

COMMISSION OF INQUIRY INTO STATE CAPTURE
HELD AT
CITY OF JOHANNESBURG OLD COUNCIL CHAMBER
158 CIVIC BOULEVARD, BRAAMFONTEIN

02 MARCH 2021

DAY 353



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Recording & Transcriptions

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TRANSCRIBERS:

B KLINE; Y KLIEM; V FAASEN; D STANIFORTH



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PROCEEDINGS RESUME ON 02 MARCH 2021

CHAIRPERSON: Good morning Mr Seleka; good morning everybody.

ADV SELEKA SC: Morning Chairperson.

CHAIRPERSON: Are you ready?

ADV SELEKA SC: Yes Chairperson we are ready. As – as mentioned yesterday Chairperson our witness today is Mr Brian Molefe. He is appearing for the second time; we were interrupted last time by an unfortunate exposure to
10 Covid but he is here – Mr Molefe will be ready to take the oath or affirmation.

CHAIRPERSON: Yes just – either place on record or Mr Masuku just...

ADV SELEKA SC: Yes.

CHAIRPERSON: Place on record that he and his team are representing Mr Molefe.

ADV SELEKA SC: Correct.

CHAIRPERSON: Again. You can do it from there if you are comfortable you can do it from there.

20 **ADV MASUKU:** Deputy Chief Justice.

CHAIRPERSON: Yes.

ADV MASUKU: Together with Mr Tshepe and Sikhakhane we appear for Mr Molefe on the instructions of Molaba Attorneys.

CHAIRPERSON: Thank you. Okay Mr Seleka.

ADV SELEKA SC: Yes the affirmation.

CHAIRPERSON: Yes please administer the oath.

ADV SELEKA SC: Or oath ja.

CHAIRPERSON: Welcome back Mr Molefe. Just switch on your microphone before you take the oath. Thank you.

REGISTRAR: Please state your full names for the record.

MR MOLEFE: Brian Molefe.

REGISTRAR: Do you have any objection to taking the prescribed affirmation?

10 **MR MOLEFE:** I have no objections.

REGISTRAR: Do you affirm 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, I truly affirm.

MR MOLEFE: I truly affirm.

CHAIRPERSON: Thank you, you may be seated.

ADV SELEKA SC: Thank you Chairperson. Chairperson Mr Molefe's affidavits is found in Eskom Bundle 17 – Eskom Bundle 17 and it has been marked as Exhibit U38.1 on page 5.

20 **CHAIRPERSON:** Yes I have got it.

ADV SELEKA SC: Mr Molefe you will have the same bundle in front of you which contains your affidavit.

CHAIRPERSON: And you can keep your microphone on at all times Mr Molefe. For the benefit of the public Mr Seleka you might wish to just re-orientate the public in

terms of ...

ADV SELEKA SC: Yes.

CHAIRPERSON: Where we were with Mr Molefe's evidence when we had to adjourn last time and what you have dealt with or are still busy dealing with and what topics he will cover for today.

ADV SELEKA SC: Yes thank you Chairperson. Now on the previous occasion when Mr Molefe appeared we dealt with matters relating to his background, employment at
10 Eskom, relationships with the Gupta's and whether or not there was also a relationship with Mr Salim Essa and Mr Molefe elaborated on ques... – on – in his answers to those questions and his secondment was also touched upon to some extent to the extent that he had knowledge of it. What we will mainly be focussing on this time around Chairperson is on the – what we refer to as the transactions.

Mr Molefe deals with that in his affidavit. A pre-payment of R1.6 billion which is converted into a guarantee
20 in December 2015. The pre-payment of R659 million in April 2016 to Tegeta and we will touch a little bit before the McKinsey matter the penalty as well.

So the R2.17 billion penalty that Eskom sought to impose against OCM. We will refer to the cooperation agreement Mr Molefe that Eskom and OCM had and the

termination thereof that led to the arbitration. So those are the aspects that we intend touching on.

CHAIRPERSON: Okay that is fine. Another issue which you should look at or maybe your junior would be looking into is that I remember that when Mr Molefe was here last time in the statement that he made before he started his evidence he had complained about the commission in respect of certain things.

I do not remember all of them but I do remember
10 that one of the things he had said was that he had written to the commission I do not know whether in December and – or earlier where he had made it clear that he was very keen to come and give evidence.

ADV SELEKA SC: Yes.

CHAIRPERSON: Before the commission and he was wondering why he had – why the commission had to issue summons against him.

ADV SELEKA SC: Yes.

CHAIRPERSON: So my recollection is that neither you nor
20 I dealt with some of those issues and I think it is important that ...

ADV SELEKA SC: Yes.

CHAIRPERSON: At least some of them should be dealt with.

ADV SELEKA SC: Yes.

CHAIRPERSON: To the extent that your team might not have looked into them. They need to be looked into so that at some stage they can be dealt with.

ADV SELEKA SC: Yes the ...

CHAIRPERSON: Ja so it does not have to – they do not have to be dealt with now.

ADV SELEKA SC: Yes.

CHAIRPERSON: But maybe your junior can go back to the statements and then look at the issues that were not
10 responded.

ADV SELEKA SC: Yes.

CHAIRPERSON: Ja. Okay.

ADV SELEKA SC: The – the summons one Chair I think we did explain it in either in a letter or in an email – I think it is a letter that ...

CHAIRPERSON: But it is important that – because he made his complaints public.

ADV SELEKA SC: Yes.

CHAIRPERSON: That the explanation should be public as
20 well.

ADV SELEKA SC: Yes.

CHAIRPERSON: Ja.

ADV SELEKA SC: Yes. Yes. Ja.

CHAIRPERSON: As I say it does not have to be done now.

ADV SELEKA SC: Ye.

CHAIRPERSON: But it has got to be done I think at some stage today.

ADV SELEKA SC: Yes no that is alright.

CHAIRPERSON: Ja.

ADV SELEKA SC: Can I explain the one of the summons though Chair?

CHAIRPERSON: If you –

ADV SELEKA SC: This is a simple one.

CHAIRPERSON: If you are able to that is fine.

10 **ADV SELEKA SC:** Ja. It is a simple one. We did explain to Mr Molefe that a summons is a formal notification that is given to every witness who comes to appear. It is not that it is issued because the witness is resisting to come and appear it is just that we ensure formally that the date and time for witness has been communicated and the witness will do an appearance on that day.

CHAIRPERSON: Hm.

ADV SELEKA SC: So it is not because you are resisting to appear I know he said he would have come willingly even a
20 letter.

CHAIRPERSON: Ja.

ADV SELEKA SC: Or a telephone. So I think we did explain that.

CHAIRPERSON: Ja well maybe I can add this. When the commission started in 2018 and in 2019 our attitude was

that somebody who is cooperating with the commission who is willing to appear should not have a summons issued against them.

We should only reserve that for somebody who was not cooperating or – and so on. And many people who came to give evidence in 2018/2019 did so without actually being issued with summonses but there came a time because of the un-constraints left and the time left for the commission to finish its work when the attitude was
10 sometimes somebody might not be somebody who is not cooperating but might be putting certain priorities ahead of the commission in terms of dates to say well no, no I am not available on that date I am available on another date and negotiating that is just not the kind of thing that we would do because then if we do that it becomes problematic.

So we then said well if we want you to come to the commission on short notice we will negotiate dates. But if we are going to give you what we regard as reasonable
20 notice we will not negotiate we will say that is the date.

So – but part of the reason of the change of attitude was to try and make sure that we can – we are guaranteed that the person will appear if they were issued a summons because if we have not issued a summons if something comes up the person phones and says, can we change the

dates and so on and we – there are problems with that. So Mr Seleka is not – is right to say just because a summons is issued against you it does not necessarily mean you are not trusted to cooperate.

So – so we have issued more summonses as we approach the end of the work of the commission than we did when we still had quite a lot of time. Okay alright. Other issues you will deal with later.

ADV SELEKA SC: Yes Chairperson.

10 **CHAIRPERSON:** Mr Seleka.

ADV SELEKA SC: Yes thank you.

CHAIRPERSON: Okay alright.

ADV SELEKA SC: Thank you. Mr Molefe ja last time you just remember will be leading your evidence and I am not your opponent.

CHAIRPERSON: You are not?

ADV SELEKA SC: I am not his opponent. So last time you even as I put people's versions to you it is merely to get your response like we did Mr Hein Bester who testified
20 here previously.

So we will carry on along the same lines. Just to recap you testified about your relationship with the Gupta brothers; I think it is – is it all of them; your visits to their place and the intention with them – is it with them to form a bank – to establish a bank? And that is way before you

came to Eskom from your explanation.

So – and then we also mentioned to you the evidence of Mr Hein Bester prior to your secondment to Transnet – to Eskom how Mr Salim Essa said to him that we will show you how powerful we are that we have already decided who is going to be the boss at Eskom. And that we were in that regard trying to show you that your secondment to Eskom seemed to have been pre-planned. Pre-planned not just by – oh let me just say pre-planned by
10 third parties outside of government.

You have made your comments on that. And then it was the announcement about the Minister, Minister Lynn Brown at the time on the 17th of April 2015 just over a month after Mr Matona was suspended that you will be seconded to Eskom. That is on the 17th of April 2016/15 – I beg your pardon.

There was a meeting on the 23rd of April 2015 which took place in Cape Town – the meeting of the board. I believe you attended that meeting. Is that correct?

20 **MR MOLEFE:** Yes that is correct but before we proceed
Chair.

ADV SELEKA SC: Yes.

MR MOLEFE: Just as we are recapping I just want to remind the commission that I did make a statement which I made a substantive allegations to the extent that I felt that

the – Glencore had been trying to export 8 billion orders and that the President had been made a – well the current President had been made a shareholding in one of – in Optimum actually – company that is the centre of everything that has happened here. I am saying this now because the fact that while we were recapping that was not mentioned. I hope that it is not being swept under the carpet and being forgotten conveniently. Just to make sure Chairperson that it did register.

10 **CHAIRPERSON:** Ja.

MR MOLEFE: And that it has – that there is a certain amount of weight that will be attached.

CHAIRPERSON: Yes.

MR MOLEFE: To what I said. Because it is at the same time Glencore and Optimum are at the centre of all these files that are behind me now.

CHAIRPERSON: Well Mr Molefe I am surprised that you would think that it is being swept under the carpet – or the carpet because you said it publicly and you – you know
20 from your own experience that when a witness says something that implicates somebody it terms of the Rules of the Commission that person is given a copy of that statement so that they have a chance to respond. So I did not expect you to think that it would be swept under the carpet.

MR MOLEFE: Yes.

CHAIRPERSON: I know some media said you – your evidence was stopped because you made allegations against the President so the commission.

MR MOLEFE: No I was just concerned that it is not being mentioned as a 00:16:36.

CHAIRPERSON: No, no we did not mention everything. I am sure – certainly I do not think we mentioned everything. The only thing I wanted to mention was something that was
10 not responded to which you said. That is what I wanted to raise.

MR MOLEFE: Thank you Chair.

CHAIRPERSON: But I do know – I have been told that your statement that you made on that day which you handed up was sent to people who were implicated in it. So there is nothing that is being swept under the carpet.

MR MOLEFE: Thank you Chair.

CHAIRPERSON: Ja.

MR MOLEFE: Yes I was at the meeting.

20 **ADV SELEKA SC**: Thank you. We did exchange that Chairperson. Yes in that meeting Mr Molefe there was the issue of the cooperation agreement between Eskom and OCM. That cooperation agreement dated back to March or May 2014 in terms of which – and it was the culmination of negotiations between the parties about coal qualities,

amount of coal to be supplied and it culminated into that agreement which was intended to ultimately amend the existing coal supply agreement between Eskom and OCM.

The item was on the agenda at the board meeting of the 23rd having it been referred to the board by the BTC that sat on the 15th of April 2015.

When you look at the minutes of the meeting it says that the item had to be removed – should be removed from the agenda and the board members have come here and
10 said that item was referred to you with certain instructions. Can you give the Chairperson your recollection of what transpired in that meeting in respect of that item of the cooperation agreement and the intended fourth addendum to the agreement between OCM and Eskom?

MR MOLEFE: Yes Chairperson the – that agreement was referred to me (not audible).

ADV SELEKA SC: Sorry.

MR MOLEFE: It was referred to me as you correctly point out.

20 **ADV SELEKA SC:** Oh okay.

CHAIRPERSON: Well I think you may have to be specific Mr Seleka if you want certain specific information. Do you want to find out why it was referred to him?

ADV SELEKA SC: Yes.

CHAIRPERSON: Or ...

ADV SELEKA SC: Yes then I will follow up Chair. If he says yes it was in fact then I can follow up Chair.

CHAIRPERSON: Ja.

ADV SELEKA SC: Ja. Yes Mr Molefe do – can you recall why it was referred to you?

MR MOLEFE: I would imagine because I was the acting Group Chief Executive and the board felt it appropriate that I should deal with it.

ADV SELEKA SC: Hm.

10 **ADV MASUKU:** Sorry Chair I – I am sorry to interject. I am not sure whether it is – the acoustic are a bit bad. We – I am struggling to hear. I am struggling to hear actually all of you.

CHAIRPERSON: I am sorry I think...

ADV MASUKU: I am struggling to hear all of you – I am not sure whether it is – there is a volume somewhere.

CHAIRPERSON: Oh you cannot hear us.

ADV MASUKU: Yes.

CHAIRPERSON: Oh even with me with my voice?

20 **ADV MASUKU:** No – well I do not have a problem with your voice I actually like it.

CHAIRPERSON: Yes okay. But I might have to raise it because there have been times when people say they cannot hear me so I always assumed I have got a loud voice so – but Mr Seleka I have to remind him now and

again.

ADV MASUKU: But it is especially Mr Seleka yes.

CHAIRPERSON: Ja.

ADV MASUKU: He spoke very softly.

CHAIRPERSON: I have to remind him to speak up because he has a very soft voice. So let us try and if the problem persists just alert me again. So let – if there is anything that the technicians can do to assist they must do that as well. Okay and you will try and speak up Mr
10 Seleka.

ADV SELEKA SC: Ja. Chair I think it was the sound system this time around.

CHAIRPERSON: Yes. I must say also I think you should try the same Mr Molefe. You also – should also try and speak up a bit.

MR MOLEFE: I will do so Chair.

CHAIRPERSON: Ja. Ja. Okay.

ADV SELEKA SC: Mr Molefe I will refer to documents insofar as you need me to or where it is necessary. So
20 that meeting what the board members have said the matter was referred to you with the instruction that you will get information and come back to – to report back. They say and from the evidence that we see is that in June 2015 you terminated the cooperation agreement and the negotiation process and they were not aware that the termination had

taken place. You did not come back to them prior to you doing the termination. And that is why I was asking you can you tell the Chairperson your recollection of why the matter came to you and now can you comment on what the board members have said here about ...

MR MOLEFE: Chair.

ADV SELEKA SC: You had – you having been given explicit instructions to come back, get information come back but they say you went ahead and terminated without
10 them knowing.

MR MOLEFE: Chair you know a lot has been said about the fact that I refused to negotiate. That is not true. We negotiated. We spoke.

CHAIRPERSON: I am sorry just repeat that.

MR MOLEFE: A lot has been said about the fact that we refused to negotiate.

CHAIRPERSON: Yes.

MR MOLEFE: We did not refuse to negotiate; we negotiated. There is evidence of the negotiation. I think
20 even in Mr Bester's affidavit he says that...

CHAIRPERSON: I am sorry Mr Molefe Maybe just so that we follow the sequence let us start with is it true that when the board referred that matter or that proposed agreement or – to you they asked you to come back to them and got back – let us start with that.

MR MOLEFE: My – my

CHAIRPERSON: Then later on.

MR MOLEFE: My understanding at the time Chair was that I should deal with the matter.

CHAIRPERSON: As you saw fit.

MR MOLEFE: As I saw fit and then report to the board about how it was dealt with.

CHAIRPERSON: About the progress or whatever.

MR MOLEFE: Yes about whatever is happening.

10 **CHAIRPERSON**: Yes.

MR MOLEFE: Yes.

CHAIRPERSON: Oh okay alright.

MR MOLEFE: That was my understanding.

CHAIRPERSON: Okay.

MR MOLEFE: It was not just a matter of going to find out what was happening.

CHAIRPERSON: Yes.

MR MOLEFE: Because that would have taken a day or two to find out what was happening.

20 **CHAIRPERSON**: Ja.

MR MOLEFE: So it was not just an instruction of go and familiarise yourself.

CHAIRPERSON: Ja okay.

MR MOLEFE: It was deal with the matter and report back to us about how you have dealt with it.

CHAIRPERSON: Okay.

MR MOLEFE: Yes.

CHAIRPERSON: Okay. Okay then I think you can deal with the question of negotiations because I think you were introducing that in the context of what Mr Seleka says has been said by board members namely that you terminated the agreement.

MR MOLEFE: Yes.

CHAIRPERSON: Without coming back to them and I think
10 you want to you before you terminated there were negotiations or whatever.

MR MOLEFE: Yes.

CHAIRPERSON: To deal with – deal with that.

MR MOLEFE: Yes.

ADV SELEKA SC: Yes. I am going to read from the minutes in the light of that explanation Mr Molefe which is – the minute is in – you get EB – Eskom Bundle 18.

MR MOLEFE: Yes.

ADV SELEKA SC: It is Eskom Bundle 18(A) page 416.29.

20 **CHAIRPERSON:** Okay I think go ahead and read because we might be – we might be able to manage.

ADV SELEKA SC: Yes.

CHAIRPERSON: Without checking but Mr Molefe must feel free to – to check.

ADV SELEKA SC: Ja. This – the – in regard to this item

they say it was requested that the submission should be taken off the agenda and submitted to the acting CE before being tabled for approval. And then the resolution says:

“Resolved that the referral from the BTC for approval to me of the mandate to conclude negotiations with Optimum Coal Mine for coal supply to Hendrina Power Station is not approved and

10 2. The mandate should be referred to the acting Chief Executive before being tabled at board for approval.”

So the mandate specifically related to the negotiations with OCM, you recall that?

MR MOLEFE: The mandate was to deal with the fact that OCM wanted an increase from R150 to R530 as I (inaudible).

ADV SELEKA SC: Yes so the team – the mandate to the team was to negotiate with OCM and then come back.

20 **MR MOLEFE:** Did it say negotiating that in the minute. I was not able to get to the page.

ADV SELEKA SC: In – Oh ja it is...

MR MOLEFE: But – but I mean you have also referred to an agreement that was there.

ADV SELEKA SC: Yes the cooperation agreement.

MR MOLEFE: So I do not know what the understanding is

in terms was it negotiate the agreement or what was it about? I mean in your understanding because my understanding was that I should go and deal with the matter – a substantive matter of what was being sought by OCM.

ADV SELEKA SC: Ja what had happened here is that the BTC had taken a decision for Eskom team to negotiate with OCM the possible terms for the amendment of the then existing coal supply agreement. So pursuant to those
10 negotiations there was a cooperation agreement and this is just for the parties to cooperate with each other, negotiate in pursuance to the amendment of the CSA – the Coal Supply Agreement. That mandate produced a report to the BTC that – which is what we are talking about these are the proposed terms to increase the price from 150 to 442 – R442.00.

BTC did not approve the mandate it referred it or the submission – it referred it the board. The board then here on the 23rd of April 2015 says:

20 “The mandate is referred to you before it
being tabled at board for approval.”

So when you read the minute the board envisages that that mandate will come back to it for approval and I want you to explain what the – the apparent – you can see the apparent inconsistency or discrepancy between the minute

and your explanation about your understanding of how the matter was given.

MR MOLEFE: He was saying that the board was referring the matter to me. You just rubberstamp it.

ADV SELEKA SC: I do not know. The board said ...[intervenes]

MR MOLEFE: And endorse what in your opinion was an outcome that had already been predetermined but the price would be increase.

10 **ADV SELEKA SC:** No ...[intervenes]

MR MOLEFE: It was not my understanding. My understanding was not – was that I was not – I was not being instructed to rubberstamp anything. In fact, because I was the new CEO ...[intervenes]

ADV SELEKA SC: Can I say something?

MR MOLEFE: ...I cast a new eye to the whole matter.

ADV SELEKA SC: May I something before you proceed?

MR MOLEFE: [No audible reply]

ADV SELEKA SC: May I say something before you
20 proceed?

MR MOLEFE: [No audible reply]

ADV SELEKA SC: I am not saying anything. I have no opinion on it. All I am conveying to you is the evidence of the board members. Mr Pamensky came here and said so. Ms Viroshini Naidoo came here and said so. Mr Venete

Klein said so. That this matter was given to you to get information because they could not get answers from the team that was handling the matter. And they gave it to you, get feedback and come back to them. It is not me.

MR MOLEFE: No, and I am saying to you Mr Seleka.

ADV SELEKA SC: Yes.

MR MOLEFE: That the mandate was not to get it back. The mandate was to deal with the matter. I mean, getting feedback, as an instruction from the board, the CEO: Just
10 go and get feedback. I mean, that is an administrative function to get feedback. I was Group Chief Executive. I had to look at the matter and deal with it decisive, which is what I did. But to add Mr Seleka.

ADV SELEKA SC: Tell the Chair.

MR MOLEFE: The agreement, Chairperson. The agreement that you refer to, I subsequently discovered. Having find by an official who did not have authority to do so, in the first place. We do not know if who that official was working for but had agreed to this proposal being
20 brought to where it was. We did not have – we did not know who the official had been working for. The agreement had never been to the board before it was signed. The implication, the financial implications were such that the size of the transaction that was being proposed to be done was so big that that official did not

have authority. If you question Mr Koko, the official that signed the agreement reported to Mr Koko. Mr Koko was not even aware at the time that the agreement was been signed. So I even suspected that I may have been... That it is an agreement that was not supposed to have gone to the board in the first place. So the way that I dealt with it. I looked at it objectively and I found it to be preposterous and unacceptable.

ADV SELEKA SC: So if we take it step-by-step. What did
 10 you say about the minute, as we call it here, that the mandate is referred to you before being tabled at board for approval? Because purely then the minute contemplated that the matter would come back to the board for its approval.

MR MOLEFE: Chairperson what I am trying to say is. My understanding, as the Group Chief Executive, was the board was *ultra vires*. I do not know how – well, the minute maybe have been withered away... But my understanding was that it was a substantive instruction to
 20 deal with the matter, irrespective of how the minute is minuted. My understanding was the board would not come to me and say: Go and find out what happened here and come back and report back. The mandate was – so the dynamic interpretation, not the literal interpretation of those words that are in the minute, the dynamic

interpretation that I gave to the minute was deal with the matter as the Chief Executive Officer in the interest of Eskom which is what I did. Which is what was the subject, actually, of my entire statement when I came here for the first time.

ADV SELEKA SC: Yes. So we are to understand you to be saying, the minute is what it is but your understanding was different?

MR MOLEFE: No, my understanding is, dynamic, it is not
10 literal. And there is a big difference between
...[intervenes]

CHAIRPERSON: No, no. Mr Molefe, you and Mr Seleka agree.

MR MOLEFE: Yes.

CHAIRPERSON: You are not saying you are disputing
...[intervenes]

MR MOLEFE: Yes.

CHAIRPERSON: ...what is written in the minutes.

MR MOLEFE: Yes.

20 **CHAIRPERSON:** You just say you have your own
interpretation of what the minutes mean.

MR MOLEFE: Yes, Chairperson.

CHAIRPERSON: Ja. So that – you are all – there is no dispute about that.

ADV SELEKA SC: Okay.

CHAIRPERSON: There is a dispute – there may be a dispute in terms of the board – the board members' understanding of what was decided. Their understanding and his understanding. But as I understand it he certainly is not disputing that that is what the minutes are saying.

ADV SELEKA SC: Yes.

CHAIRPERSON: But he says, his understanding was that he was to deal with the matter as he so see fit as Group CEO. That is... And to report simply what he had done to
10 deal with it. Mr Molefe, is that correct?

MR MOLEFE: That is correct, Chair.

CHAIRPERSON: Ja, that is what he is saying. It may be that the board or the relevant members of the board's version might be different from his understanding but that is what he says his understanding was.

ADV SELEKA SC: H'm. Yes. So with that understanding, before you made any final decision, you did not take the matter back to the board for its approval.

MR MOLEFE: Chair, I did not make any final decision.

20 **ADV SELEKA SC:** Is the termination of the Corporation Agreement a negotiation process?

MR MOLEFE: As I said, I even suspected that the Corporation Agreement was ultra vires. Secondly, there was nothing to negotiate. What Optimum was putting on the table was preposterous and illegal.

CHAIRPERSON: Yes.

MR MOLEFE: Because we had an existing agreement that they would pay us R 150.00 per coal until 2018.

ADV SELEKA SC: H'm.

MR MOLEFE: To very that to the disadvantage of Eskom would have required me to break the provisions of the PMFA.

ADV SELEKA SC: Yes, but I am asking a simple question which is, even as you perceived of those factors and you
10 decided that I am not proceeding on the basis of these proposed terms, these are preposterous and you bring that to an end. When you make that decision – prior to making that decision, did you take the matter back to the board for approval? You did not take the matter back to the board for approval. That is all I want to know.

MR MOLEFE: No, Chair there is no recorded decision that I made, terminate discussions or to stop negotiations. There is no recorded decision like that that ...[intervenes]

CHAIRPERSON: Is there an unrecorded decision?

20 **MR MOLEFE:** There is also no unrecorded decision.

CHAIRPERSON: [laughs] Okay.

MR MOLEFE: [laughs] What ...[intervenes]

CHAIRPERSON: So the negotiations ended by themselves?

MR MOLEFE: No, they did not end.

CHAIRPERSON: [laughs] They went on? [laughs]

MR MOLEFE: Yes. The process of negotiation, Chair, is ongoing and people employ different negotiating tactics.

CHAIRPERSON: But you cannot negotiate forever.

MR MOLEFE: You cannot negotiate forever.

CHAIRPERSON: So somewhere - you can use different strategies to bring finality but in the end, there must be some finality.

MR MOLEFE: There must be some finality.

10 **CHAIRPERSON:** Yes, yes.

MR MOLEFE: In this instance, the finality of the negotiations were continuing forever to the disadvantage of Optimum, they had the option of taking it to arbitration. That is what they were supposed to do. So ...[intervenes]

CHAIRPERSON: Of course, when you take.. When, between the two parties, one of the parties took an issue that was the subject of negotiations for some time, took it to arbitration, that would mean the negotiations end.

MR MOLEFE: Yes.

20 **CHAIRPERSON:** Because now you go to a compulsory route.

MR MOLEFE: Yes.

CHAIRPERSON: To fight it out.

MR MOLEFE: Yes.

CHAIRPERSON: Yes, yes, yes.

MR MOLEFE: So it was not for me to take an issue on arbitration because I had a contract ...[intervenes]

CHAIRPERSON: Ja.

MR MOLEFE: ...for R 150.00 until 2018. I had no disputes. So Optimum would have gone to arbitration.

CHAIRPERSON: H'm.

MR MOLEFE: By the way Chairperson. A date for arbitration had been set. They actually - i do not know ...[intervenes]

10 **CHAIRPERSON:** They did not pursue it?

MR MOLEFE: [No audible reply]

CHAIRPERSON: They did not pursue arbitration?

MR MOLEFE: They did not pursue it. Before the date arrived, they then went for business rescue.

CHAIRPERSON: Yes.

MR MOLEFE: So the date in Mr Ephron's...

ADV SELEKA SC: Affidavit.

MR MOLEFE: ...affidavit, he refers to the fact that there was a – that had been sent for arbitration.

20 **CHAIRPERSON:** You said earlier on to change the agreement would have been illegal and you referred to the PFMA.

MR MOLEFE: Yes.

CHAIRPERSON: Why would it have been illegal for two parties to an agreement if they were satisfied that they

should amend or more of the clauses in the agreement for them to agree, we agree to amend this? Why would that have been illegal?

MR MOLEFE: If both parties were satisfied.

CHAIRPERSON: Yes, obviously, you can only amend an agreement if both parties agree.

MR MOLEFE: Ja.

CHAIRPERSON: You cannot amend it unilaterally. Nobody can do that.

