CHAIRPERSON: In other words but all of the point I am simply making is that the evidence leaders highly trained lawyers, senior counsel and so on if they say the allegations we are talking about above are relate to terms of reference 1.4 and 1.9 at least that must come...

CHAIRPERSON: Yes, it is something.

20 **ADV DALI MPOFU**: That must count for something ja.

CHAIRPERSON: Okay.

ADV DALI MPOFU: As the court pleases.

CHAIRPERSON: Thank you.

ADV DALI MPOFU: I am sorry – as the commission pleases.

CHAIRPERSON: Thank you Mr Mpofu.

ADV DALI MPOFU: I am indebted ...

CHAIRPERSON: Mr Pretorius you wanted to say something? I am sorry Ms Le Roux wants to say something.

ADV MICHELLE LE ROUX: Sorry Chair I just need to correct something on the record.

CHAIRPERSON: Yes.

ADV MICHELLE LE ROUX: The reason why Minister Gordhan has not put in an affidavit contradicting the racism's allegations in the court papers is because the constitutional court dismissed the case on both occasions before giving him an opportunity to do that.

10 **CHAIRPERSON:** Okay.

ADV MICHELLE LE ROUX: I just needed to correct that on the record.

CHAIRPERSON: Okay thank you.

ADV DALI MPOFU: I am sorry Chair no that is not true. Mr Gordhan was cited in the constitutional court yes what they happened because the constitutional court referred the matter back to the high court Chair it – we then complied with the constitutional court directive and that is how the high court part A matter happened. When that happened Mr Gordhan did not oppose there as well. What – so – if the constitutional court did something before he moved which is also not true then at least he should have opposed in the high court.

20 **CHAIRPERSON:** But...

ADV DALI MPOFU: I am simply saying the sequence is wrong.

CHAIRPERSON: Ja okay but in the end really – it is neither here nor there for this purpose.

ADV DALI MPOFU: Yes. – ja.

CHAIRPERSON: Ja okay.

ADV DALI MPOFU: But that correction is wrong.

CHAIRPERSON: Alright. Mr Pretorius.

ADV PAUL PRETORIUS: Thank you Chair. We would like to place you several points.

CHAIRPERSON: And five minutes for you. You had indicated five minutes should be enough.

ADV PAUL PRETORIUS: Well as long as our treatment is consistent.

CHAIRPERSON: You – they did not ask for five minutes.

ADV PAUL PRETORIUS: Yes Chair.

CHAIRPERSON: You asked for five minutes.

10 **ADV PAUL PRETORIUS:** This will not be included in the five minutes Chair.

CHAIRPERSON: Okay alright.

ADV PAUL PRETORIUS: The first is what is the proper approach to applications of this sort? And our submission in that regard Chair is that the approach cannot be based on a right to cross-examination because that is not present.

CHAIRPERSON: Yes.

ADV PAUL PRETORIUS: In these proceedings.

CHAIRPERSON: That is common cause now.

20 **ADV PAUL PRETORIUS:** The applicant must establish firstly that he is implicated by evidence. Secondly that he has a version on the basis of which that evidence may be contradicted and thirdly and importantly Chair that it would further the investigation of the commission to allow that cross-examination or and we stress or be necessary to protect the integrity or reputation of the person wishing to cross-examine in respect of that evidence or issue. Based on that Chair if one has regard to paragraph 13 of the applicant's submissions. Our view is that 13.5, 13.8, 13.9 and 13.10 may subject to your discretion if you believe it would further the objects of the commission and its

investigations in its investigatorial role or proceed to protect the integrity and reputation of the witness those are the four which we concede may ... - it is 1.35

CHAIRPERSON: Yes.

ADV PAUL PRETORIUS: 13.8

CHAIRPERSON: Ja.

ADV PAUL PRETORIUS: 13.9 and 13.10. The next point briefly put Chair is it is not within the province of cross-examination or the cross-examiner of a particular witness to open an avenue of investigative enquiry. It is for the Chair to direct what evidence may be put before it and what other avenues of enquiry may be opened. So it is not for
10 the applicant to conduct his own investigation via cross-examination. Differently if that evidence is brought to the commission via the legal team that is a different question. Then Chair the IGI Report which appears at page 315 of the papers that is the Inspector General Intelligence. That is a classified report. It has not been declassified although there is mention of it appearing before some or other forum. You may want to consider Chair whether when the documents before you are released for publication by the press that report should be included or excluded from the documentation publicly released.

CHAIRPERSON: Well if it is classified and it has not been declassified it should not be for public consumption.

20 **ADV PAUL PRETORIUS**: Correct.

CHAIRPERSON: And I do not even know if – whether it should be here.

ADV PAUL PRETORIUS: Well it is here unfortunately Chair but the fact that protocol may have been breached by putting it before you I have no facts to suggest that it has but does not excuse the commission from adhering to its own protocols in controlling public release of classified documents.

CHAIRPERSON: Well I may have I see Mr Mpofu want to say something I may have to say that it should not be published before the end of these proceedings. It should not be published unless I make another decision at some stage in the future.

ADV PAUL PRETORIUS: As you please Chair. The last issue which has not really been dealt with by the parties is what time should you in your discretion Chair wish to allow cross-examination on any particular topic or subject to any particular conditions what time should be afforded and in that respect what we wish to place before you Chair is that the calendar of the commission at present and its time limits place great pressure. We have 250 witnesses at least to call before the end of the year that does
10 not include implicated parties nor does it include time for cross-examination and I think the parties must accept that their expectations may have to be tempered by that consideration.

CHAIRPERSON: I think Mr Mpofu made it clear that they accept that the – they – if leave to cross-examine is granted they would be a limit put by the Chairperson on the duration. Of course we have not gotten to the question of how time?

ADV PAUL PRETORIUS: Yes.

CHAIRPERSON: In the past I have in regard to those who have cross-examined I think I had given them thirty minutes and they accepted at that and they worked more or less within that. They may exceeded a little bit but it would all depend because also there it
20 was the issues that I considered. So in every case in determining the amount of time I would grant I would look at the issues that is why it is so important to have the version of both parties or both persons involved so that in deciding on the amount of time I allow I have a fair idea of what – how much difference there is in their respective versions. But that is something that one can deal with.

ADV PAUL PRETORIUS: Thank you Chair those are the points we wish to raise.

CHAIRPERSON: Ja.

ADV PAUL PRETORIUS: And Mr Mpofu is welcome to enjoy the last minute of my five.

CHAIRPERSON: Yes. Two seconds only Mr Mpofu.

ADV DALI MPOFU: Yes Chair two seconds. The first one – the second point Chair we accept that there will be limitations. Of course subject to the caveat that Mr Gordhan was allowed to go on for days about his daughters and all that but we accept that not all that was about Mr Moyane.

CHAIRPERSON: Ja.

ADV DALI MPOFU: And therefore it will have to be curtailed. But on a more serious
10 issue which is the IGI Report Chair. Well Chair again another caveat Mr Gordhan's version of course is that this might be a fake report. So if it is a fake report it cannot be classified. So but be that as it may because it is not a fake report. We accept that what Mr Pretorius proposes. Even on the off chance that it is genuine – genuinely classified report it would be improper to put it for public consumption. We must make the point of course that when we heard it here we heard it in the context of papers which are already in the public domain in the equality court of a matter that I think was initiated by Mr Gordhan himself and so it is already in the high court, it is already here but as far as this commission is concerned we accept that it would be – it would be improper to – or rather it should be – maybe redacted if when the papers are released.

20 **CHAIRPERSON:** Okay.

ADV DALI MPOFU: Thank you.

CHAIRPERSON: Thank you. I will reserve my decision on the application but in the meantime I want to say that the IGI Report is not to be published unless I decide differently at a later stage. So in regard to this application I reserve my decision and I may ask the parties to deal with any other issues that may arise when I look at the

matter before I make my decision. Okay, what is the next ...(intervention)

ADV PAUL PRETORIUS SC: Chair there are – one of those minutes in relation to the application by Mr Abrahams, he has applied for condonation for the late filing of a statement which will in due course be put before you Chair, the application is before you, I have a copy for you, it is unopposed, we bring it on behalf of Mr Abrahams.

CHAIRPERSON: I have read it and condonation is granted.

ADV PAUL PRETORIUS SC: Thank you Chair.

CHAIRPERSON: Is there another matter to be dealt with before we ...(intervention)

ADV PAUL PRETORIUS SC: No Chair.

10 **CHAIRPERSON:** ...we go to the witnesses, okay. I think we should then take the tea adjournment and we will resume at half past eleven.

ADV PAUL PRETORIUS SC: Thank you Chair.

CHAIRPERSON: We adjourn.

INQUIRY ADJOURNS

INQUIRY RESUMES

HEARING RESUMES

CHAIRPERSON: Yes Mr Pretorius.

ADV PAUL PRETORIUS SC: Yes Chair. Before the Eskom evidence resumes there is one witness that is to be interposed.

20 **CHAIRPERSON:** Yes

ADV PAUL PRETORIUS SC: And that is Ms Mgabadeli.

CHAIRPERSON: Yes.

ADV PAUL PRETORIUS SC: Who will be led by Ms Sello.

CHAIRPERSON: Yes, okay. Thank you. Good morning Ms Mgabadeli.

MS HLENGIWE CHRISTOPHINA MGABADELI: Morning Chairperson.

CHAIRPERSON: Thank you.

ADV MAHLAPE SELLO: Thank you Chair. Chair before we swear in Ms Mgabadeli for record keeping purposes we have made available to you a little file we marked EXHIBIT D8.

CHAIRPERSON: Hang on one second. I still have here things.

ADV MAHLAPE SELLO: It is a ring bound.

CHAIRPERSON: That belonged to what we were doing earlier.

ADV MAHLAPE SELLO: Yes Chair.

CHAIRPERSON: I think this relates to Mr Shaun Abrahams condonation application
10 and it should get out of the way. Also.

ADV MAHLAPE SELLO: It should be a ring bound document.

CHAIRPERSON: Mr Moyane's application and Mr Gordhan's opposing affidavits and their submissions should get out of the way. I have got EXHIBIT D8.

ADV MAHLAPE SELLO: Thank you Chair.

CHAIRPERSON: Yes.

ADV MAHLAPE SELLO: We have marked it D8 Chair in anticipation that the Chair will approve. If the Chair will recall Ms Mentor's range is D for David.

CHAIRPERSON: Yes.

ADV MAHLAPE SELLO: And so far the exhibits go to 7A and 7B.

20 **CHAIRPERSON:** Okay.

ADV MAHLAPE SELLO: Being individual recordings of the inspection in loco.

CHAIRPERSON: Yes.

ADV MAHLAPE SELLO: So we would with your approval then Chair request that be marked D8.

CHAIRPERSON: It shall be so marked.

ADV MAHLAPE SELLO: Thank you Chair. D8 Chair has actually got statements of two witnesses. The first statement relates to Ms Hlengiwe Mgabadeli who is the witness in the box now.

CHAIRPERSON: Yes.

ADV MAHLAPE SELLO: The other statement which I will deal with in the fullness of time.

CHAIRPERSON: Yes.

ADV MAHLAPE SELLO: With that Chair then may I request that the witness be sworn in?

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

REGISTRAR: Please state your full names for the record.

MS HLENGIWE CHRISTOPHINA MGABADELI: My name is
Hlengiwe Christophina Mgabadeli.

REGISTRAR: Do you have any objection with taking the prescribed oath?

MS HLENGIWE CHRISTOPHINA MGABADELI: Not at all.

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

MS HLENGIWE CHRISTOPHINA MGABADELI: Yes.

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

20 God.

MS HLENGIWE CHRISTOPHINA MGABADELI: So help me God.

MS HLENGIWE CHRISTOPHINA MGABADELI: (duly sworn, states)

CHAIRPERSON: Thank you.

ADV MAHLAPE SELLO: Thank you Chair.

CHAIRPERSON: You may proceed.

ADV MAHLAPE SELLO: Chair just to give perspective to Ms Mgabadeli's evidence.

The Chair will recall that Ms Mentor during the course of her testimony indicated that after she was offered the Ministerial position by Mr Ajay Gupta she had a conversation with Ms Mgabadeli at which she disclosed this fact to Ms Mgabadeli. Ms Mgabadeli has prepared a statement in response to that one particular issue and is present here today to testify on that [intervenes].

CHAIRPERSON: Actually if I recall correctly and I got reminded when I was looking at this is that Ms Mentor said she made two or three calls, maybe three calls to or no she; that was to.

10 **ADV MAHLAPE SELLO:** The other one.

CHAIRPERSON: Her friend.

ADV MAHLAPE SELLO: Yes.

CHAIRPERSON: Ms Nkosi. Is it Nkosi?

ADV MAHLAPE SELLO: Yes. It is Chair.

CHAIRPERSON: Oh, *ja*. That is the one.

ADV MAHLAPE SELLO: *Ja*.

CHAIRPERSON: There is only one in regard to Ms Mgabadeli.

ADV MAHLAPE SELLO: Only one.

CHAIRPERSON: *Ja*.

20 **ADV MAHLAPE SELLO:** In regard to Ms Mgabadeli.

CHAIRPERSON: Okay, alright.

ADV MAHLAPE SELLO: And again perhaps some perspective would assist here the Chair would recall that in her original statement at paragraphs 103 and 104 Ms Mentor has initially stated that she made this disclosure to Ms Mgabadeli, Mr Bloem and Mr Cwele. In her subsequent appearance on 12 August she noted to the Chair that she

had made an error and she changed her position to say that the discussion she had with Ms Mgabadele was between the two of them. The statement filed today is in response to the amended version.

CHAIRPERSON: Yes.

ADV MAHLAPE SELLO: Of that incident, thank you.

CHAIRPERSON: Okay, thank you.

ADV MAHLAPE SELLO: Ms Mgabadele I see you have it already, EXHIBIT D8. Could you please turn to page HCM01? It is a document that runs on for three pages until HCM03.

10 **MS HLENGIWE CHRISTOPHINA MGABADELE:** Yes.

ADV MAHLAPE SELLO: Is that your statement you have made to this Commission? Do you confirm?

MS HLENGIWE CHRISTOPHINA MGABADELE: Yes. This is my statement.

ADV MAHLAPE SELLO: And at page HCM03 the signature appearing thereon is that your signature?

MS HLENGIWE CHRISTOPHINA MGABADELE: Definitely that is my signature.

ADV MAHLAPE SELLO: Do you confirm the correctness and do you stand by the allegations you make in this statement under oath?

MS HLENGIWE CHRISTOPHINA MGABADELE: Very correct.

20 **ADV MAHLAPE SELLO:** Thank you. Ms Mgabadele just very briefly to the Chair, give the Chair your background very briefly including your time of service in Parliament.

MS HLENGIWE CHRISTOPHINA MGABADELE: If you say background how far back you want my background?

ADV MAHLAPE SELLO: Okay. That is a good question. Maybe adult background. Perhaps you start off by mentioning that you are a member of the ANC and perhaps you

take it from your membership of the ANC leading onto your service in Parliament.

MS HLENGIWE CHRISTOPHINA MGABADELI:

CHAIRPERSON: Otherwise you can just say when you started as a Member of Parliament.

MS HLENGIWE CHRISTOPHINA MGABADELI: 20.

CHAIRPERSON: And which party were you representing in Parliament?

MS HLENGIWE CHRISTOPHINA MGABADELI: Just like my father was a member of the African National Congress I was born within the family of the African National Congress. So since I grew up. I went to Parliament in 2004, April. I do not know
10 whether you want me to [intervenes].

CHAIRPERSON: And you remained a Member of Parliament until 2014?

MS HLENGIWE CHRISTOPHINA MGABADELI: Until 2014, June.

CHAIRPERSON: Okay.

ADV MAHLAPE SELLO: Okay and.

CHAIRPERSON: And during that time you were a member of certain Portfolio Committees is that right?

MS HLENGIWE CHRISTOPHINA MGABADELI: A number of Portfolio Committees.

CHAIRPERSON: A number of them?

MS HLENGIWE CHRISTOPHINA MGABADELI: Yes.

20 **CHAIRPERSON:** Was the Public Enterprises Portfolio Committee one of them/

MS HLENGIWE CHRISTOPHINA MGABADELI: I have never been that one.

CHAIRPERSON: Oh or maybe it was called something else at that time.

ADV MAHLAPE SELLO: No Chair. If I may.

CHAIRPERSON: Ah.

ADV MAHLAPE SELLO: The right Committee is the Joint Standing Committee on

Intelligence.

CHAIRPERSON: Oh, the joint *ja*.

ADV MAHLAPE SELLO: Yes. You served on that.

CHAIRPERSON: Ms Mentor was Chair of the one for

ADV MAHLAPE SELLO: Of the.

CHAIRPERSON: One for Public Enterprises.

ADV MAHLAPE SELLO: Indeed Chair.

CHAIRPERSON: But she was also serving.

MS HLENGIWE CHRISTOPHINA MGABADELI: Yes.

10 **ADV MAHLAPE SELLO:** Both served on that one.

CHAIRPERSON: Oh, both served on that one?

MS HLENGIWE CHRISTOPHINA MGABADELI: Yes.

ADV MAHLAPE SELLO: On the Joint Standing.

CHAIRPERSON: Oh, okay. Alright, yes. You continue [intervenes].

MS HLENGIWE CHRISTOPHINA MGABADELI: I can give you some of the Committees that I served on.

ADV MAHLAPE SELLO: For completeness you might as well if you recall.

MS HLENGIWE CHRISTOPHINA MGABADELI: I served on the Education one, Public Service and Commission, Defence, Joint Standing Committee on Defence, Joint
20 Standing Committee on Intelligence. I will leave the other ones.

ADV MAHLAPE SELLO: Okay.

MS HLENGIWE CHRISTOPHINA MGABADELI: Then I was appointed to some Commission. One Commission, I just remember when the soldiers were marching to Union Buildings I was in that Interim Commission. Two ladies only in that Commission and I was also in the Committee that was dealing with the Protection of Information and

others that were short term.

ADV MAHLAPE SELLO: Okay, thank you. Now specifically in respect of the Joint Standing Committee on Intelligence you served on that Committee with Ms Mentor your statement said?

MS HLENGIWE CHRISTOPHINA MGABADELI: I served in that Committee with Ms Mentor, yes.

ADV MAHLAPE SELLO: Besides that relationship do you know Ms Mentor personally and could you just briefly state to the Chair how you know Ms Mentor?

MS HLENGIWE CHRISTOPHINA MGABADELI: Yes, I do. Besides serving in the
10 Committee of Joint Standing Committee on Intelligence. We were both sitting in the caucus, the ANC caucus and she was my neighbour when I arrived. I found her in 2004 having arrived in 1999, if I am not mistaken. So I joined in that parliamentary village and I was her neighbour. We had children. I was raising my sister's children and they would help one another and each other on homework and stuff like that. We will go, I love art. She loves art. We will discuss so many things. If I remember of the ANC, let me not talk about other parties. If I remember of the ANC you like discussing about the past, the present and what you had hoped to achieve and what is being achieved and all those stories. Indeed yes we used to discuss a lot.

ADV MAHLAPE SELLO: Okay.

20 **MS HLENGIWE CHRISTOPHINA MGABADELI:** With Ms Mentor and her children were just equivalent to my own children. The same with my nieces and nephews. She was not a person, I can say she was at a distance with. We are very close.

CHAIRPERSON: You were very close?

MS HLENGIWE CHRISTOPHINA MGABADELI: We were very close.

CHAIRPERSON: Okay.

MS HLENGIWE CHRISTOPHINA MGABADELI: Very close.

CHAIRPERSON: Okay, thank you.

ADV MAHLAPE SELLO: And in 2010 the relationship was as you have just described, during the year 2010?

MS HLENGIWE CHRISTOPHINA MGABADELI: In the precinct of Parliament yes, but I do not actually remember when Ms Mentor moved away from being my neighbour, but.

CHAIRPERSON: Oh.

MS HLENGIWE CHRISTOPHINA MGABADELI: Yes.

10 **CHAIRPERSON:** At a certain stage.

MS HLENGIWE CHRISTOPHINA MGABADELI: At a certain stage.

CHAIRPERSON: You were not neighbours in the parliamentary village?

MS HLENGIWE CHRISTOPHINA MGABADELI: Yes.

CHAIRPERSON: Okay.

MS HLENGIWE CHRISTOPHINA MGABADELI: Acacia Park is very big. There is a part that is lower down very far away from, I am at the entrance next to the gate. So she moved and resettled further down which was very, very far away from me up until I left Parliament in 2014. At the time that relationship of after working hours and discussing things was no longer there, because it was too far.

20 **ADV MAHLAPE SELLO:** Okay. Now as you will recall you were provided with firstly Ms Mentor's statement then the transcripts of Ms Mentor's testimony and you were asked to comment on an allegation made by Ms Mentor and for this purpose I will refer you to paragraph 6 where a quote is given with reference to the transcript. That at page 67 of the transcript dated 12 February 2019 from lines 13 to 15 Ms Mentor states as follows:

“I have said also to the legal team of the Commission I may have discussed it with Ms Mgabadel. May be able to corroborate.”

Well it goes further.

“I also said that the SS Member of the Standing Committee on Intelligence.”

That is a direct quote taken from the transcript. Please concentrate on the first part, because that is the relevant part as to what she says she may have discussed with you.

My question is Ms Mentor’s evidence is sometime between September and October

10 Mr Ajay Gupta offered her a Ministerial post and at the conclusion of this conversation the then President Mr Zuma joined them in a room and she disclosed this fact to him to which he did not respond. That is Ms Mentor’s testimony to the Chair. Did you have a conversation such as described by Ms Mentor in the transcript or concerning an offer made to her by Mr Ajay Gupta?

CHAIRPERSON: I think maybe let us add a part of her version that you have left out that maybe important. Namely that she says she had travelled from Cape Town to Johannesburg to meet the former President, President Zuma, but she ended up at the Gupta residence where she says she had a conversation with, I cannot remember whether she is specific that it is Ajay Gupta or one or other of the Gupta brothers who
20 offered her the position of being Minister of Public Enterprises on a certain condition that she mentioned. I think it was that on condition that once she was Minister of Public Enterprises she would terminate the airline route from Johannesburg, is it Mumbai.

ADV MAHLAPE SELLO: Mumbai.

CHAIRPERSON: To Mumbai and while she was having this discussion with Mr Ajay Gupta or whichever of the Gupta brothers the former President emerged, this is

now at the Gupta residence, emerged from one of the rooms and he; at this time she was getting emotional that is her version, because she was very shocked by this offer from the Guptas and the President calmed her down and he walked her to the car to go back to the airport. So I just want to, you to get the as full a version of what that part of the story is because I do not know which part may or may not have stayed in your memory if there was such a discussion and what would have made you to remember the discussion easily if at all you remember it. Ms Sello it is, have I captured it properly?

ADV MAHLAPE SELLO: As far as Ms Mentor's testimony in totality is concerned, ye
10 Chair.

CHAIRPERSON: Yes. So that is what she told the Commission and she said she either said she discussed it with you or she may have said she thought she had discussed it with you among other people who she said she had discussed it with and the purpose of calling you is to see whether you have any recollection of such a discussion.

MS HLENGIWE CHRISTOPHINA MGABADELI: Chairperson all the details that you are giving me now I learnt about them just like most of other South Africans when Vytjie Mentor was here and the Vytjie that I know was not going not to tell me when she is being called. As I have given you the background how close we were and are still,
20 because when I get time up until this Commission started we do phone each other and one another. I have no reason why I should say I do not recall her telling me and fortunately herself in paragraph 6 said I may have discussed it with Ms Mgabadeli. So I learnt about all the calling by the President and whatever from watching the television when the state capture was on in space.

CHAIRPERSON: The Commission was sitting and she was giving evidence/

MS HLENGIWE CHRISTOPHINA MGABADELI: Yes.

CHAIRPERSON: Hm.

MS HLENGIWE CHRISTOPHINA MGABADELI: And all the descriptions of whatever happened. I really have got no reason why I say I can say she did not tell me. If she did tell me I do not recall any of that. Yes.

CHAIRPERSON: So you have no recollection of the two of you having the discussion when she would have told you that?

MS HLENGIWE CHRISTOPHINA MGABADELI: No, not at all.

CHAIRPERSON: Yes.

10 **MS HLENGIWE CHRISTOPHINA MGABADELI:** Also really in Parliament our Committees and different Committees, we finish very late. We finish very late. Take the Protection of Information, we will finish roundabout double one in the morning. Saturdays I will go, I have got [indistinct] and I will come back on Monday. There is very little time to really for a person to be called by a State President and come back and tell you all the details that I learnt about them when I was watching the television. So I have got nothing against Ms Mentor. She is my sister. She is my comrade. She is my neighbour. She was my neighbour at that time, but I just do not recall her telling me that.

ADV MAHLAPE SELLO: If I may then just follow up on that let us leave the
20 conservation of 2010 or the direct offer to her by Mr Ajay Gupta. Have you and Ms Mentor ever had any discussion regarding offers of appointments as Ministers by the Guptas in general or anyone who is not the President? Have you had a conversation that would fit that bill?

MS HLENGIWE CHRISTOPHINA MGABADELI: Maybe it will help this Commission for me to say as much as we are all members of the African National Congress there were

those who were sitting in the NEC, National.

ADV MAHLAPE SELLO: Executive.

CHAIRPERSON: Executive Committee.