10 **MR MOLEFE**: Well, only one party was satisfied, yes.

CHAIRPERSON: No, no. What I am saying is. You had OCM ...[intervenes]

MR MOLEFE: Yes.

CHAIRPERSON: ...that wanted the ...[intervenes]

MR MOLEFE: Increase.

CHAIRPERSON: Ja, increase. And you had Eskom who were happy with the status quo ...[intervenes]

MR MOLEFE: Yes.

CHAIRPERSON: ...in terms of the price, the agreement.

20 **MR MOLEFE**: Yes.

CHAIRPERSON: Ja. And OCM initiated, as I understand it, discussions and negotiations to say: Could we relook at the price and make whatever demands it made? So the point I am making is. They were seeking an amendment of the agreement.

MR MOLEFE: Yes.

CHAIRPERSON: And amendment can only happen if both parties agree.

MR MOLEFE: Yes.

CHAIRPERSON: So I was just saying. Why would it be illegal if both parties agree? Or that is not what you meant?

MR MOLEFE: Ja, the same, that I did not agree.

CHAIRPERSON: Ja.

10 **MR MOLEFE:** Both parties were not in agreement.

CHAIRPERSON: Okay, but if the ...[intervenes]

MR MOLEFE: The other issue Chairperson is the ...[intervenes]

CHAIRPERSON: Just hold on a second. Just so that we finalise this. If Eskom was persuaded to increase the price by whatever it was in the agreement, there would be nothing illegal, as far as you know?

MR MOLEFE: Yes.

CHAIRPERSON: Ja.

20 **MR MOLEFE:** Yes. If both parties had agreed ...[intervenes]

CHAIRPERSON: Yes, ja.

MR MOLEFE: ...to amend that ...[intervenes]

CHAIRPERSON: Yes, ja.

MR MOLEFE: ...I would have been.

CHAIRPERSON: Yes, okay.

MR MOLEFE: However, Chairperson, here motive and bona fides. The Optimum were in the position that they were in because in 2012 when they bought the company, they did not do due diligence. My feeling was, here we are via Eskom. We are in financial difficulties. We are load-shedding. The company is literally collapsing because when I arrived at Eskom, there was talk that we will not be able to pay salaries in three months. We are literally
10 collapsing. His people made the mistake or five years ago. Perhaps it was not a mistake and that was the whole point of my statement. Perhaps it was not a mistake. Perhaps they had banked on something that is contrary to good morals to get them this agreement. The fact that there are people inside Eskom that had find that agreement ostensible without authority, also made me suspicious that there are people Eskom that are pursuing a particular agenda to satisfy these people. I was just uncomfortable with it. Chairperson, I have a feeling that if I had signed
20 an agreement or agreed to OCM's request, we would be sitting in this Commission or a similar Commission where you would be asking me: But Mr Molefe, if you had an agreement for R 150.00, what was it that drove you to increase agreed with this particular increase that has now collapsed Eskom? So I had to do Chairperson what I

believe was correct. And the background information that I knew, it also did not smell good which is why I was at pains to make the statement that I did when I came here.

CHAIRPERSON: Well, you were speaking earlier of things being covered(?) and I said to you that people implicated in your statement, as far as I know, have been given your statement so that they respond. One of them is Mr Ephron, I think, and he, as far as I know, he has filed an affidavit in response to your statement. So the Commission has been
10 looking at that and I think probably Mr Ephron might come back and deal with certain matters. So just remember that Mr Ephron has actually filed an affidavit in response to your statement.

ADV SELEKA SC: Yes.

MR MOLEFE: But Chairperson, this strategy had gone beyond Mr Ephron.

CHAIRPERSON: Ja.

MR MOLEFE: Mr Ivan Glasenberg came to see me for this.

20 **CHAIRPERSON:** H'm?

MR MOLEFE: And it was Mr Ivan Glasenberg that had very good relationship with the chairperson of Optimum before he came the... So Mr Ephron will come and give you technical answer but my feeling was that, at the very high level, the level of a chairperson of the

chairpersonship. Mr Ephron was a CEO of Optimum. He was in the greatest to most things in what I suspect was happening a little less significant than the people at the top. Perhaps what you need to do Chairperson is to ask Mr Ivan Glasenberg is he has any comment.

CHAIRPERSON: Well, the Legal Team may look at that but I am aware that the Commission had been in touch with Mr Glasenberg's attorneys at some stage for him to provide a certain affidavit which he provided but because he lives
10 abroad, there may have been challenges at the time about him coming here. But the Legal Team will look at those matters and take it from there. But Mr Ephron certainly filed an affidavit in response to yours.

ADV SELEKA SC: Yes.

CHAIRPERSON: To your statement. And he might well be recalled. We do have some constraints.

ADV SELEKA SC: Ja.

CHAIRPERSON: But he may be called. And if you have not been given that affidavit, it should be send to you for
20 you to see what he says.

MR MOLEFE: Chairperson, can I add something?

CHAIRPERSON: Ja.

MR MOLEFE: If I may?

CHAIRPERSON: H'm?

MR MOLEFE: It may be a longwinded story I give?

CHAIRPERSON: H'm?

MR MOLEFE: It may be a longwinded story again.

CHAIRPERSON: Okay, let us hope not.

MR MOLEFE: Yes.

ADV SELEKA SC: [Indistinct] [Speaker's microphone not switched on.]

MR MOLEFE: When I was at Transnet Chairperson when we bought the 100 locomotives ...[intervenes]

CHAIRPERSON: When you...?

10 **MR MOLEFE:** We bought the 100 locomotives ...[intervenes]

CHAIRPERSON: H'm?

MR MOLEFE: It was because Transnet have not been given a good service to the coal industry to transport their coal to Richardsbay. So we went and we decided that we are going to end their pay(?) but buying locomotives because the locomotives on that line very old, 40-year-old locomotives and they were breaking and unreliable. So by then, we then said to the coal industry we will buy the
20 locomotives at the expense to Transnet but you guys must agree that you will sign Take or Pay Agreement. When the Take or Pay Agreement is signed, it means that when the locomotive arrives at your mine, you cannot tell us that you do not have coal that needs to go to Richardsbay. If you do not have the coal go to Richardsbay, you will pay for

that locomotive because we need to pay back the money that we are going to buy the locomotives. The entire industry agreed except one company, Optimum, in 2014. They refused to sign the Take or Pay Agreement until one day when I got a report from Mr Gama that Optimum is the only one is refusing to sign the Take or Pay Agreement. I said to Mr Gama: Please call Mr Ephron and tell him that we are coming to his office now. He said it is not convenient. I said it is fine. We are okay with it. And we

10 went to his office there and there. And I arrived there and I told him: Mr Ephron, but Mr Ephron if you do not sign this Take or Pay Agreement where the entire industry has signed the Take or Pay Agreement, we will not give you trains. As simple as that. Mr Ephron's response was: No, Mr Molefe, we are waiting on Eskom to sign certain agreements with us. When those agreements are signed, we will be happy to sign your Take or Pay Agreement. Chairperson, I said to him I am not interested in Eskom – I am not interested in – the fact of the matter is that, if you

20 do not sign in the next 24-hours, you will not get trains from us because the whole industry has signed. Mr Ephron reluctantly signed within 24-months(sic). That was March 2015

CHAIRPERSON: You mean within 24-hours.

MR MOLEFE: Of our meeting.

CHAIRPERSON: Ja, I thought you said within 24-months but maybe ...[intervenes]

MR MOLEFE: 24-hours. Ja. To sign it.

CHAIRPERSON: Ja, h'm.

MR MOLEFE: To sign the agreement. That was March 2015. Guess what Chairperson? Unbeknown to him and to myself, I am the seconded to go and become Group Chief Executive to Eskom a month later, literally. And when I arrived there, here is Mr Ephron with the agreement
10 that he is waiting for. And that agreement is basically exporting. And I felt that: You know, Optimum said to us they will not sign the Take or Pay Agreement because they are waiting for an agreement. In the meantime, this is the agreement that they are waiting for. So that is a bit of background Chairperson to explain my frame of mind when I dealt with the Optimum matter. It is because perhaps I knew too much. I knew on the other side they were trying to play us, using Eskom's name. Perhaps at Eskom they were also playing Eskom using Transnet's name but
20 unfortunately I crossed the line and I saw both sides of the coin and I did not like it Chairperson. And I felt that Optimum could not be allowed to behave like that especially because they probably feel that they have a very good relationship with the then Deputy President.

CHAIRPERSON: With the...?

MR MOLEFE: With the then Deputy President.

CHAIRPERSON: Yes.

MR MOLEFE: Yes.

CHAIRPERSON: Well ...[intervenes]

MR MOLEFE: That is the background Chair.

CHAIRPERSON: ...I guess at the time you asked... Oh, he was Deputy President at the time.

MR MOLEFE: Yes.

CHAIRPERSON: Ja, okay.

10 **MR MOLEFE:** It was 2018.

CHAIRPERSON: Okay alright. Yes. Mr Seleka.

ADV SELEKA SC: Chair, I... I am contemplating Mr Molefe, approaching the matter differently. I will need ...[intervenes]

CHAIRPERSON: I would like us to move us with some speed.

ADV SELEKA SC: Yes.

CHAIRPERSON: Because so far, we have only dealt with what the instruction of the board was to Mr Molefe on the
20 23rd of April 2015.

CHAIRPERSON: So I think we have got to try and move with some speed.

ADV SELEKA SC: Yes.

CHAIRPERSON: I know that there is probably no single person who is holding us back.

ADV SELEKA SC: [laughs]

CHAIRPERSON: But can I ask you to move with some speed?

ADV SELEKA SC: Yes. Yes, Chair.

CHAIRPERSON: Ja.

ADV SELEKA SC: Mr Molefe, let me do this. Let me paint the picture here from what sees from the evidence. Please have Eskom Bundle 18 in front of you. It is 18(A).

MR MOLEFE: [No audible reply]

10 **ADV SELEKA SC:** 18(A). Please turn to page 383 and I am referring to the black pagination from the top left-hand corner. Page 383, Chair.

CHAIRPERSON: [No audible reply]

ADV SELEKA SC: So what we see from the evidence. Firstly, this is a submission document to the Board Tender Committee. It is firstly to Eskom Procurement Sub-Committee, 25 March 2015 and then the Board Tender Committee, 15 April 2015. And the title of this submission is:

20 "Mandate to conclude negotiations with Optimum Coal Mine for Coal Supply to Hendrina Power Station. The resolution required the Board of Directors Standard Committee Resource that Primary Energy Division is mandated to conclude negotiations

with Optimum Coal to ensure security of supply for Hendrina Power Station at R 442.00. February 2015 money vents(?) for a CV...”

And it goes on. 2.2 says:

“PED, which is Primary Energy, is mandated to negotiate and conclude the termination of the Optimum hardship claim in the overwriting of penalties that have been suspended against Optimum...”

10

MR MOLEFE: So that was a request?

ADV SELEKA SC: Ja, this is ...[intervenes]

MR MOLEFE: ...from the BTC to the board?

ADV SELEKA SC: That is right, yes. Then you go to page 390.

MR MOLEFE: [No audible reply]

ADV SELEKA SC: It is a document entitled: Approval of a Negotiated Outcome compiled by Mr Johan Bester, Primary Energy. And then again: Serving before the Eskom Procurement Sub-Committee, 25 March 2015. The BTC, 15 April 2015. And the description is: Mandate to conclude negotiations with Optimum Coal Mine for Coal Supply to Hendrina Power Station.

20

Then you see paragraph – under introduction, paragraph – the first paragraph under introduction says:

“Optimum Coal Mine is currently losing money on every ton of coal it sells to Eskom as well as to export market.

Optimum have, therefore, already initiated Section 189 process to retrench 1 300 miners and to close the export business by 31 March 2015.

10 Optimum have agreed to continue to supply Eskom on the condition that Eskom agrees to pay a higher price from 1 April 2015, which as a minimum will cover the current cost to produce coal for Eskom.

Alternatively, Optimum wants to play bankruptcy, stop supply to Eskom and will close the mine in a matter of months...”

The next paragraph, and I will read that only:

20 “In accordance with the mandate approved by the Board of Directors, Standard Committee, BTC meeting, 12 August 2014 negotiate but not conclude coal supply agreements for up to 24 years to ensure the security of coal supply to Hendrina power station. This report reflects the progress to date thereof and requests noting of the feedback and a mandate to conclude negotiations with optimum to ensure security of supply for Hendrina is

requested.”

So that gives you the background to what was happening in regard to the cooperation agreement. The cooperation agreement itself, which I think you need to clarify to the Chairperson because when he was asking about which agreement is – you said is *ultra vires* which is signed by a person who does not have the authority to do so, I think you were referring to the cooperation agreement as opposed to the coal supply agreement, is that correct?

10 **MR MOLEFE:** Yes. Yes, that is correct but before you proceed, who signed this document?

ADV SELEKA SC: Who signed?

MR MOLEFE: Who compiled this document?

ADV SELEKA SC: The compiler – let us see the first one I referred to. The submission document itself, I do not know whether you can recognise the signatures there on page 387, that is Group Executive Acting Group Technology and Commercial – I think that is Mr Edwin Mabelane.

MR MOLEFE: It was compiled by Mr Bester.

20 **ADV SELEKA SC:** Yes.

MR MOLEFE: At the top the signature looks like Mr Bester's.

ADV SELEKA SC: Yes. Certainly the approval of a negotiated outcome the compiler is identified as Mr Johan Bester and it was signed on page 401 by Mr Johan Bester,

Mr Vusi Mboweni and Mr Edwin Mabelane, the Group Executive Acting Group Technology and Commercial.

The cooperation agreement is on page 377 of the same bundle and it runs up to page 382. It was signed on the 23 May 2014 and on behalf of Eskom the name there appears to be – is Kiren Maharaj.

MR MOLEFE: Yes.

ADV SELEKA SC: Divisional executive.

MR MOLEFE: Yes.

10 **ADV SELEKA SC:** Ja, 23 May 2014.

MR MOLEFE: Yes.

ADV SELEKA SC: And the intention was a new agreement would then be negotiated and concluded by the beginning of 2015.

MR MOLEFE: Ja.

ADV SELEKA SC: Ja. Now that is the background, this is the Hendrina power station. What that document will show in approval of a negotiated outcome is that Eskom had engaged the services of experts, they engaged Nedbank
20 and Basis Points to do an assessment of OCM's financial position and the proposed amount of R442 came about as a result of that expert assessment and that was contained in this report of April 2015.

I should also add this, by the way, that when you read the affidavit of CDH, the attorneys for Eskom at the

time, CDH says it was briefed by Eskom to assist in the conclusion of the cooperation agreement. So Eskom had lawyers assisting it to conclude that cooperation agreement of the 23 May 2015. The parties are negotiating as a result of it, the proposed increases are made based on expert assessment by Nedbank and Basis Points.

You come in - and negotiations are not completed. You come in in April 2015. You continue with the negotiations, they are trying to meet with you, you know Mr
 10 Marsden and Mr Ephron had said it was difficult at first and they ultimately get – they meet with you and that you played – you took a hard stance in regard to negotiations.

Ultimately you decide to sign a letter which is dated the 10 June 2015 terminating the negotiation process. That letter was apparently only transmitted to OCM on the 20 June 2015. So the process is terminated to negotiate. You have this report from experts who are supporting the increase of R442 because Optimum is running at a loss.

In August 2015 you get a letter – now OCM is under
 20 business rescue. You get a letter from business rescue practitioners 20 August. They say we are stopping the obligation to supply Eskom with coal but they also make an offer for an interim arrangement to supply coal to Eskom. The response to that offer was a meeting, amongst other things, was a meeting on that 3 September 2015 between

you and Mr Ephron. You and Mr Koko on the one and Mr Ephron on the other.

In that meeting the interim arrangement is agreed upon, 3 September 2015, that OCM will continue to supply coal to Eskom. That interim arrangement subsisted until 29 July 2016.

CHAIRPERSON: Mr Seleka...

ADV SELEKA SC: Yes, Chair.

CHAIRPERSON: If you are going to ask him to comment
10 on all of these things that you have been mentioning, I suspect he might have forgotten some of them by the time you give him the opportunity to.

ADV SELEKA SC: Yes.

CHAIRPERSON: So I think you might have to ask him some questions.

ADV SELEKA SC: Yes.

CHAIRPERSON: Or if he wants to dispute some of the things you have said, by the time you give him a change he might not recall what you said seven minutes ago.

20 **ADV SELEKA SC:** Yes.

CHAIRPERSON: So I think if you want him to confirm anything you need to say what you understand it to be, ask him to confirm and move on to the next one.

ADV SELEKA SC: Thank you, Chair.

CHAIRPERSON: So he has a chance to dispute it while

he remembers if he disputes it or if he confirms he confirms.

ADV SELEKA SC: Thank you, Chair.

CHAIRPERSON: What you may ask him – Mr Molefe, you have listened to Mr Seleka up to now, is there anything you dispute in terms of what he has said?

MR MOLEFE: I must thank Mr Seleka for his lecture.

ADV SELEKA SC: For?

CHAIRPERSON: Sorry?

10 **MR MOLEFE:** For his lecture. On what transpired here.

CHAIRPERSON: Yes but I just want to know whether there is – if you say look, there is anything of importance that I dispute, then we will know.

MR MOLEFE: Mr Seleka's reality is very different to mine and although we are talking about the same fact ...[intervenes]

CHAIRPERSON: The same?

MR MOLEFE: The interpretation of what was happening is very different.

20 **ADV SELEKA SC:** Yes, it is fine because and I am going to give you a chance.

MR MOLEFE: Yes because you are taking these facts and driving a particular narrative ignoring what I have already put forward in the Commission that what was in fact happening was something else. For example, you go on

about the fact that Optimum was in financial difficulty. The biggest problem that I had with Mr Bester and his memos is that they went on about Optimum and not Eskom. My fiduciary duty was not to Optimum.

I had no responsibility to keep Optimum out of bankruptcy and in the process get Eskom into bankruptcy, a company that I had primary responsibility for. I think your analysis ignores that. Had you been in my position, Mr Seleka, you might have appreciated the fact that if you
 10 do what these memos from Mr Bester and company as saying we should do, we would have bankrupted Eskom, it is as simple as that. We might have saved Optimum but we would have bankrupted Eskom.

The reason people felt that it was okay to bankrupt Eskom was because they thought that Eskom will get money from the fiscus. The debate on these matters was bankrupt Eskom or Optimum ...[intervenes]

ADV SELEKA SC: Yes but when ...[intervenes]

MR MOLEFE: And they were saying that well, we, as the
 20 parent company of Optimum, cannot afford to keep subsidising implying that our parent company, which Republic of South Africa, could afford continuing subsidise Eskom. Which I disagreed with.

ADV SELEKA SC: Ja.

MR MOLEFE: I have been a treasury official and I know

that the fiscus could not afford continuing subsidise Eskom because of mistakes, because of people who did not do due diligence when they bought a company.

ADV SELEKA SC: Yes.

MR MOLEFE: So Mr Bester goes on and on and on and on about Optimum's difficulty, it does not talk about our own difficulty, it does not talk about the difficulties of the company that worked and that we could not afford all of this. Basis Points on that point said that they did an
10 affordability test. Did they do an affordability test for Eskom? No. Why?

ADV SELEKA SC: Yes, can I say something.

MR MOLEFE: Who were they working for?

ADV SELEKA SC: Let me just say something because what I am trying to do is not express my view or try to postulate a particular narrative, what I am trying to do for the purposes of the evidence and for the purposes of the Chairperson is to look at the sequence of events prior to giving you the opportunity to then express your comment
20 on the underlying issues. So it is really just to get a sequence of events so that we can see what happened from this date to the next date and the last date, then you can say exactly what you are saying or this was my attitude in regard to these facts.

MR MOLEFE: Yes but I have said ...[intervenes]

CHAIRPERSON: One second, that is where I was saying take them in small bits and pieces.

ADV SELEKA SC: Ja.

CHAIRPERSON: You agree that on such and such a date there was a meeting between so and so and so where the following was decided, you agree that the next thing that happened, that was the following, then let him go with you where he does not have to [indistinct – dropping voice]

ADV SELEKA SC: Yes.

10 **CHAIRPERSON:** But you are entitled the validity of his propositions. You are entitled to test the soundness of his approach so it must not be like you are not going to test that, just like you should test the propositions of Glencore, Ephron if and when he comes here. So that should remain.

ADV SELEKA SC: Yes.

CHAIRPERSON: Where you feel this needs to be tested you must test it.

ADV SELEKA SC: Yes, yes.

CHAIRPERSON: And Mr Molefe, it is not as if he ignores
20 what you have said, you were saying that he is following a certain approach ignoring what you have already said, he is not necessarily ignoring that because his job entails looking at exactly what happened and why difficulty role-players acted in a certain way and at the end of the day then we look at everything and make a finding. So he is

not ignoring it, just that for now, he may be looking at a certain issue. Okay, alright, let us continue.

ADV SELEKA SC: Ja.

MR MOLEFE: Can we ...[intervenes]

CHAIRPERSON: Well, I see have gone past the tea break. You wanted to say something, Mr Molefe?

MR MOLEFE: No, I was saying that for example this agreement ...[intervenes]

ADV SELEKA SC: The cooperation?

10 **MR MOLEFE:** The cooperation agreement. If we look at it objectively, Chairperson, as a person who was in my position at the time, first question is, is it to Eskom's advantage? Second question is, who signed this agreement? Did they have authority to sign it? Why did they sign? Why did they sign? The answers to those four questions were not satisfactory to me as a Chief Executive. The answer to those questions did not convince me that we are acting in Eskom's interest.

CHAIRPERSON: No, no, that is fine. You have to put
20 your version and your perspective on the issues as you see them and do not necessarily expect that you will leave the room knowing whether we agree with you or not, you just put your version, your perspectives and the question of ultimately what is true and what is well-grounded will come later but from your side just make sure that you put your

version to share with me how you saw things and why you did what you did and if you think when you look at my faces, like I do not accept what you are saying, do not be concerned about it. Or if you think I am accepting it, as long as you put your side of the story because ultimately I will look at everything when everybody has testified so but I think we must take the tea break and when we come back we will resume and let us try and move with speed. Ja. Okay, we will adjourn. It is twenty five to twelve, we will

10 resume at ten to twelve. (sic) We adjourn.

INQUIRY ADJOURNS

INQUIRY RESUMES:

CHAIRPERSON: Okay, let us continue.

ADV SELEKA SC: Thank you Chairperson.

MR MOLEFE: Try and allocate some time to each topic so that we try and finish each topic within the time allocated, obviously as you do so we must make sure that we nevertheless do justice to the issues.

ADV SELEKA SC: Yes, thank you Chair, I was speaking

20 to Mr Molefe and his legal representatives, we were trying to see how we can expedite this. Mr Molefe and I know the facts more or less but beyond us nobody might know the facts, so one is caught between but let us see...[intervenes]

CHAIRPERSON: You can confirm the facts by putting to

him what the facts are and he will say if he agrees or does not agree, but you would know from his affidavit also what he has no issues with.

MR MOLEFE: Yes.

CHAIRPERSON: Ja.

ADV SELEKA SC: Thank you Chair. Mr Molefe just the sequence of events again. I mean, I have gone through, you're coming at Eskom, the termination that takes place on the 20, or the letter is communicated on the 20th of 10 June 2015. Just on the sequence, not your perspective on things, because I want us to deal with the sequence agree on it and then we can deal with your perspective, your reasons why you did what you did. Does that bring back memories to you of how things happened chronologically. So the 20th is the termination 20th of June 2015 is the termination of the negotiation process by letter from CDH. Do you agree with that?

MR MOLEFE: Chairperson, do you have a copy of the letter?

20 **ADV SELEKA SC:** I have, you will find it in...[intervene]

CHAIRPERSON: While you may want to look at the letter for maybe purposes of the content. Does the date more or less appear to be the date for the termination to you?

MR MOLEFE: My recollection Chairperson is that what was happening is that Optimum was employing negotiation

tactics, they were very tactical. They were driving the fear of God into us and soon we went to load shed you are going to have a disaster. There was a negotiation tactic, we in turn then employed negotiation tactics.

CHAIRPERSON: Yes.

MR MOLEFE: I mean, what do you see as something happening, it does not necessarily mean that - what you see is not what you actually see, there was a lot of meaning behind everything that was happening.

10 **CHAIRPERSON:** While you look for the letter, Mr Seleka but I think you may have to factor if that is what you want to do Mr Molefe's evidence about the approach is because he said also earlier on that, in terms of facts there might not be much in dispute in terms of what you said but it is the perspectives or the interpretation of those facts to say, what do they mean.

ADV SELEKA SC: Okay.

CHAIRPERSON: He has a certain interpretation.

ADV SELEKA SC: Yes.

20 **CHAIRPERSON:** So you might have to just tackle them head on. You know, that I said, I had found it strange that Glencore had signed or taken over an agreement with a price that was not going to change for so long, you know, that is a due diligence issue.

And I know that Mr Molefe does deal with it in his

affidavit but he is saying I was given the instructions to deal with this, I looked at this agreement, I took the view that it was in the best interest of Eskom that there should be no amendment of the agreement in terms of increasing the price.

He gave the reasons last time he repeated some of the reasons why he took that view and we know that Glencore or OCM had taken the view that there was a hardship clause, and that they should invoke that if
10 negotiations did not succeed. And his right in saying in terms of that route they were free to go to arbitration and there was a reference of the matter to arbitration and a date was set that is what he said, but Glencore/OCM decided not to pursue that, why did they not pursue that if they thought that they had a case? He did not say so but he implies that, why did they not pursue it because that was a compulsory process.

Eskom would have been forced to take part whether they liked it or not, in that process, and if OCM won they
20 would be bound by that outcome. But I know that last time he told me about what he has little of his case, ag his sleep. I think it was Mr Molefe, I hope I am not wrong.

MR MOLEFE: No it was not me I heard that.

CHAIRPERSON: Oh you did hear it; it was somebody else.

MR MOLEFE: Somebody said that we would not have honoured it or something.

CHAIRPERSON: Oh, ja.

MR MOLEFE: It was not me.

CHAIRPERSON: Okay, it was somebody else.

MR MOLEFE: I think it was Dr Naidoo or somebody else.

CHAIRPERSON: Okay, I am sorry to attribute that to you.

ADV SELEKA SC: No it was him. [laughing]

CHAIRPERSON: But basically those...[intervene]

10 **MR MOLEFE:** No, we have never discussed this before.

CHAIRPERSON: He did say. [laughing] Well Mr Molefe you are under oath. So I think you might need to take him on, on whether his approach was the correct approach or was sound or what.

ADV SELEKA SC: Yes. So Mr Molefe then well, let us go to this fact, because ultimately, all said and done the proposal was that we move the price from R150,00 to R242,00 per ton and Eskom rejected. Is it Eskom or you who rejected that proposal?

20 **MR MOLEFE:** It was Eskom Chairperson; I was just a functionary.

ADV SELEKA SC: You were just a functionary but Eskom had engaged the experts as I said, they did the assessment in April, Nedbank and Basis Points. CDH itself was also instructed to engage experts in September 2015

to again do another assessment of OCM's financial position, when they engage CDH itself was involved.

Meridian Economics was involved and SRK Consulting were involved they gave you a report in November. They also said you need to financially assist OCM.

MR MOLEFE: Yes.

ADV SELEKA SC: And what was your view on that?

MR MOLEFE: I had no obligation to agree with them you
10 see that opinions where professional opinions, they lacked
one simple thing which drives any CEO, the interest of
Eskom they were absent in all of those things.

ADV SELEKA SC: Then you have Eskom having
rejected...[intervene]

CHAIRPERSON: Well, maybe Mr Seleka Let us come to
what was the basis of bases or basis upon which those
experts said Eskom should help OCM because Mr Molefe
says I have a basis or the attitude I took, my basis was the
interests of Eskom.

20 **ADV SELEKA SC:** Yes.

CHAIRPERSON: So, in what way did those experts say it
would be in the interest of Eskom for Eskom to help OCM,
then let us take it from there. Let us hear what Mr Molefe
has to say about those reasons that they may be given, if
they gave any.

ADV SELEKA SC: Yes, Mr Molefe you will recall that the expert opinions look at both parties, the position of both parties. One, was whether OCM was running the mine at a loss. The flip side of that was that if indeed it was running the mine at a loss, it was then impacting on the ability to supply coal to Eskom.

So, coal supply to Eskom was a consideration relative to Eskom. But they had that in mind as well, which was reflected in the opinion or the memo that was given to
10 Eskom.

So, on the face of it, it seems that Eskom position was also taken into account to require what they considered to be a reasonable amount in the increase of the purchase price, which was, as I learned from you even less than the market related amount the R442,00. So, Eskom's position was also looked at, your comment on that one?

MR MOLEFE: Chairperson, you must understand this OCM, Optimum, was at...[intervene]

20 **CHAIRPERSON:** Was at?

MR MOLEFE: A cost plus mine.

CHAIRPERSON: Yes, do not be too far from the mic so that I can hear you.

MR MOLEFE: Yes, so it had been built with Eskom's capital. It had been built with Eskom's capital to

supply...[intervene]

CHAIRPERSON: Just go back in one or two sentences to remind us the importance of a cost plus mine. I know, it has been explained to me, I just wanted to refresh my memory because you have just made mention there.

MR MOLEFE: I think Chairperson cost plus mines were the biggest, was the biggest robbery that has happened here. Those cost plus mines operated like medieval robbers.

10 **CHAIRPERSON:** Like?

MR MOLEFE: Medieval robbers because what happened is, you as Mr Zondo, Eskom the coal is discovered in Hendrina, Eskom gives you the money the shaft, to mine the coal and then you get given a 40-year contract to supply Eskom with coal in the power station that is built next door

You do not put in capital, you just get the contract and to operate the mine and give Eskom the coal for 40 years. So the proviso in the original agreement was that
20 the coal will be Eskom's coal and nobody else's and then, sometime in the middle of the agreement, in the case of Optimum, they turned around and said may we please export some of the coal, the better quality coal may we please export it, Eskom agreed.

And they exported the coal and they made a lot of

money from exporting the coal. The problem arose when the international price of coal fell, they then said they are no longer profitable. But the exporting of coal was something that was additional to the original agreement in the first place, that had nothing to do with the original intention of the cost plus mines suppliers of coal and not the international market.

Those cost plus mines were not built for the international market. They were built for Eskom that was
10 the original intention. So now Mr Seleka, Chairperson what you are saying is, or what I am putting to you is the hardship that Optimum was experiencing was because of the fall in the international market of the price of coal and what they were asking was for us to take the knock on the international price of coal.

Something that they had not hedged, they should have hedged it, number one, number two, they should have done due diligence and after due diligence they would have discovered that there is an exposure to the international
20 price of coal. They did not take these two decisions and were now demanding that, because they are suffering hardship, because of these factors, we must pay for it. It was unfair Chairperson, it was unfair.

This hardship was self-imposed. What I asked myself, how could these people that are so knowledgeable,

whose parent company is listed in Switzerland. Who are operating a global leader in the coal industry. How could they take such a simplistic decision, I put myself in your shoes and said, at the time when I bought the mine, we would have done due diligence and the due diligence would have told us that we have an open position and an exposure to the coal price.

They continued with that situation, despite the fact that they should have known a reasonable person in their
10 position would have known that you cannot continue being exposed to the price of coal because your profits no longer come from your operation. They come from speculating on the price of coal. So they had speculated on the price of coal, and they now expecting us to pay for it.

Alternatively, Chairperson, they knew that they could speculate and make money and if they lose, they will be able to negotiate. But to negotiate, what was their key negotiating point, how would they negotiate a this. They knew and in my statement, I say that is why this all affects
20 Mr. Ramaphosa, in case they need to do this negotiating.

CHAIRPERSON: I think part of the point of Mr Seleka's question, I think was aimed at that I want you to just complete that, was to say that the experts that he referred to.

And may be for OCM were saying it is not in

Eskom's interests for Eskom not to give us an increase on the price, maybe not as high as we are demanding but it is not in Eskom's interest to have us operating under this type of hardship because it may lead to us either - it may have a result where the security of coal will be threatened or where we cannot supply coal, or whatever.

I think that is part of what was being said and I think this, this is the chance for you to say yes, I understand that, or no, I do not understand that or that has
 10 no validity because of A, B, C, D deal with that upfront.

MR MOLEFE: No, I think the reasoning was flawed.

CHAIRPERSON: Ja.

MR MOLEFE: Because it looked at the problem at that point. It looked at the problem at that point and not the genesis of the problem. So, I had by that time, I had a full picture of what was happening. As I said earlier, I had even been to the other side in Transnet and I have seen what, how Optimum operated and they have a flaw in the, they have a flaw in their conclusion was genesis, but it was
 20 not, it would not have been – you see Chairperson if we would have done that we would be encouraging very badly. If we had let Optimum get away with this.

CHAIRPERSON: Yes, no, but I do not think that your response in saying flaw at the point or that proposition was with the genesis of the problem because you could have a

genesis of the problem where you could put them at fault, to say they did not do due diligence, or they miscalculated by doing A, B, C or not doing A, B, C, D.

But you might be faced with a certain reality at a certain stage, and I think the question is, what do you say about whether, irrespective of the genesis, whether continuing to insist on the price that was in the agreement, would lead to a situation where the security of coal was threatened because I would imagine that if you were
 10 persuaded that Eskom's interest would be jeopardised by insisting on the price that was in the agreement.

Even if you said they were at fault for not doing due diligence in the first place, you would say, look, let us look at the reality as it is now. How do we protect Eskom's interests and maybe you would conclude, we protect Eskom's interest by not agreeing to 400 or whatever, but maybe to a little more. So that is what I want you to address to say, was it true that insisting on this price that was on the on the agreement could pose a threat to coal
 20 security for Eskom?

MR MOLEFE: Chairperson, South Africa has 400 years coal in the country. There is no shortage of coal what they may be a shortage of, is human being extracted coal and feed as of supplier's coal. There is actually not even a reason why coal should be expensive for Eskom. We just

have a lot of coal that God has given us, God given coal “mahala” that is underground.

Now what is happening is that people instil fear into Eskom especially with load shedding, and so on and say, we do not have enough coal, there is going to be a coal lift, the shortage of coal. If you do not do this, you are going to have dire consequences.

What was happening at the time, at the same time as this was happening, and Mr Bester mentions it but
10 mentions it in a very wrong way and misquotes it. At the same time, as we were having this problem in Medupi, Eskom at the beginning of the building Medupi type of pay agreements and those type of pay agreements were supposed to commence, I cannot remember if it was 2014 or 2015 and Medupi was delayed.

There were penalties in the billions that were supposed to be paid. Now, in that instance, Eskom could not afford those penalties. Nobody was coming, was saying those people were not prepared to negotiate and
20 say, guys, we have a delay in the delivery of Medupi, please relax the penalties. They were not even prepared to negotiate.

They were playing hardball in Medupi, what I then said at the time was can we investigate. If it is possible for us to pay the penalties, or to pay for the coal at Medupi

and get it delivered because I think Exxaro, I may have the parties wrong but the parties that were involved in this were banking on the fact that they were going to get the penalties for free because they do not have too mine, they do not have to they just get paid because they have a contract there.

Let them deliver the coal, let us investigate if it will be possible for the coal to be railed on there, somewhere near Hendrina and be dumped there and then we can carry
10 it into Hendrina by a truck or whatever, but let it be railed from there and be taken to Hendrina if these people are threatening to close down Optimum mine.

What Mr Bester says I said they must build a railway line, I did not I said, let us investigate the possible, transport that coal that we are going to pay for without using. So the investigation that involves taking the quality of the coal to see if it was possible to use it but I was quite prepared Chairperson, to look at options, alternative options to just simply increasing the price for people that
20 had not done due diligence that had relied on political influence to make sure that that agreement eventually goes fine. It was principle, Chairperson it was a matter of principle.

CHAIRPERSON: I do not - what comes across from what you are saying may not be what you intend to come across,

that because of the genesis of the problem you might have even that may be more weight than the question of okay, is there a threat to coal supply security for Eskom if we continue to insist on the price that is in agreement.

Because as I said, my own understanding, and you must tell me if yours is different is that if what was driving, and if what was paramount to you was the interests of Eskom. Then even if they were 100% to blame for the genesis of the problem, if insisting on the price that was in
10 the agreement would pose a serious threat to coal security for Eskom.

What would be called for, would be for you to adopt an approach to this issue that could see some increase, maybe not necessarily the one they wanted, but some increase in order to mitigate the threat to coal security because in the end, your primary concern is the interests of Eskom. What do you say to that?

MR MOLEFE: A threat?

CHAIRPERSON: Yes, in other words, I want to establish
20 whether insisting on this price that was in the agreement could lead to a situation where there was a threat to coal security for Eskom, or what was in place to deal with such a threat if it arose?

MR MOLEFE: The threat of coal supply security Chairperson was the Boogey Man.

CHAIRPERSON: Was the?

MR MOLEFE: The Boogey Man it was something that I used to put fear into us. It was a cheap negotiating strategy that you will not get coal. As I said, when I opened, when I started talking now, I said, we have 400 years of coal in the ground. We do not have a coal supply security problem.

In fact, the problem has been that we have allowed, the legislative framework has allowed a few white companies
10 to exploit our coal and have excluded the majority of South Africans in that invest. That is coal that is under the ground that was put by God, so we have coal so that was always my point of departure. Anybody who says coal supply security, I say we have 400 years of coal. The question is how do we get to Hendrina? So it is not like there is a shortage of coal.

CHAIRPERSON: H'm.

MR MOLEFE: No Chairperson if you said to me that if these guys do not give us coal there would be no coal then I would
20 be afraid. But if Hendrina closes down the whole of South Africa has coal. We would make a plan. We would have to make a plan and if we cannot make plan we are stupid.

CHAIRPERSON: Yes, no you see I think you starting to address for me what is quite an important issue. You have 400 years of coal underground but how quickly could coal

start to be delivered if OCM stopped? I think that – how much time would – would lapse without you getting coal to replace what OCM was giving Eskom if the situation ended up in them not being able to deliver coal?

MR MOLEFE: Chairperson as the CEO of Eskom allowing yourself to be manipulated by the threat of supply of coal is the same that drives an energy cost up in Eskom and leads to high electricity prices.

CHAIRPERSON: Hm.

10 **MR MOLEFE**: You must never allow that threat or you must never adhere to be phased by that threat.

CHAIRPERSON: Hm.

MR MOLEFE: Mr – Mr Ephron Glasenberg.

CHAIRPERSON: Mr Ephron

MR MOLEFE: No his boss. Mr...

ADV SELEKA SC: Glasenberg.

CHAIRPERSON: Glasenberg.

20 **MR MOLEFE**: Glasenberg came to Eskom and said to me Mr Molefe we do not agree to this agreement. There will be no supply of coal and you will have more load shedding. I said to him, Mr Glasenberg if you are putting a gun to my head I am going to ask you to shoot me. And that meeting ended on that note.

And a few weeks later I do not know if it was coincidence or what it was Mr Ramatlhodi suspended their

licence. He suspended their licence meaning they will not supply us with coal.

When I put one plus one together I thought how can Mr Ramatlhodi suspend their licence after they have just threatened me that they will stop the supply of coal.

Anyway we went to talk to him, he put it back and they continued operating. And then they put the company in business rescue.

Now the thing about business rescue is that all
10 agreements can be suspended. That is the first thing that the business rescue practitioners that they appointed did within 24 hours they told us that if we do not agree to the agreement because their business rescue plan is increasing the price. If we do not agree to the agreement that the – the price will increase they will have to stop supply to Hendrina. And they did. And we did not back off.

CHAIRPERSON: It did stop.

MR MOLEFE: We did not back off... - sorry.

CHAIRPERSON: The – are you saying they did stop
20 supplying?

MR MOLEFE: The did stop supply of coal.

CHAIRPERSON: Yes.

MR MOLEFE: They did stop the supply of coal for a month.

CHAIRPERSON: Yes.

MR MOLEFE: We scavenged for coal. We found coal.

Hendrina Power Station did not close down. It happened just after we had stopped load shedding on the 8th of August 2015 just after – we – here we are celebrating that we now have the operations right and then they stopped the supply of coal to Hendrina – the business rescue practitioners.

What were we supposed to do panic – what we supposed to do have more load shedding as Glasenberg had threatened me. But we did not. We made a plan.

For a month we supplied Hendrina with coal from
10 other small mainly BEE miners around the area until in September Mr Ephron called and said Mr Molefe can we talk again?

I said yes we can talk. He said I have just spoken to my superiors we are prepared to resume supplying you at R150.00.

ADV SELEKA SC: At 150.

CHAIRPERSON: What was the contractual price again – R100 or R150?

MR MOLEFE: 150.

20 **CHAIRPERSON:** 150 so –

MR MOLEFE: About 150.

ADV SELEKA SC: 154.

CHAIRPERSON: Oh ja.

MR MOLEFE: Ja 153/154.

ADV SELEKA SC: Ja.

CHAIRPERSON: Yes. So he was saying they were prepared to resume supplying coal at the contractual price?

MR MOLEFE: Yes.

CHAIRPERSON: Ja okay.

MR MOLEFE: At the contractual price – they did. They were prepared to supply us at the contractual price except Chairperson now they threw a curve ball. They say they are selling the mine to the Gupta's.

CHAIRPERSON: They?

10 **MR MOLEFE:** We are selling the mine to the Gupta's.

CHAIRPERSON: They tell you that?

MR MOLEFE: Well they announced that.

CHAIRPERSON: They were ...

MR MOLEFE: Ja they...

CHAIRPERSON: They announced publicly?

MR MOLEFE: They were engaged in negotiations they talked to the Gupta's and they sold the mine to them.

CHAIRPERSON: Okay.

20 **MR MOLEFE:** And this I said in November 2015 that – that was a master stroke.

CHAIRPERSON: That was?

MR MOLEFE: A master stroke because they were so angry with us they were now going to have a campaign to taint us as Gupta people – to taint us as Gupta people. 00:06:11 the Public Protector came up with the report. She did not

interview us. She interviewed Mr Ephron. Even Mr Ephron went to him – to her to complain about us and she instituted that report.

There was a media campaign. Chairperson you will surprised what a R1 billion can do. A media campaign of note to rubbish us as people who are controlled by the Gupta's.

Any scrap of evidence that you were next to the Gupta's at any point because I see in this – in this
10 commission as well there is an allegation that I was in an aeroplane that had the Gupta's in there that was flying to – I was on my way to the BICS meetings and they happened to be in the same aeroplane.

Now things like that emerged ja plus now you are in the aeroplane with them and so on. Now you are forced us to send the mine to the Gupta's. That is what happened Chair. That is why you and I are here today because I refused to sign that 4 – R150 agreement. I refused to be – to be bullied into acting against the interests of Eskom.

20 **CHAIRPERSON:** So – so...

MR MOLEFE: So they sold – they sold the mine to the Gupta's. We did not – I did not make them sell the mine – they sold the mine to the Gupta's of their own accord.

CHAIRPERSON: So are you saying you saw their statements that they would stop supplying coal to Eskom if

you did not increase the price and that therefore Eskom would suffer because there would be no coal.

MR MOLEFE: Yes.

CHAIRPERSON: You saw it as a negotiating tactic to try and put pressure.

MR MOLEFE: Yes.

CHAIRPERSON: On Eskom.

MR MOLEFE: Yes.

10 **CHAIRPERSON:** You were prepared to see whether they would carry out their plans.

MR MOLEFE: Yes.

CHAIRPERSON: And to the extent that they carried out for a month or so.

MR MOLEFE: Yes.

CHAIRPERSON: You made alternative plans.

MR MOLEFE: Yes.

CHAIRPERSON: To get coal.

MR MOLEFE: Yes.

CHAIRPERSON: Until they came back to you.

20 **MR MOLEFE:** Yes.

CHAIRPERSON: And said they were prepared to resume supplying coal.

MR MOLEFE: Yes.

CHAIRPERSON: On the contractual price.

MR MOLEFE: Until they came back with their tail between

their legs.

CHAIRPERSON: Hm.

MR MOLEFE: Because Chairperson that month and I knew that was a critical – critical month in the negotiations. Whoever – whoever battered an eyelid first – it was like poker – whoever battered the eyelid first loses. So if I had gone back to them and said sorry guys we really need the coal we would have paid even more. Out of interest Chairperson Eskom is paying about R900.00 from that
10 R150.00. How did that happen?

CHAIRPERSON: Hm. In respect of which mine?

MR MOLEFE: It is paying Glencore R900.00 for coal on average.

CHAIRPERSON: On other mines?

MR MOLEFE: Ja other mines – I am not sure if – I am not sure what is happening to Hendrina I have not followed it up. But I was reading somewhere that the – the – things we left at the cost of primary energy has gone through the roof. They have gone through the roof Chairperson – they are
20 unsustainable. Costs of primary energy before I arrived at Eskom were about 17% per annum increase on average for about ten years. During the two years that I was there the increase in the primary energy costs was 3%.

CHAIRPERSON: Was?

MR MOLEFE: 3% below inflation. It is because we did not

agree to agreements like this one.

CHAIRPERSON: So you are saying they threatened us with stopping the supply of coal.

MR MOLEFE: Yes.

CHAIRPERSON: In order to try and push us to agree to this high increase.

MR MOLEFE: Yes.

CHAIRPERSON: We were not prepared – we refused and we were prepared – we had a plan what we would do if they
10 carried out their threats.

MR MOLEFE: Yes.

CHAIRPERSON: And they did carry it out and we implemented our plan for that month.

MR MOLEFE: And we did not have load shedding.

CHAIRPERSON: And we are not the ones who went to them to say please can you stop your strike as it were.

MR MOLEFE: Yes.

CHAIRPERSON: They are the ones who came back to us and said we are prepared to resume on the old terms of the
20 agreement.

MR MOLEFE: The phone call came to me as I was boarding an aeroplane to Cape Town at about 5 or 6 in the evening. The phone rang and it was Mr Ephron and he said he would like to talk about the – the price and the resumption of the coal supply. And I said to him Mr Ephron I am getting into a

plane in fact the hostess was telling me to stop 00:12:14. But there is nothing to talk to until we start resuming operations tomorrow morning – by tomorrow morning eight o'clock. If you resume operations tomorrow morning by eight o'clock at R150.00 maybe we can talk.

And then when I got to the other side or maybe the following morning he called and he said Mr Molefe I am sorry to disappoint you we will not resume operations by eight o'clock but give us another 24 hours and we will have
10 resumed operations. I said that is fine at R150.00 – at R150.00 fine then we can talk there.

That was negotiations.

CHAIRPERSON: Ja. Mr Seleka.

ADV SELEKA SC: Thank you Chair. A couple of things Mr Molefe to – to place before you.

CHAIRPERSON: So – so just before I just go back to this. Part you are saying is in negotiations you have your own – each party has got its own tact.

MR MOLEFE: Yes.

20 **CHAIRPERSON:** How to handle negotiations and some of them might look like you are taking too much of a risk.

MR MOLEFE: Yes.

CHAIRPERSON: But it is a judgment call that you have to make.

MR MOLEFE: Yes.

CHAIRPERSON: But if you take risks and you have an appropriate plan what you will do if the risk materialises.

MR MOLEFE: Yes.

CHAIRPERSON: Then it is okay and that is what you say you did.

MR MOLEFE: Yes. In the literature Chairperson when I was trained in negotiations it is called BATNA – Best Alternative to a Negotiated Agreement and so when you are in negotiations what you assess is that if we do not come to an
10 agreement what will happen? Will it be worst for the opponent or worse for me? We have to assess that and see that if your BATNA alternative to a negotiated agreement is better than your opponents outcome then you can go all the way because they cannot afford to negotiate the absence of an agreement. Ja there is a tactic to arrive but hopefully you arrive at the middle ground before.

CHAIRPERSON: Ja.

MR MOLEFE: But to be threatened by something that does not exist you cannot threaten us with coal supply with 400
20 years of coal underground. You cannot do that.

CHAIRPERSON: Hm.

ADV SELEKA SC: Yes.

CHAIRPERSON: Mr Seleka.

ADV SELEKA SC: A couple of things to put before – to you Mr Molefe. In regard to the stoppage of coal supply I have

got a number of them – I am not taking them in any particular order. In order to the stoppage of coal supply.

MR MOLEFE: Ja.

ADV SELEKA SC: The coal supply was stopped on the 20th of August 2015 – 20 August 2015 that is when you got a letter from the business rescue practitioners and they said they cannot supply anymore and they gave you a proposal for an interim arrangement. That coal supply only lived for thirteen days because the meeting you had with them was on
10 the 3rd of September 2015. So it was not for a month – their stoppage was not for a month. And they saying Mr Ephron in his affidavit the meeting was actually requested by Eskom.

MR MOLEFE: By?

ADV SELEKA SC: By Eskom and then he took the offer called Mr Molefe, Mr Koko, Mr Molefe that the two of you met with them. But you actually wanted to meet him with the business rescue practitioners but when the business rescue practitioners were there you told them not to be part of the meeting you will only speak to Mr Ephron. So I am just
20 putting to you Mr Ephron's version.

So the stoppage was thirteen days not a month and the standard stock days at Hendrina was 35 days. So you could operate within thirteen days with a stock pile of 35 days because then supply was reinstated on the 3rd of September after the meeting where you agreed to an interim

arrangement. Your comment on that?

MR MOLEFE: Chairperson my recollection is not that we asked for a meeting. Mr Ephron did call [?] they are prepared to resume operations the following day.

CHAIRPERSON: Sorry.

MR MOLEFE: At R150.00 and I said to him eight o'clock the following morning and later on he said 24 hours. It may well be maybe that there are officials that had been making contact panicking during this period and making contact with
10 the – the business rescue practitioners and Optimum that I did not know about. But I was certainly not involved in going to cap in hand to Optimum to ask for coal – I did not do that.

ADV SELEKA SC: Then secondly is – I mean following that meeting according to Mr Ephron the interim arrangement is in place in terms of which OCM will supply coal to Eskom at the Hendrina Power Station.

MR MOLEFE: Yes.

ADV SELEKA SC: And that is the interim arrangement I said lived until 29 July 2016. But here on the hardship clause the
20 hardship clause Mr Ephron says:

“In early 2014 Eskom approached OCM to see if it would agree to suspend the hardship arbitration.”

So remember 2013 they invoked their hardship. He says early 20 – 2013 invoke – 2014 you – Eskom come to them

and say suspend a hardship arbitration because they have taken the matter to arbitration.

MR MOLEFE: 2014?

ADV SELEKA SC: 2014 – Early 2014. Allow for a period of negotiations regarding the hardship clause.

CHAIRPERSON: Well he was not there in 2014.

MR MOLEFE: Yes.

ADV SELEKA SC: Yes, no I accept that. I am just telling you because you were saying why did they not pursue the
10 hardship clause and the answer seems to be here. So Eskom says suspend the hardship arbitration to allow for a period of negotiations regarding the hardship claim and other decisions. OCM agreed and on 23 May 2014 they conclude their cooperation agreement which providing a process to further negotiate potential amendments and an extension of the CS – CSA as well as possible settlement of disputes in relation to hardship and penalties the hardship arbitration was suspended and certain interim arrangements were put in place to ameliorate the difficulties experienced by OCM. The
20 parties also suspended the enforcement of their respective rights on account of alleged breaches of the CSA.

So we know that this is the cooperation agreement which ultimately is...

MR MOLEFE: In 2014?

ADV SELEKA SC: Ja it is concluded 2014 suspends the

hardship.

MR MOLEFE: But the person – the person who signed the cooperation agreement Mr Seleka did he have authority to do so?

ADV SELEKA SC: I will come to that – all I am saying to you is this is how the hardship clause was dealt with. The parties agreed to suspend his enforcement entering into the cooperation agreement. Number 3.

MR MOLEFE: If I –

10 **ADV SELEKA SC:** Okay yes please.

MR MOLEFE: Alright the only way of dealing with the hardship clause would have been to go for arbitration.

ADV SELEKA SC: Yes that is why I am reading to you what Mr Ephron is saying. They had invoked that.

MR MOLEFE: What Mr Ephron said?

ADV SELEKA SC: Yes. They had invoked that and the parties agreed to suspend it entering into a cooperation agreement to – to negotiate a new agreement. So they did not sit on their loins and let the situation just run its course.

20 And with the affidavit that has been referred to by the Chairperson of Mr Ephron he explains that the hardship is intended for the very purpose where circumstances change that a party can then invoke a hardship clause in a long term agreement to engage in negotiations for better or reasonable terms between the parties. I am just giving you the version.

I am not saying this is what I am saying – my view. Ja so you can invoke in the long term agreement because you do not know what is going to happen ten or twenty years down the line. Circumstances change unforeseeable you invoke the hardship; you then start negotiations because that is what the hardship clause triggers. It trigger negotiations to propose amendments to an existing agreement. So that is the explanation.

MR MOLEFE: If I may comment?

10 **ADV SELEKA SC:** Yes.

MR MOLEFE: It is the old story of the lion and the hunter. So it depends on who you believe about what happened at the hunt. Do you believe the lion or do you believe the hunter? That is his version (Adv Seleka speaking over Mr Molefe).

ADV SELEKA SC: So which one is the lion?

MR MOLEFE: I do not know I am just making an example.

ADV SELEKA SC: Okay.

MR MOLEFE: That is his version and I have got my version
20 and I will stick to my version.

ADV SELEKA SC: Yes. Except that his version now I do not think it is a version as such as much as his a reference to the hardship clause to tell you when it gets to be triggered and what it triggers as a result of it being invoked. The parties then start to negotiate and this is what you found

happening at Eskom board when you arrived.

MR MOLEFE: Yes Mr Seleka in terms of the Coal Supply Agreement.

ADV SELEKA SC: Yes.

MR MOLEFE: The only thing that the hardship triggered was arbitration not the fancy things that they started engaging in.

ADV SELEKA SC: The negotiations?

MR MOLEFE: Yes, no.

CHAIRPERSON: Well maybe Mr Seleka I should say is – is
10 Mr Ephron ...

ADV SELEKA SC: Mr Molefe needs to either pull the microphone closer to him.

MR MOLEFE: Oh okay.

ADV SELEKA SC: Because the sound system does not pick him up.

MR MOLEFE: Sorry.

CHAIRPERSON: Ja I think just speak closer to it.

MR MOLEFE: Yes.

CHAIRPERSON: Is Mr Ephron referring to the hardship
20 clause to explain why they did not do due diligence? In other words is he – is he saying that we did not do due diligence is not a problem because there is this clause? We could always ask for negotiations and if we under – suffer hardship we could invoke this clause? Is that in part at least what he is saying? You are not sure?

ADV SELEKA SC: Ja I do not want to put it at that level
Chair.

CHAIRPERSON: Ja.

ADV SELEKA SC: I know from his affidavit the direct reasons specific to why they did not do due diligence are centred around what he says was publicly available information at the time and then not – or trying to avoid alerting third parties that they were about to take over OCM.

CHAIRPERSON: Hm

10 **ADV SELEKA SC:** Ja so publicly available information and understood that it was competing with various other potential purchasers to acquire the control of OCH and therefore took the strategic decision to rely on that publicly available information and effect its acquisition to a series of transactions with OCH on the stock exchange without involvement of OCH. Ja.

CHAIRPERSON: So I am trying to understand the significance of his point about the purpose of invoking the hardship.

20 **ADV SELEKA SC:** The hardship.

CHAIRPERSON: The hardship clause particularly the clause as I understand the position. On this particular occasion they did not pursue it up to the end namely arbitration. As I understand the position.

ADV SELEKA SC: Ja Chair just before you Mr Molefe. As

he explains in his affidavit and so it does not answer your main question but your ancillary question. The pursuit of the hardship clause was made. It was inter-routed by the parties agreeing amicably to suspend it and enter into a cooperation agreement. Then this in May 2014. By the time of the termination of the cooperation agreement in June 2015 there was only over a period of over a month before OCM went into business rescue. Then the business rescue practitioners take control.

10 **CHAIRPERSON:** Hm.