MS HLENGIWE CHRISTOPHINA MGABADELI: Executive Committee. I have never sat in that Committee. There were issues that were discussed at that higher level. I will be in the caucus and very productive in the caucus. My hand was almost all those days when the caucus sit because I have been inside the country for the rest of my life and I would like to see my country going right, but when it comes to issues that are discussed in NEC, at NEC Meetings, people being promised this and that as much as I am mentally okay high up there, but I was not at that level. I was not attending the NEC Meetings, because to be honest I learnt so very late that the Gupta, there is a surname called Gupta. I stay in Durban. There are so many Indians in Durban. I can count a list of surnames. I have never come across a surname Gupta. Coming from Intelligence and I thought it was just a project. G-U-P-T-A and from the Intelligence Rules when you are not involved in that you are less concerned, because before I went to Parliament I was the instructor in Nia. So I am very, my veins and everything about me even before we were unbanned as a country. That is what I was doing the most. So I never interfere when I am not needed. It was after so many, many years that oh this Gupta is a surname and I thought it was a project, project called Gupta. So really when it comes to the levels I was not in that level of knowing all those things.

CHAIRPERSON: But is your, am I correct to; is my understanding correct that what you are saying is anything about Ms Mentor having been offered a Ministerial position by the Guptas is some that as far as you recall you heard for the first time when this Commission was hearing Ms Mentor's evidence. Am I correct in understanding your evidence to be to that effect?

MS HLENGIWE CHRISTOPHINA MGABADELI: Yes. I think there was also a public sitting like this before this particular Commission sat which was not this year, which was not last year. There was a public set up.

CHAIRPERSON: Hm.

MS HLENGIWE CHRISTOPHINA MGABADELI: Where she first got to be known by.

CHAIRPERSON: Hm.

MS HLENGIWE CHRISTOPHINA MGABADELI: The masses of the country.

CHAIRPERSON: Hm.

ADV MAHLAPE SELLO:

10 **MS HLENGIWE CHRISTOPHINA MGABADELI:** Pronouncing that.

CHAIRPERSON: Hm.

MS HLENGIWE CHRISTOPHINA MGABADELI: I got to know about it.

CHAIRPERSON: At that time.

MS HLENGIWE CHRISTOPHINA MGABADELI: At that time.

CHAIRPERSON: For the first time/

MS HLENGIWE CHRISTOPHINA MGABADELI: For the first time.

CHAIRPERSON: Okay.

MS HLENGIWE CHRISTOPHINA MGABADELI: Yes.

CHAIRPERSON: Thank you.

20 **ADV MAHLAPE SELLO:** Chair, I do not have other questions that is the evidence of Ms Mgabadeli unless the Chair would require clarification on other issues.

CHAIRPERSON: No, I think that, because I think it is quite clear that what you are saying is whatever you heard as far as you can recall is what you heard through the public, in the public domain not in a private discussion.

MS HLENGIWE CHRISTOPHINA MGABADELI: Yes Chairperson.

CHAIRPERSON: That is as far as you remember?

MS HLENGIWE CHRISTOPHINA MGABADELI: Yes Chairperson.

CHAIRPERSON: Okay. No, thank you very much.

ADV MAHLAPE SELLO: Thank you Chair.

CHAIRPERSON: Thank you. Thank you for coming to share that with us. You might not, maybe appreciate the importance, but it is important because it is an aspect of the terms of reference that is quite important to the Commission whether or not certain Ministerial positions were offered to certain people. Thank you very much. You are excused.

10 **MS HLENGIWE CHRISTOPHINA MGABADELI:** Thank you.

CHAIRPERSON: Thank you.

ADV MAHLAPE SELLO: Thank you Chair with that I think I will hand over to Mr Maleka.

CHAIRPERSON: Ja, thank you.

ADV MAHLAPE SELLO: Thank you. We will be excused.

CHAIRPERSON: Mr Maleka.

ADV VINCENT MALEKA SC: Good afternoon Chair. The next witness is Mr Piers Marsden. May I ask the Registrar to administer the oath/

CHAIRPERSON: Good morning Mr Maleka.

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

CHAIRPERSON: I have just looked at the watch. I guess it has been a long morning or is your watch different?

ADV VINCENT MALEKA SC: I am sorry mine is ahead of yours.

CHAIRPERSON: Okay. The Registrar can administer the oath. Mr Maleka before you, while the Registrar is administering the oath I would like to dispose of Mr van Rooyen's

application for leave to cross-examine either at some stage today or tomorrow. So if, maybe we should say tomorrow. So if somebody can confirm that there is nothing outstanding otherwise I can announce my decision tomorrow.

ADV VINCENT MALEKA SC: Yes. Chair as far as we know all you needed to do from all the affected parties is before you.

CHAIRPERSON: And Mr Fuzile's lawyers at some stage mentioned about bringing something. They are not bringing anything.

ADV VINCENT MALEKA SC: I believe that they have and I believe that what they have submitted is before you.

10 **CHAIRPERSON:** [Intervenes].

ADV VINCENT MALEKA SC: Is before you.

CHAIRPERSON: Oh, I have not seen it. Is it an application for leave to cross-examine him?

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: Oh then I can deal with that separately.

ADV VINCENT MALEKA SC: Yes and you know our views on the score of course.

CHAIRPERSON: Well we must just, I am not going to deal with that one.

ADV VINCENT MALEKA SC: Yes.

20 **CHAIRPERSON:** Because I do not know if processes have been completed. Whether Mr van Rooyen has had a chance to respond or not to that one, but I will deal with Mr van Rooyen's application because from what you are telling me it looks like all processes have been complicated.

ADV VINCENT MALEKA SC: Yes Chair.

CHAIRPERSON: As far as that is concerned.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: *Ja.* So tomorrow I can then announce my decision with regard to Mr van Rooyen's application.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: Then I can look at the other one and processes would need to take their course.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: And at the right stage I can make it.

ADV VINCENT MALEKA SC: We will be grateful, because you know that we are eager to complete the evidence of.

10 **CHAIRPERSON:** Yes.

ADV VINCENT MALEKA SC: Mr Fuzile.

CHAIRPERSON: Yes. I have not seen that application. So somebody must just make sure that I am in possession of it.

ADV VINCENT MALEKA SC: We will liaise with your Registrar during the lunch adjournment.

CHAIRPERSON: *Ja.*

ADV VINCENT MALEKA SC: To make sure that she reminds you when.

CHAIRPERSON: *Ja.*

ADV VINCENT MALEKA SC: It was submitted to you.

20 **CHAIRPERSON:** *Ja.* Well I have got the Van Rooyen one. It is the new one that I do not have.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: *Ja*, but.

ADV VINCENT MALEKA SC: Or we will make an extra copy for you.

CHAIRPERSON: *Ja* that is fine, *ja*. Okay, thank you. You can go ahead.

REGISTRAR: Please state your full names for the record.

PIERS MICHAEL MARSDEN: My name is Piers Michael Marsden.

REGISTRAR: Do you have any objection with taking the prescribed oath?

PIERS MICHAEL MARSDEN: No.

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

PIERS MICHAEL MARSDEN: Yes.

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

10 **PIERS MICHAEL MARSDEN:** So help me God.

PIERS MICHAEL MARSDEN: (duly sworn, states)

CHAIRPERSON: Thank you.

ADV VINCENT MALEKA SC: Chair before Mr Marsden starts may I record that he was one of those persons who assisted the Public Protector to investigate matters relating to the business rescue administration of Optimum Coal Holdings and Optimum Coal Mine.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: He is also one of the persons who orally testified before the Portfolio Committee on State Owned Enterprises.

20 **CHAIRPERSON:** Yes.

ADV VINCENT MALEKA SC: We have submitted the transcript of his version together with the bundle of the transcript that Ms Norman took you through.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: On the, I think the 18th if I am not mistaken.

CHAIRPERSON: Huh-uh.

ADV VINCENT MALEKA SC: But we have also prepared a separate transcript for you of his testimony before the Portfolio Committee.

CHAIRPERSON: Okay.

ADV VINCENT MALEKA SC: I am not too sure whether it was given to you in a small blue file.

CHAIRPERSON: Well it specifically wasn't drawn to my attention, sometimes people think they have given me things when they have just put them where I am supposed them. I see a certain file here, I don't know about it but ...(intervention)

ADV VINCENT MALEKA SC: No, no that's not the one.

10 **CHAIRPERSON:** It's not the one.

ADV VINCENT MALEKA SC: No that is the copy of the legislation we dealt with yesterday, but we will get to it after ...(intervention)

CHAIRPERSON: Ja, in due course.

ADV VINCENT MALEKA SC: Lunch time.

CHAIRPERSON: Okay, but let me check whether I've got what you have got in front of you, what exhibit is the one, is that one that you have got?

ADV VINCENT MALEKA SC: The file of Marsden I believe it's U10, U11.

CHAIRPERSON: I do not have any file marked Exhibit U11 or U11, I've got one marked Exhibit U10, or Volume 10.

20 **ADV VINCENT MALEKA SC:** If you look at the spine.

CHAIRPERSON: Oh this is the one, okay, okay, I think it's because it wasn't drawn to my attention and I think I'm hearing about U11 for the first time, so we should mark it Exhibit U.

ADV VINCENT MALEKA SC: It is marked at the back and you remember you requested that there should be ...(intervention)

CHAIRPERSON: Yes, I am happy to see it's beginning to happen.

ADV VINCENT MALEKA SC: Yes, yes.

CHAIRPERSON: If all of them including those that are at home can be marked like that I would be grateful.

ADV VINCENT MALEKA SC: And together with that file you will see a ring-bound bundle, that one that you are having.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: That's a transcript of Mr Marsden's evidence before the portfolio committee.

10 **CHAIRPERSON**: Yes.

ADV VINCENT MALEKA SC: We would like you to have it at hand because at some point depending on his answers we may have to remind him about what he said to the Portfolio Committee. Mr Marsden I can fairly and comfortably welcome you by saying good afternoon.

MR PIERS MICHAEL MARSDEN: Good afternoon.

ADV VINCENT MALEKA SC: Can I make sure ...(intervention)

CHAIRPERSON: He might have to look at his watch too. Yes, you may proceed.

ADV VINCENT MALEKA SC: Thank you Chair. Mr Marsden the investigators of this Commission asked you to prepare a statement for the purposes of your oral testimony

20 to this Commission, correct

MR PIERS MICHAEL MARSDEN: Yes.

ADV VINCENT MALEKA SC: And you've had some discussions which ultimately led to a statement that you prepared and signed on Monday, this Monday, this past Monday.

MR PIERS MICHAEL MARSDEN: I think it was Tuesday but yes, it was yesterday.

ADV VINCENT MALEKA SC: Tuesday yes. Accompanying your statement that you signed on Tuesday was a set of annexures, correct?

MR PIERS MICHAEL MARSDEN: That's correct.

ADV VINCENT MALEKA SC: And they too were put in a bundle by attorneys representing you, that's Werksmans Attorneys.

MR PIERS MICHAEL MARSDEN: That's correct yes.

ADV VINCENT MALEKA SC: All of those documents are now before you and they have been placed before the Chairperson as exhibit U11. You have had an occasion to look and relook and reread the statement correct?

10 **MR PIERS MICHAEL MARSDEN:** That is correct.

ADV VINCENT MALEKA SC: And do you confirm that that statement correctly reflects your recollection of the events relating to your functions and duties as a business rescue practitioner for Optimum Coal Holdings and Optimum Coal Mine Pty Limited.

MR PIERS MICHAEL MARSDEN: I do yes.

ADV VINCENT MALEKA SC: Yes. Is there anything that you would like to reflect on the contents of the statements before we start with your evidence, or are you fairly comfortable that it represents the truth to the best of your recollection.

MR PIERS MICHAEL MARSDEN: I'm fairly comfortable yes.

20 **ADV VINCENT MALEKA SC:** Right, I would then ask you to go to page 1 and ask you something about your background which is not there, you record in paragraph 1 that you are a chartered accountant, correct?

MR PIERS MICHAEL MARSDEN: That is correct.

ADV VINCENT MALEKA SC: When did you qualify?

MR PIERS MICHAEL MARSDEN: I qualified in 1998 and then I did my articles so it would have been 2001, 2002 around there.

ADV VINCENT MALEKA SC: And when did you complete your articles?

MR PIERS MICHAEL MARSDEN: In 2001.

ADV VINCENT MALEKA SC: And thereafter?

MR PIERS MICHAEL MARSDEN: Thereafter I did a brief stint with Deloitte in the US and then I came back and effectively worked for a number of different organisations principally in the distressed business environment prior to and subsequent to the promulgation of the new Companies Act which obviously then included the business rescue as a further tool for assisting distressed companies.

ADV VINCENT MALEKA SC: Yes, it's a new chapter in the Companies Act.

10 **MR PIERS MICHAEL MARSDEN:** Yes.

ADV VINCENT MALEKA SC: When did you yourself become listed or registered with CIPIC as a Business Rescue Practitioner?

MR PIERS MICHAEL MARSDEN: Pretty soon after the promulgations, I think it was effective in 2011, so in probably the five or six months after the Act became effective.

ADV VINCENT MALEKA SC: Your know Mr Pieter van den Steen?

MR PIERS MICHAEL MARSDEN: I do yes.

ADV VINCENT MALEKA SC: In what capacity?

MR PIERS MICHAEL MARSDEN: He is a fellow and co practitioner and he was a co-practitioner on both OCH as well OCM.

20 **ADV VINCENT MALEKA SC:** Yes. So you jointly worked together in trying to rescue both those companies.

MR PIERS MICHAEL MARSDEN: That's correct yes.

ADV VINCENT MALEKA SC: Yes, when did you start with your functions and duties as the BRP for these two entities, taking back in time.

MR PIERS MICHAEL MARSDEN: So our effective appointment date is detailed in the

file according to my recollection I think it was early in August of 2015 and effective from the registering of those particular documents at the CIPC, our appointment as Business Rescue Practitioners is effective immediately thereafter.

ADV VINCENT MALEKA SC: You can go to page 2 of your statement and look at paragraph 5.

MR PIERS MICHAEL MARSDEN: Yes on the 4th of August.

ADV VINCENT MALEKA SC: The 4th August, right.

MR PIERS MICHAEL MARSDEN: That's correct.

ADV VINCENT MALEKA SC: At that point in time there had been some developments
10 between Optimum Coal Holdings and Optimum Coal Mine on the one hand and Eskom on the other, which led to the decision of those two entities to initiate the business rescue proceedings. I take it that you are aware of those developments.

MR PIERS MICHAEL MARSDEN: Yes.

ADV VINCENT MALEKA SC: Part and parcel of them involved the decision by Eskom's then acting Chief Executive Officer to impose and require penalties in the order of R2.1billion to be paid by Optimum Coal Mine to Eskom.

MR PIERS MICHAEL MARSDEN: Yes.

ADV VINCENT MALEKA SC: Yes, and once you took over as a Business Rescue Practitioner you had a fair sense of what the financial condition including the assets and
20 liabilities of Optimum Coal Mine were, correct?

MR PIERS MICHAEL MARSDEN: Yes, correct yes.

ADV VINCENT MALEKA SC: Give us a sense of what you discovered immediately after you and Mr van den Steen took over?

MR PIERS MICHAEL MARSDEN: I think what was apparent and maybe if we can just deal with it in two parts, first of all that OCM and secondly OCH given that they are

different legal entities with different perspectives. At OCM we found as you've alluded to that there was a contract with Eskom at the point in time it was to all intents and purposes the sole customer of the Optimum Coal Mine, there was a long-term agreement in place and the company was experiencing significant cash losses on a monthly basis, essentially it was selling coal to the tune of approximately R150 per ton delivered and its production costs, its cost of production were about R430 to R450 per ton, so rather substantial losses. It had exhausted all of its internal resources, and it therefore relied extensively on its shareholder in order to continue to survive and continue to meet its obligations.

10 It's immediate shareholder was Optimum Coal Holdings so perhaps if I can address that next, this as the name suggests was a holding company, it had no operations, no employees, no creditors other than a banking facility and – so Optimum Coal Holdings existed as the Holding company for several entities of which Optimum Coal Mine was one and in addition to the bank debt that sat at Optimum Coal Holdings it had signed a guarantee for the obligations of OCM to Eskom.

ADV VINCENT MALEKA SC: But it too at a point in time was in business rescue?

MR PIERS MICHAEL MARSDEN: As a result, as a direct result of the guarantee.

ADV VINCENT MALEKA SC: Ja, and therefore a company in business rescue cannot look into another in business rescue to assist it, financially at least?

20 **MR PIERS MICHAEL MARSDEN:** Well I think not only would it be difficult for a company to justify supporting a company that's clearly financially distressed, the guarantee essentially made it as a co-principal debtor on the hook for the obligations of OCM and as a result the R2.1billion fine that you alluded to from a legal point of view could then be applied either to OCM or to alternatively to OCH.

ADV VINCENT MALEKA SC: I would like to fast track that part of your evidence

because it is really common cause.

MR PIERS MICHAEL MARSDEN: Yes.

ADV VINCENT MALEKA SC: Where I wanted to get to was to try and understand whether or not you had an appreciation of the extent of the loss by OCM, that is the mining entity at that point in time. We heard evidence from amongst others Mr Clinton Ephron, I take it you know him.

MR PIERS MICHAEL MARSDEN: Yes I do.

ADV VINCENT MALEKA SC: That the extent of the loss was in the order of R150million.

10 **MR PIERS MICHAEL MARSDEN:** It would certainly be that amount, absolutely.

ADV VINCENT MALEKA SC: Yes. So the R2.1billion penalty that were imposed had a significant impact on the financial condition of Optimum Coal Mine in two respects, correct?

MR PIERS MICHAEL MARSDEN: Absolutely.

ADV VINCENT MALEKA SC: Can you identify those respects for us?

MR PIERS MICHAEL MARSDEN: So I think the most obvious one is a demand for R2.1billion, ie it would have had to find the means to settle that initial fine and the second and perhaps more significant issue is that following through on the application of that fine, so the fine was retrospectively looking historic deliveries of product that had
20 already happened and where the coal had been consumed by Eskom, but applying that methodology in terms of the contract going forward would have meant that the coal that was previously supplied at 150 would effectively have had to be supplied at R1 per ton, thereby greatly increasing the already quite substantial losses on a monthly basis.

ADV VINCENT MALEKA SC: Can I ask you to pause there and just clarify two things, so as you come in around August 2015 there is at least an accounting liability of

R2.1billion arising from the penalties correct?

MR PIERS MICHAEL MARSDEN: I mean I think it would be a contingent liability because there were certainly grounds on which the claim could have been opposed. So I mean whether one would accrue it as a full liability, probably unlikely, but most definitely given that papers had been prepared I would certainly suggest a contingent liability.

ADV VINCENT MALEKA SC: Of course, but in account terms you have to account for it contingent liability, you can't ignore it.

MR PIERS MICHAEL MARSDEN: You certainly can't ignore it.

10 **ADV VINCENT MALEKA SC:** Yes. And then from that point on, August 2015 going forward there was also another contingent liability that you had to account for, that is the effect of the penalties on the stockpile of coal Optimum was required to supply to Eskom on a month to month basis, correct?

MR PIERS MICHAEL MARSDEN: Absolutely, to the extent that Eskom wished to pursue that interpretation of the contract you are absolutely correct there would have been an obligation to supply at R1 per ton for the remainder of the contract or until such time as it was outside of the sort of claim of penalty.

ADV VINCENT MALEKA SC: Yes.

MR PIERS MICHAEL MARSDEN: But you are correct in terms of the forward looking
20 loss would have been a liability that anybody looking to acquire that or looking to fund that business would have had to understand quite intimately.

ADV VINCENT MALEKA SC: Yes, and as you have indicated Eskom was the primary if not the sole client of Optimum Coal Mine in the country?

MR PIERS MICHAEL MARSDEN: That's correct yes.

ADV VINCENT MALEKA SC: So it means that the condition you found the mine at that

point in time is that it would not have earned any significant income from the supply of coal to Eskom, instead it will continue to suffer a loss.

MR PIERS MICHAEL MARSDEN: And an ever increasing loss given the application of the 150 to one yes.

ADV VINCENT MALEKA SC: Yes. I don't know whether you will be able to do the mathematics for us but on your approach the CSA required Optimum Coal Mine to supply at a price of R150 per ton, on your calculation it would be required to supply that stockpile of coal for R1 per ton, so the losses would be around R149 per ton for each stockpile.

10 **MR PIERS MICHAEL MARSDEN:** Well the losses will be a lot more than that because the cost of production were 40, so the additional losses would have been the 150 to the one, so if one were to calculate the total losses it would have been the obligation to supply once again I hope my maths is reasonable, approximately 5.5million tons per annum, in agreement in terms of contract, at the cost of production given that your revenue would be R1, so that would be in the region of R450 per ton multiplied by five million tons.

ADV VINCENT MALEKA SC: So it's about R449 per ton.

MR PIERS MICHAEL MARSDEN: Correct, a number of billion I think in my rough calculation probably in the region of R2billion.

20 **ADV VINCENT MALEKA SC:** Alright, we will work with that number. What did do when you realised that that was the scope and scale of the financial condition of Optimum Mine when you took over.

MR PIERS MICHAEL MARSDEN: So I think there were a number of things, one of the requirements from a practitioner is to investigate the affairs that involved trying to get an understanding of some of the history of that contract, some of the aspects that

occurred prior to business rescue, but certainly what became very apparent is that any solution and any tools that a practitioner would have in order to try and advance the business rescue would require the cooperation, assistance of Eskom as well. So one of the first things that we did was attempt to engage with Eskom around a number of items, number one some form of an interim supply in which we could continue to meet those obligations through an interim period and then second of all to try and find a long-term solution which would have resulted in a more sustainable business for the mine.

ADV VINCENT MALEKA SC: Yes. You indicate that Eskom was critical to any prospects of rehabilitating the financial ill-health of Optimum Coal Mine, and you do of course know that the connection between Optimum Coal Mine and Eskom at that point in time was the agreement to supply coal, called CSA, the long-term supply agreement.

MR PIERS MICHAEL MARSDEN: Yes.

ADV VINCENT MALEKA SC: It's common ground and I'm sure you know that all things being equal that agreement would have come to an end around 31st of December 2018.

MR PIERS MICHAEL MARSDEN: That's correct.

ADV VINCENT MALEKA SC: So by the time you came in it had a lifespan remaining of three years.

MR PIERS MICHAEL MARSDEN: That's correct ja.

ADV VINCENT MALEKA SC: Did you have occasion to look at how that agreement in its terms up to the second or third Addendum at that point in time impacted on the ability of Optimum Coal Mine to financially rehabilitate itself.

MR PIERS MICHAEL MARSDEN: Absolutely and I think some of this ground has been traversed by other witnesses, but certainly there were a number of aspects of that contract. The first was that there was always the intention that there would have been

some element of cross-subsidisation, you know it was a big mine, it was able to generate more production than simply the obligation to supply Eskom, so there was certainly an ability to cross-subsidise the same coal by exporting that, and then obviously using the profitable portion of the mine to subsidise the non-profitable portion of the mine. Unfortunately when we arrived there the coal price was at an extremely depressed state and there was no export coal being produced. The second aspect is that that contract escalated at a particular rate and in reality the escalations of the cost of production had for some time exceeded the anticipated escalation in terms of the contract, so there was effectively a point at which those costs had simply escalated beyond what the increase was determined to be in the contract was well.

10

ADV VINCENT MALEKA SC: Chair Mr Marsden deals with that issue of the impact of the CSA on page 4 paragraph 13 of your statement.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: Having gained a picture of what animal you were dealing with you began to take processes to try and see whether there would be some hope to save it by beginning with engagements with Eskom, correct?

MR PIERS MICHAEL MARSDEN: That's correct yes.

ADV VINCENT MALEKA SC: You detailed those engagements from page 5, paragraph 15.

20

MR PIERS MICHAEL MARSDEN: Yes, so we attempted on numerous occasions to meet at the appropriate levels within the Eskom and we were able to do that after some time, as we mentioned we were appointed on the 4th and almost immediately afterwards we would have attempted to make contact with them. We were finally able to get an engagement with Eskom on the 17th, as detailed on page 5 and it really as an open invitation to Eskom that we were independent parties, we were here to attempt to

find a solution to a challenge that was both a concern I would have thought for Eskom as well as for shareholders and creditors of OCM.

ADV VINCENT MALEKA SC: Who initiated the meeting of 17 August 2015?

MR PIERS MICHAEL MARSDEN: We would have initiated it.

ADV VINCENT MALEKA SC: And who from the side of Eskom attended that meeting?

MR PIERS MICHAEL MARSDEN: As far as I can recall it was attended by Ayanda Nteta, by Matshela Koko, by myself, by my fellow practitioner by tele-conference and I think that Jabu may have been there as well.

ADV VINCENT MALEKA SC: Who was Jabu?

10 **MR PIERS MICHAEL MARSDEN:** He was I think at the time the acting head of Primary Energy.

ADV VINCENT MALEKA SC: Alright. I'm sure there were discussions that were held at that meeting, I would like to ...(intervention)

CHAIRPERSON: I'm sorry, what was Jabu's surname?

MR PIERS MICHAEL MARSDEN: It's just not coming to me right now, but I'm sure I can get you the details of it.

CHAIRPERSON: Ja, well I hope we will remember so that we can refer to him properly, not just as Jabu.

ADV VINCENT MALEKA SC: Yes, I don't know but you're right, we will ...(intervention)

20 **CHAIRPERSON:** This is not right, ja.

MR PIERS MICHAEL MARSDEN: Yes sir.

ADV VINCENT MALEKA SC: What was the upshot of that meeting?

MR PIERS MICHAEL MARSDEN: So I think the purpose of that meeting was to discuss the business rescue, what the potential impact of what the process was like, as well as to attempt to open discussions with Eskom around a possible renegotiation of

the Coal Supply Agreement in order to avoid a liquidation which is really the alternative if there is not a solution to finding a business rescue solution.

ADV VINCENT MALEKA SC: Yes. But what happened, I mean did you meet each other or was there no specific outcome?

MR PIERS MICHAEL MARSDEN: There was no positive outcome, the sense that we got from the meeting was that Eskom and OCM and OCH had a very strained relationship and certainly we found Eskom to be relatively cold to our advances in terms of attempting to find a solution.

10 **ADV VINCENT MALEKA SC:** In paragraph 16 you say that Eskom was unwilling to commence negotiations with OCM.

MR PIERS MICHAEL MARSDEN: That's correct yes.

ADV VINCENT MALEKA SC: What led you to believe that Eskom was not willing to engage with OCM?

MR PIERS MICHAEL MARSDEN: I mean we had made numerous attempts to meet with them, we had finally got to the point where we did have a meeting, and as you pointed out there were really no clear points of going forward points determined at that meeting. We certainly didn't get the view that the urgency that is placed on us as practitioners was necessarily reciprocated by Eskom and we were not able to get to the point of a forum in which we could commence the negotiations.

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

CHAIRPERSON: Maybe Mr Maleka let's revisit Mr Marsden when I said that it's not right to just refer to him as Jabu, whoever the person is, I didn't meant that you intended anything negative, it's just that because these are formal proceedings, it's better to refer to people as Mr So and So, Ms So and So, Dr So and So, Professor whatever and in the past there have been witnesses who because of their relationship

with the person sometimes just called the name but I think certainly from the evidence leaders side and from my side we have tried to use their surnames because it's the right way for this kind of forum. So I just want you to know that I am not necessarily saying you used Jabu because you intended anything negative.

MR PIERS MICHAEL MARSDEN: And I must apologise to the Commission.

CHAIRPERSON: Ja, that's fine.

ADV VINCENT MALEKA SC: Chair the mistake is with us, we did not forewarn Mr Marsden about the customary formalities of these proceedings.

CHAIRPERSON: Yes, okay, no that's fine.

10 **ADV VINCENT MALEKA SC:** Let me take the apology.

CHAIRPERSON: No that's fine.

ADV VINCENT MALEKA SC: For him, let me make the apology for him. Mr Marsden I mean once you realised that they had, there was no productive engagement with Eskom you did something.

MR PIERS MICHAEL MARSDEN: Yes.

ADV VINCENT MALEKA SC: As the managers for the time being of Optimum Coal Mine.

20 **MR PIERS MICHAEL MARSDEN:** Absolutely one of the key features of business rescue is the ability to suspend obligations of contract, so certainly that is one of the most powerful tools in the business rescue practitioner's toolkit. It's not something that one does lightly, it's not something that one does in haste, however we elected to use that mechanism on Eskom and we effectively terminated or suspended the Coal Supply Agreement which we obliged us to supply coal at that rate to Eskom.

ADV VINCENT MALEKA SC: Yes, and you relied on the provisions of Section 136(2)(a) of the Companies Act.

MR PIERS MICHAEL MARSDEN: That's correct, so that sits within the Business Rescue Chapter 6 legislation and is available only to Business Rescue Practitioners.

ADV VINCENT MALEKA SC: Yes, yes, what did you hope to achieve by suspending the supply of coal to Eskom?

MR PIERS MICHAEL MARSDEN: I think a number of things, I mentioned the word urgency and we touched it in our papers and we haven't discussed it necessarily here today but the time constraints placed on us as practitioners in terms of the Act are pretty clear, where a plan has to be published within five weeks, but more importantly given the losses that were being made we didn't have the luxury of time so certainly in
10 order to create some urgency and to get the attention of Eskom, certainly that was an intention, and I think it also sought to perhaps illustrate that we did not have an open chequebook in terms of which we as practitioners could continue to incur losses, that's not our mandate, our mandate is to restructure and to resuscitate a business and we certainly could not sustain that for any period of time.

ADV VINCENT MALEKA SC: Yes, as I recall in terms of the new Companies Act you had a period of three months to formulate business rescue plan, correct?

MR PIERS MICHAEL MARSDEN: It's actually shorter than that, it's a period of 25 days in which you have to publish a plan for consideration for creditors. The three months is if it's not been concluded, ie the plan presented, adopted and implemented
20 within three months there's a whole bunch of regulatory items, so the timeline is even more compressed than the three months.

ADV VINCENT MALEKA SC: Yes, so you still had time by the time you suspended coal supply to formulate a plan.

MR PIERS MICHAEL MARSDEN: Absolutely, but very little.

ADV VINCENT MALEKA SC: Little, and you say that you informed Eskom about the

suspension of coal supplied to it and Chair you will find a reference to the letter from the business practitioners to Eskom referred to in paragraph 16 on page 5.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: It is PMM7 and you will find it at page 64.

CHAIRPERSON: Yes thank you.

ADV VINCENT MALEKA SC: You are aware of it Mr Marsden, can I just highlight some few aspects of this letter. Are you at page 64?

MR PIERS MICHAEL MARSDEN: I am indeed.

ADV VINCENT MALEKA SC: Who is it addressed to?

10 **MR PIERS MICHAEL MARSDEN**: So it is addressed to Mr Koko and to Mr Mboweni and I must now extend my apologies further to the Commission, that is the gentleman to whom I referred to earlier, it's Mr Vusi Mboweni was at that private meeting, my apologies.

CHAIRPERSON: Is that the one in respect of whom you used the name Jabu?

MR PIERS MICHAEL MARSDEN: That is correct, my apologies.

CHAIRPERSON: So the name was a mistake.

MR PIERS MICHAEL MARSDEN: It was a complete mistake of mine.

CHAIRPERSON: Okay thank you.

20 **ADV VINCENT MALEKA SC**: Chair I did not know someone Jabu so at least the confusion is cleared now. But it is also copied to someone else, who is it?

MR PIERS MICHAEL MARSDEN: So it is copied in the cc to Ayanda Nteta who was also present at that previous meeting as well as to the legal advisors, Cliffe Dekker Hofmeyr for the attention of Rishiban Moodley.

ADV VINCENT MALEKA SC: Yes, one of these addressees were not new to you, y9ou had met them at the meeting of the 17th of August. You say something in paragraph 4

which is quite interesting, you refer to the Cooperation Agreement which was previously concluded between the parties on the 23rd of May 2014, do you see that?

MR PIERS MICHAEL MARSDEN: Yes indeed.

ADV VINCENT MALEKA SC: Did you have occasion to look at the terms of that Cooperation Agreement?

MR PIERS MICHAEL MARSDEN: Yes.

ADV VINCENT MALEKA SC: And you know the background to it?

MR PIERS MICHAEL MARSDEN: I do.

ADV VINCENT MALEKA SC: It related to the suspension of an arbitration between the
10 OCM entities and Eskom relating to what was declared as a hardship...

MR PIERS MICHAEL MARSDEN: That is correct.

ADV VINCENT MALEKA SC: By OCM?

MR PIERS MICHAEL MARSDEN: Yes.

ADV VINCENT MALEKA SC: Arising from difficulties relating to the cost of operating that mine, correct?

MR PIERS MICHAEL MARSDEN: That is correct yes.

ADV VINCENT MALEKA SC: So that agreement was raising something that you too had concern about relating to the CSA and its impact on the ability of the mine to run profitably?

20 **MR PIERS MICHAEL MARSDEN:** Absolutely and certainly that informed a lot of our decision making going forward in that there was and had been prior to business rescue an attempt to resolve this and I think a lot of good work and a lot of good time had been expended by both OCM not in business rescue as well as Eskom in terms of trying to determine a solution. So certainly a reliance to a certain degree on that was something that we – that we placed in terms of the fact that both parties had attempted

unfortunately not succeeded but attempted to restructure the agreement and there was certainly a history between the parties in that context.

ADV VINCENT MALEKA SC: The impression I gain from your evidence is that it must have been clear to both parties to the contract what the drastic impact of the CSA was on the ability of OCM to supply coal to Eskom?

MR PIERS MICHAEL MARSDEN: It was apparent and I think even more so in the context of business rescue. I cannot imagine a multinational like Glencore would take a decision lightly to put one its subsidiaries in that hands of an independent party in the context of insolvency as well. So not only were the numbers apparent but I think the
10 context of actually you know putting the company in business rescue just really illustrates the point even more clearly.

ADV VINCENT MALEKA SC: I also gain the impression that it must have been clear to you as the manager for the time being and also Eskom as the client of the entity you were managing that there was a risk of not procuring a security of supply of the coal to Eskom because of those difficulties you have explained?

MR PIERS MICHAEL MARSDEN: Absolutely and I think business rescue in some terminology a purgatory right where you are in the last chance saloon and to the event – in the event that we were unable to procure funding to continue the business rescue and or we failed to find a solution to the business rescue. There is a positive obligation
20 in the business rescue section of the Company's Act that requires a practitioner in the event that he believes that there is no longer a viable option to rescue the company to place it into business rescue. So it is kind of an iterative test that one goes through throughout a business rescue process to the extent that you ever reach the conclusion that there is no longer a reasonable prospect of rescuing that business. A practitioner is obliged to place a company into liquidation the consequence of course of that being

that there would no longer be supply to Eskom.

ADV VINCENT MALEKA SC: Even before the prospect of litigation became real or likely it seems to me that at that point in time the parties must have appreciated the risk to one another relating to the difficulties posed by the CSA?

MR PIERS MICHAEL MARSDEN: Yes.

ADV VINCENT MALEKA SC: Yes. I pose these questions to you now because later on we will canvass correspondence emanating from Eskom showing that they appreciated the strategic importance of Optimum Coal Mine as a useful asset to supply coal and secure security of supply to Hendrina.

10 **MR PIERS MICHAEL MARSDEN:** Absolutely.

ADV VINCENT MALEKA SC: Are you aware of that?

MR PIERS MICHAEL MARSDEN: Absolutely.

ADV VINCENT MALEKA SC: Also for the supply of coal and to secure security of supply to Arnot Power Station?

MR PIERS MICHAEL MARSDEN: At this stage in the business rescue there was no supply going to Arnot from this power station so certainly its proximity to the Arnot Power Station if the mine's proximity to the Arnot Power Station would have made it potentially compatible but at this point in time it was supply solely to the Hendrina Power Station.

20 **ADV VINCENT MALEKA SC:** You can accept?

MR PIERS MICHAEL MARSDEN: Yes.

ADV VINCENT MALEKA SC: And the Chairperson has heard evidence that from around December 2015, January 2016 coal from Optimum Coal.

MR PIERS MICHAEL MARSDEN: Yes.

ADV VINCENT MALEKA SC: Was bought and traded to Eskom for the supply of Arnot

Power Station?

MR PIERS MICHAEL MARSDEN: I am aware of that.

ADV VINCENT MALEKA SC: You are aware of those things?

MR PIERS MICHAEL MARSDEN: Absolutely.

ADV VINCENT MALEKA SC: And there were presentations made by executives of Eskom about the strategic importance of Optimum Coal's coal from Optimum Mine to Arnot, are you aware of those representations?

MR PIERS MICHAEL MARSDEN: No I am not aware of internal activities or representations.

10 **ADV VINCENT MALEKA SC:** Well I will take you through them yes. But what I find surprising is this is would those risks appreciated by the parties you could not find one another.

MR PIERS MICHAEL MARSDEN: We could not.

ADV VINCENT MALEKA SC: From your perspective why was it so difficult to find one another because this seems to be something which the parties had to work jointly with the view to find a compromised position?

MR PIERS MICHAEL MARSDEN: I think that we attempted and it is certainly in the documents to provide a number of different solutions. Certainly my experience has been previously even if a solution is unacceptable to another party there is some level
20 of back and fro, some level of counter proposal. Eskom's position was steadfast and unmoving with regards to the fact that they had a contract until the end of 2018 and that they expected that contract word and verse to be delivered on throughout the time from 2015 all the way until the end of 2018. And throughout the process that was their red line. There was not movement on that particular issue.

ADV VINCENT MALEKA SC: Yes. One of the issues you proposed to Eskom is the

prospects of an interim agreement to supply?

MR PIERS MICHAEL MARSDEN: Yes.

ADV VINCENT MALEKA SC: And you propose that option in paragraph 7 on page 65 of the letter we are looking at. Are you there?

MR PIERS MICHAEL MARSDEN: Yes I am.

ADV VINCENT MALEKA SC: Can you just indicate to us what led you to make this proposal?

MR PIERS MICHAEL MARSDEN: Historically the mine had been funded by its shareholder. Within business rescue that option is not necessarily guaranteed and one
10 is required to fund those losses by means of post commencement finance and in the absence of that whether I wanted to or not I simply could not continue to incur those losses I would have run out of cash. So we had put together a proposal whereby effectively for an interim period whilst we were attempting to find a solution there would be an interim arrangement which would see that security of supply guaranteed whilst negotiations continued.

ADV VINCENT MALEKA SC: And you in that letter annex a copy of the proposed interim agreement, correct?

MR PIERS MICHAEL MARSDEN: That is correct, yes.

ADV VINCENT MALEKA SC: Chair we have looked at this at some point but look the
20 terms of the interim agreement mirror aspects of the fourth addendum.

MR PIERS MICHAEL MARSDEN: That is correct yes.

ADV VINCENT MALEKA SC: That was in a draft form but rejected by Eskom?

MR PIERS MICHAEL MARSDEN: Yes that is right.

ADV VINCENT MALEKA SC: Yes. And in paragraph 8 of your letter again at page 65 you say that Eskom was not moved to consider that interim proposal correct?

MR PIERS MICHAEL MARSDEN: That is correct yes.

ADV VINCENT MALEKA SC: I would like to – you to reflect on this. I mean Eskom is now facing a clear decision by you that you are not going to supply coal correct?

MR PIERS MICHAEL MARSDEN: I think more than that the decision has been made and the conveyor belts at this point had actually stopped delivering coal.

ADV VINCENT MALEKA SC: So there was no supply of coal at all to ...

MR PIERS MICHAEL MARSDEN: We suspended the obligations and switched off the conveyor belts.

ADV VINCENT MALEKA SC: Yes. And that is the operation of the law.

10 **MR PIERS MICHAEL MARSDEN:** Correct.

ADV VINCENT MALEKA SC: And yet they insist that you should comply with the CSA which on practical terms has been suspended?

MR PIERS MICHAEL MARSDEN: That is correct.

ADV VINCENT MALEKA SC: How can you comply with something that by law has been suspended?

MR PIERS MICHAEL MARSDEN: I think their intention was that to the extent that the resupply commenced any solution to the business rescue would have required the CSA to remain intact.

ADV VINCENT MALEKA SC: No but you have already suspended.

20 **MR PIERS MICHAEL MARSDEN:** Correct.

ADV VINCENT MALEKA SC: The agreement and you entitled to do so by law?

MR PIERS MICHAEL MARSDEN: Correct.

ADV VINCENT MALEKA SC: How can they insist then that you should supply when by law the agreement has been suspended?

MR PIERS MICHAEL MARSDEN: They could not insist. What happened subsequent

to that was a meeting was called by Eskom and I think you certainly covered it with Mr Ephron's...

ADV VINCENT MALEKA SC: Well we can go back.

MR PIER'S MICHAEL MARSDEN: I was merely sitting outside but and I am not sure what clause it is but the – the intention of the suspension certainly worked in that we then were able to get an engagement with Eskom at the highest level.

ADV VINCENT MALEKA SC: As a matter of sequence.

MR PIER'S MICHAEL MARSDEN: Yes.

ADV VINCENT MALEKA SC: Let me take you back to your statement on page 5.

10 Remember you suspended and on your approach the conveyor belts were shut around the 20th August 2015.

MR PIER'S MICHAEL MARSDEN: Yes.

ADV VINCENT MALEKA SC: And you say as a result of that suspension there was a meeting convened by Eskom and you refer to that meeting in paragraph 17 of your statement.

MR PIER'S MICHAEL MARSDEN: That is correct.

ADV VINCENT MALEKA SC: So there must have been a period of about 13 days during which there was no supply of coal to Eskom?

MR PIER'S MICHAEL MARSDEN: I cannot remember the exact days but absolutely
20 there was a period and that appears to be the correct period.

ADV VINCENT MALEKA SC: Yes. Do you know where Hendrina would have obtained its coal during that period?

MR PIER'S MICHAEL MARSDEN: They would have had a modest amount of coal available on stock piles already delivered to themselves and they would have then been able to truck in from third parties suppliers as well which they certainly did.

ADV VINCENT MALEKA SC: We have evidence to show that third party suppliers were at rates higher than those that Optimum Coal supplied to Hendrina.

MR PIERS MICHAEL MARSDEN: That would not surprise me.

ADV VINCENT MALEKA SC: Okay. Chair you would recall that Mr Opperman referred to a short term agreement and the rates that we explored with him were fairly higher.

MR PIERS MICHAEL MARSDEN: Yes.

ADV VINCENT MALEKA SC: But you are not aware of them but you would not be surprised?

10 **MR PIERS MICHAEL MARSDEN:** Not in the slightest.

ADV VINCENT MALEKA SC: Alright. What happened at the meeting of 3 September?

MR PIERS MICHAEL MARSDEN: I am loathed to call myself a participant in the meeting.

ADV VINCENT MALEKA SC: Well just take us through what happened. We know that the meeting called by Eskom who attended?

MR PIERS MICHAEL MARSDEN: So a meeting was called. I received the phone call from the chief executive Mr Molefe for a meeting at Megawatt Park. I was invited as was Mr Van Den Steen my co-practitioner and I was requested to ensure that Mr Ephron was invited as well. So we were invited up the executive section of Eskom at
20 which point ...

ADV VINCENT MALEKA SC: The third floor of Megawatt Park?

MR PIERS MICHAEL MARSDEN: Indeed yes.

ADV VINCENT MALEKA SC: Yes.

MR PIERS MICHAEL MARSDEN: And we were enjoying some good coffee outside there when Mr Ephron was called to a meeting and myself and Mr Van Den Steen were

left drinking coffee outside.

ADV VINCENT MALEKA SC: You were invited to a meeting and you do not attend the meeting?

MR PIERS MICHAEL MARSDEN: That is correct.

ADV VINCENT MALEKA SC: Why not?

MR PIERS MICHAEL MARSDEN: We were not sure if the meeting that was happening in our absence was perhaps a pre-meeting or that we would be invited at some point in time. That did not happen and so it was most unusual.

ADV VINCENT MALEKA SC: And what happened after the meeting between the
10 executives of Eskom Mr Molefe and Mr Ephron took place?

MR PIERS MICHAEL MARSDEN: Mr Ephron came out and told us that the meeting was finished. We then left the building and either on the way out or immediately afterwards outside Mr Ephron recorded to us what had happened at the meeting and essentially he would need to get consent from his stakeholders but essentially if Glencore were prepared to fund the losses on an interim basis would we as practitioners agree to recommence the supply on a couple of – with – on an interim basis with a couple of key factors. Number 1 the price would not be at the stated R1,00 but more like the R150,00 that it was originally. Eskom had defaulted on two months' worth of previous payments. There was a condition that they needed to pay that
20 amount and then the payment terms were changed from I think 30 days statement to effectively every 7 days.

ADV VINCENT MALEKA SC: You were not at that meeting.

MR PIERS MICHAEL MARSDEN: Yes.

ADV VINCENT MALEKA SC: Mr Ephron tells you what was agreed at that meeting.

MR PIERS MICHAEL MARSDEN: Yes.

ADV VINCENT MALEKA SC: And after you gained a sense of what happened you put in writing your understanding of what was agreed and sent your letter to Eskom?

MR PIERS MICHAEL MARSDEN: That is correct.

ADV VINCENT MALEKA SC: And Chair that is all dealt with at page 6 paragraph 19 and the letter of Mr Marsden and his colleagues – his colleague are at – is at page 74 and 75.

CHAIRPERSON: Thank you.

ADV VINCENT MALEKA SC: You have had a chance to look at this letter, correct?

MR PIERS MICHAEL MARSDEN: That is correct yes.

10 **ADV VINCENT MALEKA SC:** And it sets out what was supposed to be an agreement at the meeting between Mr Molefe and Mr Ephron. Was there any comeback from Eskom to say what you had put in writing was not a correct reflection of what was agreed at that meeting?

MR PIERS MICHAEL MARSDEN: Not as far as I can recall.

ADV VINCENT MALEKA SC: Not as far as you are aware. So on that premise that those would be the terms of the interim agreement what happened thereafter?

MR PIERS MICHAEL MARSDEN: So the interim agreement had a very important condition or several important conditions. One was the resupply and so just from an operational perspective we again began to supply the Hendrina Power Station. The
20 most important aspect from our perspective was that the parties would give one another sixty days to commence and hopefully conclude good faith negotiations on a longer term solution i.e. beyond the interim sixty agreement.

ADV VINCENT MALEKA SC: Yes. So you supplied and were you paid?

MR PIERS MICHAEL MARSDEN: That is correct yes.

ADV VINCENT MALEKA SC: And you say in paragraph 20 of your statement that

Eskom began to engage earnestly with the difficulties of Optimum Coal Mine by calling for information relating to its financial condition.

MR PIER'S MICHAEL MARSDEN: I am not sure if I said they engaged earnestly but certainly they began to engage. Well principally at the start with request for financial information pertaining to the costs of the operation.

ADV VINCENT MALEKA SC: But did you doubt their good faith when they began to call for information from Optimum Coal Mine?

MR PIER'S MICHAEL MARSDEN: I think we had the seeds of doubt given that this information had been extensively audited by Eskom themselves prior to business
10 rescue. I think we heard testimony yesterday I was – happened to be in the room for Mr Opperman who conceded that both Nedbank and another sort of consulting company had been provided and gone through this information so we thought that whilst it was positive to now have some engagement we certainly had a concern that there was a lot of redundancy in terms of information that had already been provided but regardless we provided it.

ADV VINCENT MALEKA SC: Yes. But you not suggesting that Eskom was playing marbles when it called for this information?

MR PIER'S MICHAEL MARSDEN: Let us give them the benefit of the doubt.

ADV VINCENT MALEKA SC: Yes. I am sure you provided that information.

20 **MR PIER'S MICHAEL MARSDEN:** We did.

ADV VINCENT MALEKA SC: What was the next phase of the development relating to the negotiations?

MR PIER'S MICHAEL MARSDEN: So in parallel to the negotiations we had received an unsolicited bid for the business and we received several of these throughout the process so we were not certainly running a formal process to solicit bids but we

received on the 10 September just going chronologically in terms of the statement a unsolicited non-binding offer from Oakbay Investments.

ADV VINCENT MALEKA SC: Yes. Chair that was what was referred to as he first offer. The first of Tegeta offer.

CHAIRPERSON: Yes, yes.

ADV VINCENT MALEKA SC: We have looked at it I do not think that we should waste time and burden the record by considering it.

CHAIRPERSON: Yes, no it is not necessary.

ADV VINCENT MALEKA SC: Yes. We have heard evidence on it. What did you do
10 once you received that offer?

MR PIERS MICHAEL MARSDEN: As I said it was already in parallel with our engagements with Eskom so we – we were not really considering the sale of OCM at that point in time we were focussed on the engagement with Eskom and you know we kind of not treated it with it glibly but we did not consider it in much detail. Our focus was very much on the Eskom renegotiation.

ADV VINCENT MALEKA SC: Yes. One thing that is interesting from your perspective of what that offer said is the statement you make in paragraph 22 of your affidavit. It is last statement where you say that the offeror at the time indicated amongst others that it was confident it would be able to secure Eskom's consent to the transaction, correct?

20 **MR PIERS MICHAEL MARSDEN:** Yes that is right.

ADV VINCENT MALEKA SC: You know that under the original CSA as amended by the first to the third addenda.

MR PIERS MICHAEL MARSDEN: Yes.

ADV VINCENT MALEKA SC: Eskom was entitled to consent or refuse consent for the session.

MR PIERS MICHAEL MARSDEN: Absolutely.

ADV VINCENT MALEKA SC: Of that contract.

MR PIERS MICHAEL MARSDEN: Ja I believe they had change of control provisions as well.

ADV VINCENT MALEKA SC: Yes.

MR PIERS MICHAEL MARSDEN: So they were certainly as I mentioned right at the start an absolutely fundamental player in any business rescue context.

ADV VINCENT MALEKA SC: What I find interesting with this offer is that it indicates to you upfront that the potential buyer would be able to secure the consent of Eskom.

10 **ADV VINCENT MALEKA SC:** How did you consider that expression of confidence for the buyer and I will tell you why I am asking this question.

MR PIERS MICHAEL MARSDEN: Yes.

ADV VINCENT MALEKA SC: You know that another bidder also sought to establish whether Eskom would consent and Eskom indicated that it would not.

MR PIERS MICHAEL MARSDEN: Ja we saw this as really a response to one of our conditions in terms of any transaction that we believed would require a consent so certainly we stated that one of the objectives to any offer would be that they would need to get Eskom's consent. So I think this was a reply to the terms and conditions that we had done.

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

MR PIERS MICHAEL MARSDEN: They were at the time a supplier of Eskom's through the Brakfontein operations so we certainly knew that they had a relationship with Eskom and as a result to the extent that Eskom was going to consent perhaps you know they were already a known quantity.

ADV VINCENT MALEKA SC: Can I follow up if you do not mind?

MR PIERS MICHAEL MARSDEN: Of course.

ADV VINCENT MALEKA SC: Pembani was one of the entities that was interested in making an offer to buy this mine, correct?