ADV SELEKA SC: And that is when they start engaging with Eskom. So what whether in that process they could as OCM still pursue the arbitration they would I think have had to seek the consent of the – well the business rescue practitioners could have had to run with it.

CHAIRPERSON: Well so I am trying to understand the point.

ADV SELEKA SC: Yes.

CHAIRPERSON: Because they are aggrieved by the fact that the price – they are aggrieved by the price that is in the
 20 contract. They want it to be increased. Eskom says no. They have the option of pursuing arbitration under the hardship clause. They initiated that. Then on what you have told me by agreement between the parties this either terminated or suspended.

ADV SELEKA SC: Suspended.

CHAIRPERSON: Pending the outcome of the efforts that would be made under the cooperation agreement.

ADV SELEKA SC: Correct.

CHAIRPERSON: When Eskom terminates the cooperation agreement obviously they must go back to using the hardship clause and pursuing arbitration if they still feel aggrieved.

ADV SELEKA SC: Yes.

CHAIRPERSON: And they feel they have a case to put
10 before the arbitrator. So – so that is what I am trying to follow.

ADV SELEKA SC: Ja.

CHAIRPERSON: And after the termination of the cooperation agreement they did not pursue the arbitration as I understand it

ADV SELEKA SC: My...

CHAIRPERSON: Of course you say in two months' time they wanted to (speaking over one another).

ADV SELEKA SC: My recon... - sorry Chair. My recollection
20 is that they did but I will have to check the specific paragraphs that matters then went back to arbitration after the termination because then Eskom also referred to the penalty claim to arbitration. I think the two were then consolidated. Mr Molefe, you will remind us ...[intervenes]

CHAIRPERSON: But do they blame Eskom about anything

concerning arbitration or arbitration not taking place? So in other words, what is the importance, significance of whether they followed or did not follow or pursue up to the end the route of arbitration as far as they are concerned.

Because as I understand it, nothing prevented them from pursuing arbitration even when there was an agreement to suspend, they did not have to agree to suspend the hardship clause or the route of arbitration if they did not want to and they wanted an arbitration award
10 to be issued in their favour.

So I am trying to understand what their point is about the arbitration route.

ADV SELEKA SC: No, they dumped a portion in blame on Eskom in regard to what that – I do not want to say the apparent figure to pursue the hardship clause to the very end. I think what, what one sees from the evidence Chair is, that the situation gets overtaken by events.

CHAIRPERSON: Ja.

ADV SELEKA SC: Because this arbitration is ultimately
20 pursued beyond 2015. It is then 2016 and 2017 gets to the settled on the penalties. By that – by December 2015, there is an agreement to by chairs in OCH to take over OCH.

But I will have to see the passage regarding what happens immediately after the termination letter from

Mr Molefe which I have found otherwise.

CHAIRPERSON: But remember the big picture.

ADV SELEKA SC: Yes.

CHAIRPERSON: As you do that, the big picture is, I think they suggest in their evidence that Eskom was being, I think, unfair on them, to say the least, by insisting on this price that was in the contract.

Mr Molefe has given reasons why they insisted on that contract price. He said they made threat of
10 stopping the supply of coal. He had said that was negotiated but he understood it.

He put a plan in place. He says, subject to what I think you said, it might not have been a month but he says he had a plan to deal with that threat if it materialised.

ADV SELEKA SC: Yes.

CHAIRPERSON: So it is important to keep the big picture in terms of what we are trying to establish.

ADV SELEKA SC: Yes.

20 **CHAIRPERSON:** H'm.

ADV SELEKA SC: Yes.

CHAIRPERSON: I think Mr Molefe has been dying to say something ...[intervenes]

ADV SELEKA SC: Yes.

MR MOLEFE: Chairperson, there is something that was

mentioned by Mr Seleka that I think is quite fundamental and goes to the bona fides of Optimum. He says that they did not do due diligence because they did not – they were afraid of the ...[intervenes]

CHAIRPERSON: Third parties... to know.

MR MOLEFE: ...confidentiality.

CHAIRPERSON: H'm.

MR MOLEFE: Ja.

CHAIRPERSON: H'm.

10 **MR MOLEFE:** Now in due diligence, the first thing that gets filed is a confidentiality agreement, a very strict confidentiality agreement.

CHAIRPERSON: H'm, h'm.

MR MOLEFE: The information gets put into what they call data rooms. I have in my life, Chairperson, done a lot of transactions with very sensitive information. Confidentiality is not an excuse not to do... in the first place.

20 Secondly, the two things that sunk them was the international coal price. International coal price. This has got nothing to do with confidentiality. They were open to international contract... number one.

Number two, it was R 150.00 that they know was in place. It was not a secret. It was in the CSA. They could have told Eskom. It would have told them that you

have a price of R 150 until 2018. They decided to pursue that transaction despite knowing that.

And by the way Chairperson, the R 150 itself was the result of arbitration with the previous audit. So Eskom had gone to arbitration before on this very agreement. The reason ...[intervenes]

CHAIRPERSON: So ...[intervenes]

MR MOLEFE: They were not going to arbitration. It means that they were – their bet was on something
10 extraordinary.

CHAIRPERSON: So part of the point you are making is that OCM should not have been crying, like they were crying about being treated unfairly by Eskom, because in terms of the coal supply agreement that was in place there was a hardship clause, which they could use if they felt that Eskom was treating them harshly.

MR MOLEFE: Yes.

CHAIRPERSON: And they could take it up to arbitration and you say they had done so before and there was this
20 150 was as a result of arbitration and they chose not to pursue the arbitration clause to its end.

MR MOLEFE: Ja, to the point where I even felt like they were treating us like little boys that needed to be taught a lesson.

CHAIRPERSON: H'm.

MR MOLEFE: That would not follow through on our rights to the agreement, they had a sense of impediment Chairperson, they had a sense of impediment. There was proper mechanisms to the agreement ...[intervenes]

CHAIRPERSON: H'm, and you say if they felt that they had a good case to put before the arbitrator they had the opportunity to do so.

MR MOLEFE: Yes.

CHAIRPERSON: Why didn't they do that.

10 **MR MOLEFE:** Yes.

CHAIRPERSON: Because the arbitrator would have had power to increase the price if they made a proper case.

MR MOLEFE: Yes, yes.

CHAIRPERSON: H'm, thank you. We are two, three minutes before one o'clock.

ADV SELEKA SC: Ja, let me deal with this one Chairperson. Then the notices by the DMR, those notices were before OCM went into business rescue because OCM – well actually they coincide with the business rescue, on
20 the 4th of August 2015, these are notices in regard to OCM's alleged failure to follow a proper retrenchment process. These are different from notices of November 2015, which we will come to later, because with the notices of August, 4 August 2015 Mr Ramathodi and Mr Ramoncha say you did not meet with them. Those notices were then

lifted on the 7th of August 2015.

MR MOLEFE: Ja, there were two meetings, when those notices were given to OCM ...[intervenes]

CHAIRPERSON: Remember to come closer to the mic.

MR MOLEFE: When those notices were – those notices were given to OCM shortly after my meeting with Mr Glasenberg where I said he is putting it down to my ... and I remember distinctly Chairperson thinking how did they get to Mr Ramathodi who is now executing their plan to stop
10 supply. I did call Mr Ramathodi at a meeting and I explained to him that please withdraw those notices because they are threatening the security of supply, we are in a very delicate position, and shortly thereafter they were withdrawn.

I agree, there was another meeting later, there was another meeting later, but what is strange about the allegations of Mr Ramathodi was that we were saying in that meeting that he should withdraw Glencore's license. We could not have said he must withdraw Glencore's
20 license, when he had already done so previously, he had already done so previously of his own accord for different reasons, and I specifically persuaded him don't do this, because you are complicating everything, and immediately after, you can check the dates, immediately after those notices were withdrawn and OCM was prepared to – was

allowed to operate again they then went into business rescue, and the day after business rescue was announced they stopped supply.

Their objective was to stop the supply of coal.

CHAIRPERSON: But Mr Molefe to the extent that you are saying to me you suspected that there may have been collusion between Minister Ramatlhodi and OCM with regard to the issuing of those notices, why would OCM have needed to talk to him in order to stop the coal
10 because they could stop coal without his assistance?

MR MOLEFE: No, no, no Chairperson I am not saying that there was collusion.

CHAIRPERSON: What are you saying?

MR MOLEFE: I am saying well it was coincidental, immediately after this threat was made the notices were issued by DMR. What I am saying is that it did cross my mind that they might have made contact with Mr Ramatlhodi, I do not have evidence of that in fact. In fact it could be purely coincidental.

20 **CHAIRPERSON:** Yes. But you accept ...[intervenes]

MR MOLEFE: But it happened at a very interesting time, which is just after Mr Glasenberg had put the proverbial gun to my head and I ...[intervenes]

CHAIRPERSON: H'm, but you accept that to stop coal they didn't need his assistance, OCM?

MR MOLEFE: No, no Chairperson, what happened is – no they needed – no they needed an excuse because when Mr Glasenberg said we will stop the supply of coal, CDH can tell you, I immediately gave them instructions to interdict the stoppage of the supply of coal, right, because we have a contractual agreement, they were obliged to continue supplying us at 150, so there had to be an extraordinary reason for the interdict not to succeed.

10 So suddenly it is the DMR that says because of retrenchments we are taking your license away, so you cannot interdict us, because they will say but it is not us, the DMR.

Then that gets fixed and then coal supply is restored, then they go into business rescue and you cannot interdict business rescue, so the only thing legally that we could do when they stopped, if Mr Glasenberg was to carry out his threat of stopping supply for us to interdict, but business rescue and DMR could not be interdicted.

CHAIRPERSON: But leaving out DMR and the issue of
20 business rescue ordinarily if they wanted to stop supplying coal they would not need anybody's assistance, ordinarily is that correct?

MR MOLEFE: No, we would interdict them.

CHAIRPERSON: No, no, no if you don't interdict them, if they don't go to anybody, if they want to stop they could

just stop it.

MR MOLEFE: Ja, they could stop it ...[intervenes]

CHAIRPERSON: Ja, you would have your remedies.

MR MOLEFE: We would come running to the courts Chair to say we have an agreement with these people and we would sue them.

CHAIRPERSON: Yes, yes, ja, but practically they could stop it and fight you in court if they want to.

MR MOLEFE: Ja, they could stop it and fight with us in
10 court.

CHAIRPERSON: Yes, ja.

MR MOLEFE: But you see that is I was getting ready for that battle.

CHAIRPERSON: Yes.

MR MOLEFE: Ja, of interdicting them, but then they got business rescue.

CHAIRPERSON: I think they ...[indistinct] you [laughing]

MR MOLEFE: Ja, it was hard Chairperson, it was very hard. [laughing]

20 **CHAIRPERSON**: Okay, alright I think we must take the lunch break, I think there was ...[intervenes]

ADV SELEKA SC: Chair can I clarify something?

CHAIRPERSON: Ja, okay.

ADV SELEKA SC: It goes on the facts here, on the facts Mr Molefe, the notices are – the August notices are issued

on the 4th of August, by that time there is no stoppage of coal supply to Eskom, they had not stopped. The DMR notices in regard to the retrenchment process are issued on the 4th and then lifted on the 7th of August. The business rescue practitioners only notify you on the 20th of August that they are going to stop.

MR MOLEFE: Yes.

ADV SELEKA SC: So their stoppage had nothing to – and even assisted by the DMR.

10 **MR MOLEFE**: The effect of the notices would eventually lead to a ...[indistinct – dropping voice]

ADV SELEKA SC: Yes, but supply didn't stop.

MR MOLEFE: No it didn't stop, I never said it stopped, but the conditions were created to stop it.

ADV SELEKA SC: Yes.

CHAIRPERSON: But I think part of the point Mr Seleka is making is this, because I understood you to be saying in your evidence that notices came after Mr Glasenberg had spoken to you.

20 **MR MOLEFE**: Yes.

CHAIRPERSON: I seem to understand that he is saying no, no, no, the notices came first.

MR MOLEFE: No, no.

CHAIRPERSON: Because – or at least the business practitioners only came much later.

ADV SELEKA SC: Chair you may well be correct, Mr Molefe hasn't given us a date when he has met with Mr Glasenberg.

CHAIRPERSON: Ja, yes.

ADV SELEKA SC: The meeting we have on record is of the 3rd of September, that is way after those notices of August.

CHAIRPERSON: Yes, yes.

ADV SELEKA SC: But then that is where they, the two
10 parties capitulate and they agree to enter into an agreement arrangement, from then going forward.

MR MOLEFE: Mr Glasenberg was not in the meeting of September.

ADV SELEKA SC: Yes, I am not saying he was, all I am saying is ...[intervenes]

MR MOLEFE: The meeting that Mr Glasenberg was in was before the DMR notices, before business rescue.

CHAIRPERSON: Do you remember the date?

MR MOLEFE: It was sometime in July.

20 **CHAIRPERSON:** Sometime in July?

MR MOLEFE: I can't remember the date.

CHAIRPERSON: Yes, but ...[intervenes]

MR MOLEFE: There were people at that meeting, in fact Mr Ephron, in Mr Ephron's affidavit he may refer to that meeting, I will find it during lunch time Chairperson. Even

my affidavit I may refer to the day on which Mr Glasenberg from Mr Ephron's evidence.

CHAIRPERSON: But you – please do check during the lunch, the date during the lunch break.

MR MOLEFE: Yes, yes.

CHAIRPERSON: But you might not need to spend too much time on this issue, because you said you were not even suspecting but something crossed your mind about the two – the notices and the facts, so that ...[intervenes]

10 **MR MOLEFE:** You must appreciate Chair that under the circumstances you also become very paranoid, so when two things happen.

CHAIRPERSON: Ja.

MR MOLEFE: You start joining dots that don't exist, like people join dots.

CHAIRPERSON: Yes, ja, ja, no that is right, so when we come back maybe Mr Molefe can just indicate what date that meeting was but we don't spend too much time on it, we move on.

20 **ADV SELEKA SC:** Ja, we will move on Chair.

CHAIRPERSON: Okay, alright let us take the lunch break, it is now eight minutes past one, we will resume at ten past two.

ADV SELEKA SC: Thank you Chair.

CHAIRPERSON: We adjourn.

REGISTRAR: All rise.

INQUIRY ADJOURNS

INQUIRY RESUMES

CHAIRPERSON: Okay let us continue.

ADV SELEKA SC: Thank you Chairperson. We are ready to proceed. Chair, we found two aspects which arose in our discussion prior to the adjournment. One is the date of the meeting that Mr Molefe is referring to. The other is what happened with the hardship arbitration after the
10 termination. So both of that are in Mr Molefe's... Let us use your files Mr Molefe. Which is Eskom Bundle 17 on page 134.

CHAIRPERSON: What are we going to get there?

ADV SELEKA SC: It will be – there are two aspects. One is the date of the meeting.

CHAIRPERSON: Ja?

ADV SELEKA SC: And the other is ...[intervenes]

CHAIRPERSON: But just say what the date is. Is it before or after the 4th of August?

20 **ADV SELEKA SC:** The date is the 11th of June 2015.

CHAIRPERSON: Okay.

ADV SELEKA SC: Yes.

CHAIRPERSON: Is that the meeting with Mr Glasenberg?

ADV SELEKA SC: With Mr Glasenberg, yes.

CHAIRPERSON: Okay. Okay the other aspect was what?

ADV SELEKA SC: The other aspect is what happened to the hardship arbitration. Mr Ephron says after the termination by Mr Molefe, the termination process, the hardship arbitration recommenced on 23 June 2015 and the hearing date was scheduled for 16 to 27 May 2016.

CHAIRPERSON: Well, Mr Molefe did say a date had been scheduled ...[intervenes]

ADV SELEKA SC: That is correct.

CHAIRPERSON: ...for hearing but I think the point was,
10 the arbitration was not pursued to its conclusion.

ADV SELEKA SC: Yes, that was the point I think he was seeking to make or making.

CHAIRPERSON: Ja.

ADV SELEKA SC: Otherwise ...[intervenes]

CHAIRPERSON: So I guess the only thing is for Mr Molefe just to confirm whether he accepts that the date of his meeting, your meeting with Mr Glasenberg is the date that he gives.

MR MOLEFE: Yes, indeed Chair it was correct.

20 **CHAIRPERSON:** Alright.

MR MOLEFE: Ja, it was before.

CHAIRPERSON: Before? Way before?

MR MOLEFE: Ja, way, ja.

CHAIRPERSON: Okay. No, that is fine.

ADV SELEKA SC: Ja.

CHAIRPERSON: Okay.

ADV SELEKA SC: So that puts in place the sequence
Mr Chair.

CHAIRPERSON: Ja.

ADV SELEKA SC: Chairperson.

CHAIRPERSON: Ja.

ADV SELEKA SC: Chair, I – I hope ...[intervenes]

CHAIRPERSON: Well, maybe just for the sake of
completion on the point Mr Molefe. I would take it that in
10 the light of that date, your thought about any connection
between Mr Glasenberg said to you and the notices on the
4th of August falls away.

MR MOLEFE: No, I was just saying I did have it
...[intervenes]

CHAIRPERSON: Ja.

MR MOLEFE: It was just a historical thing that happened
at the time. I am not saying I hold the view now.

CHAIRPERSON: Yes. No, no. I accept.

MR MOLEFE: Yes.

20 **CHAIRPERSON:** I wanted to – that we be on the same
page.

MR MOLEFE: Yes.

CHAIRPERSON: Ja. Okay alright. Proceed Mr Seleka.

ADV SELEKA SC: Yes. No, no. That changes the events
quite significantly. But Chair we also got the letter of

Mr Molefe of the 10th of June 2015, terminating the Corporation Agreement and negotiations.

CHAIRPERSON: Oh, okay.

ADV SELEKA SC: Yes.

MR MOLEFE: Yes.

CHAIRPERSON: Yes.

MR MOLEFE: Ja.

ADV SELEKA SC: I think Mr Molefe ...[intervenes]

CHAIRPERSON: Oh, he has... to say it ...[intervenes]

10 **ADV SELEKA SC:** Correct Chair.

CHAIRPERSON: Ja, okay.

ADV SELEKA SC: Chair ...[intervenes]

CHAIRPERSON: You want to say anything about it?

MR MOLEFE: Yes. I must confess that I had completely forgotten that I written or sent a letter like this.

CHAIRPERSON: Okay.

MR MOLEFE: Because of the passage of time.

CHAIRPERSON: Yes.

MR MOLEFE: ...on the 15th of... Sorry, the 15th of June.

20 **CHAIRPERSON:** Yes, okay.

ADV SELEKA SC: Yes.

MR MOLEFE: That I had written that letter.

CHAIRPERSON: Ja.

MR MOLEFE: But because of the passing of time, I had forgotten that I had written a letter like that. But what this

letter would have done in the way that it is structured, it has triggered the ...[intervenes]

CHAIRPERSON: Maybe I should know where the letter is in the bundle so I can have a look at it.

ADV SELEKA SC: It was not incorporated Chairperson.

CHAIRPERSON: Oh, is that so?

ADV SELEKA SC: So we... Yes.

CHAIRPERSON: Okay.

ADV SELEKA SC: But I ...[intervenes]

10 **CHAIRPERSON:** No, that is fine. Registrar... Well, if you do not need it Mr Molefe...[intervenes]

ADV SELEKA SC: Well, I have a copy.

CHAIRPERSON: So I can have a look. Oh, you have a copy?

ADV SELEKA SC: Yes.

CHAIRPERSON: No, then let us have another copy so that Mr Molefe can keep that copy. Was there to be any significance on the content of the letter other than that it was a termination of the Corporation Agreement?

20 **ADV SELEKA SC:** We only wanted to show the termination Chair.

CHAIRPERSON: Oh, okay.

ADV SELEKA SC: I think Mr Molefe thought it might ...[intervenes]

MR MOLEFE: Yes, I think the way that it is, it is sufficient

to trigger the arbitration.

CHAIRPERSON: The arbitration?

MR MOLEFE: Ja.

CHAIRPERSON: Ja, okay.

MR MOLEFE: So this letter, the way it was written, would have triggered arbitration.

CHAIRPERSON: Ja, okay.

MR MOLEFE: And it did, because on the 21st, they applied for the arbitration date.

10 **CHAIRPERSON:** You say the 21st of which month?

MR MOLEFE: Of June, I think.

ADV SELEKA SC: Oh, you mean the ...[intervenes]

MR MOLEFE: Ja, subsequent to this letter there was an application for arbitration.

CHAIRPERSON: Oh, ja by OCM.

MR MOLEFE: Yes.

ADV SELEKA SC: 23 June.

MR MOLEFE: Ja, and then a date was set.

CHAIRPERSON: Ja, ja.

20 **MR MOLEFE:** That is how the ...[intervenes]

CHAIRPERSON: The sequence.

MR MOLEFE: Ja, this is how the whole thing should have unfolded.

ADV SELEKA SC: H'm.

MR MOLEFE: Ja.

ADV SELEKA SC: Yes.

CHAIRPERSON: Okay alright. No, that is fine. Then I do not have to read the contents ...[intervenes]

ADV SELEKA SC: No.

CHAIRPERSON: ...if the only point was, this was the letter of termination?

ADV SELEKA SC: Yes.

CHAIRPERSON: Ja.

ADV SELEKA SC: Yes. So that proves the termination.

10 What I need to emphasise here Chair and Mr Molefe also, is that this is far removed from the notices of the DMR which come in August, the 4th of August 2015.

CHAIRPERSON: I think he has conceded that.

ADV SELEKA SC: Ja.

CHAIRPERSON: Ja.

ADV SELEKA SC: Thank you. Chair, before I move on. May I draw one aspect to your attention unrelated to the matter? I was approached during the lunch adjournment by the legal representatives for Mr Anoj Singh with an email
20 that they have been asked by the secretariat to come before you this afternoon. Apparently, in order to argue the postponement or present the postponement ...[intervenes]

CHAIRPERSON: Have you seen the note that they are talking about? The secretariat would not do that.

ADV SELEKA SC: Ja. I ...[intervenes]

CHAIRPERSON: What does it say?

ADV SELEKA SC: The emails says:

“Dear Mr Mathopo... [which is Mr Singh’s attorney] ... our telecon this morning at 10:04 refers. [This is 2 March 2021]

10 As discussed in our telecon. While the secretariat does not have formal instructions on this matter, we suggest that your counsel appears before the Chairperson at some stage during the proceedings today in Braamfontein...”

But I think the sentence ...[intervenes]

CHAIRPERSON: But it is nonsense.

ADV SELEKA SC: Ja, they ...[intervenes]

CHAIRPERSON: Since when do they have the power to able it to appear before the Commission who is not scheduled to appear?

20 **ADV SELEKA SC:** Ja, but I think that sentence is clear
Chair. They do not have formal instructions.

CHAIRPERSON: No, but why do they say that in the first place?

ADV SELEKA SC: Ja.

CHAIRPERSON: It is not their place. Well, will you arrange for the secretary to talk to me about that letter?

ADV SELEKA SC: Indeed.

CHAIRPERSON: Who is it signed by?

ADV SELEKA SC: Should I mention it here Chair?

CHAIRPERSON: Ja, mention it.

ADV SELEKA SC: It is Ms Shannon van Vuuren.

CHAIRPERSON: ...the secretary of the Commission?

ADV SELEKA SC: She is part of the ...[intervenes]

CHAIRPERSON: No, she is not the secretary.

ADV SELEKA SC: No, she is not. Yes.

10 **CHAIRPERSON:** Will your junior please bring it to the attention of the secretary of the Commission and ask him to investigate how the person who sent that letter came to sent that letter to the attorneys concerned and make those arrangements?

ADV SELEKA SC: Ja.

CHAIRPERSON: Now he caused them to come all the way here for nothing.

ADV SELEKA SC: Ja.

20 **CHAIRPERSON:** It is unacceptable. If your junior could communicate with the secretary of the Commission, Mr Masala, to investigate how this happened? And to talk to me about it sometime after the hearing?

ADV SELEKA SC: Okay Chair.

CHAIRPERSON: Okay.

ADV SELEKA SC: Thank you. Mr Molefe?

MR MOLEFE: Yes.

ADV SELEKA SC: Let us proceed. Mr Molefe, the – let us put this to you so that you can respond to it. While OCM was refused the price increase of R 154.00 to R 442.00, we see subsequent to this in January 2016, that Eskom was not only prepared but in fact did go to conclude short-term agreements with Tegeta for the supply of coal in terms of which Eskom paid more than R 442.00 per ton to Tegeta.

10 The contract in January – for the contract in January, Eskom paid Tegeta R 467.00 per ton. For the contract in February 2016, Eskom paid Tegeta R 490.00 per ton.

But before I give you a chance, let me add, the coal that Tegeta was supplying to Eskom, it was obtaining it from OCM at a price higher than R 442.00. On the first one, it is R 448.00. So they are getting the R 448.00 from OCM selling it at R 467.00 to Eskom.

20 The second contract, they get it at R 467.00 from OCM and sells it to Eskom at R 490.00. Why did Eskom then take that approach?

MR MOLEFE: Which line was this?

ADV SELEKA SC: That was Arnot.

MR MOLEFE: Yes. Firstly Chairperson, on the 1st of September, I underwent a procedure for my

shoulder... and under general anaesthetic. And during that procedure there was a problem, my lungs were flooded with water and they had to induce a coma about...

And subsequent to that, I was not at work for the whole of December after I was released from hospital because my lungs were still quite weak.

ADV SELEKA SC: Come closer to the mic.

MR MOLEFE: Oh. Subsequent to that, my lungs were still quite weak. So I was not at work from the 1st of December
10 until the middle of January. So I was not part of these negotiations for this... But my understanding is that the Arnot contract which was in Exxaro – I think it was Exxaro.

ADV SELEKA SC: Yes.

MR MOLEFE: ...was at R 1 030,00 per ton and it was coming up. The 40-years was expiring in December 2000(?)... [speaker's voice trails off at end of sentences – unclear.]

This we had discussed even before I left. And we were in negotiations with Exxaro to price negotiations
20 for a new contract and we could not agree.

And I think Exxaro thought that we would eventually agree because of the shortage of coal. That is exactly the same argument that: Where would we otherwise get the coal? And there demand was R 1 300,00(sic).

They, in fact, wanted to increase the price. We did not increase the price. We did not increase the price. Instead, when the contract ended in December 2015, we got – I think it was six BEE companies to supply coal to Arnot on a short-term basis until we could either negotiate – finalise negotiations with Arnot or put in place another agreement, a long-term agreement.

One of the six companies was Tegeta but there were five others. Umzimbiti was one. I just do not have
10 the list here but there were six of them that we negotiated with.

So what you are saying Mr Seleka that we were buying coal at R 400,00 was actually better than the R 1 039,00 that we had been paying on the long-term contract. So - and firstly.

Secondly, it is not the same quality coal. Arnot and Hendrina do not use the same quality coal. So you cannot compare the price that was being paid at the Hendrina and the price that was being paid at Arnot. So
20 that is a completely different story.

And one cannot say: Why would you take from Optimum at this much and then take it... So each power station has in terms of its – the way it was built, the specifications, as specifications about the quality of coal that it takes and it is the quality of coal that determines the

price.

But even at Arnot, R 1 039,00 per ton of coal was over the top and that is what we had been paying on a contract that terminated. Despite our hardship we continued to pay it until the contract came to an end and when it did, we got six BEE suppliers to supply us at about half of what we were getting the coal at.

And did not... or agree with Exxaro. They also used all sorts of negotiations... to get us to R 1 300,00
10 which we resisted. So it is something that was happening as I was – just before I went to hospital and when I woke up there – I came back in January, I found out that they had six contractors that were supplying.

I was not part of the actual mechanics of putting those six together and the agreeing to the price and deciding who they were.

ADV SELEKA SC: Yes.

MR MOLEFE: But I am quite aware of what was happening to the coal supply contract at Arnot.

20 **ADV SELEKA SC:** Okay. Two things. One is, on the quality of coal. I thought you were telling the Chairperson that this coal was being obtained from OCM. OCM which was supplying to Hendrina Power Station and now Tegeta taking that coal from OCM and supplying it to Arnot. So the quality was the same ...[intervenes]

MR MOLEFE: No.