MR PIERS MICHAEL MARSDEN: That is correct.

ADV VINCENT MALEKA SC: And Pembani was no stranger because it was...

MR PIERS MICHAEL MARSDEN: Absolutely not.

ADV VINCENT MALEKA SC: Pembani was part and parcel Optimum Coal Mine, correct?

MR PIERS MICHAEL MARSDEN: That is correct they were minority shareholders.

10 **ADV VINCENT MALEKA SC:** It was supplying to Eskom

MR PIERS MICHAEL MARSDEN: That is right.

ADV VINCENT MALEKA SC: So they cannot be a point of distinction in that regard as between Pembani and Tegeta, correct?

MR PIERS MICHAEL MARSDEN: I think there is a slight nuance here in that Tegeta were confident that they would get Eskom's consent. I think at the point that we initially engaged with Pembani they too were confident that they would get Eskom's consent. I think whether they did or did not is ultimately where the test lies.

ADV VINCENT MALEKA SC: Well that is important because Tegeta was quite confident well before the consent provisions were triggered and ultimately it got
20 consent. Pembani was frustrated by lack of consent.

MR PIERS MICHAEL MARSDEN: Sure.

ADV VINCENT MALEKA SC: Are you able to explain the precipitous expression of confidence and the ultimately procurement of that confidence?

MR PIERS MICHAEL MARSDEN: I am not able to explain it no.

ADV VINCENT MALEKA SC: Well I suggest to you that is because Tegeta was given

favourable treatment from beginning to the end.

MR PIERS MICHAEL MARSDEN: I would agree with that.

ADV VINCENT MALEKA SC: Yes. Can I take you then to paragraph 23 of your statement?

MR PIERS MICHAEL MARSDEN: Yes.

ADV VINCENT MALEKA SC: Where you deal with the terms of the letter dated 17 September 2015. Chair you will find that letter as PMM14 it is at page 101.

CHAIRPERSON: Thank you.

ADV VINCENT MALEKA SC: That letter is written by CDH do you see that?

10 **MR PIERS MICHAEL MARSDEN:** Sorry the...

ADV VINCENT MALEKA SC: Page 101.

MR PIERS MICHAEL MARSDEN: Ja our offer is 13 their response is 14 you are right yes.

ADV VINCENT MALEKA SC: Yes. And that is a letter from CDH, correct?

MR PIERS MICHAEL MARSDEN: That is correct yes.

ADV VINCENT MALEKA SC: Just to explain to us why did CDH write that letter to you and your colleague?

20 **MR PIERS MICHAEL MARSDEN:** So if take you back to the minutes they were recorded as acting for Eskom. They received that pack of information that Eskom had requested so we kind of engaging either lawyers or practitioners directly to them. We had provided that information in – earlier on in the month and then after an appropriate amount of time we had proposed a solution and this letter is in response that proposed solution.

ADV VINCENT MALEKA SC: Yes and it is quite clear from the legal representatives of Eskom that they rejected your proposal?

MR PIERS MICHAEL MARSDEN: Absolutely and I think what is important is there is no counter proposal or any stipulation on the way forward.

ADV VINCENT MALEKA SC: Yes. You record in paragraph 24 I am at page 6 Chair page 8 I am sorry.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: Paragraph 24. That the negotiations came to an end around 5 February 2015.

CHAIRPERSON: October?

ADV VINCENT MALEKA SC: I am sorry 5 October 2015. Do you see that?

10 **MR PIERS MICHAEL MARSDEN:** Yes indeed.

ADV VINCENT MALEKA SC: What did you do after Eskom made it clear that it was not going to pursue further negotiations in terms of your proposal?

MR PIERS MICHAEL MARSDEN: So I think what we had come to the conclusion of and going back to what the objectives of a business rescue are the objectives of a business rescue are to restructure a company its affairs etcetera and that envisaged to be a restructure of the legal entity and its contracting affairs. What became apparent to us throughout this period was that there was clearly a history between the parties and to the context that Glencore was a shareholder we were unlikely to make any further headway with renegotiating this hearsay. There was simply too much water under the
20 bridge. So going back to our business rescue we then proceeded to say well is the next alternative to restructuring it and there is one more step prior to no alternatives being left which would have been a liquidation.

ADV VINCENT MALEKA SC: Yes.

MR PIERS MICHAEL MARSDEN: Which is an outright sale of the assets and that achieves the second category of business rescue which is a result better than a

liquidation [indistinct] rescue.

ADV VINCENT MALEKA SC: Yes.

MR PIERS MICHAEL MARSDEN: So at that point in time we really back to the drawing board put a line through our attempts to renegotiate the CSA in the context of Glencore as a shareholder in context of the entities as they were and changed tact to a certain degree.

ADV VINCENT MALEKA SC: Yes. But that too failed and the options were becoming narrower and narrower?

MR PIERS MICHAEL MARSDEN: That is correct.\

10 **ADV VINCENT MALEKA SC:** And in paragraph 25 you say that one of the options that you considered in the narrow scope was a sale of the asset?

MR PIERS MICHAEL MARSDEN: That is correct yes.

ADV VINCENT MALEKA SC: And what happened to that option? I mean did you trigger it or?

MR PIERS MICHAEL MARSDEN: So I think we advised Eskom that we had a number of options. The first was the sale of OCM to a third party.

ADV VINCENT MALEKA SC: Yes.

MR PIERS MICHAEL MARSDEN: The second was the sale OCM to Eskom themselves.

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

MR PIERS MICHAEL MARSDEN: And the third was the sale of OCM to a third party but via a competitive process. The distinction being the first and third being one was a kind of bilateral discussion whereas the third we would have effectively solicited bids on an open basis as a distinction between options one and three there.

ADV VINCENT MALEKA SC: Yes.

MR PIER MICHAEL MARSDEN: We indicated that we had received an expression of interest and from a party which would have fitted into that first category a bilateral discussion.

ADV VINCENT MALEKA SC: Yes.

MR PIER MICHAEL MARSDEN: And that was once again as mentioned the Oakbay offer.

ADV VINCENT MALEKA SC: Yes. And those options were communicated to ...

CHAIRPERSON: I think it is time.

ADV VINCENT MALEKA SC: My apologies Chair. I...

10 **CHAIRPERSON:** Ja you did not keep an [indistinct]

ADV VINCENT MALEKA SC: I was disorientated by the fact that we started late when I thought we started early.

CHAIRPERSON: Ja. We are going to take the lunch adjournment and resume at two. We adjourn.

ADV VINCENT MALEKA SC: Thank you Chair.

INQUIRY ADJOURNS

INQUIRY RESUMES

CHAIRPERSON: Yes Mr Maleka you may proceed.

20 **ADV VINCENT MALEKA SC:** Thank you Chair. Mr Marsden we were at PMM17 page 106 where you informed Eskom of the various options available to you as the BRPs, but before you return to it can I ask you to page back to 101?

MR PIER MICHAEL MARSDEN: Yes, I am there.

ADV VINCENT MALEKA SC: You have already indicated this is the letter from CDH responding your request for negotiations and the various options?

MR PIER MICHAEL MARSDEN: Yes. Can I?

ADV VINCENT MALEKA SC: [Intervenes].

MR PIERS MICHAEL MARSDEN: Sorry.

ADV VINCENT MALEKA SC: Go ahead.

MR PIERS MICHAEL MARSDEN: *Ja*. I think it is important to highlight kind of what I had mentioned previously about Eskom's position with regards to in particular the penalty.

ADV VINCENT MALEKA SC: Yes.

MR PIERS MICHAEL MARSDEN: And I think that perhaps Clause 2.2 really highlights it as clear as one can which I will read. It says:

10 “The penalty claim is not negotiable and it should be settled in
 full and without any delay.”

So it really just highlights as I have said previously Eskom's kind of unmoving position towards that particular aspect.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: And when you said unmoving that is just another way of saying they were rigid. Is that right?

MR PIERS MICHAEL MARSDEN: They were completely rigid, absolutely.

CHAIRPERSON: *Ja* and this reflects exactly that attitude?

MR PIERS MICHAEL MARSDEN: Exactly.

20 **CHAIRPERSON:** Okay.

ADV VINCENT MALEKA SC: Thank you Chair. Can you also deal with 2.1, because it reinforces that conclusion?

MR PIERS MICHAEL MARSDEN: “Any discussion and negotiation on the
 new contract price for coal to the Hendrina Power Station will
 only be considered closer to 2017 and not at the stage prior.”

So yes.

ADV VINCENT MALEKA SC: Yes.

MR PIERS MICHAEL MARSDEN: On the two issues both the CSA and the penalty.

ADV VINCENT MALEKA SC: Alright. Thanks for that clarification. Let us go to the letter that you sent to Eskom when it became clear that there was no room for negotiations. There is PMM17 Chair at page 106. Remember by this time there is no room.

CHAIRPERSON: Thank you.

ADV VINCENT MALEKA SC: Remember by this time there is no room for negotiation.

10 Correct.

MR PIERS MICHAEL MARSDEN: That is correct, yes.

ADV VINCENT MALEKA SC: *Ja.* Deal with those options.

MR PIERS MICHAEL MARSDEN: So essentially we presented three options. One was the sale of OCM to a third party. We disclosed that we did have an indicative offer. The second was a slightly out of the box consideration which was the sale of OCM to Eskom themselves given how important the supplier was and third was the sale of OCM to a third party. The contrast as I mentioned previously to item one being that through a competitive process i.e. to take the time to engage advisors to prepare a data, a due diligence pack etcetera and effectively try and elicit bids in that manner as opposed to
20 kind of unsolicited bids.

ADV VINCENT MALEKA SC: Yes. I know that each of the options you explain is motivated by the ups and the down sides to it. We do not have to go there. What I want to understand is did Eskom respond to you about each of these options?

MR PIERS MICHAEL MARSDEN: Not in as much detail as we would have liked or hoped. I think certainly not formally I think at one point there was the infamous

comment around option two where we do not want the bakery when we get the bread, but certainly as far as I recall there was no formal response to what we did in terms of that.

ADV VINCENT MALEKA SC: What I find interesting is that the third of the three options you propose make it quite clear that the asset can be sold through a competitive dealing process and yet what happens thereafter is that there is a set of unsolicited bids.

MR PIERS MICHAEL MARSDEN: That is right.

ADV VINCENT MALEKA SC: Inconsistent with the proposal. My sense is that the
10 third option was imminently reasonable consistent with Eskom's obligations to promote a competitive procurement process. Do not misunderstand me. Understand that this was not an asset of Eskom, but Eskom had an interest in it.

MR PIERS MICHAEL MARSDEN: Absolutely.

ADV VINCENT MALEKA SC: So the third option was a fairly reasonable one [indistinct] of that to Eskom's obligations. The moment US Optimum begin to engage with unsolicited bids did you inform Eskom about them as and when they were coming through?

MR PIERS MICHAEL MARSDEN: I do not recall the timing of when we did, but as they progressed to a point where we were comfortable that we could engage with Eskom we
20 did that.

ADV VINCENT MALEKA SC: Alright. Can I take you through to those unsolicited bids? You address them from page 9.

MR PIERS MICHAEL MARSDEN: Yes.

ADV VINCENT MALEKA SC: Paragraph 28.1.

MR PIERS MICHAEL MARSDEN: Yes. I mean I will run through maybe as briefly as

much detail as you want.

ADV VINCENT MALEKA SC: Yes.

MR PIERS MICHAEL MARSDEN: We had received an offer from a company called Endalweni Mining Corporation and there was as I said.

CHAIRPERSON: I am sorry. I am sorry. Did you change the page where we were? Did you move backwards or?

ADV VINCENT MALEKA SC: Yes, we moved backwards to the statement Chair.

CHAIRPERSON: To the statement?

ADV VINCENT MALEKA SC: *Ja*, page 9.

10 **CHAIRPERSON:** Okay.

ADV VINCENT MALEKA SC: And Chair remember we have now established that negotiations are closed.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: We have now established that Mr Marsden set out the three options. We have now established that Eskom did not meaningful engage with or respond to him.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: About those options.

CHAIRPERSON: *Ja*.

20 **ADV VINCENT MALEKA SC:** Now we look at what he is doing.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: In the light of Eskom's non-responsive attitude.

CHAIRPERSON: *Ja*.

MR PIERS MICHAEL MARSDEN: So the first party in paragraph 28 is Endalweni Mining Corporation and there is quite extensive negotiation around the terms conditions

etcetera and what would be acceptable to us. Nothing really came of that. I do not think that they were able to adequately satisfy ourselves that there was sufficient. The second on which is the African Exploration Mining and Finance Corporation which is affected the state owned mining corporation.

ADV VINCENT MALEKA SC: Which state owned entity is that? I mean.

MR PIERS MICHAEL MARSDEN: I believe it sits, I stand under correction, but I believe it sits under the Department of Energy as an entity, but it is the state owned mining corporation. I think it owns Alexkor amongst other assets.

ADV VINCENT MALEKA SC: Oh, I see. Okay.

10 **MR PIERS MICHAEL MARSDEN:** They are currently the bidder in round two of Optimum, its current business rescue. So.

ADV VINCENT MALEKA SC: Okay.

MR PIERS MICHAEL MARSDEN: For interest sake more than anything else.

CHAIRPERSON: Where you reading from page 9?

MR PIERS MICHAEL MARSDEN: Yes, I am.

CHAIRPERSON: I thought you said paragraph 48 and I cannot see 48 on my page 9.

MR PIERS MICHAEL MARSDEN: Sorry, 28.

CHAIRPERSON: 28, okay.

MR PIERS MICHAEL MARSDEN: Yes, page 9.

20 **CHAIRPERSON:** Okay, alright. Thank you.

MR PIERS MICHAEL MARSDEN: So obviously a prequalified candidate one would have assumed with the backing of the state, but they withdrew from the process for a number of reasons. Amongst other that Eskom had requested it to record its intentions in respect of OCM and then they disappeared. We had some meetings with a company called Joe Singh Group of Companies and after one meeting they too withdrew from

the process and then perhaps the most relevant in 28.4 is with the Pembani Group of Companies which as you have mentioned was well known to not only us, but also to Eskom. They were a minority shareholder in Optimum Coal Holdings and we actually got to the point where we signed a term sheet with them and effectively afforded them the opportunity to exclusively look at the accusation of OCM.

ADV VINCENT MALEKA SC: Yes and I mean Pembani knew the asset very well, all things being equal.

MR PIERS MICHAEL MARSDEN: Very well yes.

ADV VINCENT MALEKA SC: They had dealt with the asset since they became the
10 shareholder in 20, I think 2012 if I am not mistaken.

MR PIERS MICHAEL MARSDEN: I assume that.

ADV VINCENT MALEKA SC: Yes.

MR PIERS MICHAEL MARSDEN: Sometime prior to business rescue.

ADV VINCENT MALEKA SC: But anyway you indicate in 28.4 that Eskom indicated its unwillingness to support the Pembani bid.

MR PIERS MICHAEL MARSDEN: So we engaged with Pembani directly and then they had an engagement with Eskom.

ADV VINCENT MALEKA SC: Yes.

MR PIERS MICHAEL MARSDEN: We were obviously not party to that engagement,
20 but they did record that in a letter to us which is annexure sometime after they had withdrawn from the transaction. So we were not immediately aware of why they had withdrawn. That only became apparent when they issued us that letter some few months later.

ADV VINCENT MALEKA SC: Chair the letter is at page 133.

CHAIRPERSON: Thank you.

ADV VINCENT MALEKA SC: You have read the letter. I am not going to ask you to deal with it, but the point is that Eskom was not willing to support that deal. Correct?

MR PERS MICHAEL MARSDEN: Absolutely. I mean it is quite clear in the second to last paragraph:

“Eskom was not prepared to amend the OCM Coal Supply Agreement or waive its right to enforce the claim under the Coal Supply Agreement.”

ADV VINCENT MALEKA SC: Yes. Did they explain to you why Eskom was not willing to support their bid?

10 **MR PERS MICHAEL MARSDEN:** They did not.

ADV VINCENT MALEKA SC: And then in paragraph 29 you deal with the only remaining.

MR PERS MICHAEL MARSDEN: Yes.

ADV VINCENT MALEKA SC: Bid.

MR PERS MICHAEL MARSDEN: Yes. I think importantly to note that when we contracted with Pembani we did it on an exclusive basis.

ADV VINCENT MALEKA SC: Yes.

20 **MR PERS MICHAEL MARSDEN:** So we had at that point in time told the Oakbay to get a consortium that we had found an offer that we thought was more appropriate and we had terminated discussions. When that transaction failed we were then left effectively to revert back to the last remaining bidder in terms of the unsolicited process.

ADV VINCENT MALEKA SC: Yes.

MR PERS MICHAEL MARSDEN: That is correct.

ADV VINCENT MALEKA SC: And then the bid was made through KPMG of course.

MR PIERS MICHAEL MARSDEN: That is right.

ADV VINCENT MALEKA SC: And we know that KPMG were the statutory auditors of the Oakbay Group of Companies. Correct?

MR PIERS MICHAEL MARSDEN: I believe so, yes.

ADV VINCENT MALEKA SC: It was unsolicited, but what I want to establish from you is how did the statutory auditors get to know that this sale may well be up for sale?

MR PIERS MICHAEL MARSDEN: I think that the Optimum matter was quite widely publicised in the media. We certainly did not go out with any formal announcement around the sale process. So that aspect I cannot comment on, but as I am aware and
10 as I am sure you are aware they were interested in acquiring the asset even prior to business rescue.

ADV VINCENT MALEKA SC: Yes.

MR PIERS MICHAEL MARSDEN: I presume they thought the timing was appropriate.

ADV VINCENT MALEKA SC: And then you responded to the KPMGs letter expressing the offer on behalf of Oakbay or Tegeta. Correct?

MR PIERS MICHAEL MARSDEN: That is correct, yes.

ADV VINCENT MALEKA SC: You deal with your response in paragraph 32.

MR PIERS MICHAEL MARSDEN: Yes that is right. We were seeking quite a lot of clarification around the offer. I think it is also important to note that at this stage, time I
20 was wearing to hats. One, as the OCH practitioner one, the OCM practitioner. At this point in time we were engaging merely around OCM. As I said OCH was a non-trading company. It did not have creditors and the stay that we had given from the moratorium effectively dealt with both the banks and Eskom's potential claim. So at this stage we were dealing very much in the OCM capacity. So we sought to clarify a number of items specifically that OCT a sister or brother company i.e. owned by OCH would not

form a part of this transaction.

ADV VINCENT MALEKA SC: Yes. My recollection is that at that point in time OCH had several subsidiaries. One was Optimum Coal Mine.

MR PERS MICHAEL MARSDEN: Yes.

ADV VINCENT MALEKA SC: Next was OCT.

MR PERS MICHAEL MARSDEN: That is correct.

ADV VINCENT MALEKA SC: And the last was Koornfontein?

MR PERS MICHAEL MARSDEN: That is correct. There were a couple of smaller.

ADV VINCENT MALEKA SC: Others?

10 **MR PERS MICHAEL MARSDEN:** Others, but yes those are three main subsidiaries of OCH.

ADV VINCENT MALEKA SC: Yes. The offer that you were engaging with at that point in time, the Tegeta offer, to which subsidiary did it relate, I mean?

MR PERS MICHAEL MARSDEN: It related exclusively to the OCM, the mine.

ADV VINCENT MALEKA SC: The mine only?

MR PERS MICHAEL MARSDEN: The mine only.

ADV VINCENT MALEKA SC: Alright and that is a premise on which you engaged.

MR PERS MICHAEL MARSDEN: Absolutely.

ADV VINCENT MALEKA SC: Whether.

20 **MR PERS MICHAEL MARSDEN:** That is premise on which we had engaged the previous buyers as well.

ADV VINCENT MALEKA SC: Yes and then what was the response of KPMG insofar as you were dealing with that offer? I mean did they come back to you to say look their client's accept it or they reject it? I am just trying to establish how far the negotiations progressed.

MR PERS MICHAEL MARSDEN: So we got to the point of a non-binding term sheet.

ADV VINCENT MALEKA SC: Yes.

MR PERS MICHAEL MARSDEN: After some correspondence which essentially sought where OCH would sell its shares and claims in OCM with a whole bunch of considerations. The principle once again was Eskom's consent, a due diligence period and there were a number of other ancillary sort of terms that had been agreed between the parties.

ADV VINCENT MALEKA SC: Do you remember what the purchase price was at that point in time?

10 **MR PERS MICHAEL MARSDEN:** It was a R1.

ADV VINCENT MALEKA SC: A R1?

MR PERS MICHAEL MARSDEN: Ja. I think it, further to that there was some assumption of debt within OCM that had not yet been clarified that would be dealt with post due diligence, but essentially the value that OCH would receive for its shares claims would be R1.

ADV VINCENT MALEKA SC: Yes. On the face of it, it looks for someone like me a laughable offer, but it was serious in the sense that they assume liabilities?

MR PERS MICHAEL MARSDEN: Absolutely. I think that it would have to deal with the very present 2 billion or just north of that claim as well as of course the funding
20 obligation going forward.

ADV VINCENT MALEKA SC: Yes.

MR PERS MICHAEL MARSDEN: The mine was still at that stage loss making to a considerable degree. So if you buy an asset for a Rand there is generally a reason for it.

ADV VINCENT MALEKA SC: And I would like you if you can take us through the

financial implications of that R1 deal that Tegeta would be assuming at that point in time. My recollection is this that at that point in time OCH no, OCM had a banking facility?

MR PIERS MICHAEL MARSDEN: That is correct.

ADV VINCENT MALEKA SC: To the order of R2.5 billion?

MR PIERS MICHAEL MARSDEN: That is correct.

ADV VINCENT MALEKA SC: So Tegeta would be assuming that liability of.

MR PIERS MICHAEL MARSDEN: So maybe just a slight clarification.

ADV VINCENT MALEKA SC: Yes.

10 **MR PIERS MICHAEL MARSDEN:** The 2.5 billion was an OCH facility, but of course banks being banks they had security across the organisation.

ADV VINCENT MALEKA SC: Indeed.

MR PIERS MICHAEL MARSDEN: So they had security not only of the assets which they had perfected in OCM. We were effectively acting as their agents. They also had sessions of the shares in OCT and in Koornfontein as well.

ADV VINCENT MALEKA SC: Yes, but it is a facility that enabled OCH to fund?

MR PIERS MICHAEL MARSDEN: That is correct.

ADV VINCENT MALEKA SC: And that is the reason why ultimately when OCH sold the three entities it had to settle its portion of that facility which was something in the
20 order of R400 million?

MR PIERS MICHAEL MARSDEN: So the purchase price was contributed to by two parties. Ultimately we are talking about the final transaction?

ADV VINCENT MALEKA SC: Yes.

MR PIERS MICHAEL MARSDEN: There was a purchase price that was delivered from essentially from Tegeta for the.

ADV VINCENT MALEKA SC: Tegeta, 2.5 billion?

MR PIERS MICHAEL MARSDEN: Correct and the R400 million was a contribution made by Glencore in order to ensure that the banks were paid in full such that the assets would be released. If that is where you are heading.

ADV VINCENT MALEKA SC: That is where I am heading to.

MR PIERS MICHAEL MARSDEN: That is correct.

ADV VINCENT MALEKA SC: Yes. So for that R1 they will be assuming at least portion of the 2.5 billion?

MR PIERS MICHAEL MARSDEN: Correct and I think that recorded in the term sheet
10 where we record that there are banks that have security over the assets and post due diligence we will have to apportion how much of that pertains to OCM.

ADV VINCENT MALEKA SC: Yes.

MR PIERS MICHAEL MARSDEN: Because of course a portion would pertain to OCT and Koornfontein.

ADV VINCENT MALEKA SC: Indeed.

MR PIERS MICHAEL MARSDEN: Indeed.

ADV VINCENT MALEKA SC: Then they will be assuming a potential liability for the penalties of 2.1 billion?

MR PIERS MICHAEL MARSDEN: It is, I mean, yes. There is within the term sheet an
20 endeavour by both parties to try and resolve it, but ultimately there would be a liability that would accrue and would be part of that.

ADV VINCENT MALEKA SC: We know that on that letter you have read from Cliffe Dekker Hofmeyr. Eskom was quite clear about those penalties. They were not negotiable. They had to be paid immediately without delay. Correct?

MR PIERS MICHAEL MARSDEN: That is correct.

ADV VINCENT MALEKA SC: So new buyer for R1 would be assuming that liability?

MR PIERS MICHAEL MARSDEN: That is correct. Although in the term sheet we had agreed that there may be an apportionment of it.

ADV VINCENT MALEKA SC: Yes.

MR PIERS MICHAEL MARSDEN: There would be for sure a portion that would be due by the new buyer.

ADV VINCENT MALEKA SC: And lastly that buyer would be taking over the prospective penalties?

10 **MR PIERS MICHAEL MARSDEN:** Forward looking losses and the prospective penalties, absolutely.

ADV VINCENT MALEKA SC: Yes. On your approach at that point in time and the reason for you to stop it was to supply coal at R1 per ton?

MR PIERS MICHAEL MARSDEN: Ja, at this point in time we had, we were in the interim supply agreement. So we were back to the R150, but even in that context there was significant losses. So one can debate whether it is the one or the 150 [intervenes].

ADV VINCENT MALEKA SC: Let us assume that it is 150.

MR PIERS MICHAEL MARSDEN: There are massive losses.

ADV VINCENT MALEKA SC: The cost of producing coal for R1.50 per ton was higher?

20 **MR PIERS MICHAEL MARSDEN:** Significantly.

ADV VINCENT MALEKA SC: Yes. So they will be assuming that liability to?