ADV SELEKA SC: ...insofar as the coal from a particular mine. It did not come from another mine. It came from OCM.

MR MOLEFE: Yes, Mr Seleka.

ADV SELEKA SC: Ja.

MR MOLEFE: But Mr Seleka, if you remember that OCM was exporting coal from the Optimum Mine, the coal that was being exported was a different quality ...[intervenes]

10 **ADV SELEKA SC:** Ja.

MR MOLEFE: ...to the coal ...[intervenes]

ADV SELEKA SC: [Indistinct]

MR MOLEFE: Come again?

ADV SELEKA SC: Address the Chairperson.

MR MOLEFE: Oh. The coal that was being exported, was of a different quality to the quality that was been given to Eskom. It was from the same mine but some of it had the export quality, some of it had no export quality.

20 Now as I say, I was not there. I was not – I am not in a position to comment about the qualities of the coal. What I am saying is that, it is possible that a different quality coal came out of the Hendrina Mine because they were exporting. They had been exporting until they were stopped by the international price of coal.

So. Ja, that is – I am not a geologist or a mining

engineer of coal, coal quality. I do not have knowledge on coal quality but that is my understanding of what was happening.

ADV SELEKA SC: And then on the price. Well, just before I move on. The evidence is that because the coal at Hendrina – I mean at OCM, which was being supplied to Hendrina could also be used at Arnot, that is why they were able to also source from OCM the coal and supply to Hendrina. To Arnot, I beg your pardon. So that is what we

10 see from the evidence.

MR MOLEFE: Yes.

ADV SELEKA SC: I accept you saying you cannot go into the qualities ...[intervenes]

MR MOLEFE: No, but all I am saying is Mr Seleka.

ADV SELEKA SC: Ja?

MR MOLEFE: That the – it is possible that Hendrina had different qualities of coal because, as we know, they had been exporting high quality coal from the same mine and they were giving us low quality coal for purposes of
20 burning at Hendrina. So the fact that they could get different quality coal from there is actually not a big scientific discovery.

ADV SELEKA SC: Yes, but this is in December... I mean, this is in January 2016. They had closed their export in May 2015.

MR MOLEFE: They had closed their export in May 2015, not the mine. So they could still get the coal. I do not know. Let me say ...[intervenes]

ADV SELEKA SC: Ja, okay.

MR MOLEFE: I was not there. I did not know. But just from thinking about it, I mean, the fact that they were not exporting does not mean they could not get the coal.

ADV SELEKA SC: Ja.

MR MOLEFE: It is the quality coal that they needed.

10 **ADV SELEKA SC:** Yes. The second thing on the price. I mean, you would have read the Parliamentary Portfolio Committee's report. That your figure of R 1 10,00 and thirty something was actually incorrect because Dentons came to a figure of R 646.00 per ton.

MR MOLEFE: For?

ADV SELEKA SC: Exxaro supplying coal to Arnot but the figure was not over one thousand one hundred.

MR MOLEFE: Chair, I understand under... I remember it as actually specifically R 1 030,00 but maybe the
20 engineers – the Primary Energy people can explain it. However, the principle is, even if it was at R 630.00 we were able to get it cheaper from the BEE supplier that were put together during December in...

It may have been six hundred but I cannot remember but somebody like Mr Matshela Koko would have

all those figures at his fingertips unlike me who was... who was firstly removed from the Primary Energy issues and in fact during that period was not even at Eskom.

ADV SELEKA SC: Ja, and then talking of Exxaro. Exxaro provided a submission to the Parliamentary Portfolio - provided an affidavit here in which they say that Eskom was engaging with them in negotiations with them to buy another piece of land from...

Eskom had said to them: Your contract at Arnot
10 expires in 2023. That was the position until in December when Exxaro says Eskom suddenly says your contract is coming to an end by the end of December 2015.

So the impression created is that, even this Exxaro like OCM, you yielded them out to create a space for Tegeta. Can you comment on that?

MR MOLEFE: Chair, they wanted R 1 300,00. The contract was coming to an end and in fact it did come to an end in December 2015. If the contract was up to 2022, they should have enforced their rights. They did not. The
20 contract came to an end.

And as far as I remember they wanted R 1 300,00. It was unreasonable. The fact that we could get the coal at R 400.00 from BEE suppliers around that area, that says a lot about exactly what was happening with Primary Energy at Eskom.

People were feeling entitled to have their 40-year contract renewed at much higher prices than what we could get the coal for.

ADV SELEKA SC: Yes, Tegeta was a cost ...[intervenes]

CHAIRPERSON: So basically you are saying that once one accepts that you could get coal elsewhere for much less than what they wanted, there was no special reason why you should agree to a higher price?

MR MOLEFE: Exactly Chair.

10 **CHAIRPERSON:** Yes.

MR MOLEFE: In fact, my thinking about coal supply in South Africa to Eskom was that, there is 400-years of coal in the ground. If you are allowed and gave Black Economic Empowerment companies, small companies the assistance to start mining the coal and you have a lot of them and you create a price tension through competition, you would actually reduce Eskom's Primary Energy cost.

But buying from a few big white companies that feel entitled and that controls supply just to squeeze you is
20 not sustainable. And unfortunately, as long as we are not allowing the small BEE companies...

As the small miners coming and having claims here and there and giving them supply to Eskom, you will see the price will come down because everybody wants to do the business and they will give you the right price which

is why I was saying that...

I said once and I was ridiculed for this, but what we need is the bread. We do not want to own the bakery. So what Eskom was doing is that for it to get the bread, it was building bakeries for people through the...

So they build a bakery for you and then they we will buy bread for you. So I was saying, get out of the bakery. Let these people have their own small bakeries and supply Eskom and you will see the price will come
10 down.

This issue of Arnot demonstrates exactly what happened when you do now bow down to the pressure of – or the threat of the bogeyman of coal supply problems.

Unfortunately, for them at the time... I mean, the government had already given licenses. There were quite a few BEE companies that are operating that were prepared and available to supply Eskom with coal at lower prices than the 40-year contract. I suspect the same thing would have happened at the Hendrina had we run into...

20 **ADV SELEKA SC:** As I understand it, the coal plus mine does not provide coal at the said price per ton. Instead, Eskom is responsible for paying operational and capital costs which were billed on a monthly basis and then the mine is paid a management fee to operate the mine.

So I have asked Exxaro the question regarding

your price per ton and the response is: We do not know how Mr Molefe arrived at that price because that is not how the price is set. Your response?

MR MOLEFE: Mister... then again, you just said the price was R 600,00 ...[intervenes]

ADV SELEKA SC: Sorry? No, Dentons. I said that was Dentons' report.

MR MOLEFE: They said the price was R 600,00.

ADV SELEKA SC: Dentons' report, ja.

10 **MR MOLEFE:** Says the price was R 600,00 per ton?

ADV SELEKA SC: Yes, Dentons' report, not Exxaro.

MR MOLEFE: Ja. So where did they get it?

ADV SELEKA SC: I would not know.

MR MOLEFE: Well, Mr Seleka ...[intervenes]

ADV SELEKA SC: Because Dentons was appointed by Eskom ...[intervenes]

MR MOLEFE: Ja.

ADV SELEKA SC: Ja.

20 **MR MOLEFE:** Well, Mr Seleka if you take a management fee – we can call it a management fee, right, of X amount and divide it by the tons of coal that our supplier for that management fee, you come to the cost per ton. You understand what I mean?

ADV SELEKA SC: I hear what you are saying.

MR MOLEFE: If you charge a management fee of a

thousand rands and you say supply one thousand tons of coal, it is one rand per ton.

ADV SELEKA SC: Ja?

MR MOLEFE: So this financial gymnastics and changing of terminology and so on, does not mean anything. The issue is substance. The substance was, they are being paid for the coal and they are being paid for X amount of coal. You can calculate what the cost per ton is.

The... the monies... fee or the price or whatever.

10 Which is why Dentons talks about R 600,00. And in fact Chairperson, as you will see, even on the... there is issue of valuations. There are no fines to valuations. It depends on... on a particular day that they think the value of this thing is so much.

ADV SELEKA SC: Yes.

MR MOLEFE: Tomorrow they have value of this thing and tomorrow call it the management fee and then the next day it is the price. The next thing they give you this bottle for free, you are only buying the liquid inside or you are
20 buying the liquid and the bottle is for free. It is exactly – so people do all sorts of machinations. However, when you analyse these things you must cut out the frills and get to the heart. The heart is what were we paying that time, even if the thing that you are paying is management fee or whatever.

ADV SELEKA SC: Yes. Again on the price, I think I found the paragraph I want to read to you but what Exxaro is saying their cost of coal increased – I am saying this is what Exxaro says, increase because of Eskom, Eskom failing to get the other piece of land and therefore, the volumes of coal available at the mine they were occupying going down and, as a result, increasing the price. So they put the blame solely on Eskom for the increase in the price. I found the paragraph here, they says:

10 “Exxaro calculated the cost of coal it supplied to be
783 per ton when the CSA was terminated in 2015.
A cost plus mine unlike commercial does not
provide coal at the said price per ton.”

Which is what I had in mind but ...[intervenes]

MR MOLEFE: So it went ...[intervenes]

ADV SELEKA SC: I am saying it was you who was at fault.

MR MOLEFE: Was it me who was at fault?

ADV SELEKA SC: Not you personally.

20 **MR MOLEFE:** Oh. They had increased from 600, 700 and
something.

ADV SELEKA SC: Okay, there is a distinction. Exxaro has made that calculation itself so the figure I read to you is Exxaro’s figure. 686 is what Dentons found in their report or investigation to be the price per ton in April 2015, Exxaro’s price in April 2015.

MR MOLEFE: Is that what Eskom was paying?

ADV SELEKA SC: That is what Dentons' report says.

MR MOLEFE: Ja, Chairperson, just to tell you about price
...[intervenes]

ADV SELEKA SC: But sorry, Chair – Mr Molefe, sorry, but
I think incorporating your answer the question which
Exxaro says, Exxaro says do not look at this price in
isolation, look at the price based on our interaction with
Eskom which was refusing to acquire another piece of land
10 adjacent to the mine and, as a result, the volumes were
going down in the mine we occupied thereby resulting in
higher prices. So address it in that context and not in
isolation.

CHAIRPERSON: Before he addresses that, what is the
whole point about those figures and the price when we
were discussing the price in the context of OCM and
Eskom. I understood the context because of what
Glencore, Mr Ephron said in his statement and his affidavit
sometime back.

20 **ADV SELEKA SC:** Yes.

CHAIRPERSON: But the price with regard to Exxaro, what
is the point?

ADV SELEKA SC: The way we came to this, Chair, is what
I had put to Mr Molefe as the impression conveyed from
Exxaro's position which is that, Exxaro ultimately gets

elbowed out in order to create a position for Tegeta. So it is a further step on the OCM price as such.

CHAIRPERSON: Exxaro being elbowed out allowed Tegeta in the context of the OCM transaction or separately is another issue.

ADV SELEKA SC: It is connected with OCM ultimately in the sense that Tegeta then gets the coal from OCM to supply the Arnot power station.

CHAIRPERSON: And?

10 **ADV SELEKA SC:** So this is the picture, Chair. You have OCM on the one hand which according to the facts Eskom is unwilling to increase the price.

CHAIRPERSON: To accommodate, ja.

ADV SELEKA SC: Ja, to accommodate. The same situation seems to play itself out with Exxaro but at a different mine, the Arnot power station but in respect of both, Tegeta is the common factor.

CHAIRPERSON: Ja.

ADV SELEKA SC: Tegeta ultimately comes into the picture
20 to replace OCM and to replace Exxaro.

CHAIRPERSON: Right.

ADV SELEKA SC: And supply – and to supply the two mines.

CHAIRPERSON: Ja and how does the Exxaro happens?

ADV SELEKA SC: The replacement of Exxaro?

CHAIRPERSON: Ja, I do not remember that Mr [indistinct] 06.03 had dealt with that, maybe he did, it is quite some time back. How is it alleged that happened? How does it come to the proposition I guess that they were being elbowed out? They wanted a price increase as well?

ADV SELEKA SC: Exxaro is a different entity, Chair.

CHAIRPERSON: Ja, I accept that.

ADV SELEKA SC: Yes. They – no, their case is not that they wanted a price increase, Mr Molefe, their position is
10 we wanted Eskom to acquire another piece of land where we can mine, continue to mine because the volumes of the mine that we then currently occupied were going down, the volumes of coal. As the volumes of coal go down, the price goes up. So please acquire the land because this comes way back when you look at Exxaro's affidavit. Acquire the land so we can keep supplying you the volumes that you want. Eskom then took a different position. Firstly they said your contract, according to Exxaro, your contract will expire in 2023. However, in
20 December 2015 Eskom said no, your contract is coming to an end by the end of December because, according to Eskom, we could not agree and Mr Molefe will tell you, he says the price but from my reading is that they could not agree on the acquisition of another piece of land.

CHAIRPERSON: Yes.

ADV SELEKA SC: As a result, Exxaro is out by the end of December, there is a gap, then ...[intervenes]

CHAIRPERSON: But they are out because their contract came to an end.

ADV SELEKA SC: They are out because the contract which Eskom – bear in mind that, Chair, which Eskom had said will come to an end 2023.

CHAIRPERSON: Ja, but when was it going to come to an end in terms of the contract?

10 **ADV SELEKA SC:** It was going to expire the 31 December 2015.

CHAIRPERSON: Yes.

ADV SELEKA SC: But they were in negotiations to have it extended. Mr Molefe?

CHAIRPERSON: Yes but if there was no agreement about the extending it would expire.

ADV SELEKA SC: Yes, then they were notified it will expire.

CHAIRPERSON: Yes.

20 **ADV SELEKA SC:** So they did not reach an agreement, Chair.

CHAIRPERSON: Yes.

ADV SELEKA SC: But I am just conveying to Mr Molefe that that is the version that Exxaro puts forward ...[intervenes]

CHAIRPERSON: But why – what is their point? Are they saying that Eskom treated them unfairly in order to make space for Tegeta and if so, in what way?

ADV SELEKA SC: They trace it back to the time before 2015 where the parties are discussing to acquire another piece of land. I understand that they were supplying coal by conveyor belt to Arnot power station. When the contract terminated, Chair, Tegeta had to source the coal by road transport. So they allude to that, that Eskom failed to
10 negotiate properly with us. Instead it was willing to go to a company like Tegeta which was supplying coal in a different way as opposed to conveniently by conveyor belt. I think the whole thing rests, if you read the affidavit, on the fact that there was no reasonable accommodation of Exxaro in terms of the negotiations to extent their agreement beyond December 2015.

CHAIRPERSON: I mean, we have the OCM position.

ADV SELEKA SC: Yes.

CHAIRPERSON: We know what they say because they
20 have – it there from – put up in affidavits and testified. Mr Molefe says in effect I am bringing to the proposal to increase the price of [indistinct – dropping voice] OCM was not in the interest of Eskom and in any event if OCM thought that Eskom was being harsh on them in insisting on that contractual price the agreement had a way that

would have given them relief from that harshness, that is invoking the [indistinct – dropping voice] clause, going to arbitration and if they won the arbitration then they would get relief. They chose not to pursue arbitration to its final end or they did not for whatever reason but I think he implies the fact that they did not go up – pursue it up to the end, that is arbitration, was not Eskom's fault, whatever reason there might be. So I am not sure to what extent OCM responds effectively to that line of argument.

10 **ADV SELEKA SC:** Yes.

CHAIRPERSON: Now Exxaro says they wanted Eskom to acquire some land so that they would ...[intervenes]

ADV SELEKA SC: Increase the values.

CHAIRPERSON: Yes and they had negotiations and negotiations did not produce the desired results and their contract was coming to an end. Now it may be that there is some point but I am just saying I am not sure.

ADV SELEKA SC: Yes.

20 **CHAIRPERSON:** So – but intervened when he was about to respond.

ADV SELEKA SC: Yes.

CHAIRPERSON: Let me allow him to respond.

ADV SELEKA SC: Ja, I have not gone into the details of it but, Mr Molefe, you can respond – yes, in the context of them saying do not look at the price in isolation look at it

in the context of Eskom's delay in acquiring the piece of land then we can move on.

MR MOLEFE: My understanding was, as the contract was coming to an end, Exxaro, their price demand was 1 300 and in addition they wanted us to buy land to give to them. That was a demand. They are demanding that we should buy land and give it to them.

CHAIRPERSON: As a client.

ADV SELEKA SC: As a cost plus mine.

- 10 **MR MOLEFE**: Ja, ja, must buy land and give it to them, which is what I was uncomfortable with especially in the context of land redistribution and so on, why do you buy land and give it to these guys? Now the specific price, there is no price unless there is a willing buyer and a willing seller. So you cannot say that the price was this much if they had done this and this and that when nobody was prepared to pay that price. The fact that somebody has demanded a price does not mean there is a price, there is no price. The price exists when there is a willing
- 20 buyer, willing seller. An indication of the market price at that time for the coal that was going to Arnot was in fact the agreement that we had reached with the six small suppliers which was in the 400, around 400. So that was – they were willing to supply us at 400, we were willing to pay 400. They were not making demands to be given land

and 1 300. Why did we have to agree to their demands? Why did we have to renew that agreement? If we had renewed that agreement – and unfortunately I was ill-disposed and was not in a position to – but if we had renewed that agreement and bought them land and paid 1 300 a ton when we could buy coal at 400 from BEE suppliers, I would still be sitting here, except that these would be criminal proceedings.

ADV SELEKA SC: Ja, except also that the 1 100 is not
10 common cause.

MR MOLEFE: Well, but the 600 – we can take the 600, even that 600 it is still higher than – the point that I am making is that the price was higher than what we could get the coal for. So, I mean, the 600, the 700, there is 1 100 and I am saying that they wanted 1 300. All of those things are not acceptable. Even if it was 500 it would not be acceptable because you can get the coal at 400 or at 450. If you can get the coal at 450 why buy it at 500 just because it is Exxaro? There is a man in Newcastle who
20 asked Mr Cele the day [indistinct – African language]

ADV SELEKA SC: Can we go back to the matter?

CHAIRPERSON: Well, yes ...[intervenes]

ADV SELEKA SC: If we ...[intervenes]

CHAIRPERSON: Ja, the point is how far do you want to take this issue?

ADV SELEKA SC: No, I want to go back to OCM, Chair.

CHAIRPERSON: Ja.

ADV SELEKA SC: Ja. Let us go back to OCM particularly on the point the Chairperson was raising, that the hardship clause was not pursued because we know – you will recall the meeting of the 3 December has the parties again agreeing to supply, the parties again agree to supply. So after the termination, which is in June, there is a resuscitation of the hardship application but in September
10 the parties meet and there is an agreement for OCM to supply coal with interim arrangements. Do you recall that?

MR MOLEFE: Yes, there was – as I said earlier, they agreed to continue supplying at 150.

ADV SELEKA SC: Yes. And then ...[intervenes]

MR MOLEFE: So, I mean, they chose not to pursue arbitration and instead they agreed to continue supplying at 150, we did not have a problem with that because we did not have a problem with them, we had a problem with the price.

20 **ADV SELEKA SC:** Yes.

MR MOLEFE: So 150 is willing buyer as far as we were concerned because 150 is what was contracted.

ADV SELEKA SC: Yes, in terms of the contract.

MR MOLEFE: We were obliged to take the coal at 150.

ADV SELEKA SC: 150, 154 the ...[intervenes]

MR MOLEFE: 154, ja. When you are talking thousands of tons I mean R4 is a...

ADV SELEKA SC: Then the termination of the cooperation agreement in June is followed by the letter of demand for penalties, Mr Molefe, 2015.

MR MOLEFE: Yes.

ADV SELEKA SC: The penalties for R2.17 billion.

MR MOLEFE: The penalties for?

ADV SELEKA SC: Penalties for R2.17 billion against
10 OCM.

MR MOLEFE: Yes.

ADV SELEKA SC: Yes. Now we have gone extensively or at least to some extent into that evidence in regard to how the penalty of 2.17 ultimately gets reduced into an amount of 255 million.

CHAIRPERSON: You are talking about the settlement now with Tegeta?

ADV SELEKA SC: The settlement with OCM, Chair.

CHAIRPERSON: With OCM under Tegeta.

20 **ADV SELEKA SC:** OCM under Tegeta.

CHAIRPERSON: Ja, okay.

MR MOLEFE: Who reached this thing?

ADV SELEKA SC: I am asking you.

CHAIRPERSON: I think the question is you remember that amount of penalties that was demanded from OCM when

OCM was under Glencoe which was R2, something billion.

MR MOLEFE: 2.17 billion.

CHAIRPERSON: Yes.

ADV SELEKA SC: Yes.

CHAIRPERSON: When OCM was under Glencore, that claim of Eskom was settled at a much lower amount namely R200 and something million, so the question is do you remember that and I think there will be a follow-up question.

- 10 **MR MOLEFE**: Yes. Chairperson, that 2.17 billion had been outstanding since 2013, long before I arrived. That 2.17 billion was not a figment of my imagination, it is a person who came here, just cannot remember his name, who testified that he actually calculated the 2.17 billion, it was correct, and from wherever it was calculated in Eskom it was brought to me as a legitimate claim that Eskom had. My job as a CEO was to ensure that money that is being owed to Eskom is collected. That is why I gave instructions that if needs be, we must issue summons
- 20 before the matter prescribes, before the 2.17 billion prescribes. In fact, the 2.17 billion was accumulated, if I am not wrong, while Mr Ramaphosa was Chairperson of the OCM. So it was under his Chairmanship that the 2.17 billion became due and not collected. Before I arrived at Eskom there was not effort to collect the 2.17 billion, it is

only when I was there that I said but why are we not collecting what is due to us and I even said how can we go to Soweto and start collecting debt when we cannot collect from OCM debts that was accumulated even when Mr Ramaphosa was Chairman. So that was the 2.17 billion, when I left Eskom in 2016, that 2.17 billion was still outstanding.

Subsequent to my departure, I was not part of this, I was not there, I am told the new owners, Tegeta, invoked
10 the arbitration clause and the matter went to arbitration. Guess who was leading Eskom's negotiating team during the arbitration? Ms Suzanne Daniels.

CHAIRPERSON: Well, before you proceed, you have linked the failure by Eskom to claim this R2,17 billion based on penalties from OCM, you have linked it to Mr Ramaphosa having been Chairman of OCM. Are you just – are you making a connection?

MR MOLEFE: No ...[intervenes]

CHAIRPERSON: Are you suggesting he did anything to
20 make sure it was not claimed or what is the point?

MR MOLEFE: It is just a coincidence, Chairperson, perhaps.

CHAIRPERSON: A coincidence, okay. I just want to make sure we know what you are saying.

MR MOLEFE: That while he was Chairperson.

CHAIRPERSON: Ja, okay.

MR MOLEFE: The claim of 2.17 billion arose and then there was an agreement. In my opinion, a dubious agreement because, like I said, I was questioning the authority of the person who signed the agreement, an agreement that I am told had never served before the board prior to my arrival, prior to that meeting of April. So, Chairperson, perhaps maybe I am being paranoid in linking all of these things up, in linking all of these things up, but
10 there was a 2.17 billion for which I was persecuted for trying to collect. Subsequent to that, after I had left, there is a hardship clause and arbitration that gets activated by the new owners. Perhaps even when Optimum had followed through on the arbitration, might have ended at 200 million, like it actually ended up being but I was not there when the 200 million was negotiated, I do not know if I had led the negotiations.

CHAIRPERSON: But had you left Eskom or is it just that you were not part of the negotiations but you were still
20 ...[intervenes]

MR MOLEFE: I had left Eskom.

CHAIRPERSON: You had left Eskom.

MR MOLEFE: What year was it settled? 2017?

ADV SELEKA SC: Yes.

MR MOLEFE: I left Eskom December 2016.

CHAIRPERSON: Ja, okay.

MR MOLEFE: So when I left what was due to Eskom was still 2.17 billion.

CHAIRPERSON: I understand you to be saying with regard to your instruction that Eskom attorneys should demand payment from OCM.

MR MOLEFE: Yes.

CHAIRPERSON: Of that R2.17 billion. I understand to be saying you were told by people within Eskom that Eskom
10 was owed R2,17 billion in penalties by OCM.

MR MOLEFE: Yes.

CHAIRPERSON: And the people who told you are the people who would have made calculations.

MR MOLEFE: Yes.

CHAIRPERSON: As to who that amount was made up.

MR MOLEFE: Yes and they even gave evidence here.

CHAIRPERSON: Yes.

MR MOLEFE: And showed – I was watching, I did not even understand the calculations, they had detailed
20 showing of how they calculated the 2.17 billion.

CHAIRPERSON: Yes, ja. So the point you are making is you understood the claim to be legitimate.

MR MOLEFE: Yes.

CHAIRPERSON: And you understood your job as Chief Executive Officer of Eskom to be to make sure that that

amount, that claim did not prescribe and that you should recover whatever was owed to Eskom by OCM.

MR MOLEFE: Yes.

CHAIRPERSON: But if somebody says that claim was not properly – the amount was not properly or correctly arrived at, you cannot argue about that because you were not involved in how it was made up, is that what you are saying?

MR MOLEFE: No, I would say that as far as I am
10 concerned it was correct because the Primary Energy people said it was correct. They even gave evidence here under oath to say that it was correct. I am not in a position to dispute that.

CHAIRPERSON: Yes No, what I am saying is, to say it is correct you rely on what they ...[intervenes]

MR MOLEFE: What they said, yes.

CHAIRPERSON: Ja. Not that you could yourself work it out.

MR MOLEFE: Yes, yes.

20 **CHAIRPERSON:** Ja.

MR MOLEFE: No, I was not in a position to work out ...[intervenes]

CHAIRPERSON: You were not qualified to do that.

MR MOLEFE: Yes.

CHAIRPERSON: Ja, okay, Mr Seleka?

MR MOLEFE: Yes. But also, Chairman, gets even more interesting. Mr Koko has laid a complaint with the Public Protector that there is 1.7 billion in penalties ...[intervenes]

CHAIRPERSON: Did you has or had?

MR MOLEFE: Has.

CHAIRPERSON: Has recently.

MR MOLEFE: I am not sure where the complaint is now.

CHAIRPERSON: Ja, okay.

MR MOLEFE: But he has laid a complaint there, as far as
10 I know he has laid a complaint to the Public Protector to say that there is R1.7 billion of penalties due by Optimum that has prescribed and that were never collected from that period of 2012 -2016. There is another – the 1.7 billion can never be recovered because it prescribed and so he is asking the Public Protector to investigate who was responsible for collecting that debt and why did they not collect it? I am surprised it has not been his evidence here up to now but that is what I was made to understand by him.

20 **CHAIRPERSON:** Okay. Mr Seleka.

ADV SELEKA SC: Before your coming there, Mr Molefe, there were at least two opinions presented by CDH to Eskom.

MR MOLEFE: Yes.

ADV SELEKA SC: One is an opinion of 23 October 2013.

CHAIRPERSON: CDH again is? Just indicate who they are?

ADV SELEKA SC: Cliffe Dekker Hofmeyr attorneys, thank you, Chair.

CHAIRPERSON: Ja, okay.

ADV SELEKA SC: They gave an opinion the 23 October 2013 and the second opinion was on the 17 March 2015. That is a month just before you came there. And then the third one was on the 2 December 2016. I think you were
10 still at Eskom that time.

MR MOLEFE: Yes.

ADV SELEKA SC: Yes. All I am asking you is were you not aware of these opinions which raised concerns about the merits of the claim.

CHAIRPERSON: Then maybe what you should do, Mr Seleka, is to take us to each one and say this one had this to say about this claim, obviously just give the important things and if they raised concerns about the validity of the whole claim or whatever, you put that to him.

20 **ADV SELEKA SC:** Yes.

CHAIRPERSON: And you can refer him to the 11th page of your opinions and he can comment if he is able to in terms of whether he was aware of them or he had ...[indistinct – word cut off] but he has already said – he has already said in terms of how the claim or the amount was calculated he

wasn't qualified to deal with that but he ...[intervenes]

ADV SELEKA SC: Yes.

CHAIRPERSON: ...there are people at Eskom who were dealing with that.

ADV SELEKA SC: He relied on that.