MR PIERS MICHAEL MARSDEN: Absolutely.

ADV VINCENT MALEKA SC: Having regard to those at least three identifiable levels of liabilities which Tegeta would be taking for R1. I suggest to you that you need a strong balance sheet to carry that liability for the life of the mine or for the life of the

CSA.

MR PIERS MICHAEL MARSDEN: Yes. I think that, remember Eskom's position with regards to the penalty, we interpret it as in the context of having Glencore as a shareholder. So we thought that there was the possibility that it could be renegotiated, but in the event that they stuck to that position you would need an organisation who could meet those financial commitments.

ADV VINCENT MALEKA SC: Oh, yes. With a strong balance sheet?

MR PIERS MICHAEL MARSDEN: Absolutely.

ADV VINCENT MALEKA SC: Or parental support?

10 **MR PIERS MICHAEL MARSDEN**: A strong balance sheet.

ADV VINCENT MALEKA SC: Yes and I suggest to you that Tegeta did not have that balance sheet. That is the reason why it would have gone to Eskom to procure a guarantee to secure the purchase price and that is the reason why it would have gone to Eskom to secure a prepayment to fund the balance of the purchase price. On any basis they did not have that balance sheet.

MR PIERS MICHAEL MARSDEN: I know chronologically we are a little bit out of order, but certainly we had similar thoughts and when the ultimate transaction was concluded so this was kind of a preliminary and then it moved and I am sure we will cover that ground, but the fundamental point remains in any context. The ability to fund the
20 purchase price and continue was of course a concern of ours and as a result we had request a demonstrable evidence of funding available at that point to conclude the purchase of the business and we were shown a document, but I am sure we will get there.

ADV VINCENT MALEKA SC: We will get there.

MR PIERS MICHAEL MARSDEN: Ja.

ADV VINCENT MALEKA SC: What I am suggesting to you is that even at that point in time you must have had our doubts about.

MR PIERS MICHAEL MARSDEN: Indeed.

ADV VINCENT MALEKA SC: The funding ability of Tegeta.

MR PIERS MICHAEL MARSDEN: Indeed.

ADV VINCENT MALEKA SC: To meet such liabilities.

MR PIERS MICHAEL MARSDEN: Yes.

ADV VINCENT MALEKA SC: Yes. Alright, can we then look at your statement? Chair I am back at page 12.

10 **CHAIRPERSON:** Ja.

ADV VINCENT MALEKA SC: You were explaining how you were dealing with that offer of Tegeta.

MR PIERS MICHAEL MARSDEN: Yes.

ADV VINCENT MALEKA SC: And you could summarise or read out the whole or portion of 34.1 up to 34.3.

MR PIERS MICHAEL MARSDEN: So whilst we were engaging with Tegeta we of course were attempting to engage with Eskom at the same time. So despite Eskom's unwillingness to engage with OCM we continued to update Eskom. In November we reminded them that they played a key role in the rescue of OCM. We further advised
20 that we had secured additional funding for the month of November and thus had limited times and funds to conclude the transaction. Eskom did not comment on any of the options that we have just discussed that were available to us. It merely confirmed that it was willing to meet with representatives of Oakbay to consider the veracity of its 10 September offer and we acknowledged that as well.

ADV VINCENT MALEKA SC: And in paragraph 35 you say that Tegeta then requested

you to arrange a meeting with Eskom.

MR PIERS MICHAEL MARSDEN: Yes.

ADV VINCENT MALEKA SC: And that that meeting was held on 25 November.

Correct?

MR PIERS MICHAEL MARSDEN: That is correct.

ADV VINCENT MALEKA SC: Can I ask you to deal with that meeting? Firstly did you attend the meeting?

MR PIERS MICHAEL MARSDEN: I did attend the meeting indeed.

ADV VINCENT MALEKA SC: What about your colleague, Mr van der Steen.

10 **MR PIERS MICHAEL MARSDEN:** Mr van der Steen was there.

ADV VINCENT MALEKA SC: Alright. From Eskom's side who attended the meeting?

MR PIERS MICHAEL MARSDEN: Mr Koko, Ms Nteta. I believe Ms Daniels was there. I think it reflected in the minutes.

ADV VINCENT MALEKA SC: Yes.

MR PIERS MICHAEL MARSDEN: A little bit further and Shaun Blankfield from Glencore.

ADV VINCENT MALEKA SC: Yes. We can go to the minutes. They are at pages 148 and 149.

20 **MR PIERS MICHAEL MARSDEN:** Mr Magalani, Ms Nteta and then of course representing Oakbay Mr Howa, Mr Twala and Ms Ragavan.

ADV VINCENT MALEKA SC: Alright. When I look at the minutes it seems as if you were doing a lot of the talking?

MR PIERS MICHAEL MARSDEN: I am prone to that.

ADV VINCENT MALEKA SC: Then the most important part of the minutes and again subject to your guidance which I would pick up and ask you to comment on is at page

149 and I am going to read these and ask for your comment.

“The Chairman who was Mr Koko at the time...”

PIERS MICHAEL MARSEN: That is correct.

ADV VINCENT MALEKA SC: “...emphasised the Eskom position which is
Eskom's priority is security of supply.”

Do you see that?

MR PIERS MICHAEL MARSDEN: Yes.

ADV VINCENT MALEKA SC: We will come back to that in a moment.

10 “There is a coal supply in place until 2018. Eskom expects
Optimum Coal Mine to honour the contract at the contracted
price until 2018. Eskom will not waive its penalty claim.”

That was his view.

MR PIERS MICHAEL MARSDEN: Yes.

ADV VINCENT MALEKA SC: What I find odd with this position it is a matter which I
want you to comment on, is you cannot insist on security of supply in relation to an
asset which you know has already indicated via its Managers you especially that you
cannot supply at that rate. Correct?

MR PIERS MICHAEL MARSDEN: That is correct.

ADV VINCENT MALEKA SC: That position itself imperils the security of supply.

20 **MR PIERS MICHAEL MARSDEN:** Indeed.

ADV VINCENT MALEKA SC: What was your response to Eskom's position?

MR PIERS MICHAEL MARSDEN: I think that we had on numerous occasions, I do not
want to use the word threaten, but they interpreted it as such. We had clarified that in
the event that we do not find a solution that very issue would come to the fore to the
extent that we run out of options and as we have been through our options had greatly

diminished over the last few months. If we go to the point where we had no options we would be obliged to place the company into liquidation and of course imperil the supply in that way.

ADV VINCENT MALEKA SC: Yes. Mr Howa and his colleagues from Oakbay were there present?

MR PIERS MICHAEL MARSDEN: They were.

ADV VINCENT MALEKA SC: They must have heard this unwavering position of Mr Koko?

MR PIERS MICHAEL MARSDEN: They did.

10 **ADV VINCENT MALEKA SC:** That Eskom will not waive.

MR PIERS MICHAEL MARSDEN: They did.

ADV VINCENT MALEKA SC: The penalty. So they would have engaged with you on the offer on the strength of that knowledge that Eskom was not going to waive the penalties. Correct?

MR PIERS MICHAEL MARSDEN: I think we did not really get an opportunity to have a discussion, because the meeting then moves on effectively to attempt to address that and the whole structure of the transaction effectively changes as a result of what happened subsequent to the meeting.

20 **ADV VINCENT MALEKA SC:** No, no I understand, but if we take Mr Koko on his own words.

MR PIERS MICHAEL MARSDEN: Yes.

ADV VINCENT MALEKA SC: They were present. They heard what he said.

MR PIERS MICHAEL MARSDEN: They did.

ADV VINCENT MALEKA SC: And they knew what Eskom's position was?

MR PIERS MICHAEL MARSDEN: That is correct.

ADV VINCENT MALEKA SC: In relation to the penalties?

MR PIERS MICHAEL MARSDEN: That is correct.

ADV VINCENT MALEKA SC: The question of how it changes and why it changes is something that we will deal with later.

MR PIERS MICHAEL MARSDEN: Yes.

ADV VINCENT MALEKA SC: But at that point in time when you had arranged a meeting at the request of the very same persons. They were told what Eskom's position is. Correct?

MR PIERS MICHAEL MARSDEN: That is correct.

10 **ADV VINCENT MALEKA SC:** Yes. Then there is something new which is introduced which was not part of the offer of Oakbay. It relates to the two subsidiaries Koornfontein and OCT, Optimum Coal Terminal. Those are assets which were outside the offer. How do they get raised for the first time in this meeting in relation to the desire of Tegeta to discuss the offer with Eskom?

MR PIERS MICHAEL MARSDEN: So Mr Koko raised the issue that much as you have raised and as much as we all understood that OCM is a standalone business who is likely to be in the context of a non-renegotiated offer which has been made now clear on several occasions [indistinct] making and it would require a new set of balance sheets in huge to support that. The current position was that Eskom already had a
20 guarantee from OCH and as such it would have the ability in the event of a default to pursue that guarantee to OCH and effectively then follow the money down to either Koornfontein or OCT in terms of a recover of the amounts that would have been due to it. So there was a proposal made at the meeting by Mr Koko that rather than consider a transaction of just the bad part of the business, if I can use that common vernacular, to rather expand our scope and look at not only OCM but at Koornfontein as well as at Oct

which were in certain contexts the good aspect of the business.

ADV VINCENT MALEKA SC: I would like you to be clear on your recollection of the discussions at that point in time. Are you suggesting that it is Mr Koko who raised the issue?

MR PIERS MICHAEL MARSDEN: I absolutely believe so and I think it is recorded in the minutes as well.

ADV VINCENT MALEKA SC: So it is not the buyer who is raising the issue/

MR PIERS MICHAEL MARSDEN: It is not.

ADV VINCENT MALEKA SC: Okay.

10 **CHAIRPERSON:** One second. Okay. We may proceed, thank you.

ADV VINCENT MALEKA SC: Chair if there is anything you want us to help with we will definitely do.

CHAIRPERSON: Yes. No, it is something that needs to be sorted out by the Protectors in Administration.

ADV VINCENT MALEKA SC: Oh.

CHAIRPERSON: Yes, thank you. Thank you.

ADV VINCENT MALEKA SC: Thank you Chair. We now know that Mr Koko raises the question of the other assets and not the buyer?

MR PIERS MICHAEL MARSDEN: If I can read from the minutes.

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

MR PIERS MICHAEL MARSDEN: So it is on page 260 the second paragraph right at the bottom.

“He...”

And in the context of this the “he” refers to Mr Koko.

“...postulated that if OCM were to be ring-fenced Eskom was

not convinced that it would survive on its own and hence he was compelled to engage in a discussion regarding OCT not OCM.”

ADV VINCENT MALEKA SC: Yes. Can I take you forward to page 149?

MR PIERS MICHAEL MARSDEN: Yes.

CHAIRPERSON: I am sorry. Mr Marsden just before you read, did you say page 260?

MR PIERS MICHAEL MARSDEN: No, sorry I have got a different referencing. It is 149, my apologies Chair.

CHAIRPERSON: Oh, okay. We must just use the [intervenes].

10 **MR PIERS MICHAEL MARSDEN:** My apologies Chair.

CHAIRPERSON: I was trying to see where are you reading from now.

MR PIERS MICHAEL MARSDEN: My apologies, so it is the second paragraph, the paragraph opens with “you noted that”, but I’m reading the last sentence of that same paragraph.

CHAIRPERSON: Thank you.

ADV VINCENT MALEKA SC: Then you read something about OC – sorry Tegeta’s financial strength can you read the minutes?

20 **MR PIERS MICHAEL MARSDEN:** Yes so it’s slightly before the paragraph that I’ve – or the sentence that I’ve just read, “he further questioned the financial strength of the new buyer, firstly would it be able to sustain a loss of 134 per month and secondly how would the buyer survive without the Koornfontein contract and the export allocation”.

ADV VINCENT MALEKA SC: The key part of his concern at that point in time is that it was clear to him, absent any form of increase in the asset base for sale, quite clearly Optimum Coal Mine itself was running at a loss.

MR PIERS MICHAEL MARSDEN: Correct.

ADV VINCENT MALEKA SC: And that loss on his own estimation was 130 million rand per month.

MR PIERS MICHAEL MARSDEN: That is correct.

ADV VINCENT MALEKA SC: So he is telling the prospective buyer at the meeting that you are buying a loss making asset of 130 million rand per month.

MR PIERS MICHAEL MARSDEN: Correct.

ADV VINCENT MALEKA SC: You have to be a strong person.

MR PIERS MICHAEL MARSDEN: Indeed.

ADV VINCENT MALEKA SC: Who has the greatest faith in commercial realities to
10 acquire an asset at a loss of this significant proportion?

MR PIERS MICHAEL MARSDEN: I agree.

ADV VINCENT MALEKA SC: And he suggested that there had to be a pairing of the coal of Koorfontein asset as well as access to the export allocation contract which is OCT.

MR PIERS MICHAEL MARSDEN: That's correct.

ADV VINCENT MALEKA SC: Yes, can I ask you to explain to us why OCT as an asset was an important issue that could have increased the financial fortunes of a buyer?

MR PIERS MICHAEL MARSDEN: Absolutely I think the importance of OCT is that it
20 has an allocation through RBCT of approximately 6 million tons. Koorfontein, itself had its own allocation of just over a million tons as well. What does that mean, the export of coal is an extremely lucrative business in South Africa and the gatekeeper of that and the access to export markets is largely as a result of the Richards Bay coal terminal. So if one has coal and no export allocation it doesn't really help you. So the ability to access that very important strategic assets is fundamental and that in itself

has significant value. So whilst OCT is largely a non-trading entity, it simply has the rights – it could sell those rights for very handsome reward on an ongoing basis.

ADV VINCENT MALEKA SC: So Optimum Coal could export coal using the terminal to the extent of 6 million tons?

MR PIERS MICHAEL MARSDEN: It could export its own coal and/or it could sell that allocation to any other miner who wishes to use the allocation to the tune of 6 million tons.

ADV VINCENT MALEKA SC: Indeed, so I as a trader, could approach OCT and say that, please take out my exports to the market and I'll pay you a fee?

10 **MR PIERS MICHAEL MARSDEN:** Correct, and it's a very lucrative allocation.

ADV VINCENT MALEKA SC: And I mean it's – you do nothing, you don't even lift a finger to ...(intervention).

MR PIERS MICHAEL MARSDEN: Just some paperwork that you push, but yes, in that context.

ADV VINCENT MALEKA SC: It does not involve any significant overheads?

MR PIERS MICHAEL MARSDEN: No it doesn't or risk.

ADV VINCENT MALEKA SC: Alright what then was your response to Mr Koko's idea that those two assets must become part and parcel of the sale agreement and secondly in the light of his concern about the lack of financial strength of the buyer to absorb the
20 loss of OCM as a standalone?

MR PIERS MICHAEL MARSDEN: I actually thought it had quite a lot of commercial merit I think that through the guarantee Eskom already had the ability to access those good assets if I use that in inverted commas. So to retain the structure in place made commercial sense and I think at the same time it solved the problem that you've put and the problem that he had suggested around the buyer's financial strength, because

any transaction that involved, both Koornfontein and OCT would support any losses that were made at OCM. So the proposal had merit, I was surprised that it had been done because it could have been raised previously, so I was certainly surprised at the proposal but pleasantly surprised because I thought it had commercial value.

ADV VINCENT MALEKA SC: Yes, were you surprised that the new buyer did not see the commercial sense of it when it made its offer?

MR PIERS MICHAEL MARSDEN: Just for a correction, their first offer was not there, they then subsequently did make an offer on that basis, so I think they must have seen the commercial value. So quite shortly after this they made a further
10 offer...(intervention).

ADV VINCENT MALEKA SC: No I'm saying at that point in time before they revised the offer.

MR PIERS MICHAEL MARSDEN: I think they must have seen the commercial value in it yes.

ADV VINCENT MALEKA SC: Okay, for the first time as a result of that meeting?

MR PIERS MICHAEL MARSDEN: Yes.

ADV VINCENT MALEKA SC: Yes, and then you deal with the question of the debt to the bank, still at page 149, the paragraph following the one you have just read.

MR PIERS MICHAEL MARSDEN: Yes so the bank consortium had – the debt had
20 grown as a result of interest and post commencement finance, it was at a higher amount than you would recognise from earlier on and any transaction would require, equally, their consent to the extent that they were not fully repaid and as a result, you know, they were the secured creditor they had access to the assets etcetera, so any transaction, whether it be at OCM or OCH would require some level of consent from the banks.

ADV VINCENT MALEKA SC: And you said that was the senior debt of 2.7 billion rand secured in favour of the banks?

MR PIERS MICHAEL MARSDEN: Yes they had security over the fixed assets they had accession over the receivables, they had a pledge over the shares, as you would anticipate with banks, they had pretty much everything.

ADV VINCENT MALEKA SC: Yes, Chair you'd recall how the banks do tie you up they even own your income, they even own your assets, you can't do anything. I would step off the minutes unless you would like to say something but maybe let me direct your attention to the second last paragraph and the last sentence of that paragraph under

10 Roman III.

MR PIERS MICHAEL MARSDEN: Sorry are we still on 149?

ADV VINCENT MALEKA SC: Yes.

MR PIERS MICHAEL MARSDEN: Yes I think the last sentence is really fundamental is that Nazeem – NH, Nazeem Hower confirmed that (indistinct) was dealing with dealing with it from OCM perspective and did not have a mandate at this point and that's been paraphrased into talk regarding OCH which was the proposal by Mr Koko.

ADV VINCENT MALEKA SC: Yes, but he raised a few issues before then about whether there were negotiables from the side of Eskom correct?

MR PIERS MICHAEL MARSDEN: He did it was...(intervention).

20 **ADV VINCENT MALEKA SC:** And one of them relates to penalties correct?

MR PIERS MICHAEL MARSDEN: That's correct.

ADV VINCENT MALEKA SC: And can I ask you to deal with his issue relating to penalties you'll see it under Roman III.

MR PIERS MICHAEL MARSDEN: Yes he had asked whether Eskom would consider a waiver of the penalty and unsurprisingly Eskom replied back that it was clear that

Eskom was not prepared to waive that penalty.

ADV VINCENT MALEKA SC: Alright, we can leave the minutes on the clear premise that what was clear to the parties in that room at that point in time was that the penalties would not be waived, there may be a restructuring of the offer in order to include three assets.

MR PIERS MICHAEL MARSDEN: That's correct.

ADV VINCENT MALEKA SC: And the banks would have to consent to the sale because of the security debt of 2.7 billion?

MR PIERS MICHAEL MARSDEN: That's correct.

10 **ADV VINCENT MALEKA SC:** Alright, now I'd like to take you back to your statement in order to trace the developments thereafter and you deal with those developments from page 13 paragraph 36.

MR PIERS MICHAEL MARSDEN: Yes, so just to recollect the timing, because I think it is important, the meeting that we've just referred to, the minutes, was held on the 24th of November so very shortly thereafter on the 26th of November in the context of a completely re-structured deal in a surprisingly short amount of time, Tegeta made a new offer, this offer included the sale now of all of the assets of OCH i.e. not just the shares in OCM but in the other subsidiaries including OCT and Koornfontein for a purchase consideration of 1 billion rand. This was not a written offer, it was communicated to me
20 by Mr Ephron.

ADV VINCENT MALEKA SC: Alright, we heard the evidence of Mr Clinton Ephron in relation to how Glencore corresponded to that offer and he said it was rejected.

MR PIERS MICHAEL MARSDEN: I have a slightly different recollection, whilst they did certainly reject it, given the context that it would have required the bank's consent I also had arranged a meeting with the bank consortium and in the context of a purchase

consideration of one they would have written off 1.5 given their total exposure was that and I received a very curt response that, that was not an acceptable offer. So both Glencore and the consortium of banks rejected that proposal.

ADV VINCENT MALEKA SC: Yes, alright I don't think anything turns on it we know as a fact that, that offer was rejected and then what was the next phase of the development, I think you begin to deal with it on page 14 paragraph 38.

MR PIERS MICHAEL MARSDEN: In paragraph 40 or earlier than that sorry?

ADV VINCENT MALEKA SC: Earlier than that from paragraph 38.

MR PIERS MICHAEL MARSDEN: So taking back to the context of, the offer has now
10 been rejected, on or about the 30th of November 2015 I received a call from Mr Ephron requesting that I attend a meeting, I did such and I was informed at that point in time that Glencore had received a number of notices from the Department of Mineral Resources stopping operations, not only at – within the OCH table but at other Glencore operations and as a result of that Glencore had, effectively reconsidered its position and the view that the 1 billion was certainly not sufficient value and they had made a fundamental decision to, essentially declare the business rescue process a failure, if I can use that terminology. They would continue to support OCH and OCM they would discharge the company from business rescue once they had gone through some of the governance steps and they would live with the contract until the end of its
20 term in 2018.

ADV VINCENT MALEKA SC: Yes we'll get to the details, Mr Ephron testified about the notices and I think other witnesses, too testified about the notices and they were of the view that they were too harsh and represented some form of pressure but from a different quarter and that was DMR. I wonder whether you took a view about the purpose behind those notices.

MR PIERS MICHAEL MARSDEN: I think I would concur with that view.

ADV VINCENT MALEKA SC: Alright then I'd like to get to the details of this fundamental shift of Glencore in relation to its assets at Optimum Coal Mine, I mean it's a fundamental shift.

MR PIERS MICHAEL MARSDEN: It is Glencore, essentially acceding to all of the demands that Eskom have made and that they've stuck to as we've recalled on several occasions that kind of firm line in the sand. We're essentially having Glencore saying, you know, this last couple of months is really not worked out and we would seek to discharge the business rescue and to live with the contract, on Eskom's terms until the
10 remainder of 2018, which is a fundamental shift.

ADV VINCENT MALEKA SC: I mean we heard his evidence and it is quite clear from his evidence that from May 2014 when he came in, it was quite clear that neither Optimum Coal itself, the holding company, would absorb the loss and therefore they had to do something fundamental and they could not carry on under the CSA as it was structured and for that reason they declared a hardship. The penalties even added to the difficulties they had and for that reason they decided to place this mine and the holding company into a business rescue. At this moment when Eskom was quite clear that it was not going to give a quarter they now shift and concede to each and every demand of Eskom by taking out this company out of business rescue by telling Eskom
20 that they will supply on the same terms of the CSA which, previously the conceded oppressive, correct?

MR PIERS MICHAEL MARSDEN: That's correct.

ADV VINCENT MALEKA SC: Why would Glencore all of a sudden get to this Lazarus moment?

MR PIERS MICHAEL MARSDEN: I really I think that, that's a question they should

have answered but I think the context is we were running out of options, the last bidder had put an offer that was not acceptable, there was external pressure that may or may not have impacted their other businesses and as a result they had an internal meeting and decided to do an about turn and pursue this process.

ADV VINCENT MALEKA SC: Alright, you do indicate in paragraph 41 on page 14 that, that fundamental changing position was communicated to Eskom.

MR PIERS MICHAEL MARSDEN: That's correct.

ADV VINCENT MALEKA SC: Can I ask you to deal with how Eskom was told of that change in stance?

- 10 **MR PIERS MICHAEL MARSDEN:** So immediately after Glencore had informed me of their intentions, I was requested to facilitate two meetings in a very specific sequence. First they had requested that I set up a meeting with Eskom which I did and they, immediately, thereafter wanted to meet with the banking consortium. So if we can deal with the first meeting, the first meeting was held on the 1st of December it was attended by myself, Mr Van Den Stein, Mr Koko and two representatives from Glencore and at this meeting, Glencore effectively recorded that the offer had been rejected and that they, Glencore, would continue to support OCM going forward and that OCM and OCH would be discharged from BR. Obviously pursuant to some governance that had to be achieved first, it's not something that can be done immediately and then they
- 20 confirmed, further, that they would not seek amendment to the CSA and it would pursue arbitration proceedings for the resolution of the penalty and it would also not insist on an extension of the supplier agreement with Eskom at the Koornfontein mine.

ADV VINCENT MALEKA SC: Alright I suppose that this meeting was not recorded because you don't favour us with any minutes or notes of the meeting?

MR PIERS MICHAEL MARSDEN: No it was an informal meeting, I do think that – I

don't think the contents is disputed, I certainly recall from Mr Koko's evidence at the Parliamentary enquiry that he records very similar (indistinct) stance at the meeting.

ADV VINCENT MALEKA SC: We will come to his position because it becomes fundamentally important and you're quite correct that he did make submissions and testified at the Portfolio Committee hearings but what I want to confirm with you at this point in time is that, when Mr Ephron communicated that position to Mr Koko, Eskom must have been surprised by this, correct?

MR PIERS MICHAEL MARSDEN: I would hope pleasantly surprised yes.

ADV VINCENT MALEKA SC: Indeed, because whatever it insisted upon up to that
10 point in time, had been considered by Glencore.

MR PIERS MICHAEL MARSDEN: Exactly their hardball tactics and holding the line appeared to have worked.

ADV VINCENT MALEKA SC: Yes, the consequence of it is this, that on Eskom's hard line and the concession of Glencore Optimum would be running at further losses for the lifetime of the CSA which was two years more, correct?

MR PIERS MICHAEL MARSDEN: Correct.

ADV VINCENT MALEKA SC: So if one does simple mathematics, from the perspective of Eskom it will be 130 million rand per month multiplied by 24 months.

MR PIERS MICHAEL MARSDEN: That's correct.

20 **ADV VINCENT MALEKA SC:** From the perspective of Glencore it will be 150 million rand multiplied by 24 months.

MR PIERS MICHAEL MARSDEN: Correct.