MR MOLEFE: But even before we go there CDH issued summons ...[intervenes]

CHAIRPERSON: I think, I think, I think the point Mr Molefe would be if they raised concerns, it depends what
10 the concerns are and so on and so on but attorneys and lawyers advise and the client can still say, go ahead, although you advised me against it but do it, you know, and then they carry out instruction, despite the fact that they may have advised you not to proceed, it depends on a number of things. They might say, chances of winning are not good, but you say, let's take our chances okay, so.

MR MOLEFE: In the interest of Eskom.

CHAIRPERSON: I don't know about in the interest of Eskom but that's how lawyers work, Mr Seleka.

20 **ADV SELEKA SC:** Eskom bundle 14, right, let's see, page 891.

CHAIRPERSON: I'm keeping two lever arch files here, Mr Seleka and I don't have much space, I've got 18A and 17...[intervenes].

ADV SELEKA SC: [Indistinct 2.05].

CHAIRPERSON: All of them?

ADV SELEKA SC: I think remove all of them because this exercise is bound to take a while, we'll stick to this file.

CHAIRPERSON: Were you involved in giving instructions to CDH about the claim, while you were there?

MR MOLEFE: No, it was in fact, legal.

CHAIRPERSON: Yes.

MR MOLEFE: The person who would have been involved,
10 as far as I know, would have been Ms Suzanne Daniels and/or the legal team.

CHAIRPERSON: Ja, did they, at any stage, that is the legal department, come to you while CDH was dealing with the matter, come to you and indicate what challenges or advices CDH may have raised and with a view to getting – briefing you on whether to pursue it or not to pursue it?

MR MOLEFE: Not that I can remember.

CHAIRPERSON: You can't remember them doing that?

MR MOLEFE: I don't remember anyone at Eskom saying
20 to me that you cannot or should not pursue the R2.1billion claim.

CHAIRPERSON: Apart from the people at Eskom who, you say, brought the claim to your attention and maybe told you how it was made up, the amount, apart from those people did you, thereafter at any stage get consulted by anybody,

whether from within Eskom or CDH people, to discuss the merits of pursuing the claim or not against OCM?

MR MOLEFE: Chair, when we said we're issuing summons and they agreed to issue summons...[intervenes].

CHAIRPERSON: Is this CDH?

MR MOLEFE: Yes, summons had to be accompanied by particulars of claim.

CHAIRPERSON: Yes.

MR MOLEFE: I would have imagined that those
10 particulars of claim would have set out our case succinctly in a manner that, as far – with the information that we have in our hands, would make us win the case. Now, I'm not aware that there was a – their reply to the summons. I'm not aware that the optimum offered an alternative view formally in the ...[intervenes].

CHAIRPERSON: In response to the claim, in response to the summons.

MR MOLEFE: In response to the summons, which is what was supposed to happen.

20 **CHAIRPERSON:** Yes.

MR MOLEFE: Which is what – their response would have been the basis of the argument.

CHAIRPERSON: Yes, but remember, my question was, irrespective what OCM may or may not have said in response, the question was whether you were ever

involved in a discussion whether with people within Eskom or with people from CDH where the merits of the claim – of pursuing the claim in terms of litigation were discussed to say, do we have a strong case, how is our case?

MR MOLEFE: Ja, as far as I remember Chair, I mean, I can't – it's a long time ago, I can't recall the specific – if there was, specifically discussions like that but what I do recall is that the feeling, certainly from the Primary Energy people and from the legal people, was that this was a
10 legitimate claim and, in fact, I was quite happy to say that – to render my support through the process of – because I was not going to litigate myself, to render my support through the process of the litigation if that is a legitimate claim. It is what an Accounting Officer is expected to do, and my feeling was, if there are any – if it is not correct then OCM will say so in the process and that we will lose the case but the impression that I had at the time was that, if we pursued this in Court, we would not lose the case because the R2.1billion claim was legitimate.

20 **CHAIRPERSON:** Okay, Mr Seleka?

ADV SELEKA SC: Yes, well you see the lawyers, Mr Molefe, were involved and steeped in the matter, so the first opinion – the reference to the first opinion, you see is in the affidavit of Mr Rishaban Moodley of CDH.

MR MOLEFE: Oh Rishaban Moodley?

ADV SELEKA SC: Yes.

MR MOLEFE: Yes.

ADV SELEKA SC: Page 891.

MR MOLEFE: Yes.

ADV SELEKA SC: Eskom Bundle 14 C.

MR MOLEFE: Yes.

ADV SELEKA SC: And there he refers to – on paragraph 22, he refers to the opinion given, so he says,

10 “During October 2013, CDH provided the legal opinion to Eskom relating to the potential penalty claim on the sizing quality of parameters under the CSA and addenda thereto, including our preliminary concerns relating to the evidence which would be necessary for such a claim to succeed”.

Now, I accept, you are not there but the question is going to be whether you were given this...[intervenes].

MR MOLEFE: No, I was not aware of it.

ADV SELEKA SC: So, they raise preliminary concerns already in October 2013...[intervenes].

20 **MR MOLEFE:** But with whom did they raise the preliminary – I mean who was that opinion addressed to?

ADV SELEKA SC: Ja, on page 984 of the same bundle, it's primary...[intervenes].

CHAIRPERSON: My bundle ends at 950, A and B – the bundle I've been given ends at 950.

ADV SELEKA SC: It's a C Chair, which I have, 14 C.

CHAIRPERSON: I've been given 14 B.

ADV SELEKA SC: Oh, I think it's that overflow again of the affidavit in one – so the affidavit has to be there, ja Chair, sorry...[intervenes].

CHAIRPERSON: I just asked her to ask you if you didn't hear the page number or the bundle number?

ADV SELEKA SC: It's page 984 Chair.

MR MOLEFE: Yes, I've got it.

10 **ADV SELEKA SC:** I was saying, the Chairperson should have the file with the affidavit.

CHAIRPERSON: That is B?

ADV SELEKA SC: That is – ja it seems in your case, Chair, it's the end of B. So, what I'm saying, Chair, she shouldn't take it away from you.

CHAIRPERSON: No, that's fine.

ADV SELEKA SC: So, page 984, Mr Molefe the – your opinion, it's in a memorandum it's addressed to Mr Johan Bester, Divisional Executive Primary Energy...[intervenes].

20 **CHAIRPERSON:** I'm sorry, Mr Seleka, this opinion is dated 20 October 2013.

ADV SELEKA SC: Yes.

CHAIRPERSON: I guess more than a year or a year and a half before Mr Molefe came to Eskom.

ADV SELEKA SC: Yes.

CHAIRPERSON: Why do you want to ask him about its contents, especially when he says, nobody, as he can recall, ever discussed merits and demerits of the claim.

ADV SELEKA SC: Yes, it wasn't my intention Chair, but at the Chairperson's request, that I take him through, I was going to...[intervenes].

CHAIRPERSON: That was if it was important, so I just see the gate now, so I'm not sure, he wasn't at Eskom at that time, how is it going to assist us?

10 **ADV SELEKA SC:** Yes, we don't have to go into the details of it.

CHAIRPERSON: Ja but what is – do you have to refer to it at all?

ADV SELEKA SC: Not in relation to...[intervenes].

CHAIRPERSON: In relation to him because he wasn't there.

ADV SELEKA SC: Yes, I think Mr Molefe, when he arrives, the question is, were these concerns, expressed in this opinion, drawn to his attention.

20 **CHAIRPERSON:** Okay, no, that can be asked.

ADV SELEKA SC: Yes, Mr Molefe I have asked that question...[intervenes].

CHAIRPERSON: Tell him what the concerns were, I think I interrupted you when you were putting that to him, just refresh his memory in terms of what the opinions said were

the concerns and ask him whether these opinions or the concerns were...[intervenes].

ADV SELEKA SC: Were drawn to his attention.

CHAIRPERSON: Drawn to his attention.

ADV SELEKA SC: Thank you Chair. Mr Molefe three – concerns were raised in three broad categories. One is the quality of coal, the other is the sizing specification and lastly was the quantity. On the quality specifications, the concerns were that Eskom had failed to invoke its rights in
10 terms of the agreement to notify OCH that OCM had failed to comply as and when coal was delivered. You have touched on that, I don't know how did you know about it.

MR MOLEFE: About?

ADV SELEKA SC: That Eskom failed to invoke its rights in terms of the CSA.

MR MOLEFE: Oh, I said, Mr Koko has made something to the Public Protector that Eskom has allowed penalties of R1.7billion to prescribe, I don't know if it's the same thing.

CHAIRPERSON: Maybe let's ask this question this way.
20 After you had joined Eskom, between that time and the time when you left Eskom, did anybody bring any legal opinions to your attention from CDH that dealt with the merits and demerits of the claim for penalties against OCM?

MR MOLEFE: No, Chairperson I can't recall that.

CHAIRPERSON: You don't recall that?

MR MOLEFE: But having said that, I've just been reading the conclusion of this legal opinion very quickly, paragraph 11, it does not forbid us from pursuing the claim it says, however,

10 "Should Eskom be of the view that taking into account the risk identified, it wants to proceed with a claim against OCM at this stage as a result of the continued failure by OCM to comply with the size and specification we advise them it should not be done as a set off against the purchase price",

So, it was not – from my reading of this, even now, I'm seeing it for the first time but even now, it's not an opinion that says, you don't have a claim. It says that there are some risks but if you want to pursue it, which means that there is some merit in pursuing it, don't set it off against purchase price. So, it's not like it's forbidding Eskom, or it is advising against...[intervenes].

20 **CHAIRPERSON:** Well maybe, I don't know if you want to go to the point of saying, advising against, when you have not read the whole of it but...[intervenes].

MR MOLEFE: Perhaps, maybe, I should just read it Chairperson because I was not there.

CHAIRPERSON: Ja, no, no I don't think you should try and read it for present purposes, I think you have made the

point that the last paragraph leaves room for Eskom to pursue the claim which may well be in line with what I said to you earlier on in terms of how lawyers work but may well be that, in the body of the document, it might be raising certain issues.

MR MOLEFE: But the point that I'm making, Chair, is that, that little hole, you're required by the PFMA or ...[indistinct – dropping voice].

CHAIRPERSON: Well, I don't know if the PFMA goes that
10 far other than that, it only expects you to pursue a claim if there are reasonable grounds of believing that you will be successful but we don't know, Mr Seleka how much you want us – ja but I don't know Mr Seleka how much you want to ask Mr Molefe about the contents of this in the light of his evidence that he has no recollection of this being brought to his attention but it may well be that the people to whom these opinions were directed, particularly the legal department.

ADV SELEKA SC: Yes.

20 **CHAIRPERSON:** Are the people who should answer but I'm just mentioning, you might have a point that you want to raise with him.

ADV SELEKA SC: Yes, a couple of things, Mr Molefe, CDH, the attorneys, identify Mr Koko as one of the persons they were working with.

MR MOLEFE: Yes.

ADV SELEKA SC: I'll show you but that paragraph you were reading, paragraph 11 of this document, starts with the word "however". You know when the word "however" follows, there's something that I've said before and it is in paragraph 10, just of the purposes of what you were mentioning now, I'm reading this, not to take it anymore than this, it says,

10 "In light of the risks identified in Eskom, applying a payment reduction for OCM's failure to comply with the sizing specification at this stage, we advise that it will be prudent to first address all the concerns in order to ensure that Eskom will be in a better position to impose the payment reduction and subsequently enforce any claim for the reduction of the purchase price. Due to OCM's failure to comply with the quality or quantity specification".

20 So, they're telling you it is prudent to first address the concerns, then they say, however, should Eskom be of the view that taking into account, the risk identified it wants to proceed with the claim against OCM. So, despite the risk, you nonetheless want to proceed...[intervenes].

MR MOLEFE: But paragraph 10 acknowledges OCM's failure.

ADV SELEKA SC: No, it does but...[intervenes].

MR MOLEFE: And it's those failures there must be penalties.

ADV SELEKA SC: But let me...[intervenes].

MR MOLEFE: Because I was not there...[intervenes].

CHAIRPERSON: Well, there is no disagreement between the two of you we can move on. Mr Molefe accepts that the opinion may have raised some issues about the merits of the claim in regard to some aspects he has not read the whole opinion, but he accepts that he may have done so.

10 All he was saying was there is that window that they opened at the end and Eskom wanted to pursue that, he says so I think – I'm not sure that – but I think it was fine to just emphasise that, however, came after they had expressed some concerns about some claims, ja.

ADV SELEKA SC: Pursuing the claim without first addressing the concerns.

CHAIRPERSON: Yes, ja.

ADV SELEKA SC: And – in fact, that paragraph, Chair, it says, it advises you not to set off, you saw that
20 11.1...[intervenes].

CHAIRPERSON: Not to settle or not to...[intervenes].

ADV SELEKA SC: Not to set off.

CHAIRPERSON: Oh, not to set off?

ADV SELEKA SC: Yes, ja, so one has to read it very carefully. It tells you not to do something as opposed to

doing something. Anyway, but I wanted to read to you, because – let me just finish off then on these penalties. The penalty starts off at that high amount and CDH, the attorneys have given advice to Eskom and I accept you are not Eskom, you were the Chief Executive at Eskom. It will be unthinkable that this opinion didn't come to your attention when the penalty itself comes to your attention but the merits or demerits of it doesn't come to your attention. That there are concerns, CDH points out that

10 even the finance department didn't know how the methodology and the formula for the figures applied. This amount of R2.1million is ultimately, on the basis of this opinion from CDH, based on information received from Eskom, wiggled down to that R255million. They say 577 – you see 577 is misleading in the sense that it incorporates R158million which is a double charge, a double payment because then that amount gets to be reduced, deducted, then you see a R419million, then there's further two deductions it ends up at R255million but this is done way

20 after Glencore is out of the picture, Tegeta is in the picture and Eskom – the advice given in 2013 and repeatedly until 2017 is now being acted upon to do the reductions when it is Tegeta in the picture and the question is, why, why did Optimum not raise it?

MR MOLEFE: It does not raise – all that you're telling me

was not raised by Optimum while I was there. When we issued the summons, they should have replied to our summons and said exactly what you're seeing.

ADV SELEKA SC: Okay.

MR MOLEFE: And then perhaps we would have settled out of Court, perhaps we would have gone to arbitration, but it was not for me to go and look for their defence.

ADV SELEKA SC: Okay, give me a chance, give me a chance. That's -your response is too quick because CDH
10 does give Eskom the defences – various defences raised by OCH in the subsequent opinions, it gives you various defences raised by – and some of them are exactly what we are pointing out there, the sizing specifications and your sampling tool which was faulty the hammer sampling tool which was not – was malfunctioning and that you had failed to notify them of the breach as and when it occurred. So, OCM had raised those defences, may I add this, Mr Molefe, two processes had started...[intervenes].

CHAIRPERSON: Sorry did you say OCM had raised those
20 defences?

ADV SELEKA SC: Had raised those defences.

CHAIRPERSON: Okay.

ADV SELEKA SC: Expressed by your attorneys, in the opinions, you're saying that didn't come to your attention, those opinions, I just want a yes or no because I don't

want to forget my next question.

MR MOLEFE: I can't remember that.

ADV SELEKA SC: The next thing is, you will recall that, when you pursued the claim, CDH, again, the attorneys, advised you let's issue summons because that will interrupt prescription because a referral to arbitration will only stop it for one year, so they pursued two processes. OCM filed a notice to defend in the summons in respect of the summons and they filed their plea to the arbitration,
10 referral to arbitration or statement of defence but the parties, from what it appears, decided to pursue the arbitration which ultimately brought about a negotiated settlement.

MR MOLEFE: Which party, you mean eventually after...[intervenes].

ADV SELEKA SC: Eventually yes.

MR MOLEFE: Yes, no I can't comment on that.

ADV SELEKA SC: Yes, so it's not as if they didn't defend your matter, they did...[intervenes].

20 **CHAIRPERSON:** Well, it would be helpful if you were to tell me where in the bundle, I can find OCM's response or the document where they raised the defences because I was under the impression that they didn't.

ADV SELEKA SC: Chairperson, that you find in Mr Moodley's affidavit again, because he deals with it

extensively in the opinions that he gives to Eskom, let me find one.

CHAIRPERSON: Or if your junior can find it while you continue and let you know once she has found it, that will be fine. Looks like your junior thinks you are looking at the wrong bundle.

ADV SELEKA SC: No, she's saying that you are looking for the pleading, but you can turn to page 918, Chairperson of Mr Moodley's bundle, Eskom Bundle 14 (C), now that's
10 that other file, you have it in front of you Chair.

CHAIRPERSON: Oh.

ADV SELEKA SC: Ja it's (B) in this case, page 918.

CHAIRPERSON: Yes.

ADV SELEKA SC: Page 918, Chairperson, under the heading, "OCM potential defence to the Eskom claim", and he refers to a letter which OCM had addressed to Eskom. So, he's reproducing here, the contents of his opinion of 2 December 2016 which, Chair you will find on page 1042.

CHAIRPERSON: Okay, no that's fine. I don't think that –
20 I wanted to see where they are to be found, you can move on, I think what may be important, just for the record purposes is for you to articulate what their defences were. Mr Molefe might have no comment but just so that it's known what their defences were so that when you come to the – when you refer to the defences raised or issued

raised by CDH, one can see whether they are the same but – so that's just for the record. It may well be that there are other people who really need to be questioned about why they may seem to have found these defences unattractive when they were raised by OCM but suddenly attractive when they were raised by – whether it's CDH or Tegeta.

ADV SELEKA SC: So, was the Chairperson asking me to read them into the record?

CHAIRPERSON: No, I'm saying if you can articulate
10 them, if you articulate them without reading them it's fine, if you want to read them it's okay.

ADV SELEKA SC: Yes, well there's a couple of them, let's see, maybe I can summarise them. The ...[intervenes].

CHAIRPERSON: Or the ones that are the same as the ones that seem to have been relied upon to reduce the claim via Eskom.

ADV SELEKA SC: Ja, the failure by Eskom to notify as and when there was a breach, if ...[intervenes]

20 **CHAIRPERSON:** When the quality of the coal was below the agreed ...[intervenes]

ADV SELEKA SC: That is, that is correct.

CHAIRPERSON: Standard.

ADV SELEKA SC: Yes, that is correct.

CHAIRPERSON: So I think that clause was, that clause

was to the effect that if OCM delivered coal that was below the agreed quality level, then Eskom was required to send a notice to OCM within a certain period.

ADV SELEKA SC: Yes.

CHAIRPERSON: And if it did not send such a notice, then the quality of the coal would be taken to have been in accordance with the agreed standards.

ADV SELEKA SC: Correct Chair.

CHAIRPERSON: Ja.

10 **ADV SELEKA SC:** Correct Chair. And they had indicated that Eskom had not done so. Let me see. I think I need to go to the opinion itself. 10.42 Because in the affidavit he summarizes and I think he skipped some of the issues. I will be brief in running through them. This then is the opinion of the 2nd of December 2016. And from Tyrrell Thompson, well Cliff Decker, Hoffmeyr to Eskom. The one is:

20 “There is no reasonable basis to justify a penalty of this amount 2,2 billion having regard to the history and background circumstances surrounding the imposition of penalties arising out of CSA. And Eskom has no reasonable prospect of recovering this amount in an arbitration.”

And I am trying to scheme through. Then in regard to the sampling process:

“The parties were in negotiations to renegotiate the clause.”

And Mr Moodley then says this:

“The CSA includes a renegotiation clause in terms of which if at any time either parties are of the view that the specification in the CSA are no longer properly and are realistically representative of the coal which OCM could reasonably expect to produce from its resource, it could request a renegotiation of the specification.”

And at that stage the parties were in that renegotiation.

CHAIRPERSON: And when was this?

ADV SELEKA SC: This is in December now 20 – did I say 15? Ja, 15.

CHAIRPERSON: Ja. Even if you do not cover all of them ...

ADV SELEKA SC: Yes.

CHAIRPERSON: I think you would cover all of them if necessary when you ask people who were involved.

ADV SELEKA SC: Correct Chair.

CHAIRPERSON: In making the decision to ...

ADV SELEKA SC: Yes.

CHAIRPERSON: (Indistinct) the amount that they ... (indistinct).

ADV SELEKA SC: Thank you Chair. There's an important one Mr Molefe. He says during this renegotiation:

“During the settlement discussions there were extensive negotiations on the specifications, with Primary Energy and the Hendrina Power Station. And ultimately a specification was agreed in relation to sizing which matches that which OCM delivered during the period from 2012 to 2015.”

If this is a specification that the power station was
10 capable of accepting, OCM is arguing, then clearly the delivery of coal, meeting that sizing specification during most of 2012 to 2015 could not have caused any meaningful damage to the power station.

And by the way, the claim from 2012 to, to I think it is May 2014 was completely abandoned.

MR MOLEFE: Are you asking me to comment?

ADV SELEKA SC: I am telling you, yes can you – do you know of that?

MR MOLEFE: No I did not know that, but from what you
20 are saying, you are saying that there was a specification that was specified in the ... (indistinct).

ADV SELEKA SC: Precisely.

MR MOLEFE: Ja, in the sizing. In the coal supply agreement.

ADV SELEKA SC: Yes.

MR MOLEFE: That specification was not ... (indistinct).

ADV SELEKA SC: Yes.

MR MOLEFE: Right, however in the renegotiation the SCA was changed. Or ...

ADV SELEKA SC: The specification was changed.

MR MOLEFE: The specification in the SCE was changed.

ADV SELEKA SC: Yes and Eskom agreed.

MR MOLEFE: Agreed, right.

ADV SELEKA SC: To a specification that matches ...

10 **MR MOLEFE**: At the time of imposing the penalties, OCM did not meet the specification that had been specified in the agreement.

CHAIRPERSON: Look this side Mr Molefe.

MR MOLEFE: Oh yes.

CHAIRPERSON: I cannot hear.

MR MOLEFE: Oh.

CHAIRPERSON: At the time of?

MR MOLEFE: At the time when OCM delivered the coal, they did not meet the specification.

20 **CHAIRPERSON**: Yes.

MR MOLEFE: And are therefore liable to the penalties.

CHAIRPERSON: Yes.

MR MOLEFE: The fact that later on when the engineers met they decided to change the specification. That does not mean that – I do not know, it does not mean that they

have the meeting it was wrong to impose the penalty, because the penalty was imposed on the basis of the specification that had been in the agreement. Not what was consequently modified.

ADV SELEKA SC: But there is just one concern, because the other concerns is that Eskom had already failed to invoke the notice clause. It had then failed to invoke the notice clause.

MR MOLEFE: When did Eskom fail to do so?

10 **ADV SELEKA SC:** From 2012 ...

MR MOLEFE: Precisely my problem.

ADV SELEKA SC: To 2014.

MR MOLEFE: That was precisely my problem with the whole thing. The fact that Mr Koko is saying there is, there is penalties of 1,7 billion that had not been collected. I, I was not prepared Chairperson to be part of the people that had not pursued Eskom's legitimate claims for the penalty.

CHAIRPERSON: But you are talking of cross-purposes. Mr Seleka's reference to that clause and the failure of
20 Eskom to invoke that clause is important. He has meant to say to you, because in terms of the contract, the CSA ...

MR MOLEFE: Yes.

CHAIRPERSON: That Eskom had with OCM whenever OCM delivered coal of a substandard coal ...

MR MOLEFE: Yes.

CHAIRPERSON: In terms of the agreement, Eskom was obliged if it wanted to impose penalties.

MR MOLEFE: Yes.

CHAIRPERSON: To send OCM a written notice.

MR MOLEFE: Yes.

CHAIRPERSON: Telling then that you have supplied us with substandard coal and so that then they can impose the penalties.

MR MOLEFE: Yes.

- 10 **CHAIRPERSON:** But in terms of the contract if Eskom failed to send such a notice, the contract said, the coal, the substandard coal would be taken to have been of an acceptable standard. And therefore Eskom could not thereafter impose penalties. So he is saying, OC – one of the points raised by OCM was Eskom can't pursue this claim against us or at least part of it, because they did not send us the notices required by the agreement and effect of not sending us those notices, is that the coal is taken to have been of the right standard. That is what he is talking
- 20 about here.

MR MOLEFE: And what I was saying Chair, that it means there are employees at Eskom that did not invoke the penalty as they were required by the contract. Right. Those employees misbehaved. And well maybe we cannot recover those penalties because they have already

misbehaved, but there was a discipline problem at Eskom when it came to Optimum. But things were not being followed to the letter. And all I was saying was, I was not prepared to be part of those people that were turning a blind eye. So what, what we are being told now is that there are people at Eskom that turned a blind eye, that OCM was not complying.

CHAIRPERSON: Well you are not being told that they turned a blind eye. You are being told notices were not
10 sent. Why they were not sent might be another reason. Maybe they turned a blind eye, maybe it was negligence. We don't know. But the point Mr Seleka was making is, that was a defence that was raised and indeed if Eskom did not dispute the allegation that it did not send those notices, then it had no claim or part of the claim would not be sustained. You might say, look I do not know about whether notices were sent or not sent. If they were not sent it means that OCM may have had a point. But you, you don't know whether they were sent or they were not
20 sent. I assume.

MR MOLEFE: I don't know whether or not the notices were not sent.

CHAIRPERSON: Ja.

MR MOLEFE: But ...

CHAIRPERSON: Ja.

MR MOLEFE: If I had known that the notices were not sent, I would have all those people in front of a disciplinary hearing. Yes.

CHAIRPERSON: But also if you had known that those notices were not sent, would you have pursued the claim?

MR MOLEFE: Well I would have taken legal advice.

CHAIRPERSON: Legal advice, ja. Okay, no that is fine.

MR MOLEFE: Yes.

ADV SELEKA SC: Ja which ...

10 **CHAIRPERSON:** And CDH would have given legal advice.

ADV SELEKA SC: Which was being given.

CHAIRPERSON: Ja.

ADV SELEKA SC: Because it was in existence already.

CHAIRPERSON: Yes. Ja.

ADV SELEKA SC: You see what I find difficult is this Molefe ...

MR MOLEFE: Mr Richard Moodley is not a ... (indistinct) like you. So I would have asked for legal advice from senior, with the amount of money involved.

20 **ADV SELEKA SC:** It will come from your bank. Anyway ...

MR MOLEFE: You will find that if we instructed you Mr Seleka, you would have defended it.

CHAIRPERSON: No. But Mr Molefe remember what I told, lawyers work on the basis that they can advise you that your prospects of winning are not reasonable.

MR MOLEFE: Yes.

CHAIRPERSON: But if you insist I can ... (indistinct).
Okay. Yes, or there could be a situation where they say,
look okay this is just not on.

MR MOLEFE: Yes.

CHAIRPERSON: Or they can say, look we do not think we
will win but let us take our chances. So maybe you would
have said, let us take our – if you want to take your
chances I will represent you.

10 **MR MOLEFE:** Yes.

CHAIRPERSON: But the fact of the matter is, he wasn't,
he was not, he is not aware whether the notices were sent
or were not sent. And obviously there are people who
ought to know why, what the actual position was.

ADV SELEKA SC: Yes. Yes.

CHAIRPERSON: And if they were, if they were aware that
they were not sent, were they just taking chances to see
whether OCM would take the point or not.

ADV SELEKA SC: Yes. Let me get your response to this
20 Molefe, because I find it hard as the Chief Executive that
you know about the penalties. You insist on these
penalties being claimed. Or enforced and pursued. So you
must have spoken to some people within Eskom. This
people were there before you. These people have been
provided with this opinions by CDH. CDH mentions the

names of these people in their affidavit. People from legal. Ms Daniels. Mr Johan Bester. Mr Koko. Ayan Danthetha(?). Neo Silanku(?). Mentions their names in their affidavit, that we were given these people to work with. That you could have know about, the existence of the penalties. But not known about the concerns pertaining to the merits of that, those penalties, is at least for me inconceivable. And I want you to comment on that.

MR MOLEFE: Yes.

10 **ADV SELEKA SC:** So that, so that – you see the statement you are making is, well I didn't want to be part of those people who failed to do this, but the point is by the time you come in, those people have been advised that there are problems. So for you to pursue claim which is riddled with difficulties against a company, against which and I am going to say to you, Eskom knows we have a difficult pursuing or succeeding against. It seems not right when you know the weaknesses. And one of it is that there was double penalty of R158 000 000,00. Which reduces
20 the amount even further. So but comment on ...