ADV VINCENT MALEKA SC: Yes, Chair at this stage I would like to introduce documents which are not in these files because they reflect how Eskom dealt with this change of position...(intervention)

CHAIRPERSON: I'm sorry before you proceed did you – Mr Marsden, did you ever get to know what had informed Glencore's fundamental shift around that time, did you get to know or is it something that you might have got to know much later?

MR PIERS MICHAEL MARSDEN: I certainly asked the question at the time...(intervention).

CHAIRPERSON: Ja I would have expected you to ask.

MR PIERS MICHAEL MARSDEN: And I think I was aware of the Section 54 Notices at the time Glencore, and still remains a very large organisation whilst these numbers are extraordinarily large for ordinary people, Glencore is a large organisation and I suspect
10 that as big as the losses are as illustrated, between 130 and 150 depending on whose versions, Glencore could have sustained that loss, they had the balance sheet in order to do that. What it would have done is two-fold, it would have protected the OCT and they would have retained that allocation which, at the time, with coal prices quite depressed was not as valuable but where they are at the moment certainly would have been and I think Glencore would have seen through that cycle of prices. Secondly, I think that, come the 1st of January 2019 at the end of this (indistinct) there would have been a very interesting negotiation around an extension. So I think they took the view that we can quantify what that range of costs is and in the context of the last remaining offer being a billion rand, the maths just didn't work and in the context, perhaps,
20 pressure of the 54 has an impact on the other business they could factor a risk element into that.

CHAIRPERSON: Thank you.

ADV VINCENT MALEKA SC: Thank you Chair, Chair can I, with your leave hand up these documents, they are already in the bundle of documents we introduced at the beginning of the Eskom hearings but we thought it was just to extract...(intervention).

CHAIRPERSON: For convenience.

ADV VINCENT MALEKA SC: For convenience rather than to ask you to bring the whole set of files. Chair as a matter of convenience these documents were extracted from volume 4 of the transcript of the Parliamentary proceedings and you'll see that each of the pages at the top has been paginated, it is the pagination which starts with 1499 which is relevant for the present purposes. And the evidence of Mr Marsden in relation to these documents is going to become important when you hear the next witness Dr Ramontja because these letters were addressed to him. So it's a very useful introduction of Dr Ramontja's evidence before he even takes the stand. We
10 have placed documents before you, and I'd like to identify them with the pagination which begins with ES, okay, have you seen ES 1499 before?

MR PIERS MICHAEL MARSDEN: I may have seen it as part of Mr Koko's testimony which I kept a keen eye on.

ADV VINCENT MALEKA SC: I'd like to orientate you about those letters. ES 1499 appears to be a draft and then if you go to ES 1501 you will see that, that's an email from Ms Suzanne Daniels to Mr Koko, it is dated 6 December 2015 7h55 pm and it is addressed to Mr Matshela Koko and Ms Norman who is very astute and diligent about the calendar, she tells me that, that must have been a Sunday and thereafter you will see there is ES 1502 and 1503. That document appears to be an updated version of
20 the previous document. If you compare the two, in other words if you compare ES 1499 and ES 1502 you will see that the page – the second page, page two of that letter is longer and therefore has additions which the previous letter did not have but other than the additions the contents of the letters are the same. So the deduction we make Chair as a legal team, having regard to the email from Ms Daniels, is that ES 1502 it's an updated version of the previous draft.

CHAIRPERSON: Which is ES 1499?

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: And is – was ES 1501 a kind of covering note for 1499?

ADV VINCENT MALEKA SC: We assume that this ES 1501 was an email from Ms Daniels telling Mr Koko that he has updated the draft and that albeit is the one which is signed by Mr Koko in ES 1502 and 1503.

CHAIRPERSON: Yes the 1501 is on the 6th of December 2015 at 7h55 and then 1502 is signed by Mr Koko on the same date?

ADV VINCENT MALEKA SC: Yes the previous draft, 1499 is not signed at all.

10 **CHAIRPERSON:** Yes.

ADV VINCENT MALEKA SC: So we will work with the document which Mr Koko has signed because this – the one that he used to make submissions to Parliament and there's the one that he introduced in the Parliamentary evidence. So if you don't mind I'll ask you to go to page 1502, are you there?

MR PIERS MICHAEL MARSDEN: I am but if I could make one comment before we disregard 1499.

ADV VINCENT MALEKA SC: Yes.

20 **MR PIERS MICHAEL MARSDEN:** Timing is everything in life and there is one other sentence if we could just focus on as a distinction between the two letters before we get into the content.

ADV VINCENT MALEKA SC: Yes.

MR PIERS MICHAEL MARSDEN: So if we go to 1499, it says "at the recent meeting of the parties two days ago"...(intervention).

CHAIRPERSON: Where are you reading from?

MR PIERS MICHAEL MARSDEN: Sorry I'm – my apologies it's 1499 the second

paragraph from the bottom, “at the recent meeting of the parties two days ago, the meeting was held on the 1st of December, so one can assume that the genius of this letter was the 3rd of December and I think timing is important, that changes in 1502, “at the latest meeting of the parties, and obviously given the influxion of time it’s changed, but it’s an important distinction for me.

ADV VINCENT MALEKA SC: Thank you for that distinction but I understand from your evidence that the last meeting you had with them was on the 1st of December.

MR PIERS MICHAEL MARSDEN: That’s correct.

ADV VINCENT MALEKA SC: There was no other meeting after that?

10 **MR PIERS MICHAEL MARSDEN:** There was no other meeting no.

ADV VINCENT MALEKA SC: Yes, so whether it is the recent or the latest, from your perspective we must work with the date 1 December 2015.

MR PIERS MICHAEL MARSDEN: Yes the only distinction was that there was a monthly update report, a standardised update report that was submitted, critically in that interim period.

ADV VINCENT MALEKA SC: I understand.

MR PIERS MICHAEL MARSDEN: It was not a meeting.

ADV VINCENT MALEKA SC: So we can work on the basis that as far as we’re concerned recent or latest the date must be fixed as 1 December 2015.

20 **MR PIERS MICHAEL MARSDEN:** Correct, absolutely right.

CHAIRPERSON: But some of these things may be significant for different purposes. That paragraph from which you read which suggests that there were – there was a meeting two days previously on what has been indicated – you have indicated the last meeting was on the 1 December before these letters and so – so either different parties I mean are intended or if it is intended the same parties are intended – if the same

parties are intended then maybe the author was just mistaken about the date of the meeting or if it was not mistaken there may have been other purposes for stating things in a certain way?

MR PIERS MICHAEL MARSDEN: If I can maybe explain why I want to make the distinction that probably would clarify and I presume we are heading there so I do not know if I am going into the unknown here. But I did watch Mr Koko's testimony at the Parliamentary inquiry and he seeks to discredit is maybe the only word that I can think of this letter stated by the fact that on the 4 December there was an update report that came in which was a generic update report. So that is why the intention behind this
10 letter started prior to that update report and that is merely a red herring so that is why I make the distinction.

CHAIRPERSON: Yes.

MR PIERS MICHAEL MARSDEN: The letter further says in the latest meeting. There was no other meeting so...

CHAIRPERSON: Ja.

MR PIERS MICHAEL MARSDEN: So the advocate is absolute correct it still records the latest meeting we are referring to the same meeting.

CHAIRPERSON: Yes but also the meeting – at the meeting of the 1st is the position not at that stage Eskom was being or – ja Eskom was being informed that Glencore would
20 take Optimum out of the rescue process – business rescue process so it is not as if it was out of that process already.

MR PIERS MICHAEL MARSDEN: Correct and there is some governance around how one exits so.

CHAIRPERSON: Yes.

MR PIERS MICHAEL MARSDEN: So that is part of the reason why we could not

immediately discharge it.

CHAIRPERSON: Yes, yes.

MR PIERS MICHAEL MARSDEN: The principle reason being the bank debt had accelerated and we needed to restructure that.

CHAIRPERSON: Yes.

MR PIERS MICHAEL MARSDEN: And then there are further governance issues that the practitioner has to satisfy himself that Glencore has provided sufficient funding.

CHAIRPERSON: Ja.

MR PIERS MICHAEL MARSDEN: So there is – there is whilst we have said we are
10 going out of business rescue we had not yet achieved the task.

CHAIRPERSON: Yes.

MR PIERS MICHAEL MARSDEN: And I think that is the distinction I wanted to make.

CHAIRPERSON: Yes because the letter says that the business rescue practitioners indicated that Optimum was no longer in business rescue. So at that meeting you could not put – you could not have put it that way?

MR PIERS MICHAEL MARSDEN: Correct. We were – our intention was to discharge it but we had not yet done the act.

CHAIRPERSON: Yes, ja, ja. The fundamental shift had just happened?

MR PIERS MICHAEL MARSDEN: Exactly right.

20 **CHAIRPERSON**: Ja okay. Thank you.

ADV VINCENT MALEKA SC: Alright Chair just to reinforce your point if you put 1499 side by side with 1520 and

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: And you reflect back to that paragraph the second last paragraph.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: You will see that 1499 is shorter than its mirror image on 1502?

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: The sentence that I am going to read from 1502 has now been added. It was not there previously on 1499.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: The sentence is and I am reading the second sentence from that penultimate paragraph.

10 “They further advised that they will follow the contract route to
 process Eskom’s claim of R2.2 billion.”

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: They made it very clear that they are not insisting on the extension of the Koorfontein Coal Supply contract with Eskom. They insisted that the extension of Koorfontein Coal Supply contract is at the discretion of Eskom. This was not previously in the draft.

CHAIRPERSON: In that paragraph.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: Yes. Ja, ja.

20 **ADV VINCENT MALEKA SC:** Alright. I am sure Mr Marsden around the 6 December
 you were not aware of these letters?

MR PIERS MICHAEL MARSDEN: Very much not.

ADV VINCENT MALEKA SC: Yes. I would like to take you to 1502 because it reflects Eskom’s position to the stance taken by Glencore at that meeting of 1 December 2015. And forgive me if I were to go through paragraph by paragraph.

MR PIERS MICHAEL MARSDEN: No problem.

ADV VINCENT MALEKA SC: This is Mr Koko writing to Doctor Thibedi Ramontja who is the next witness we are going to call. Do you know why he is writing to DMR?

MR PIERS MICHAEL MARSDEN: I have no idea.

ADV VINCENT MALEKA SC: Okay. He says and as he starts.

“As you may be aware Eskom has been involved in a legal
wrangle with the above supplier from about August this year.”

Do not worry about that we will take that up with Doctor Ramontja. Next he says in a rather dramatic fashion the company was placed under business rescue and Eskom
10 was faced with intermittent veiled threats of liquidation while at the same time the business rescue practitioners purportedly sought constructive engagement with the parties. Do you see that?

MR PIERS MICHAEL MARSDEN: Yes Sir.

ADV VINCENT MALEKA SC: Was the initiation of business rescue process or proceedings by Glencore dramatic as far as you are aware?

MR PIERS MICHAEL MARSDEN: Not in my view I think they had made it quite clear prior to making the decision that that was a possibility and they had let Eskom know about it.

ADV VINCENT MALEKA SC: And they had engaged Eskom about that prospect
20 before?

MR PIERS MICHAEL MARSDEN: Correct.

ADV VINCENT MALEKA SC: Yes. So there was nothing dramatic as far as you are aware? And then they say that you had purported constructive engagements with Eskom. We have gone through a series of what you had done to engage Eskom from August when you took over up to the point when you received the final offer of Tegeta.

Would you describe those negotiations as a reflection of purported constructive engagement?

MR PIERS MICHAEL MARSDEN: Certainly not I think that we sought on many occasions to try engage with Eskom so from our side it certainly was not purported we sought actively to engage in constructive engagements. Whether the engagements themselves were constructed is an entirely different question but I would lay the blame in that regard on Eskom rather than ourselves. We genuinely attempted to engage with them.

ADV VINCENT MALEKA SC: What I find surprising about that disruption is that it does
10 not disclose the director general the chapter and verse of those negotiations. Correct?

MR PIERS MICHAEL MARSDEN: Correct.

ADV VINCENT MALEKA SC: And it yet it puts a description on the qualitative nature of those discussions.

MR PIERS MICHAEL MARSDEN: Correct.

ADV VINCENT MALEKA SC: In a manner that is not consistent with the true nature of those discussions.

MR PIERS MICHAEL MARSDEN: Correct.

ADV VINCENT MALEKA SC: I am going to read the next paragraph.

20 “From Eskom’s perspective it was expected that as a Glencore operation Optimum Coal Mine would enjoy a far more – would enjoy a far more support than the conditional funding for limited time periods that was on offer.”

I hope I understand what he is conveying there but let me ask you first. Do you understand what is conveying to the director general?

MR PIERS MICHAEL MARSDEN: I do. Glencore had been providing us post

commencement finance throughout the business rescue. Given where the banks ranked in the security profile any funding that Glencore provided was largely lost and would in all likelihood not be recovered. So they were essentially providing that on a monthly basis in order to see how we had progressed initially in our negotiations and subsequently in the conclusion of a transaction.

ADV VINCENT MALEKA SC: The point I would like to establish from you is that by the time this letter was written which is five days after the meeting.

MR PIERS MICHAEL MARSDEN: Yes.

ADV VINCENT MALEKA SC: Glencore has made it quite clear that they are going to
10 provide far more than a financial loss.

MR PIERS MICHAEL MARSDEN: You are absolutely right at this point in time we – Glencore had given me the assurance and had given Mr Koko on the 1 December meeting assurance that they would provide sufficient funding to see it through to the end of the contract.

ADV VINCENT MALEKA SC: All that was required of Optimum Coal Mine to meet its obligations under the CSA?

MR PIERS MICHAEL MARSDEN: Correct. Exactly right.

ADV VINCENT MALEKA SC: Including the question of dealing with the penalties.

MR PIERS MICHAEL MARSDEN: Exactly right.

20 **ADV VINCENT MALEKA SC:** Yes. Again that was not disclosed to the director general in this letter.

MR PIERS MICHAEL MARSDEN: Correct.

ADV VINCENT MALEKA SC: Yes. The next paragraph reads as follows:

“Optimum supplies one of Eskom’s key contributors to the national power system as Hendrina Power Station is a stalwart of

Eskom's fleet supplying approximately 20 sorry 2000 megawatts to the national grid. Glencore was fully aware of the dynamics and history relating to the nature of the coal supply agreement and its structure when it concluded the sale with its previous owner."

That is a fair reflection of the true state of affairs? Then when Glencore bought the mine from BACSA correct?

MR PIERS MICHAEL MARSDEN: Yes it seems to be correct.

ADV VINCENT MALEKA SC: We heard Mr Ephron's evidence they were aware about
10 what the CSA at that point in time I think it was BACSA bought it in 1993 from Trans Natal they bought it in about 2012 I think.

MR PIERS MICHAEL MARSDEN: It sounds about right.

ADV VINCENT MALEKA SC: From BACSA.

MR PIERS MICHAEL MARSDEN: That is right.

ADV VINCENT MALEKA SC: So I think he is reflecting the truth at that point in time, correct?

MR PIERS MICHAEL MARSDEN: Embedded of course in the supply agreement is the hardship so yes.

ADV VINCENT MALEKA SC: Yes.

20 **MR PIERS MICHAEL MARSDEN:** It is included in there.

ADV VINCENT MALEKA SC: What I want to understand is...

MR PIERS MICHAEL MARSDEN: It is a fair reflection.

ADV VINCENT MALEKA SC: It is a fair reflection?

MR PIERS MICHAEL MARSDEN: Yes.

ADV VINCENT MALEKA SC: Okay. The next paragraph reads as follows:

“At the latest meeting of the parties the business rescue practitioners together with the Glencore representatives or representative indicated that Optimum is being rescued and that it would honour the contract in its current form with no amendments. They further advised that they will follow the contract route to process the Eskom claim of R2.2 billion. They made it very clear that they are not insisting on the extension of the Koorfontein Coal Supply contract with Eskom they insisted that the extension of Koorfontein Coal Supply contract is at the
10 discretion of Eskom.”

Again he is reflecting the truth?

MR PIERS MICHAEL MARSDEN: That is a fair reflection of the meeting yes.

ADV VINCENT MALEKA SC: Yes. As a matter of detail when did the Koorfontein Coal Supply agreement come to an end?

MR PIERS MICHAEL MARSDEN: It was slightly different in that it was a volume based contract not a time based contract details aside sometime in January 2016 so very presently.

ADV VINCENT MALEKA SC: Okay. The next paragraph reads as follows:

“Eskom is perplexed by this about turn given the events of the
20 past few months and at the blatant disregard Optimum displays for the impact that the threats of liquidation has on the precarious balance of electricity security and commercial viability as a Glencore operation Optimum surely cannot be perceived to be acting in the national interest.”

I see that you are smiling?

MR PIERS MICHAEL MARSDEN: Yes.

ADV VINCENT MALEKA SC: Alright.

MR PIERS MICHAEL MARSDEN: I should not be.

ADV VINCENT MALEKA SC: Yes. It seems to me that once you conceded each and every of Eskom's demands and communicated them and when I say I mean Glencore you representing them. Once you conceded them at that point in time you did something which Eskom did not expect because on Mr Koko's approach that was perplexing.

MR PIERS MICHAEL MARSDEN: I do not understand the word perplexing in the
10 context of the two preceding paragraphs or in the context of the numerous occasions when Eskom laid out what it is they wanted. They have laid out in the numerous discussions and documents we have been through on numerous occasions what they wanted. They had got exactly what they wanted. So why one would be perplexed having stuck to a hard line and having received that hard line is inexplicable.

ADV VINCENT MALEKA SC: A hard bargainer like Eskom at that point in time would have been happy?

MR PIERS MICHAEL MARSDEN: Exactly right.

ADV VINCENT MALEKA SC: Rather than being perplexed?

MR PIERS MICHAEL MARSDEN: Very much so.

20 **ADV VINCENT MALEKA SC:** Yes. But I can understand why he would suggest that he was per- your change of stance was perplexing. Because from his explanation in that paragraph about the history of the engagement with Glencore there was one important development which he does not refer to in this letter and that is the attempts by Tegeta to acquire the mine. Because your change of stance at that point in time meant that the offer was no longer on the table. The mine was no longer available for

sale.

MR PIERS MICHAEL MARSDEN: Correct.

ADV VINCENT MALEKA SC: And that was a matter that perplexed him. I cannot think of any other matter that could perplex him once you concede and every demand Eskom was making.

MR PIERS MICHAEL MARSDEN: I agree with you.

CHAIRPERSON: Well he – he could not have been perplexed about the fundamental shift the change unless in insisting on the position on which Eskom was insisting rigidly on your evidence unless he did not expect the shift. Is it not?

10 **MR PIERS MICHAEL MARSDEN:** He should not have been perplexed in the slightest at the news that he heard on the 1 December. He should have overjoyed and it should have been one his KPI's for that year if Eskom's position was to take a hard line, they had negotiated hard and they had got one of the largest mining houses to effectively concede on each of their items. I do not understand the word perplexed in the context of this {indistinct}.

CHAIRPERSON: Well I am thinking that let me talk in not on the facts of this case. Let us say you have negotiations with somebody to settle something some dispute and you take a position that for example is intended by you to ensure there is no settlement but there is capitulation but you do not think capitulation is going to be – is going to happen
20 and then if it happens would you not be perplexed?

MR PIERS MICHAEL MARSDEN: If your stated intention is different from your actual intention.

CHAIRPERSON: Ja okay alright.

MR PIERS MICHAEL MARSDEN: Yes.

CHAIRPERSON: I am not talking about this one.

MR PIERS MICHAEL MARSDEN: In your example. You never wanted a settlement you were seeking it as leverage for another example.

CHAIRPERSON: Ja okay.

ADV VINCENT MALEKA SC: And what he is saying in the paragraph I have just read, that is the last paragraph he refers to the fact that there were threats of liquidation and those threats of liquidation had a potentially negative impact on the supplier of coal and therefore electricity to the country and that you would not be acting in the best interest of the nation. But what is quite clear is that by the time he writes this letter there were no longer threats of liquidation of the mine. Correct?

10 **MR PIERS MICHAEL MARSDEN:** Correct.

ADV VINCENT MALEKA SC: In fact the mine was going to be removed from business rescue?

MR PIERS MICHAEL MARSDEN: Correct.

ADV VINCENT MALEKA SC: In fact the mine was going to honour all of its CSA obligations however oppressive.

MR PIERS MICHAEL MARSDEN: Correct.

ADV VINCENT MALEKA SC: What reason can you think of that Mr Koko does not disclose all the true facts? The little that he discloses is in fact a misrepresentation of the facts.

20 **MR PIERS MICHAEL MARSDEN:** I do not think I can speculate on what Mr Koko was intending with this letter.

ADV VINCENT MALEKA SC: But from your perspective do you accept that this statement relating to threats of liquidation the possible impact of those threats of liquidation to the security of supply were a clear misrepresentation of the facts.

MR PIERS MICHAEL MARSDEN: Exactly right. Effective 1 December that position no

longer existed. Prior to that before Glencore's about turn that was a real possibility but post the 1 December meeting i.e. at the time this letter was drafted that was no longer a realistic possibility.

ADV VINCENT MALEKA SC: In fact Hendrina would continue to procure?

MR PIERS MICHAEL MARSDEN: Correct.

ADV VINCENT MALEKA SC: Coal at its own requirements under the CSA.

MR PIERS MICHAEL MARSDEN: Correct.

ADV VINCENT MALEKA SC: The angling possibility that Eskom may well have faced was the supply of coal which was not meeting the specs but that would be dealt by with penalties.

10

MR PIERS MICHAEL MARSDEN: In terms of the contract yes.

ADV VINCENT MALEKA SC: Yes. Then I am paging over Chair to ES1503.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: In [indistinct] you are aware that we have similar challenges at Arnot Power Station the current supply contract with Exxaro Resources expired on 31 December 2015 and we are discussing the winding down of operations with Exxaro, is there any comment you want make I am just reading in the interest of full disclosure?

MR PIERS MICHAEL MARSDEN: I was not aware of it at the time.

20 **ADV VINCENT MALEKA SC:** But what you have been aware of in due course is that coal from Optimum was procured by Tegeta to supply Arnot?

MR PIERS MICHAEL MARSDEN: Indeed.

ADV VINCENT MALEKA SC: We will get to that in due course.

MR PIERS MICHAEL MARSDEN: Ja.

ADV VINCENT MALEKA SC: The next paragraph reads as follows:

“While Eskom has issued request for proposals to the open market the tender submission indicate that we will not have sufficient volumes to meet their requirements for Arnot – of Arnot based on previous tests. Eskom can confirm that the coal qualities at Optimum are suitable for Arnot’s burn requirements and will pass the necessary combustions tests based on Optimum’s current mining plans there should be sufficient coal volume to service both power stations therefore Optimum becomes highly sought after source for Arnot as well.”

10 Do you see that?

MR PIER'S MICHAEL MARSDEN: Yes.

ADV VINCENT MALEKA SC: This is not a sudden reflection of the importance of Optimum to Eskom. It has always been there historically from day 1. It has always been there when you took over as the BRP's, correct?

MR PIER'S MICHAEL MARSDEN: It is historic importance, an ongoing importance, absolutely.

ADV VINCENT MALEKA SC: Yes So he is not telling the director general anything new here?

MR PIER'S MICHAEL MARSDEN: He is not a couple of these items just reading it
20 quickly maybe require some clarification if you do not mind

ADV VINCENT MALEKA SC: Yes.

MR PIER'S MICHAEL MARSDEN: Optimum’s current mine plans certainly at that point in time we were in control of the mine and we had no plans to expand production beyond our obligations to Hendrina. Although when the mine was in full production and supplying to the export market it would have had sufficient coal to supply and so the

half of that I suppose is debatable the second half would we have sufficient volume, yes. So once again supporting your assertion that it is an important asset from an Eskom perspective.

ADV VINCENT MALEKA SC: You know Mr Marsden the sad part of this story arising from this paragraph is that Glencore was willing to keep Optimum Coal Mine as part and parcel of a strategic supply to Eskom for the rest of the CSA. In fact if it wanted to go even further but that mine has now been lost altogether.

MR PIER'S MICHAEL MARSDEN: Yup.

ADV VINCENT MALEKA SC: Because the evidence before the Chair is that that mine
10 is a mine dump at the moment. Are you aware of that fact?

MR PIER'S MICHAEL MARSDEN: I am aware it is undergoing its second business rescue process and I do not believe it is currently in production.

ADV VINCENT MALEKA SC: Yes. And that is the sad reality of what Eskom is now facing.

MR PIER'S MICHAEL MARSDEN: Indeed.

ADV VINCENT MALEKA SC: Yes. The next paragraph reads as follows:

20 'I also put it to you that Komati Power Station received 180 000 tonnes per month of coal from Koornfontein Mine. As a subsidiary of Optimum Coal Holdings this contract expires at the end of January 2016. As a result of the rescue proceedings this power station is also at risk post January 2016.'

Do you understand what is communicating to the DG at that point in time?

MR PIER'S MICHAEL MARSDEN: I understand what he is miscommunicating to the DG.

ADV VINCENT MALEKA SC: Alright.

MR PIERS MICHAEL MARSDEN: I think that factually Optimum Coal Holdings is in business rescue. Its subsidiary Koornfontein Mines is not. It is a separate legal entity it has its own board, it has its own funding structure and it is not in business rescue. So whilst I had representation as a shareholder Koornfontein exists as a separate legal entity not within business rescue and not at threat of either business rescue and or liquidation as well. The contract expires at the of January 2016 I think that at least agrees to the date I just gave you. We had been requesting an extension on similar terms from Eskom they were the ones who did not want to give the extension and if you go back to the previous page on page 1502 the last sentence of the second last
10 paragraph.