MR MOLEFE: Would you like my comment?

ADV SELEKA SC: Yes.

MR MOLEFE: Chairperson, I was brought up in the National Treasury. At the time when the PFMA was written up, I was in fact in the team that drafted the PFMA. My –

the view from the National Treasury has always been that government does not pursue its legitimate claims.

CHAIRPERSON: I'm sorry, does not pursue?

MR MOLEFE: Its legitimate claims. And that government is very lax at negotiating. And let's people get away with murder.

CHAIRPERSON: People owe it for electricity and they don't collect?

MR MOLEFE: Yes.

10 **CHAIRPERSON:** Legitimate?

MR MOLEFE: Yes.

CHAIRPERSON: Ja.

MR MOLEFE: And that this was also rife in the parastatal. The clause that I was referring to earlier that there is that accounting officers must collect what is due. Perhaps my interpretation of that clause is considered here. But do not leave a claim if there is a chance of collecting it. That is supposed to come to the fiscus. My attitude in this whole matter was that there was a claim, Eskom had a claim
20 since 2013 and it had not been collected. The fact that there were defences and so on and so forth, I was quite prepared to leave that to the legal people. But from where I was sitting to be able to show that as an accounting officer I did take reasonable steps to collect. And that the collection became difficult. So I do not think that with my

frame of mind, especially with my background on the National Treasury, and my knowledge of the, well limited knowledge of the PSMA, that I would have taken the risk that somebody would have turned around one day and said, why did you not collect what was legitimately owed to Eskom. There is, there is a guy who came here who calculated these penalties and said they were legitimate. I mean I do not have to go and say, Mr Seleka here are the measurements of the coal and these were the
10 specifications. There is a guy who did that and said, as a result of these measurements these people owe us money. For me that was enough. But we must pursue it. And the legal people must sort it out. As far as I am concerned, all the people that Mr Seleka is mentioning and CDA, should then have come with a definite recommendation that we cannot pursue this claim. That did not come to me. As far as I am concerned, there was even, even this legal opinion from 2018 leaves a possibility of claiming. I did not want that I would be the one that turned a blind eye when there
20 was a legitimate claim on the table. So that was my frame of mind at the time. So the, the other thing is that as a Group Chief Executive, I did not really, really sit down with the legal team and debate legal merits, because I am not a lawyer. I was quite prepared to receive from them a consensus view from them that there is this claim, they can

definitely not pursue. And this claim we can pursue. Eskom had 100s of legal matters that were outstanding, some of them prescribing and so on and so forth for which I was prepared to take advice. And this was one of them, but this one was peculiar. Number one, it is a very large amount. And number two, I know the parties involved. And suspected that there was something amiss.

CHAIRPERSON: Well I did, I think Mr Seleka's proposition was simply that he found it difficult to accept that all of
10 these people who are mentioned, I think in their opinion is Ms Daniels, Mr Koko and ...

ADV SELEKA SC: In the affidavit.

CHAIRPERSON: (Indistinct), and whoever who I think Mr Seleka implies knew about the issues that CDH had raised about this claim. He was saying he was finding it difficult that despite the fact that they must have all known, nobody told you about this reservations that the lawyers had raised. So I think that is the ...

MR MOLEFE: But, but ...

20 **CHAIRPERSON:** That is the question you were supposed to answer.

MR MOLEFE: Yes. But when they were here at the Commission, what did they say about why this penalty was being collected?

ADV SELEKA SC: We have not completed their evidence.

We only started with one of these cases.

MR MOLEFE: Oh no, then I will watch on TV.

CHAIRPERSON: But, but, but ...

ADV SELEKA SC: No, he is still not answering.

CHAIRPERSON: But you, you are saying, are you saying definitely none of those people brought to your attention the reservations or whatever the challenges are, that were articulated by CDH in regard to the, to the claim?

MR MOLEFE: I am saying ...

10 **CHAIRPERSON**: Or you are saying you cannot remember?

MR MOLEFE: I am saying that I cannot recall.

CHAIRPERSON: Ja.

MR MOLEFE: That anyone came to me.

CHAIRPERSON: Ja.

MR MOLEFE: And said, definitely we cannot collect this.

CHAIRPERSON: Ja. Ja but you were, Mr Seleka is not going that far. He is simply saying to say there are challenges about pursuing it, but you, if you want you may pursue it provided you don't set off ...

20 **MR MOLEFE**: Yes. So if, if there is no one who said, we cannot definitely pursue this ...

CHAIRPERSON: You would pursue.

MR MOLEFE: I suspect that my attitude would have been, let's pursue because as I say, my interpretation of collect what is due, is very concerning. Yes, that do not leave

anything on the table, for the fiscus.

CHAIRPERSON: Okay, but I am sure after today you will have a different view about it.

MR MOLEFE: I had a lesson ja, Chairperson, fortunately I am no longer in the field.

CHAIRPERSON: Ja. Okay, alright.

MR MOLEFE: Yes.

ADV SELEKA SC: Because if the concerns date back to 2013 and you terminate to 2013, 2014, 2015 you put a
10 letter of demand in 2015. And you are still there at December 2015. Another opinion comes in. The question is, why at that time does not Eskom, the entity Eskom with its officials, do the exercise to come to the right amount, which is the amount they ultimately settled on with Tegeta in 2017? Far less than the 3.1 billion which had by the way a double penalty which had to be deducted. Why did they not do the recalculation to come to that right amount of 255, before Tegeta comes into the picture?

MR MOLEFE: Why did the legal department not do it?

20 **ADV SELEKA SC:** No, the Eskom.

MR MOLEFE: Mister, the gentleman who calculated the penalties?

ADV SELEKA SC: The entire Eskom team that was involved there.

MR MOLEFE: I do not know Mr Seleka.

ADV SELEKA SC: Okay.

MR MOLEFE: There was a man who came here who said he is convinced that the 2.17 billion is correct.

ADV SELEKA SC: Who is this man?

MR MOLEFE: I will find out.

CHAIRPERSON: He said he can't remember the name.

ADV SELEKA SC: Okay.

MR MOLEFE: Ja. He showed the workings.

CHAIRPERSON: Well I, I can't remember but there are so
10 many witnesses.

MR MOLEFE: But you do not recall Chairperson somebody here saying, no this is the right amount and this is how we work it out, and I was responsible for calculating the 2.17 billion?

CHAIRPERSON: I don't ...

MR MOLEFE: (Indistinct) I insist that ...

CHAIRPERSON: It is possible, it is possible that somebody did come but I cannot immediately remember. He is younger than me. He should remember.

20 **ADV SELEKA SC:** I should be able to. Ja.

CHAIRPERSON: Ja, but ...

ADV SELEKA SC: I know that people came.

MR MOLEFE: Look I remember when that guy gave evidence ...

CHAIRPERSON: Yes.

MR MOLEFE: I remember thinking, you know what?

CHAIRPERSON: Ja.

MR MOLEFE: When this matter comes up ...

CHAIRPERSON: Ja, I'll refer to him.

MR MOLEFE: I won't have to say anything ...

CHAIRPERSON: Ja.

MR MOLEFE: Because he has already calculated it and shown it to the Commission.

CHAIRPERSON: Ja.

10 **MR MOLEFE**: That it was the right amount.

CHAIRPERSON: Ja.

MR MOLEFE: And I think that at the time ...

CHAIRPERSON: Your junior does not remember Mr Seleka?

ADV SELEKA SC: He's given me various name Chair.

CHAIRPERSON: Oh she did give you some names?

ADV SELEKA SC: She's given me various names but ...

CHAIRPERSON: It means she thinks that there is somebody who came.

20 **MR MOLEFE**: But there was something like that.

CHAIRPERSON: There is somebody who came.

ADV SELEKA SC: Ja, I am not sure whether she ...
(indistinct).

CHAIRPERSON: Or not. I think she seems to know it.

MR MOLEFE: Gert Opperman, ja.

CHAIRPERSON: No, she is, she is younger than us.

ADV SELEKA SC: No but Gert Opperman had concerns himself. CDH says he had concerns about how the figure was arrived at.

CHAIRPERSON: Who?

ADV SELEKA SC: Mr Gert Opperman.

CHAIRPERSON: Mister?

ADV SELEKA SC: Gert Opperman.

CHAIRPERSON: Oh, okay, alright.

10 **MR MOLEFE:** I can't remember who it was, but there was somebody.

CHAIRPERSON: Well if you can find out and when you get home maybe ...

MR MOLEFE: You will let me know.

CHAIRPERSON: You will let your counsel know and then they can pass on the name. From what Mr Seleka says and my ...

MR MOLEFE: Actually the name ... (indistinct).

20 **CHAIRPERSON:** It seems that his junior might be remembering. But I want us to take an adjournment now. It is just after 16:00.

ADV SELEKA SC: Yes Chairperson.

CHAIRPERSON: And I would like counsel to see me in Chambers to report back on the lunch issues, so that when we come back then I will know.

ADV SELEKA SC: Yes.

CHAIRPERSON: What the position is.

ADV SELEKA SC: Yes.

CHAIRPERSON: So let's adjourn now. You can look ...
(indistinct) during ...

MR MOLEFE: Chairperson if you give me three minutes.

CHAIRPERSON: No, no, we will come back. We are not
adjourning for the day.

MR MOLEFE: Oh okay.

10 **CHAIRPERSON:** Ja, we just adjourn for 10 minutes.

ADV SELEKA SC: Yes Chair.

CHAIRPERSON: It is 10 past, we will resume at 20 past,
but if I can see counsel in Chambers.

We adjourn.

INQUIRY ADJOURNS

INQUIRY RESUMES

CHAIRPERSON: Thank you let us continue.

ADV SELEKA SC: Thank you. Mr Molefe yes you wanted
to.

20 **MR MOLEFE:** Yes Chair on the matter that we were talking
about before. In my affidavit paragraph 70.

ADV SELEKA SC: Paragraph?

MR MOLEFE: 70 page 022 I think.

CHAIRPERSON: Black numbers. Black numbers on the left
hand corner.

MR MOLEFE: Eskom Bundle 17 page I think 22.

CHAIRPERSON: Okay ja.

ADV SELEKA SC: 22.

CHAIRPERSON: Paragraph 70?

MR MOLEFE: Paragraph 70.

CHAIRPERSON: Yes.

MR MOLEFE: When I arrived at Eskom I discovered that Glencore was owing Eskom an amount in excess of R2 billion in penalties in terms of the Coal Supply Agreement.
10 Furthermore Eskom was not taking adequate steps to recover the money. It is not clear to me why there was a reluctance from Eskom to recover the money that was legitimately due to Eskom. And then I put in a footnote 43 this was in the evidence of Mr Snehal Nagar paragraph 7.3 of his affidavit here at the commission and ...

CHAIRPERSON: And did you mention somebody's name just now?

ADV SELEKA SC: Snehal.

MR MOLEFE: Snehal Nagar – N-a-g-a-r.

20 **CHAIRPERSON:** What paragraph is that?

ADV SELEKA SC: So page 23 sorry Mr...

CHAIRPERSON: Ja I am at page 23.

ADV SELEKA SC: Footnote 43.

CHAIRPERSON: Oh in the footnote ja.

MR MOLEFE: In the footnote at the bottom.

CHAIRPERSON: Oh I am looking – I was looking in the text.

MR MOLEFE: Yes.

CHAIRPERSON: Ja.

MR MOLEFE: So the footnote states exactly where I got the fact that it was in fact R2.1 billion.

CHAIRPERSON: Ja.

MR MOLEFE: And my learned friend here was able to find that specific paragraph.

CHAIRPERSON: Oh now that she was nodding to say there
10 was somebody who made calculations here she is your learned friend.

MR MOLEFE: She is my senior Chair.

ADV SELEKA SC: Ja.

MR MOLEFE: Yes. And she did find the paragraph 7.3 and in it is Snehal Nagar actually shows calculations in his affidavit of how the money was – how that...

CHAIRPERSON: In whose affidavit? In your affidavit?

MR MOLEFE: No in his affidavit.

ADV SELEKA SC: No Mr Snehal. He says Mr Nagar.

20 **CHAIRPERSON:** Mr – Mr Nagar's affidavit?

MR MOLEFE: Ja.

CHAIRPERSON: Whose affidavit is that?

MR MOLEFE: Mr Nagar. – Snehal Nagar.

CHAIRPERSON: So you say in the calculations of how the claims...

MR MOLEFE: Yes.

CHAIRPERSON: Were made up are in his affidavit.

MR MOLEFE: Yes.

ADV SELEKA SC: Yes that is what he is saying Chair.

CHAIRPERSON: Oh has he given evidence?

ADV SELEKA SC: He did give evidence in phase 1.

CHAIRPERSON: Oh in phase 1.

ADV SELEKA SC: Yes not during –

CHAIRPERSON: That was a long time ago.

10 **ADV SELEKA SC:** Yes.

CHAIRPERSON: ja.

MR MOLEFE: And that is where the detail calculations come from in this commission.

CHAIRPERSON: Sorry?

MR MOLEFE: That is where the detailed calculations come from in the commission.

CHAIRPERSON: Yes, ja okay.

ADV SELEKA SC: Yes.

20 **MR MOLEFE:** Which is why I never went back to it because I thought...

CHAIRPERSON: Yes.

ADV SELEKA SC: Ja.

MR MOLEFE: He is 00:03:15.

CHAIRPERSON: Okay.

ADV SELEKA SC: Because I think he is one of the officials

CDH men – Mr Moodley mentions as having dealt with.

MR MOLEFE: Yes.

ADV SELEKA SC: And all these concerns having been raised. Mr Molefe you were saying you knew who you were dealing with in terms of OCM.

MR MOLEFE: Yes.

ADV SELEKA SC: Based on your experience from Transnet and now at Eskom. Could that have influenced how you dealt with them your past experience at Transnet with them?

10 **MR MOLEFE:** I mean not just my past experience. Glencore's application is there.

ADV SELEKA SC: In general.

MR MOLEFE: In general they are known to be sharks.

ADV SELEKA SC: They are known to?

MR MOLEFE: To be sharks. They are very shrewd.

CHAIRPERSON: To be shy?

MR MOLEFE: To be sharks.

CHAIRPERSON: Oh sharks.

MR MOLEFE: Ja they are known – ja they are known to be

20 **CHAIRPERSON:** Known to be sharks.

MR MOLEFE: Yes I mean there is a media articles all over that refer to how especially under the leadership of Mr Glasenberg they have been very robust in – in their dealings. They do not leave anything on the table. They do not have sympathies when they are in the right. So that is – I mean it

is extensively covered in the media. They have several investigations and guilty verdicts in several territories of wrongdoing in the financial markets. So I – I had a feeling that – and I had had an experience with them refusing to sign the type of year agreement. And this – this whole thing did not sound right to me from thereon.

ADV SELEKA SC: So you – is it right or fair to say you had a particular view about it and if it were according to you you would not deal with them based on...

10 **MR MOLEFE:** I would deal with them.

ADV SELEKA SC: Not deal in that sense. You would not do business with them.

MR MOLEFE: Yes that is what I mean. I would – I would – I was prepared to do a deal with them whereby we stuck to the agreement.

ADV SELEKA SC: Whereby?

MR MOLEFE: We stuck to the agreement.

CHAIRPERSON: No I think you may be talking at cross-purposes.

20 **ADV SELEKA SC:** Yes.

CHAIRPERSON: I think Mr Seleka is – is asking you Mr Molefe whether because of the view you had of them you would have preferred to have no business interactions with them.

MR MOLEFE: Yes.

CHAIRPERSON: If it were up to you.

MR MOLEFE: No I would have business interactions with them.

CHAIRPERSON: You would have ja.

MR MOLEFE: There is no one that I would not have business interactions with except that in their case it would have been not with a pinch of salt but perhaps a tablespoon.

CHAIRPERSON: Ja. So I guess what you are saying is you – you would have business interactions with them but you...

10 **MR MOLEFE:** I would be very careful.

CHAIRPERSON: You would be careful.

MR MOLEFE: Yes.

CHAIRPERSON: Okay.

ADV SELEKA SC: Because you know what – what the comments you have made about their political connection to Mr Ramaphosa and the issues you have just now mentioned, things reported in the media about them leaves one with the impression that this is a company that you were not going to easily accommodate.

20 **MR MOLEFE:** Ja easily being the operative word. I could accommodate them but it would not come easy.

ADV SELEKA SC: Having mentioned Mr Ramaphosa a couple of times I think it will be fitting to say – to read to you what Mr Ephron says about him.

MR MOLEFE: Yes.

ADV SELEKA SC: In his affidavit and it is under the heading Involvement of Mr Ramaphosa in the business of OCH and OCM in the period 2012 / 2014. So the affidavit is found in Eskom Bundle 18(B) I will read it to the record – page 1266.

CHAIRPERSON: Will I still need 14(B)? – Bundle 14(B) today?

ADV SELEKA SC: No Chair.

CHAIRPERSON: Okay.

10 **ADV SELEKA SC:** No. Page 12...

CHAIRPERSON: And the other 14?

ADV SELEKA SC: Not that one too.

CHAIRPERSON: Okay. I have got it.

ADV SELEKA SC: 1266 paragraph 8 he writes – this is the affidavit of Mr Ephron dated 11 February 2021 and he writes:

20 “Mr Ramaphosa had not direct involvement in the day to day operations of OCH or OCM in the period 2012 to 2014. Mr Ramaphosa was never appointed Chairman of OCH or OCM. Mr Ramaphosa nominated various professionals from Shanduka Resources to represent him on the OCH board. I never asked Mr Ramaphosa to intervene on behalf of OCH or OCM in any matters relating to Eskom or the CSA and to the best of my

knowledge and recollection he never did so.”

Are you looking for ...

CHAIRPERSON: You – you want him to comment on that – you want to get to the page Mr Molefe?

MR MOLEFE: No.

CHAIRPERSON: Ja he is telling you what Mr Ephron says in his affidavit about Mr Ramaphosa and OCM in response to your statement last time. He wants you to comment on that response if you are able to.

10 **MR MOLEFE:** Yes.

CHAIRPERSON: One of the things that he – Mr Seleka reads is that he says that is Mr Ephron says Mr Ramaphosa was never appointed Chairman of OCH – OCM. OCH was the holding company.

ADV SELEKA SC: OCH or OCM.

CHAIRPERSON: Ja or both.

ADV SELEKA SC: Or both yes.

CHAIRPERSON: Do you want Mr Seleka to help you to find whatever you are looking for?

20 **MR MOLEFE:** Yes Chair.

CHAIRPERSON: Tell him – if you tell him what you are looking for he might be able to tell you what page you will find it in.

MR MOLEFE: Oh. Chairperson in paragraph 80 of my affidavit.

CHAIRPERSON: Yes.

MR MOLEFE: Page 025.

CHAIRPERSON: Hm.

MR MOLEFE: I say:

“Mr Ramaphosa was Chairman of Optimum at the time of the initiation of the hardship claim.”

CHAIRPERSON: At the time of the initiation of?

MR MOLEFE: Of the hardship claim.

10 **CHAIRPERSON:** Yes which was what 2014/2015?

ADV SELEKA SC: 13 – 2013.

CHAIRPERSON: 2013.

MR MOLEFE: Yes. And then there I have made a footnote I think it is number 48 – number 48 there is a reference to a I think an article from a – I think it was a magazine but one of these mining magazines and it was written by Imaralu D on the 25th of June 2012 and that is where Ramaphosa is mentioned as Chairman of Optimum. So if you go to that link that is on my footnote...

20 **CHAIRPERSON:** Yes.

MR MOLEFE: You will find that article.

CHAIRPERSON: Okay so – so you rely on that article.

MR MOLEFE: Yes.

CHAIRPERSON: For your statement you made that he was Chairman.

MR MOLEFE: That he was Chairman.

CHAIRPERSON: Ja if that article was wrong then that is it but that is where you base your statement on.

MR MOLEFE: Yes.

CHAIRPERSON: Ja.

MR MOLEFE: Ja.

CHAIRPERSON: Okay. From what you read Mr Seleka Mr Ephron is categorical to say Mr Ramaphosa was never appointed as Chairperson of either OCM or OCDH is that
10 right?

ADV SELEKA SC: Correct Chairperson and he uses the word never.

CHAIRPERSON: Hm.

ADV SELEKA SC: The heading – the title of the article Mr Molefe is referring to reads:

“Glencore Ramaphosa acquires 70% stake of
Optimum Coal.”

MR MOLEFE: Yes. That is the title but in the body of the article.

20 **ADV SELEKA SC:** Yes.

MR MOLEFE: It refers – it quotes somebody as saying that ...

CHAIRPERSON: Will your junior check unless you have already checked where that is.

ADV SELEKA SC: She is doing exactly that.

CHAIRPERSON: But let us – let us deal – let us deal with the substance. Last time when you appeared and you made the statements you made relating to Mr Ramaphosa we – we adjourned in the manner that we did. But let – I just want to get what precisely you say it was that he may have done wrong if that is what you are saying or whether you are saying – you are not saying that he did anything wrong himself but you are saying maybe Glencore – maybe other people OCM or OCH were hoping to use his presence or his
10 connection with OCM or OCH to their advantage; to their benefit in terms of their interactions; in terms of business with Eskom. So I just want to know whether you are accusing him of having done something wrong or whether you are simply saying other people were hoping to use their association with him wrongly.

MR MOLEFE: Chairperson what I said was it was very strange that they did not do due diligence and that the – I do not take the excuse that they were concerned about those things. What they did do is that they sold a stake of this
20 company that they had bought to Mr Ramaphosa exactly.

CHAIRPERSON: Come closer to the microphone.

MR MOLEFE: They sold the stake of this company that they have bought to Mr Ramaphosa as their BEE partner and the only way that they could get out of the pickle that they subsequently found themselves because they had not done

due diligence was through negotiation. And my postulation was that they were hoping to use Mr Ramaphosa's influence to help them negotiate part of that thing. I think – I do not know who – I think Glencore issued a statement after my statement.

CHAIRPERSON: I cannot remember.

MR MOLEFE: Ja there was a public statement and they said that Mr Ramaphosa – his – was acting – was not acting in our interests. I cannot believe that Chairperson. He was a
10 shareholder. He had an interest in the matter. He had an interest in the matter. If – if the penalties was to be settled because there are roles while he was still shareholder he would have financial benefit. He would have an interest in the settlement of the penalties. So I am not saying that I definitely know that he pedalled influence but the circumstances are such that the situation was likely to arise. Also there is a lot of unexplained things at Eskom. Why were the – why were the penalties not pursued? Why were people so lackadaisical in pursuing Eskom's interest? The
20 settlement agreement was done in 2014.

CHAIRPERSON: But you - you would accept would you not Mr Molefe that when it comes to that it is more speculation.

MR MOLEFE: Yes.

CHAIRPERSON: In terms of trying to say the reason why they might not have pursued the claim might be because Mr

Ramaphosa was part of OCM or OCH.

MR MOLEFE: Yes.

CHAIRPERSON: That would be speculation.

MR MOLEFE: Yes.

CHAIRPERSON: But I understand what you are saying and you must tell me if I misunderstand. You are saying – you are not accusing him of having done anything wrong but you are saying Glencore – OCM or some people in Glencore – OCM as you see things it seems to you that the reason why
10 they may not have – they might not have done due diligence is that they hoped that they would use their association with him to their benefit in terms of their interactions with Eskom. Am I correct?

MR MOLEFE: Indeed Chairperson.

CHAIRPERSON: Okay alright. Mr Seleka.

ADV SELEKA SC: Ja. But you are not ascribing any arrangement to that end on the part of the President.

MR MOLEFE: No except to know it that when he left Glencore just know he went to become Deputy President and
20 then Chairman of the War Room which I described in my statement as defunct to Chairman of Eskom because of the way that the War Room was operating. Ja. That was also strange. That was also peculiar. Without saying that the War Room discussed old contracts I am not aware that they did but it would appear from even the evidence that was

given here the level of detail that the War Room was prepared to go into while he was Chairman was strange because it was things that were supposed to be dealt with by the board.

CHAIRPERSON: Well you may or may not have a point. My understanding was that the – the people involved in the so called War Room were an extraordinary measure that was resorted to by the then President Mr Zuma to try and say it looks like existing structures are failing to find a solution to
 10 the Eskom problems of load shedding. Please try and assist the country to find the solutions and therefore it may well be that to find a solution might need more details than normal. That is my thinking but you may well have a point. I am just saying this.

MR MOLEFE: I agree with you Chairperson and for whatever reason then put him in this unenviable situation where normally in the corporate world you would have to wait to cool off before you go into that level of detail with the company that was in a R2 billion and a R8 billion basically
 20 dispute to take over charge on behalf of the government. They would – there needed to be a cooling off period. He had to be separated. I also make the point that when Mr Cyril Ramaphosa was Chairman of the War Room the transaction had not been completed. It was only approved by the Competition Commission in August 2015. Now

Competition Commission is typically a condition precedent to the finalisation of a contract. So technically while he was Chairman of the War Room he was in fact strictly speaking the shareholder. For if the Competition Commission had not approved that transaction – any financial benefit derived would have accrued to him because the transaction had not been consummated by fulfilling the conditions precedent.

CHAIRPERSON: Yes.

MR MOLEFE: That is a very strange situation for me. I
10 think he should have recused himself if he knew that the –
he has just come out of this company that is having these
difficult discussions with Eskom.

CHAIRPERSON: Have we received Mr Seleka any response from the President to the Rule 3.3 Notice entailing Mr Molefe's statement of last time?

ADV SELEKA SC: I am not aware of a response yet Chair.

CHAIRPERSON: Hm. But the statement – the Rule 3.3 Notice was sent?

ADV SELEKA SC: That was long sent to the Presidency.

20 **CHAIRPERSON:** Ja. Ja okay.

ADV SELEKA SC: Yes.

CHAIRPERSON: Okay. So – so as I understand it in regard to the earlier point you do not accuse him of anything but you say other people may have hoped to use their association with him to their benefit.

MR MOLEFE: Yes.

CHAIRPERSON: But in regard to the War Room you – you say you think he should have recused himself because he – he had – there has been no cooling off period?

MR MOLEFE: Yes and I am not saying he did anything.

CHAIRPERSON: Ja you are not saying...

MR MOLEFE: While he was at the War Room.

CHAIRPERSON: Yes, ja.

MR MOLEFE: But I am just saying that...

10 **CHAIRPERSON:** Just that situation.

MR MOLEFE: It was peculiar that situation.

CHAIRPERSON: Ja.

MR MOLEFE: That we find ourselves in. here we are – because Chairperson when I say we are not agreeing with Glencore – when I say that we are not agreeing with Glencore and we will not entertain their request for an increase it could sound like I am actually not agreeing to doing a deal that Mr Ramaphosa is involved in for a person like myself. Perhaps I have the personality to say that it is
20 not correct to do this transaction. I do not know if Eskom officials who were in a position to oppose this thing and knew that Mr Ramaphosa was involved would have had the courage knowing that look this thing the Deputy President is involved in this thing – if we touch this thing you know my career could be finished.

CHAIRPERSON: Hm.

MR MOLEFE: If we do something about this my career could be finished. Or the close association that he had with Glencore could mean that you actually against him in a sense. It could be read like that.

ADV SELEKA SC: Ja.

CHAIRPERSON: Mr Seleka.

ADV SELEKA SC: Mr Molefe I was trying to follow you. I lost you on two aspects. One is the War Room and the other
10 is Mr Ramaphosa's involvement with Glencore. Coming at established the War Room Mr Ramaphosa was the Deputy President; he was made a chairperson – the Chairperson of the War Room.

CHAIRPERSON: The then President established it as I understand it.

ADV SELEKA SC: Yes we will come to that Chair.

CHAIRPERSON: Ja and appointed him.

ADV SELEKA SC: And appointed him as the Chairman of this...

20 **CHAIRPERSON:** Sorry.

ADV MASUKU: Sorry can I just – because I am getting a little concerned.

CHAIRPERSON: Ja.