“They insisted that the extension of Koornfontein’ s supply
contract is at the discretion of Eskom”

So the threat of Koornfontein sits very squarely on Eskom’s doors not at Koornfontein’s doors. If you understand me?

ADV VINCENT MALEKA SC: I understand that. I mean I have read a little of every available public information relating to the business rescue proceedings. I have never come across any evidence whatsoever suggesting that Koornfontein Mine was in or about to be put into business rescue. This is the first time I hear of it.

MR PIERS MICHAEL MARSDEN: You are absolutely right it was never at risk of being
20 in business rescue.

ADV VINCENT MALEKA SC: Do you know any reason why Mr Koko would miscommunicate this fundamental proposition to the director general?

MR PIERS MICHAEL MARSDEN: I do not.

ADV VINCENT MALEKA SC: The next paragraph reads as follows:

“As at the date of this letter we have not yet received a formal

notification of the status of Optimum.”

Is that true?

MR PIERS MICHAEL MARSDEN: That is true yes we had not been able to achieve the governance required in order to discharge the business rescue.

ADV VINCENT MALEKA SC: Okay the next paragraph reads as follows:

“While Eskom fully appreciates the turnaround of the business it remains concerned that such erratic display of business stability may compromise the security of supply to Hendrina Power Station in the short to medium term therefore Eskom would
10 require a firm resolution on Optimum by mid December 2015.”

Do you see that?

MR PIERS MICHAEL MARSDEN: I do.

ADV VINCENT MALEKA SC: I do not know what firm resolution he was looking at by December 2015. But on what you have told the Chairperson it is quite clear that remaining disputes between Eskom and Optimum Coal Holdings relating to Optimum Coal Mine have been resolved.

MR PIERS MICHAEL MARSDEN: I suppose they have been verbally agreed but there is governance and paperwork that needs to support those decisions. So I can only anticipate that the formal discharge of business rescue is what was required in this
20 paragraph, I assume.

ADV VINCENT MALEKA SC: Ja but that is a formality.

MR PIERS MICHAEL MARSDEN: I mean there are steps that need to be done but yes.

ADV VINCENT MALEKA SC: Yes but is it – those are formal processes?

MR PIERS MICHAEL MARSDEN: Correct.

ADV VINCENT MALEKA SC: They are not matters of substance.

MR PIERS MICHAEL MARSDEN: No.

ADV VINCENT MALEKA SC: Yes. Alright, we will leave that to Mr Koko and we will ask him.

MR PIERS MICHAEL MARSDEN: Sure.

ADV VINCENT MALEKA SC: Maybe he will be able to tell us what was erratic about the remaining steps to bring about the formal rescue of the entity. The next paragraph reads as follows:

10 “The risk of security of supply for Hendrina Power Station,
Komati Power Station and Arnot Power Station is of such a key
national interest that we thought it appropriate to bring it to your
attention. This upcoming adversity facing Eskom will require
some form of intervention on the part of the Department of
Mineral Resources to assist Eskom in leveraging the necessary
key authorities to assist in assuring resolution to the coal
supply situation and certainly going forward.”

Can you think of any need for the Director-General, his department or even the
Executive Authority of that department be the Minister of Mineral Resources would have
to intervene in your contractual relationship with Eskom once you have conceded to its
20 demands at the meeting of 1 December 2015?

MR PIERS MICHAEL MARSDEN: I see no reason.

ADV VINCENT MALEKA SC: Alright. We have dealt with the contents of this letter
and in fairness you were not aware of them when Mr Koko wrote to the Director-
General?

MR PIERS MICHAEL MARSDEN: Correct.

ADV VINCENT MALEKA SC: Now that you are aware of them what is the view you take of the contents of this letter?

MR PIER'S MICHAEL MARSDEN: I think it is quite disturbing in terms of where we had landed on 1 December and to the extent that Eskom wished to play hard ball on the contract which was their prerogative and they achieved that. I would have thought that would have been the end of the matter.

ADV VINCENT MALEKA SC: There were further developments which took place between Eskom, Glencore, Optimum Holdings and yourself before Mr Koko wrote this letter and I am talking about developments of 1 December which were not disclosed in
10 this letter and I would like to deal with them to the extent that you are aware of them. You begin to deal with them from page 15.

MR PIER'S MICHAEL MARSDEN: Yes. So to pick up where we were, we had just concluded the meeting with Mr Koko at Eskom. As I had previously said we had been asked to set up two meetings one, with Mr Koko and the second with the consortium of banks. Mr Ephron excused himself from that meeting between driving from Megawatt Park to the banks. Shortly after in December, unfortunately I do not have the date it was an informal session, Mr Ephron advised me that there was a meeting held in Switzerland. The principal terms of the transaction that had been agreed between Glencore, Oakbay and Tegeta which included the sale of OCHs assets for a purchase
20 considering of 2.15 billion and the various terms of the offer. I was certainly not present at those meetings and essentially we would have been required to consent to that transactions. We were in operational control effectively in the shoes of the Board of Directors of OCH. So whilst the shareholders had agreed we also needed to understand the transaction and the consent thereto. We discussed the new offer with Glencore's representatives and Mr Ephron on his return to Johannesburg and we were

satisfied that the offer was significantly more than the one billion and if there was the contribution of 400 million as proposed by Glencore this would essentially deal with all of the stakeholders at OCH.

ADV VINCENT MALEKA SC: Yes.

MR PIERS MICHAEL MARSDEN: The stakeholders at OCH being the bank consortium, being Eskom in terms of its contingent claim in terms of the guarantee and Glencore representing the shareholders and there were no staff at OCH being the holding company. So in the world of our affected parties this ticked the boxes.

ADV VINCENT MALEKA SC: Yes. What is quite clear from Mr Ephron's evidence is
10 that he was called to fly to Zurich on 1 December to attend a meeting, because on that day 1 December there was a meeting between Mr Glasenberg and the Minister of Mineral Resources at that point in time. Are you aware of that meeting in Zurich between?

MR PIERS MICHAEL MARSDEN: I have no personal knowledge, but yes I am aware of the meeting.

ADV VINCENT MALEKA SC: But you were not told of it?

MR PIERS MICHAEL MARSDEN: I was not aware of it, no.

ADV VINCENT MALEKA SC: Okay and then once he arrived at the meeting he was told of, well there was everyone there, the agreement was reached and I assume that it
20 was on 2 December when an agreement was reached. When did you become aware that Zurich had struck a deal on the sale of the three assets?

MR PIERS MICHAEL MARSDEN: I do not recall the exact date, but it would have been early in December sometime immediately thereafter. I can only postulate that it would have been sometime between the 2nd or the 4th or the 5th.

ADV VINCENT MALEKA SC: Alright and then we know that as a result of that deal

there was some kind of the implementation of it?

MR PIERS MICHAEL MARSDEN: Yes.

ADV VINCENT MALEKA SC: By means of the execution of the sale agreement?

MR PIERS MICHAEL MARSDEN: Yes that is right.

ADV VINCENT MALEKA SC: You refer to that sale agreement, Chair at page 16.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: Paragraph 46 and it begins at page 150. If you do not mind I would like to take you to some of the terms of that sale. The first is part of the definition classes. If I may ask you to go to page 158 and just to confirm with you the
10 sale agreement is on the letterhead or at least the branding of Werksmans?

MR PIERS MICHAEL MARSDEN: That is correct.

ADV VINCENT MALEKA SC: So Werksmans was quite busy?

MR PIERS MICHAEL MARSDEN: They were indeed.

ADV VINCENT MALEKA SC: At page 158 paragraph 1.2.29 there is a definition of what a guarantee is. Do you see that?

MR PIERS MICHAEL MARSDEN: I do.

ADV VINCENT MALEKA SC: Okay. The guarantee executed by the seller in favour of Eskom on 6 April 2008 in terms of which the seller guaranteed the performance by OCM of all of its obligations in terms of the CSA. Correct?

20 **MR PIERS MICHAEL MARSDEN:** Yes.

ADV VINCENT MALEKA SC: Yes. So as I understand independent of the CSA there will be a guarantee put up by OCH?

MR PIERS MICHAEL MARSDEN: That is correct.

ADV VINCENT MALEKA SC: To make sure that OCM fulfils all of its obligations?

MR PIERS MICHAEL MARSDEN: That is correct.

ADV VINCENT MALEKA SC: In the event of breach Eskom can rely on that guarantee?

MR PERS MICHAEL MARSDEN: Yes.

ADV VINCENT MALEKA SC: Okay. Against that background I am going to take you to page 168 which deals with suspensive conditions.

MR PERS MICHAEL MARSDEN: Hm.

ADV VINCENT MALEKA SC: And the key ones which you would be aware of begin at page 169 paragraph 3.1.3. Do you see that?

MR PERS MICHAEL MARSDEN: Yes.

10 **ADV VINCENT MALEKA SC:** It says:

“By 31 March 2016 the sale agreement ought to be approved by the lenders which is the banks, the competition authorities which is the Competition Commission failing which the Competition Tribunal and halfway through the competition, appeal courts in case of litigation and then the Minister of Mineral Resources in terms of Section 11 of the MPRDA.”

Correct?

MR PERS MICHAEL MARSDEN: Absolutely.

20 **ADV VINCENT MALEKA SC:** We will come back to this and some of them I will raise them with Dr Ramontja when he comes in, because those were contractual obligations imposed on someone who had to take initiative to make sure that these obligations were fulfilled.

MR PERS MICHAEL MARSDEN: Yes.

ADV VINCENT MALEKA SC: Do you know who was supposed to show the obligations to ensure fulfilment of these?

MR PERS MICHAEL MARSDEN: Generally in an agreement of this nature both parties would use their endeavours to make sure that the conditions precedent are met.

ADV VINCENT MALEKA SC: Well can I take you to page 172?

MR PERS MICHAEL MARSDEN: Yes.

ADV VINCENT MALEKA SC: You will see that there is Clause 5 which deals with regulatory filings.

MR PERS MICHAEL MARSDEN: Hm.

ADV VINCENT MALEKA SC: 5.1.1:

10 “It is recorded that the proposed transaction shall on
implementation cost constitute a large merger for the purposes
of the Competition Act.”

And we know that a larger merger is notifiable?

MR PERS MICHAEL MARSDEN: Yes.

ADV VINCENT MALEKA SC: By the parties to that measure. Correct?

MR PERS MICHAEL MARSDEN: Absolutely.

ADV VINCENT MALEKA SC: 5.1.2:

20 “The purchaser shall be responsible for preparing and lodging
on behalf of the parties as soon as reasonably possible after
the signature date. Requisite measure filings for the proposed
transaction in accordance with the provisions of the
Competition Act.”

It seems to me that the obligation to file notification for the transaction is placed on Tegeta as the proposed purchaser?

MR PERS MICHAEL MARSDEN: That is correct.

ADV VINCENT MALEKA SC: Yes. If you go to page 173 paragraph 5.1 Section 11

applications.

“The purchaser shall be responsible for preparing and lodging on behalf of the parties as soon as reasonably possible after the signature date the application in accordance with the requirements of Section 11.”

So again the agreement makes it quite clear that it is Tegeta who must initiate those processes.

MR PERS MICHAEL MARSDEN: I would agree.

10 **ADV VINCENT MALEKA SC**: Yes. Of course I accept that it does it on behalf of the party, but it is the one which must procure by making the applications.

MR PERS MICHAEL MARSDEN: I think there is a slight distinction between procuring the entire.

ADV VINCENT MALEKA SC: Sorry.

MR PERS MICHAEL MARSDEN: CP and submitting of documents.

ADV VINCENT MALEKA SC: Is it [intervenes].

MR PERS MICHAEL MARSDEN: I do not want to contradict myself. They are certainly responsible for that, but both parties are responsible for ensuring that the CP is met.

ADV VINCENT MALEKA SC: I take your point. It is the one that has to initiate.

20 **MR PERS MICHAEL MARSDEN**: Initiate, correct *ja*.

ADV VINCENT MALEKA SC: Yes. Now we have looked at one set of the suspensive conditions. There were additional suspensive conditions which are set out in 169 paragraph 3.1.4.

“On or before 31 March 2016 the purchaser shall have obtained in a form and substance reasonably acceptable to the seller

and the purchaser. The irrevocable and unconditional consent
of Eskom...”

Do you see that?

MR PIER'S MICHAEL MARSDEN: Yes.

CHAIRPERSON:

ADV VINCENT MALEKA SC: “...and release by Eskom of the Eskom
guarantee.”

Do you see that?

MR PIER'S MICHAEL MARSDEN: Yes.

- 10 **ADV VINCENT MALEKA SC:** So it seems when I look at that the obligation is on
Tegeta to procure Eskom's consent to the deal.

MR PIER'S MICHAEL MARSDEN: That is correct.

ADV VINCENT MALEKA SC: The obligation is also on Tegeta to make sure that
Optimum Coal Holdings is released from the guarantee.

MR PIER'S MICHAEL MARSDEN: That is right.

ADV VINCENT MALEKA SC: Correct; but the last issue which I would like to look at
on this agreement is the calculation of the purchase price at page 175. Do you see
that?

MR PIER'S MICHAEL MARSDEN: I have got it yes.

- 20 **ADV VINCENT MALEKA SC:** It is disaggregated into different components. You will
see that insofar as the sale of shares and claim in Koornfontein there is an amount of
R340 million which is designated as a purchase price. Do you agree?

MR PIER'S MICHAEL MARSDEN: Yes.

ADV VINCENT MALEKA SC: Okay and you will see that insofar as the sale of shares
in Koornfontein is concerned I think the price is R1.

MR PIERS MICHAEL MARSDEN: That is correct.

ADV VINCENT MALEKA SC: And then insofar as the sale of the claims in OCT the profitable entity is concerned the purchase price is R140 million. I ask you this because as an accountant if you were to account in the books of the seller the value for these things you will start firstly with the purchase price.

MR PIERS MICHAEL MARSDEN: Yes.

ADV VINCENT MALEKA SC: And thereafter you can value it and do your own financial engineering, but on date one of purchase as you account for these assets you will say well the purchase price is a fair value.

10 **MR PIERS MICHAEL MARSDEN:** Yes.

ADV VINCENT MALEKA SC: Alright and then I would ask you to go to page 227 paragraph 12. It deals with the rehabilitation trust. It is a matter that is of interest to you and you want to, we will debate it later on, because you deal with it in the concluding part of your statement.

MR PIERS MICHAEL MARSDEN: Yes.

ADV VINCENT MALEKA SC: It records that there have been some investments held in the rehabilitation trust for both Optimum and Koornfontein and those investments at that point in time as at 31 January 2016 reflected a cash positive or cash equivalent balance of R1.75 billion. Correct?

20 **MR PIERS MICHAEL MARSDEN:** So this agreement was signed on 10 December and this is effectively stating that by 31 January 2016 some month and a half later the aggregate value of those two should be no less than 1.750 and be held in cash and/or cash equivalents.

ADV VINCENT MALEKA SC: Yes. So what it anticipates is that whereas you as Glencore would have arranged those investments differently by this date a cash or cash

equivalent had to be in a trust account held for the benefit of the trust?

MR PIERS MICHAEL MARSDEN: That is right. Just remember the Optimum Coal Mine is simply a beneficiary to the trust.

ADV VINCENT MALEKA SC: Yes.

MR PIERS MICHAEL MARSDEN: The trustees determine into which assets they would like those funds to be invested.

ADV VINCENT MALEKA SC: Yes.

MR PIERS MICHAEL MARSDEN: And the trustees in terms of this agreement took it out of long term assets and put it into cash and/or cash equivalents.

10 **ADV VINCENT MALEKA SC:** Into cash, yes. Alright. I have completed my evidence relating to this agreement. Unless you want to something about it I will take you back to your statement.

MR PIERS MICHAEL MARSDEN: No, I am fine. Thank you.

ADV VINCENT MALEKA SC: You deal with the fulfilment of the conditions precedent at page 16 and you talk about your concerns concerning question marks around the ability of Tegeta to fund the purchase price in paragraph 48.1.

MR PIERS MICHAEL MARSDEN: Yes.

ADV VINCENT MALEKA SC: All I want to ask you there is why were you concerned that Tegeta would not have the ability to fund the purchase price at that point in time?

20 **MR PIERS MICHAEL MARSDEN:** They were not a publically traded organisation. So financial information was not available to us. It is a substantial amount of cash. They had given us assurances that they had the means with which to meet their obligations, but we wanted to see something beyond verbal or written assurances.

ADV VINCENT MALEKA SC: And you said the banks also required something more?

MR PIERS MICHAEL MARSDEN: Yes, absolutely. So the banks we have just dealt

with the conditions precedent one of which was the banking consortium which held the security was required to consent to the transaction and in my discussions with the bank consortium that was one of their fundamental components, because if we go down this particular path we need to make sure that when we get to the end the party has sufficient funds in order to meet the obligation and they had a very specific format and delivery mechanism that they wanted.

ADV VINCENT MALEKA SC: Which was?

MR PIERS MICHAEL MARSDEN: Via the Swift System. They wanted very specific language around proof of funding and in order to ensure the veracity and the custody
10 they wanted that letter to be delivered via the Swift System which is a secure banking system as far as I understand.

ADV VINCENT MALEKA SC: Yes. Chair Swift is something that makes sure that when you put in and lock in payment it gets sort quite quickly. There is no debate about whether the money has gone in or not, you know, and that is why they call it Swift. It is very swift.

MR PIERS MICHAEL MARSDEN: It is very swift, *ja*.

ADV VINCENT MALEKA SC: Okay, but in the end the bank could not get a letter secured by Swift Payment System?

MR PIERS MICHAEL MARSDEN: No. What was delivered, once again unfortunately I
20 do not have the exact date, but sometime after 10 December agreement was signed and prior to the end of that month we had a meeting with the bank consortium as well as with representatives of Tegeta and a letter on the letterhead of the Bank of Baroda was presented to us. We were not allowed to retain a copy. We were not allowed to otherwise duplicate it and it essentially recorded I do not have the wording, because we do not have a copy that in the event that all the conditions precedent are met the

company would have sufficient to discharge the 2.15-odd billion that was there.

ADV VINCENT MALEKA SC: Yes.

MR PIERS MICHAEL MARSDEN: A portion of the purchase price.

ADV VINCENT MALEKA SC: Yes. In paragraph 48.2 you refer to a letter that you received from the Bank of Baroda.

MR PIERS MICHAEL MARSDEN: Yes.

ADV VINCENT MALEKA SC: It is at page 275 Chair.

MR PIERS MICHAEL MARSDEN: Yes. So this was.

CHAIRPERSON: Thank you.

- 10 **MR PIERS MICHAEL MARSDEN:** Very similar to the letter that we had been shown in late December. We eventually got a copy of and I cannot recall if it is an identical letter for obvious reasons, but it appears to be very similar to the letter that we were shown in December.

ADV VINCENT MALEKA SC: Yes. This is, well the first time that the Bank of Baroda commits itself to funding of the purchase price on behalf of Tegeta.

MR PIERS MICHAEL MARSDEN: Well they had committed to it in December.

ADV VINCENT MALEKA SC: Yes.

MR PIERS MICHAEL MARSDEN: But we were not able to retain a copy of it.

ADV VINCENT MALEKA SC: I understand, but this is; the letter that you annex here.

- 20 **MR PIERS MICHAEL MARSDEN:** Yes.

ADV VINCENT MALEKA SC: Is a letter that you ultimately got?

MR PIERS MICHAEL MARSDEN: That is correct.

ADV VINCENT MALEKA SC: And you say you got it around 3 March 2016, I think.

MR PIERS MICHAEL MARSDEN: I think it is dated 4 March. It must have been around then.

ADV VINCENT MALEKA SC: Yes and what I want to understand is did you manage to establish why the Bank of Baroda would be so confident to guarantee payment of R2.15 billion on behalf of Tegeta?

MR PIERS MICHAEL MARSDEN: We took as read that there were sufficient funds through it.

ADV VINCENT MALEKA SC: There has been some anecdotal evidence that the Bank of Baroda was prepared to do this because by this time Eskom had put up a R1.7 billion guarantee at Absa for the benefit of Tegeta. Are you aware of such evidence?

MR PIERS MICHAEL MARSDEN: I am aware of them now. I was not obviously at the
10 time.

ADV VINCENT MALEKA SC: Okay. Chair I am not going to ask Mr Marsden to deal with the contents of the letter, because it is essentially repeats the relevant suspensive conditions.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: That we have dealt with.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: Unless you insist Mr Marsden I would move away from that letter.

MR PIERS MICHAEL MARSDEN: I think the only point perhaps that I could add to it,
20 is that that letter did not satisfy the banking consortium. So that CP ultimately was not met. How that was dealt with was given that the banks would be settled in full the legal opinion was you no longer require their consent. So that particular condition precedent was waived rather than being met.

ADV VINCENT MALEKA SC: Yes.

MR PIERS MICHAEL MARSDEN: They were unsatisfied with that letter given that it

had not come through the protocols.

ADV VINCENT MALEKA SC: Yes.

MR PERS MICHAEL MARSDEN: That they requested.

ADV VINCENT MALEKA SC: Yes. The structure of payment as I understand is that the agreement established an escrow agent which was Werksmans.

MR PERS MICHAEL MARSDEN: That is correct.

ADV VINCENT MALEKA SC: And it is the one which was going to receive payment and confirm by a specific date that monies have been paid both by Optimum Holdings for its portion and also Oakbay for its portion.

10 **MR PERS MICHAEL MARSDEN:** Amongst various statutory documents, Directors resignations, company books and records. So they acted as the repository for what everybody had to deliver including importantly of course the cash.

ADV VINCENT MALEKA SC: And their view about the compliance of that part of the agreement was quite key?

MR PERS MICHAEL MARSDEN: Yes.

ADV VINCENT MALEKA SC: Yes. I mean you deal with all of those things Mr Marsden from paragraph, I think, page 50 sorry paragraph 50 on page 18. I would like to move quite quickly.

MR PERS MICHAEL MARSDEN: Yes of course.

20 **ADV VINCENT MALEKA SC:** You say in paragraph 51:

“On 11 April you had a telephone call from Mr Howa.”

MR PERS MICHAEL MARSDEN: Yes.

ADV VINCENT MALEKA SC: What did he say to you?

MR PERS MICHAEL MARSDEN: So contextually this was post all the conditions being met and essentially the clock was for the funds to arrive as you mentioned in the

escrow agreement. Mr Howa mentioned to me that they were short on their contribution i.e. they did not have sufficient funds to meet their obligation which was due in two or three days' time given that the contract CPs had been met and he requested me to see if the bank consortium would allow the transaction to close and effectively bridge them for the R600 million that they were short.

ADV VINCENT MALEKA SC: What I found surprising is this. That they had already displayed to you a letter from the Bank of Baroda which says that we are good for 2.15 billion and that was around what? April or March?

MR PIERS MICHAEL MARSDEN: March, 4 March.

10 **ADV VINCENT MALEKA SC:** Yes. I mean his bank has already said we are good for the money and more or less three weeks later he tells you that look we are short to the extent of a third of the purchase price.

MR PIERS MICHAEL MARSDEN: I was equally surprised.

ADV VINCENT MALEKA SC: Okay. Did he explain to you why they were short?

MR PIERS MICHAEL MARSDEN: He did not?

ADV VINCENT MALEKA SC: You did not ask him about the undertaking by the Bank of Baroda?

MR PIERS MICHAEL MARSDEN: We did. He did not give us an explanation.

ADV VINCENT MALEKA SC: Must have worried you by that point in time?

20 **MR PIERS MICHAEL MARSDEN:** I think so.

ADV VINCENT MALEKA SC: And then you arranged a meeting with the consortium of banks and they said no, they were not prepared to fund the shortfall?

MR PIERS MICHAEL MARSDEN: Exactly right.

ADV VINCENT MALEKA SC: And what happened thereafter?

MR PIERS MICHAEL MARSDEN: I took that message back to Mr Howa and then we

sat back and waited for the funds to arrive or not arrive.

ADV VINCENT MALEKA SC: And I am sure you must have been worried?

MR PIERS MICHAEL MARSDEN: We were extremely worried.

ADV VINCENT MALEKA SC: Yes and did you get a call from Werksmans?

MR PIERS MICHAEL MARSDEN: I was on the call with the bank that held the accounts and we saw the funds coming in, in tranches, live essentially and the full purchase price came in.

ADV VINCENT MALEKA SC: Were you able to track from which banks were the funds transmitted?

10 **MR PIERS MICHAEL MARSDEN:** I do not have that information.

ADV VINCENT MALEKA SC: You do not have that information?

MR PIERS MICHAEL MARSDEN: No.

ADV VINCENT MALEKA SC: Okay. What is quite clear is that Eskom advanced a prepayment to Tegeta under a prepayment agreement for the supply of coal. The total amount that Eskom paid under that prepayment agreement was R669-odd million VAT inclusive?

MR PIERS MICHAEL MARSDEN: Yes.

ADV VINCENT MALEKA SC: There is a substantial controversy around that prepayment and I am sure you are aware of it?

20 **MR PIERS MICHAEL MARSDEN:** Yes in fact we, when we were watching, it is covered so I do not, I do not [intervenes].

ADV VINCENT MALEKA SC: We will get to it.

MR PIERS MICHAEL MARSDEN: The 34, ja.

ADV VINCENT MALEKA SC: All I wanted to find out is when did you become aware of that prepayment?

MR PIER'S MICHAEL MARSDEN: On a Carte Blanche episode.

ADV VINCENT MALEKA SC: Not.

MR PIER'S MICHAEL MARSDEN: Some weeks after the transaction had [indistinct].

ADV VINCENT MALEKA SC: Some weeks after the transaction?

MR PIER'S MICHAEL MARSDEN: Maybe even some months, yes.

ADV VINCENT MALEKA SC: Okay. Alright. I am going to ask you to go back to your statement.

MR PIER'S MICHAEL MARSDEN: Yes.

ADV VINCENT MALEKA SC: And in paragraph 55 on page 19 you confirm that
10 Werksmans as the escrow agent did confirm that the money was paid/

MR PIER'S MICHAEL MARSDEN: Exactly right.

ADV VINCENT MALEKA SC: Yes and then.

MR PIER'S MICHAEL MARSDEN: The full extent of the purchase price.

ADV VINCENT MALEKA SC: To the full extent, *ja* which is R2.15 billion?

MR PIER'S MICHAEL MARSDEN: That is correct.

ADV VINCENT MALEKA SC: Good. Then you talk about the discharge of OCM from,
sorry the discharge of OCH from business rescue. So that is the parent company?

MR PIER'S MICHAEL MARSDEN: Yes. It no longer has any assets or any liabilities.

ADV VINCENT MALEKA SC: Yes.

20 **MR PIER'S MICHAEL MARSDEN:** It is effectively.

ADV VINCENT MALEKA SC: Yes and you say it was discharge on 15 April 2016?

MR PIER'S MICHAEL MARSDEN: That is correct.

ADV VINCENT MALEKA SC: Yes. Nothing substantial turns around it.

MR PIER'S MICHAEL MARSDEN: No.

ADV VINCENT MALEKA SC: Then you talk about the funding of OCM by Tegeta, and

the sale of coal to Tegeta, and this topic arises in the context of the fact that although the sale agreement was executed the change of ownership had not yet become effective.

MR PIERS MICHAEL MARSDEN: No, the change of ownership was effective but the legal entity remained in business rescue, so the entity itself has its own liabilities, its own creditors so we remained in control of the legal entity, it's shareholders had simply changed.

ADV VINCENT MALEKA SC: Oh I see. So it was still in business rescue that's why you were present on the ground?

10 **MR PIERS MICHAEL MARSDEN**: And that's why we were in operation exactly yes.

ADV VINCENT MALEKA SC: Alright, so you were controlling the business?

MR PIERS MICHAEL MARSDEN: That's right.

ADV VINCENT MALEKA SC: Okay, and you talk about that question of the sale of coal to Tegeta from paragraph 16.

MR PIERS MICHAEL MARSDEN: Mmm.

ADV VINCENT MALEKA SC: Correct?

MR PIERS MICHAEL MARSDEN: Yes.

ADV VINCENT MALEKA SC: Can I ask you to summarise that topic for us.

20 **MR PIERS MICHAEL MARSDEN**: Sure, so even prior to the close of the transaction as catered for in the agreement which we've been through the conditions precedent there was a requirement from 1 January 2016 that any shortfall as we've discussed there is a substantial shortfall at OCM would be required to be funded by Tegeta/Oakbay, so there was a post-commencement finance agreement that was put in place and essentially any shortfalls in the mine from the period January until the transaction closed would have to be funded by Tegeta. We did that and we were able

to extract a number of draws. What happened concurrently with that is the mine was designed to operate to produce just enough coal to meet the obligations of Hendriena. However from a risk perspective you tend to produce slightly more in the event of any stoppage or anything else, so on an *ad hoc* basis there was additional coal available for sale and even prior to this in 2015 any surplus coal that we had we sold out into the open market, notably to Glencore in previous to 2015. However in 2016 from sometime in mid-January we had two competing bids for that surplus coal, and Tegeta were able to offer more for that coal than Glencore. The impact of that be it reduced their funding obligation in terms of the PCF, so there is both a sale of coal, the process of which gets

10 paid to OCM which then subsequently reduces the need for post-commencement finance.

ADV VINCENT MALEKA SC: In fact I suggest to you that Tegeta is benefitting twice as a result of your supply of coal to them, because on the one hand they buy coal from you, as Optimum Coal Mine, and they pay you and that is part and parcel of their obligation to fund you under their post-commencement finance agreement, correct?

MR PIERS MICHAEL MARSDEN: That's correct.

ADV VINCENT MALEKA SC: And to the extent that they take that coal to the market we know that they took it to Arnot, are you aware of that fact?

MR PIERS MICHAEL MARSDEN: Yes I am.

20 **ADV VINCENT MALEKA SC:** And they sold it to Arnot at prices higher than your would have sold to Hendriena.

MR PIERS MICHAEL MARSDEN: I understand.

ADV VINCENT MALEKA SC: And that were high rates.

MR PIERS MICHAEL MARSDEN: Yes.

ADV VINCENT MALEKA SC: So they were benefitting twice.

MR PIERS MICHAEL MARSDEN: I certainly understand your logic, in the event that they ultimately were the acquirers of OCM that kind of would come out in the wash because the first pocket of benefit is a funding obligation that's not either a profit or a loss, but I understand your logic absolutely.

ADV VINCENT MALEKA SC: No, no, no Mr Marsden, absent the supply of coal to them they would have to search in their pockets to fund?

MR PIERS MICHAEL MARSDEN: Absolutely.

ADV VINCENT MALEKA SC: At that level they're buying coal to reduce their financial exposure.

10 **MR PIERS MICHAEL MARSDEN:** That's correct.

ADV VINCENT MALEKA SC: Yes. Anyway we have dealt with the issue of the post-finance agreement, you refer to it in paragraph 62. Chair it is part and parcel of the Annexures, I am not going to take Mr Marsden there, and then you explain what happened thereafter and you talk about your discussion with Mr Gert Opperman about the Hendriena coal requirements at paragraph 64.

MR PIERS MICHAEL MARSDEN: Yes, it wasn't a discussion, it was an email, we as I mentioned you produce just enough coal to satisfy the obligations and if there's surplus you put that out into the open market, but clearly your primary obligation is to ensure that you first supply to Hendriena so we were requested to supply more than I thought
20 was available out of that equation and then I sent an email to the mine manager at the time to say but do we have sufficient product on the floor to enter into a third party sale, and the response that we got is recorded in the email from Mr Opperman whereby – by Hendriena not taking their full obligation they had obviously made excess available for us to sell to third parties.

ADV VINCENT MALEKA SC: Yes, Chair the email is at page 318.

CHAIRPERSON: I've got it thank you.

ADV VINCENT MALEKA SC: Are you aware that sometime before December 2015 Mr Opperman sought to motivate to his superiors and ultimately the Board of Eskom to authorise additional supply of coal during what he called the festive seasons?

MR PIERS MICHAEL MARSDEN: I'm not aware no.

ADV VINCENT MALEKA SC: You're not aware of this, okay I will not trouble you with it then.

MR PIERS MICHAEL MARSDEN: It seems to me that you have dealt with the issues of the post-finance supply agreement up to page 23 paragraph 74 of your statement.

10 **ADV VINCENT MALEKA SC:** Yes. You begin with the question of rehabilitation of funds from ...(intervention)

MR PIERS MICHAEL MARSDEN: Sorry Mr Maleka can I just raise one issue that I think is important before we do that.

ADV VINCENT MALEKA SC: Yes.

MR PIERS MICHAEL MARSDEN: I am referring to paragraph 72.

ADV VINCENT MALEKA SC: 72.

20 **MR PIERS MICHAEL MARSDEN:** 72, because this impacts when it comes to the discussion around the prepayment which we no doubt will get to, then once again dates being fundamentally important the supply of contract draft unsigned was dated the 21st of April 2016 and this related to the ongoing supply and the material terms of that supply beyond that date which was in other words post Glencore having exited as the shareholder but now Tegeta coming in as the shareholder.

ADV VINCENT MALEKA SC: Yes.

MR PIERS MICHAEL MARSDEN: So that may be relevant for later, so I just wanted to highlight that.

ADV VINCENT MALEKA SC: But my recollection is that although the agreement was not signed the parties behaved as if it was effective?

MR PIERS MICHAEL MARSDEN: Agreed but the date at which the parties started to bring effect to that agreement is the 21st of April.

ADV VINCENT MALEKA SC: Okay. Unless you have any further qualifications with speed I would like to go to the rehabilitation funds.

MR PIERS MICHAEL MARSDEN: Yes.

ADV VINCENT MALEKA SC: You deal with that topic from paragraph 77, correct?

MR PIERS MICHAEL MARSDEN: That's correct.

- 10 **ADV VINCENT MALEKA SC:** We have looked at what the agreement said in that regard, we have looked at what the agreement contemplated in terms of the balance that had to be in the rehabilitation funds by the 31st of January 2016 and you say in paragraph 78 that when you took appointment as BRP's the amount standing to the credit of the funds was R1.456billion, correct?

MR PIERS MICHAEL MARSDEN: That's right.

ADV VINCENT MALEKA SC: And it was invested in Standard Bank?

MR PIERS MICHAEL MARSDEN: When we took control as BRP it was invested in a number of different instruments, it was then converted to cash at this point and it was sitting in one lump sum in a bank account.

- 20 **ADV VINCENT MALEKA SC:** Yes, I understand that, so it had been converted as a result of that clause in the agreement?

MR PIERS MICHAEL MARSDEN: Correct.

ADV VINCENT MALEKA SC: And it's sitting in Standard Bank's account.

MR PIERS MICHAEL MARSDEN: That is correct.

ADV VINCENT MALEKA SC: I think you were here yesterday when Mr Sinton

testified.

MR PIERS MICHAEL MARSDEN: I was.

ADV VINCENT MALEKA SC: You heard his evidence?

MR PIERS MICHAEL MARSDEN: I did.

ADV VINCENT MALEKA SC: Is there any aspect of it that you would want to detail, qualify or elaborate on?

MR PIERS MICHAEL MARSDEN: No.

ADV VINCENT MALEKA SC: I mean your evidence is fairly consistent with what he said.

10 **MR PIERS MICHAEL MARSDEN:** I hope so.

ADV VINCENT MALEKA SC: Yes, in terms of the desire by Tegeta to get hold of the funds to transfer them into a different bank account.

MR PIERS MICHAEL MARSDEN: Absolutely.

ADV VINCENT MALEKA SC: And you heard his explanation that he needed authority from the trustees, he needed authority from the DMR.

MR PIERS MICHAEL MARSDEN: Yes I think maybe the only thing to add is further to that point we were equally distressed when we were made aware of that request, we were in the unfortunate position of being in control of the beneficiary of the trust, so we were in charge of OCM who was the beneficiary of the trust on behalf of the DMR but
20 we were not trustees, those were appointed by Tegeta. We also faced a further problem in that with the closure of the bank accounts that R1.45billion had to go somewhere and so we were particularly concerned around where it would go, the manner in which it would be managed and handled by the trustees and so we sent a variety of documents to whoever would listen to us at the time in order to try our best to ensure that those funds remained intact.

ADV VINCENT MALEKA SC: Yes. My reading of your statement is that you were so concerned about the fate of the trust funds to a point where you escalated this issue with the Tegeta representatives to insist that they should tell you which bank was going to hold those funds.

MR PIERS MICHAEL MARSDEN: I think we did a lot more than that, certainly that was one aspect, we wanted the bank account to be in the name of the rehabilitation trust, as a starting point, which bank it is in is perhaps less important than the name of the bank account. I think we requested assurances from the bank itself, we had a meeting with the bank whereby we walked them through our understanding of what the
10 purpose of those trust funds were and what the ...(intervention)

ADV VINCENT MALEKA SC: When you say the bank you say the Bank of Baroda?

MR PIERS MICHAEL MARSDEN: Bank of Baroda, absolutely and that was the nominated bank, sorry I missed that point, that they had done, we insisted that the trustees as appointed by Tegeta gave us assurances around their understanding of the trust funds etcetera, so you know we sent a letter to the Reserve Bank ...(intervention)

ADV VINCENT MALEKA SC: At that point you escalated the matter even to the Reserve Bank?

MR PIERS MICHAEL MARSDEN: As much as possible, that's correct yes.

ADV VINCENT MALEKA SC: Why were you so much concerned about the fate of the
20 trust funds to a point where you even involved the engagement of SARB to deal with the matter?

MR PIERS MICHAEL MARSDEN: I think we were very distressed by the request from Tegeta to withdraw, that Mr Sinton testified to yesterday, to withdraw the funds to this unknown entity and we were concerned that if we didn't act there was the possibility that they may try again.

ADV VINCENT MALEKA SC: Do you know that there was litigation commenced by one of the NGO's, if I'm not mistaken I think it was an Organisation for Undoing Tax Abuse, OUTA, against the trustees and some entities in the Oakbay stable, about allegations of abuse over trust funds, are you aware of that litigation?

MR PIER'S MICHAEL MARSDEN: Not in detail but I'm aware that it exists.

ADV VINCENT MALEKA SC: Okay.

MR PIER'S MICHAEL MARSDEN: I think the Public Protector also made some findings with regards to (indistinct) the funds in her report as well.

ADV VINCENT MALEKA SC: So what you feared then ultimately led to litigation?

10 **MR PIER'S MICHAEL MARSDEN:** Yes.

ADV VINCENT MALEKA SC: So it seems as if you knew something more at that point in time when you were trying to make sure that the funds of the trusts are secure.

MR PIER'S MICHAEL MARSDEN: I think I'm professional cynic as a start, but certainly the actions of Ms Ragavan as highlighted by Mr Sinton would have heightened those concerns.

ADV VINCENT MALEKA SC: Okay, alright. You deal with the next topic which is the Carte Blanche story at page 28, paragraph 94 of your statement. Chair I see it's already past four, I think we are reaching the conclusion of Mr Marsden's evidence.

CHAIRPERSON: Yes no I think we can finish.

20 **ADV VINCENT MALEKA SC:** We can finish, thank you Chair. You deal with it from paragraph 94.

MR PIER'S MICHAEL MARSDEN: Yes.

ADV VINCENT MALEKA SC: What gave rise to your concerns immediately after you watched this episode of Carte Blanche?

MR PIER'S MICHAEL MARSDEN: So there were two episodes across two weeks that

were aired by investigative journalists and specifically Carte Blanche and a number of articles following on that and there was a full interview with Mr Howa which was available on the website and obviously given our interest I watched those and pursuant to the interview I learnt for the first time that Eskom had actually made a pre-payment to Tegeta for the purchase of coal from Tegeta, an amount of R586 excluding VAT and the coal for which the prepayment was made appear to have been or was procured from Optimum Coal Mine. I came to learn from the episodes, the interviews and the articles that the prepayment was approved by a committee of Eskom late in the evening at nine o'clock on the 11th of April coincidentally the same date that I had been requested to

10 ask the banks for the bridging finance and for a very similar amount, so pursuant interview Mr Howa also remarked that the prepayment had been made to the basis that OCM, which was in BR and therefore under my control, required money for its liquidity, which was factually inaccurate and for the start-up of equipment which was also inaccurate. The prepayment was not made to OCM, we did not receive any prepayment and from April 2016 in fact the coal that we supplied to Tegeta that they on-supplied was actually on 30 day payment terms as well, so the events surrounding the prepayment came as a surprise in terms of the quantum and in terms of the timing with the knowledge that I had of the meeting of 11th of April and in that context myself and my fellow practitioners submitted our reports in terms of 34.

20 **ADV VINCENT MALEKA SC:** Yes, I would like to establish some few facts from you in relation to immediately what you learnt from the episodes of Carte Blanche.

MR PIERS MICHAEL MARSDEN: Yes.

ADV VINCENT MALEKA SC: By the time you conclude the sale agreement Mr Howa was someone that was well known to you.

MR PIERS MICHAEL MARSDEN: Yes.

ADV VINCENT MALEKA SC: Even thereafter it was someone that was known to you, correct?

MR PIERS MICHAEL MARSDEN: Absolutely.

ADV VINCENT MALEKA SC: Did you have any engagements with him as the representative or the new owner.

MR PIERS MICHAEL MARSDEN: Extensive yes.

ADV VINCENT MALEKA SC: In any of those engagements did he disclose to you that there were negotiations relating to prepayment between Tegeta and Eskom?

MR PIERS MICHAEL MARSDEN: No.

10 **ADV VINCENT MALEKA SC:** Did he ever disclose to you that Tegeta would approach Eskom to talk about any funds relating to the operational requirements of OCM?

MR PIERS MICHAEL MARSDEN: No.

ADV VINCENT MALEKA SC: Why do you think that he would go to Carte Blanche and say things about OCM which he did not talk to you, it must have been obvious to him that you would be amongst persons who have the primary knowledge of the true facts.

MR PIERS MICHAEL MARSDEN: I presume so.

ADV VINCENT MALEKA SC: And that when he goes public around misstatements of fact you will obviously reveal the truth set of facts as you did.

MR PIERS MICHAEL MARSDEN: I would hope so.

20 **ADV VINCENT MALEKA SC:** What would be the reason for him to do so, I am asking you an unfair question but you are the only person who can help us for now?

MR PIERS MICHAEL MARSDEN: I think that they may have been caught by surprise at the fact that the prepayment was made and the fact that that was then publically available may have caught them off-guard and in an attempt to justify he maybe he complicated the issue with the statements of mis-facts.

ADV VINCENT MALEKA SC: You know what I find surprising with this and maybe it should be a proposition I put on the table Chair is that this project of State Capture goes about making public statements that are untrue in the light of information which is captured on documentation, as if this information would not at some point become public, because I don't understand from the example that we are dealing with that Mr Howa would know that you, a BRP, essentially a public representative in a company, that is in financial distress and that you have the facts at your disposal and yet he will go about making statements publically that are untrue. I really don't understand how he would have expected that a public representative such as you would keep quiet once

10 the untruths are told by him in public.

MR PIERS MICHAEL MARSDEN: I can't answer that unfortunately.

ADV VINCENT MALEKA SC: Alright, you can't answer that but what you can answer is your last leg of the BRP process.

MR PIERS MICHAEL MARSDEN: Yes.

ADV VINCENT MALEKA SC: You deal with it in page 30 paragraph 101.

MR PIERS MICHAEL MARSDEN: Yes, so effective in mid-April OCH was discharged, we had new shareholders at OCM, but OCM itself remained in business rescue until it could satisfy practitioners that it was no longer financially distressed, and the test in that regard is a six month test.

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

MR PIERS MICHAEL MARSDEN: In terms of the Companies Act, that it will reasonably be able to meet its obligations as they fall due in the ensuing six months. We requested therefore a couple of things had to be achieved in order to satisfy that requirement; number one all of the pre-commencement creditors, ie the creditors who were stuck in the moratorium from the date of business rescue, needed to be satisfied,

in the absence of a plan, so we ensured that all of those creditors had either been paid or signed settlement agreements. The second test is that – the six month looking test, so we interrogated the financial forecast that was provided to us by Tegeta, it did show a shortfall, not as big as the numbers that we had done, largely as a result of the increase in supply of excess coal to Tegeta, and we ensured that we had confirmation from the bank that they had the resources to meet that shortfall and they subordinated all of their claims in favour of other creditors, and in that context we deemed that OCM was not longer financially distressed. Sorry, one important point, the issue of the R2billion fine we believe that an arbitration proceeding would not be resolved within the
 10 ensuing six months and therefore it did not fall within the jurisdiction of the six month test.

So on that basis we deemed that the company was no longer financially distressed and we discharged it from business rescue.

ADV VINCENT MALEKA SC: Alright. There are two concluding points that I would like to raise with you, the first is that it is now clear that the penalties, the R2.1billion arbitration claim were ultimately settled between Eskom and Tegeta, at about R255million, are you aware of that fact?

MR PIERS MICHAEL MARSDEN: I've heard about it yes.

ADV VINCENT MALEKA SC: Okay, as the BRP's you did not have the occasion to
 20 assess and value a reasonable estimate of the penalties did you?

MR PIERS MICHAEL MARSDEN: No we didn't.

ADV VINCENT MALEKA SC: Okay, the next thing is you know that Tegeta, sorry not Tegeta, Optimum Coal Mine experienced a second business rescue process.

MR PIERS MICHAEL MARSDEN: Is experiencing I think still.

ADV VINCENT MALEKA SC: Okay, fair enough, it is still in business rescue. Do you

know the grounds on which it was put in business rescue?

MR PIERS MICHAEL MARSDEN: I do not.

ADV VINCENT MALEKA SC: Okay, I think you have indicated that the mine is no longer operational?

MR PIERS MICHAEL MARSDEN: I can suspect – I just had a thought. I think the rationale given, and I have not seen the sworn statement but from the press reports I believe it is as a result of the closure of the bank accounts, as the purported reason.

ADV VINCENT MALEKA SC: Yes. You're correct, the reason is they could not operate because the bank accounts were closed, but we had evidence that this mine is no longer operational, are you aware of that fact?

MR PIERS MICHAEL MARSDEN: I am.

ADV VINCENT MALEKA SC: Okay. From your knowledge what's happening to that mine?

MR PIERS MICHAEL MARSDEN: I have no direct knowledge of what's happened but of course I keep my ear relatively close to the ground, and my understanding is given the financial constraints it's faced it is not in the condition that it was in when we discharged it from business rescue.

ADV VINCENT MALEKA SC: Right. Chair that would be the end of our questions to Mr Marsden.

20 **CHAIRPERSON:** Thank you very much Mr Marsden, should we require you again you will be contacted but for now you are excused.

MR PIERS MICHAEL MARSDEN: With pleasure, thank you Chair.

CHAIRPERSON: Thank you very much.

ADV VINCENT MALEKA SC: Chair I take it that Mr Marsden is released for going back to Canada, he is on a flight tonight, we won't need him tomorrow.

CHAIRPERSON: Oh yes, it would be quite expensive to require him. Yes no thank you, you are excused, thank you for coming.

MR PIERS MICHAEL MARSDEN: Thank you very much, I am both relieved and released.

ADV VINCENT MALEKA SC: Chair the next witness is Dr Ramontja, I see that it is ...(intervention)

CHAIRPERSON: And he was ready ...(intervention)

ADV VINCENT MALEKA SC: He was ready since yesterday, we released him, he has been here and he has been kind enough and tolerant to accommodate us.

10 **CHAIRPERSON**: How much time do we need for him?

ADV VINCENT MALEKA SC: Chair I think even if we were start today I won't finish, but I'm aware that tomorrow you have other things, I won't need more than an hour.

CHAIRPERSON: Oh, you won't need more than an hour, and how is his situation?

ADV VINCENT MALEKA SC: I believe that he is here and he is represented.

CHAIRPERSON: Yes, in terms of tomorrow?

ADV VINCENT MALEKA SC: Oh he indicates that he will accommodate us once again.

CHAIRPERSON: Yes, okay, okay, that's fine, maybe we should – what if we start at half past nine in terms of the arrangement for this week.

20 **ADV VINCENT MALEKA SC**: We can start at nine.

CHAIRPERSON: Which is likely to go on for some time, I am thinking that maybe we should start at nine, but it depends on whether we will be able to use the rest of the day fully, number one, number two, whether Dr Ramontja he wishes to finish and rush or whether he will be more or less quite flexible in case we start at half past nine he can still be around until we are finished in an hour or hour and a half's time, I have a

suspicion he will not mind.

ADV VINCENT MALEKA SC: Chair would he accommodate us if we start at nine with the view to finish at ten.

CHAIRPERSON: I'm thinking we – I am thinking about that but I would like not to do that unless the situation compels us to, maybe let me start by saying and I say – Ms Norman is looking at you and at me, what is the situation about the rest of the day, I know we have a witness that's scheduled for tomorrow, but is he likely to take the whole day.

ADV THANDI NORMAN SC: Thank you Mr Chairman, Pretorius SC had indicated that
10 we might have a few hours available to us if we do not finish with some of the Eskom witnesses tomorrow, he doesn't think that he will take the whole day with the witness for tomorrow.

CHAIRPERSON: Mr Pretorius?

ADV THANDI NORMAN SC: Mr Pretorius yes.

CHAIRPERSON: Okay how many witnesses other than apart from Dr Ramontja are we looking at for tomorrow?

ADV THANDI NORMAN SC: For tomorrow only one as far as I understand, only Dr Ramontja yes. Oh, and also Mr Nene tomorrow, that's the witness yes, but according to him he said – he offered in the morning that if there is one witness that we can't
20 finish today we will have time for that witness tomorrow.

CHAIRPERSON: Yes, but do we know how long Mr Nene is likely to be?

ADV THANDI NORMAN SC: Not the entire day according to Mr Mokena yes.

CHAIRPERSON: Not the entire day, well then in that event I would only we say at nine o'clock if Dr Ramontja would be inconvenienced a lot if we start at half past nine and finish half past ten, eleven or thereabouts. Maybe he might be – or if he is represented

here somebody might be indicate. Do you want to come forward and indicate?

ADV THANDI NORMAN SC: Thank you Mr Chair.

CHAIRPERSON: Thank you.

MR KOMA RAMONTJA: Good afternoon Chair.

CHAIRPERSON: Good afternoon yes.

MR KOMA RAMONTJA: Koma Ramontja from Koma Ramontja Attorneys on behalf of Dr Ramontja, I have consulted with Dr Ramontja, we don't have a problem, either we start at nine o'clock or half past nine.

CHAIRPERSON: Half past nine, there's no problem.

10 **MR KOMA RAMONTJA:** Yes, we are comfortable with that time.

CHAIRPERSON: Okay, no thank you very much. Okay then in that event let's start at half past nine tomorrow. We will adjourn the proceedings for today and we will start at half past nine tomorrow morning. We adjourn.

INQUIRY ADJOURNS TO 14 MARCH 2019