ADV MASUKU: About this evidence that is coming from both the evidence leader and the Chair about how the War

Room was established and why it was established and who was establishing it. I do not recall a document of evidence given to this commission on those facts.

CHAIRPERSON: Ja.

ADV MASUKU: Where is that information coming from – this evidence?

CHAIRPERSON: Ja, no, no I think – I think we...

ADV MASUKU: Sorry Chair the second one.

CHAIRPERSON: Yes.

10 **ADV MASUKU:** The second one Mr Molefe gave his evidence last time to my recollection what it is was to give facts. It is up to the commission to investigate based on the facts that he gave the questions you are asking him about whether he is accusing anybody of anything. I think it is unfair to – to ask him to – to ask him on the question of whether or not he is accusing anybody when he has given you facts.

The first obviously important point is to determine whether or not the facts he has given you are correct. If
20 they are correct it is up to you Chair to decide whether there is a conflict of interest that can be read into it and that really takes the other side being given a hearing on whether the evidence that has been provided by Mr Molefe does create a conflict of interest.

We talking about the President here we are not

talking about anybody who is not – who is a – we are talking somebody very important to this country place my client in a position where – and he is courageous enough to say what he wants to say but I – I do want to caution the questions that are being asked here are questions I am not familiar that there has been evidence that has been given which allow – I mean on which – on which one can say well this is why the War Room was established. This is who established it and this is – who – these are the facts
10 surrounding its purpose. Those facts are – I am sure they are somewhere in the government archives.

CHAIRPERSON: Yes, no, no let me say this.

1. With regard to every witness who gives evidence if there is something that needs to be clarified in his evidence including whether he is making or she is making a certain allegations implicating somebody in wrongdoing that can be asked to get to clarify and actually asking that question helps so that when any investigation is done it is done on the understanding
20 whether there is an allegation that somebody has done something wrong and if it is clarified to say no I am not saying that somebody has done anything wrong that might save time in whatever investigation is done as opposed to understanding a witness to be making an allegation of wrongdoing against somebody

and investigating an allegation of wrongdoing that actually the witness made or never intended to make. So that clarification is important.

2. I said the President appointed the Deputy President because my recollection is that that was in the public domain. Obviously if Mr Molefe has a different understanding or if anybody has a different understanding they might say I – we are not sure about that maybe that must be looked into and it can
10 be looked into. But obviously raising some of these things might help narrow whatever investigation might need to be done. So that is the – that is the context.

Okay alright.

ADV MASUKU: Chair can I just...

CHAIRPERSON: Yes.

ADV MASUKU: And I do not mean to engage in this.

CHAIRPERSON: Yes.

ADV MASUKU: And you know it is not my style.

CHAIRPERSON: Ja.

20 **ADV MASUKU:** But – but it is very important that – and I am glad you have explained why you want to know the – his attitude whether or not he is accusing anybody. That should never be the basis on which you conduct an investigation. You have been given facts, this is what happened. So and so owns shares; so and so is the

chairperson of the commission and there are transactions that are now involved which engage the – Eskom. Those are facts I think it is really – really just trying to – to get us into your point where we careful about putting people in an un-envisage positions of having to say things they have not thought about. My recollection is that the most important thing for this commission to do is to investigate the facts that you have been given. On that you can then – because he can – the point of the matter is you do not have to – he
 10 does not have to say that – that – he does not have to accuse anybody for the commission to conduct its own investigation. He might say I am not accusing anybody but in your investigation you might find that there is some wrongdoing and it is – I just worry about ...

CHAIRPERSON: Yes.

ADV MASUKU: His question – line of questioning that seems to suggest that you do want – because – this question you have asked – can you show you the front page tomorrow and his answer that he has given. And –
 20 but it is not safe to do that.

CHAIRPERSON: Yes, no, no

ADV MASUKU: To some of our clients.

CHAIRPERSON: Look the position is that whether a witness is – who gives evidence and the commission wants to investigate certain matters arising from that evidence

whether he is asked or she is asked here at the hearing by the evidence leader or by me certain issues that may need to be asked or whether he is asked by the investigators outside of the hearing after he has given evidence there will be an opportunity to ask questions and that is important because that is part of investigating to say exactly what do you know about this? Is your knowledge such that there may be some wrongdoing that we must pursue here or is your knowledge that you do not know if

10 there is wrongdoing but this is what you know. So this is aimed to – to look at that. But also we have a limited amount of time as the commission so it is unlike 2019 when we might have had a lot of time and we have limited resources. Whatever we can get at the earliest opportunity we should try and get.

ADV MASUKU: Thank you Chair for clarifying.

CHAIRPERSON: Ja. Thank you. Mr Seleka. Oh we are at one minute to five already. I am not sure that there is – or there – was there a question you had asked and that

20 has not been answered?

ADV SELEKA SC: Yes there was a question I wanted to ask but I also wanted to...

CHAIRPERSON: To say something.

ADV SELEKA SC: To say something.

CHAIRPERSON: Okay.

ADV SELEKA SC: Because the evidence on the War Room its establishment and running and information given to it was ...

CHAIRPERSON: Was given already.

ADV SELEKA SC: Was part – was part of the evidence we led under the suspensions.

CHAIRPERSON: Okay. Okay.

ADV SELEKA SC: So we have the documentation relating to that.

10 **CHAIRPERSON:** Yes.

ADV SELEKA SC: But we were not going to ask Mr Molefe about that until he mentions the War Room and the Deputy President as the Chairperson of the War Room. As a result of that questions of clarity arise and they will inherently arise because we need to clarify certain things.

CHAIRPERSON: But part of the point you making is that indeed there was evidence that has been led under the suspension of executives.

ADV SELEKA SC: Executives.

20 **CHAIRPERSON:** With regard to the War Room.

ADV SELEKA SC: Indeed.

CHAIRPERSON: Ja. And its appointment and so on.

ADV SELEKA SC: Yes.

CHAIRPERSON: Okay.

ADV SELEKA SC: Because the executives partly were

being accused of not giving information to the War Room or incorrect information (talking over one another).

CHAIRPERSON: Or conflicting information.

ADV SELEKA SC: Correct.

CHAIRPERSON: Ja.

ADV SELEKA SC: So we had to go into that.

CHAIRPERSON: I remember that ja.

ADV SELEKA SC: Ja. We had to go into that. And then the issue of the interest the President has in Glencore.

10 That comes from Mr Molefe and so we have gotten to give his affidavit to those he has implicated and to get their response. And I wanted to read – well I was going to raise two points with you Mr Molefe in regard to what you have been explaining to the Chairperson. So I can do that now or I can do that tomorrow.

CHAIRPERSON: But if you can do it tomorrow then that would be – then we will do it tomorrow.

ADV SELEKA SC: Ja okay.

CHAIRPERSON: So we will adjourn now. The position is
20 that we will continue tomorrow I thank everybody for their cooperation for making it possible for us to continue tomorrow. We are meant to have Mr Anoj Singh tomorrow.

ADV SELEKA SC: Correct Chair.

CHAIRPERSON: So your estimate is that we should finish before lunch with Mr Molefe's evidence.

ADV SELEKA SC: Correct.

CHAIRPERSON: And then Mr Anoj Singh can then come in at that stage.

ADV SELEKA SC: Yes.

CHAIRPERSON: And – ja okay. So we – we will adjourn and we will start at ten tomorrow – tomorrow as normal.

ADV SELEKA SC: Thank you Chair.

CHAIRPERSON: We adjourn.

REGISTRAR: All rise.

10 **CHAIRPERSON:** I will just for the public I will come back there will be an evening session so I am adjourning so that another work stream can come in and then I will hear evidence from another work stream. We adjourn.

INQUIRY ADJOURNS

INQUIRY RESUMES

CHAIRPERSON: Good afternoon Mr Hulley. Good afternoon everybody.

ADV HULLEY SC: Good afternoon Mr Chair.

CHAIRPERSON: I see there is somebody moving around
20 where Mr Joubert is. Do you know who that person is?

ADV HULLEY SC: That is Mr Nicholson from the Commission.

CHAIRPERSON: H'm?

ADV HULLEY SC: Mr Nicholson from the Commission.

CHAIRPERSON: From the Commission?

ADV HULLEY SC: He is from the Commission.

CHAIRPERSON: Oh, okay. No, that is fine. I was wondering because there should not be anybody other than somebody that has just been approved.

ADV HULLEY SC: Correct.

CHAIRPERSON: ...by the Commission.

ADV HULLEY SC: That is correct.

CHAIRPERSON: Good afternoon Mr Joubert.

MR JOUBERT: Good afternoon Chair.

10 **CHAIRPERSON:** Good. Do we have the legal team for Colonel Mhlongo around? Are they available? Have they been connected?

COUNSEL: Yes, good afternoon Chair. We have been able to successfully connect and we are on(?).

CHAIRPERSON: Oh, okay. Good afternoon. Thank you very much. Thank you.

COUNSEL: Thank you Chair.

CHAIRPERSON: Okay alright. Please administer the oath to Mr Joubert and then we can start.

20 **REGISTRAR:** Mr Joubert?

MR JOUBERT: Yes?

REGISTRAR: Please state your full names for the record.

WITNESS: Terrence John Joubert.

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

WITNESS: No.

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

WITNESS: Yes.

REGISTRAR: Do you solemnly 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.

WITNESS: So help me God.

10 **TERRENCE JOHN JOUBERT:** (d.s.s.)

CHAIRPERSON: Thank you Mr Hulley.

ADV HULLEY SC: Thank you Mr Chair.

CHAIRPERSON: My recollection is such that we should not be too long with Mr Joubert. Is that so?

ADV HULLEY SC: That is so Mr Chair.

CHAIRPERSON: Yes. So ...[intervenes]

ADV HULLEY SC: Just to fill it in Mr Chair what has transpired since the last occasion since we convened.

CHAIRPERSON: Yes.

20 **ADV HULLEY SC:** You will recall that you have directed Colonel Mhlongo to file an affidavit dealing with his challenge.

CHAIRPERSON: Yes.

ADV HULLEY SC: With his evidence ...[intervenes]

CHAIRPERSON: On the merits.

ADV HULLEY SC: And what – he has in fact done so. That now forms part of the LEA-10 Bundle and it appears at page 210.27.

CHAIRPERSON: What page?

ADV HULLEY SC: 210.

CHAIRPERSON: Let us start with the bundle. What bundle are we using?

ADV HULLEY SC: We are using Bundle LEA-10.

CHAIRPERSON: Okay and to find Colonel Mhlongo's
10 affidavit, I must go to what page?

ADV HULLEY SC: Yes, it is at page 210.

CHAIRPERSON: 2010?

ADV HULLEY SC: 2010. I am sorry 210. Not 2010.

CHAIRPERSON: 210, not 2010.

ADV HULLEY SC: H'm.

CHAIRPERSON: 210.

ADV HULLEY SC: 210.27.

CHAIRPERSON: Oh, okay, okay. Nobody has drawn to my
attention that he has filed. So I have not had a chance to
20 read it but it seems to be a short affidavit.

ADV HULLEY SC: It is a 13-page affidavit, if you exclude the first and the last page.

CHAIRPERSON: Yes.

ADV HULLEY SC: That is then 11 pages.

CHAIRPERSON: Okay alright.

EXAMINATION BY ADV HULLEY SC: Thank you Mr Chair.

Now for the benefit of Mr Joubert, there – an affidavit, a new affidavit has in fact come in from Colonel Mhlongo in which it deals with the allegations that you have advanced and that particular affidavit appears at page 210, the Bundle LEA-10 that you have got in front of you which should include pages 210.27.

MR JOUBERT: 210.27... [Distortion present – speaker inaudible.]

10 **ADV HULLEY SC:** Have you got it, sir?

MR JOUBERT: Yes, Chair.

ADV HULLEY SC: Okay. Now just – and I am not going to take you through specific passages, except to give you the gist of the content. But according to Mr Mhlongo... Sorry, Colonel Mhlongo. What he says is that the two of you had been very close friends when you first joined the DSO in 2004. Is that correct?

MR JOUBERT: No, that is not correct.

ADV HULLEY SC: Now let us just break it up into two
20 different sections. When did you in fact join the DSO?

CHAIRPERSON: I am sorry. Just repeat the question.

ADV HULLEY SC: When did Mr Joubert, in fact, join the DSO?

CHAIRPERSON: Oh. Ja?

MR JOUBERT: Ja, I got transferred on the

1st of January 2004 to the DSO.

ADV HULLEY SC: And that was down in KwaZulu-Natal?

MR JOUBERT: Ja, I was based in East London and I only came across to Durban the 20th of January of the same year.

ADV HULLEY SC: And was that when you met mister or Colonel Mhlongo for the first time?

MR JOUBERT: That is correct sir.

ADV HULLEY SC: And was he also a member of the DSO
10 at the time?

MR JOUBERT: That is correct Chair.

ADV HULLEY SC: Now you say you disagree with his statement and there are two aspects to the statement. The first is that, is that you became friends when you first joined the DSO in 2004. Are you disagreeing with the fact that you became friends or which aspect of your statement are you disagreeing with?

MR JOUBERT: I am disagreeing with the fact that we became friends. We were colleagues, sitting on the same
20 floor. That is about it. He belonged to the Guangzhou Group and which I was not part of.

ADV HULLEY SC: Now he goes on to say. Sorry, and if I could just cover an aspect. The DSO, eventually, was disbanded and a new organisation the DPCI, the Directive for Priority Crimes Investigation was established in 2008.

Is that correct?

MR JOUBERT: That is correct.

ADV HULLEY SC: Now some people were required to go over to or had to choose whether they are going to stay with the National Prosecuting Authority under which the old DSO have been and others had to choose whether they are going to go over join the SAPS in which event they would go with the DPCI. Is that correct?

MR JOUBERT: That is correct Chair.

10 **ADV HULLEY SC:** And what did you choose?

MR JOUBERT: Well, I chose to stay on and form a risk management within the NPA. I did not go across to the police.

ADV HULLEY SC: And Colonel Mhlongo, what did he ...[intervenes]

MR JOUBERT: He went back – he went across to the police.

ADV HULLEY SC: Now he says ...[intervenes]

CHAIRPERSON: Well, Mr Hulley. Maybe you should have
20 started off by recapping what evidence he had given up to last time and then – so that the public can also follow.

ADV HULLEY SC: Yes, Chair.

CHAIRPERSON: Ja, where we are with his evidence. I know that he had not finished. So. But I cannot remember where he was.

ADV HULLEY SC: Thank you Mr Chair that is in order.

CHAIRPERSON: That is right. And it may well be that you lead him to complete his evidence and then maybe you then raise Mr Mhlongo's version in regards to certain aspects.

ADV HULLEY SC: Aspects.

CHAIRPERSON: Ja.

ADV HULLEY SC: Thank you Mr Chair. Now, Mr Joubert, on the last occasion you had testified about a certain
10 statement that you had made some time in 2013. Do you recall that? I am just going to give you ...[intervenes]

MR JOUBERT: Ja.

ADV HULLEY SC: I am just going to summarise some of the evidence that you would have given, A, for your benefit, for the benefit of the Chairperson and of course for the benefit of the public. Now you had deposed to an affidavit in 2013. To be precise, the 24th of November 2013. Is that correct?

MR JOUBERT: That is correct Chair.

20 **ADV HULLEY SC:** And in that statement or affidavit that you gave, you spoke about a conversation. In fact, two conversations that you have had with Colonel Mhlongo. Is that correct?

MR JOUBERT: That is correct Chair.

ADV HULLEY SC: Now in respect of the one conversation

that you spoke of you testified that what had transpired is that he had come into your office to discuss a certain matter and while he was – while he came – or while he was in your office, he received a telephone call.

During the course of that conversation with the – with whomever was on the other end of the telephone, you realised that he was speaking about certain very sensitive matters relating to the new National Director of Public Prosecutions, Mr Nxasana. Is that correct?

10 **MR JOUBERT:** That is correct Chair.

ADV HULLEY SC: That at some point, you commenced to record what he was saying in that conversation.

MR JOUBERT: That is correct Chair.

ADV HULLEY SC: And you testified that a transcript had been produced relating to what had transpired or what he had said in the course of that conversation.

MR JOUBERT: That is correct Chair.

ADV HULLEY SC: And I have directed your attention through the transcript in the bundle of documents that is
20 before you. Do you recall that?

MR JOUBERT: That is correct Chair.

ADV HULLEY SC: Now you have taken us through the contents of that transcript and you had explained to the Commission certain aspects that you have dealt with in the recording or which was captured on the recording and

certain aspects which had preceded the recording. Do you recall that?

MR JOUBERT: That is correct Chair.

ADV HULLEY SC: Now in essence what had transpired in the discussion that you had with Colonel Mhlongo was that he had advised you that he had been mandated by Advocate Nomgcobo Jiba to find information that would place Mr Nxasana in a bad light. Is that correct?

MR JOUBERT: That is correct Chair.

10 **ADV HULLEY SC:** And in the course of that conversation, there were a number of aspects which arose during the course of the conversation. You mentioned some four aspects but the two pertinent aspects that arose what that you – he mentioned that Mr Nxasana had apparently been charged at some stage with the murder of a particular person and that they were investigating to try and locate information relating to that murder charge.

MR JOUBERT: That is correct Chair.

ADV HULLEY SC: And the second pertinent aspect was
20 that he had indicated to you that they had found information relating to fraud charges for fraud allegation in respect of the Road Accident Fund.

MR JOUBERT: That is correct Chair.

ADV HULLEY SC: And he wanted your assistance, that is now Colonel Mhlongo wanted your assistance in trying to

speak to somebody within the Road Accident Fund who might be able to assist them or providing with further information or documentation relating to that Road Accident Fund allegations.

MR JOUBERT: That is correct Chair.

ADV HULLEY SC: And you had indicated that you would put him in touch with a person within the Road Accident Fund but you had – but in truth, you were simply leading them on or leading Colonel Mhlongo on because you
10 actually did not know anybody within the Road Accident Fund.

MR JOUBERT: That is correct Chair.

ADV HULLEY SC: Now... So Mr Chair, that would be a summary of what had transpired.

CHAIRPERSON: Ja.

ADV HULLEY SC: What I would like to do is, is to move on to - because it seems that the affidavit of Colonel Mhlongo has to a large extent narrowed the issues down in certain respects. I would like to get into the
20 substance of the affidavit.

CHAIRPERSON: Okay, that is fine.

ADV HULLEY SC: Thank you Mr Chair. Now, if we can just back to the statement of Colonel Mhlongo. We have spoken about the fact that according to him the two of you were fairly – it appears – and he does not use this

language per se but the substance of what he is saying is that the two of you were close friends. And you came down and joined the DSO in KwaZulu-Natal in Durban. Now you disagree with that?

MR JOUBERT: Yes, I definitely disagree with that.

ADV HULLEY SC: Now after the DSO had in fact been disbanded, the – we got to the point where you had made the election to say with the NPA and he had made the election to take employment with the DPCI which now
10 resided under the SAPS, South African Police Service.

MR JOUBERT: That is correct Chair.

ADV HULLEY SC: Now physically, where were you located then? And if I say you, I mean you personally. Where were you located in terms of which building were you at after the split?

MR JOUBERT: We basically just moved floors from the 6th floor to the 3rd floor on the same building, Southern Light Building and the police, obviously, had to leave to the various units whichever one they applied to and were
20 transferred to.

ADV HULLEY SC: And in the case of Colonel Mhlongo, he had obviously taken up employment with the DPCI which is commonly known as the Hawks. Is that correct?

MR JOUBERT: That is correct. So he obviously moved with the rest of the clan when they were moved.

ADV HULLEY SC: Now at some stage he returned from the evidence that you have given on the previous occasion and from his affidavit, he returned to the building. This time to take up a position – he was seconded to come and assist in the Missing Persons Unit.

MR JOUBERT: That is correct Chair. He was seconded to this PRC and he moved to our building, back into our building.

ADV HULLEY SC: Now according to him, he says that the
10 relationship between the two of you deteriorated after the statement or your affidavit on the 25th of November of 2013 came to light. He became aware of it and the relationship between the two of you became frosty after that. What is your response to that?

MR JOUBERT: Chair, the words that I would use is, there was never a relationship per se. It was merely – he was merely my colleague at the time of the DSO. Now he became an acquaintance. Somebody I knew. We had space on our floor. They needed space. So I actually
20 asked the office manager to move him from wherever they were sitting to my floor which was on the 3rd floor. And that was it. To say that we were friends based on that I would not agree.

ADV HULLEY SC: Okay. Now in relation to the conversation that you recorded and he confirms from his

affidavit that there was in fact a recording. He confirms that he subsequently became aware of the recording. So that does not seem to be a bone of contention or an area of dispute.

But what he says about that conversation is essentially that you were the person that initiated the conversation. You were the person that had raised concerns about the appointment or rather about certain investigations that Mr Nxasana was intending to institute
10 against people within the NPA of which you were one.

What do you say about that.

MR JOUBERT: I would say that is a bunch of lies for a lack of a better expression because remember Mr Nxasana was about to start work at my... My battery is flat. Sorry, just two seconds.

ADV HULLEY SC: [No audible reply]

MR JOUBERT: Sorry Chair.

CHAIRPERSON: Yes.

MR JOUBERT: Just to recap again. I had no dealings – I
20 did not even know Mr Nxasana. I knew his right-hand man who was Advocate Duma. This guy was going to – was carrying on for himself with regards to investigations that he is undertaking against this new guy.

I saw it fit to record this guy for two reasons. One is, there was somebody that is going to be

investigated without his knowledge. This guy was appointed on the 30th of August.

I just saw it fit to record what this guy was saying, giving it to Duma who was the advisor to Mr Nxasana for him to know that there was this investigation and I was merely doing my job.

As to his claims of me having – being worried of cases opened against me by Mr Nxasana that is a lot of lies. That is one thing I can tell you. That is so far from
10 the truth.

ADV HULLEY SC: Okay let us just chat about those cases.

CHAIRPERSON: Mr Hulley, I am sorry. Has Mr Joubert been given Colonel Mhlongo's affidavit, latest affidavit and asked to respond to it?

ADV HULLEY SC: We did provide it to him and asked him to respond. Unfortunately, he did not have sufficient time.

CHAIRPERSON: Oh.

ADV HULLEY SC: We thought it would just make sense if
20 I led him.

CHAIRPERSON: Okay alright. Maybe... It may or may not be necessary after he has finished for him to nevertheless provide an affidavit, just so that there is a response in writing.

ADV HULLEY SC: Yes, Chair.

CHAIRPERSON: When one looks at Colonel Mhlongo's affidavit, one can have regard to his responses as well apart from the fact that he is responding now.

ADV HULLEY SC: Yes.

CHAIRPERSON: Ja.

ADV HULLEY SC: Ja, we will attend to that off the air.

CHAIRPERSON: Ja.

ADV HULLEY SC: Thank you Mr Chair. Now what he says is to be specific. He says that you mentioned to him
10 that there were in fact two cases that you had that were old cases against you and if you... In fact, to be precise, I think turn to page 210.33 at paragraph 17.7.

MR JOUBERT: Yes. Yes, Chair.

ADV HULLEY SC: Now at 17.7 he says that he, that is nor referring now to you, specifically mentioned the case the you had to with the tender – with a tender for the procurement of security services in respect of which he had been suspended at some point and the case involving the unlawful use of an official firearm.

20 Now let us just break this up into parts. Firstly, were you ever suspended in respect of any cases?

MR JOUBERT: Yes, Chair ...[intervenes]

ADV HULLEY SC: And ...[intervenes]

MR JOUBERT: I was suspended from the NPA four times to be exact. I will give you the sequence. The first time I

suspended for an assault that never took place. I was then reinstated. The second time was for some gun-running that was found to be false.

The third time for the security tender thing that I was arrested for. I just need to also mention that I blame the state for and...

And the fourth time was for having R 30 100,00 in my car which they subsequently now want to return to me. So those are the four times that I was suspended from
10 the NPA.

CHAIRPERSON: Are you able to give years, even if it is not the exact dates, which years you were suspended those four times?

MR JOUBERT: Not exact but I remember 2011 was the year that I was suspended for this tender thing. I think 2010/2009 for assault. I am speaking under correction Chair. And roughly, I think roundabout 2017/2018 for this gun-running thing. And 2019 for this R 30 100,00 that it had in my car.

20 **CHAIRPERSON:** H'm. So are you with regard to the allegations of assault for which you say you were suspended, was there a disciplinary inquiry that followed that which ...[intervenes]

MR JOUBERT: Yes.

CHAIRPERSON: ...found you not guilty or what

happened? Did they found you not guilty?

MR JOUBERT: For each of these suspensions, I went through the disciplinary process.

CHAIRPERSON: Disciplinary process, yes.

MR JOUBERT: I actually went to court first. I was found not guilty on this charge, on the assault. And then I was reinstated. With the gun-running thing, it never reached court. It was a suspension, a very... suspension, by the way. But be that as it may. I was then reinstated.

10 With the tender – the security tender. Just to give you a background. I was running the KZN office. There was a security tender that came out that was handled in Pretoria. My duty was to stamp the forms of each and every company that came to do inspection of the sites which I did.

 And for that I was part and parcel arrested with the rest of the clan from head office which I had no dealings with. But that was just to give you a background of what happened to me.

20 I got arrested, I spent five days in custody and for that the case was – or the second appearance it was thrown out of court. It never went back. We then lodged a civil claim against all the necessary individuals involved in this and we are still waiting for that thing to be concluded.

 As for the fourth one which is the latest one. In

2019, on the 12th of October, for some reason the police at McDonald's stopped my car, searched my car. I had my firearm with me. They were not interested in that. They found R 30 100,00 in my car. And they said: No, I am corrupt. I must have collected or whatever the case might be.

But that case is also has run its course because I have got a copy here that I was about to send where the NPA said there is no – they are not going to take this
10 matter any further and I could collect my money from the relevant police station.

But all of this Chair, I have seen it as people – there were people behind this but I do not want to mention names now on national television. I will deal with it at the right time.

ADV HULLEY SC: I want to deal, if I might. It was just the two matters ...[intervenes]

CHAIRPERSON: I am sorry Mr Hulley.

ADV HULLEY SC: Sorry Mr Chair.

20 **CHAIRPERSON:** In regard to one, I think it is the occasion when you say the police found you are in possession of about R 30 000 and you were arrested and spent five days in police custody. Were you ever charged?

MR JOUBERT: No. No, no.

CHAIRPERSON: It is not about that one.

MR JOUBERT: For the security tender I was arrested and I spent five days in custody in Pretoria.

CHAIRPERSON: Oh, for the ...[intervenes]

MR JOUBERT: For this one they just took my money and put it in the 13 and was investigating the matter.

CHAIRPERSON: Oh.

MR JOUBERT: Up to now that I have been given ...[intervenes]

CHAIRPERSON: How long ago was it when they took your
10 money?

MR JOUBERT: It happened on the 12 October 2019.

CHAIRPERSON: Oh. Have they not told you anything about what is happening?

MR JOUBERT: No, no, as I said, I am sitting here with a document that I would forward to Adv Hulley in due course in the course of business tonight, just for him to have a look at this document to show that these guys have now opted to give me my money back after arresting me for having R30 100.

20 **CHAIRPERSON:** Are you saying the police have written to you wanting to make arrangements to give the money back to you?

MR JOUBERT: The NPA, the person that was dealing with this matter was A Waters from the NPA, the Captain B E Ndwada(?) was the IO, the case number is a Durban North

CAS 135/10/2019. They basically just informed my lawyer that I can now – there is no – there is nothing that came, there is no evidence to prove anything that was suggested against Mr Joubert and therefore he can – he has declined to prosecute and cash monies can now be retrieved from this Durban North SAPS.

CHAIRPERSON: Okay, alright, thank you. So in respect of none of these allegations that have been made against you have you been formally charged at any stage?

10 **MR JOUBERT:** The only one that I was formally charged for was the security tender one.

CHAIRPERSON: Yes.

MR JOUBERT: And that is the one that was thrown out of court on the 28 May 2012. This case was thrown out of court.

CHAIRPERSON: Was that after some oral evidence had been led in court or was that before any witnesses gave evidence?

MR JOUBERT: Before any witnesses testified this case
20 was thrown out.

CHAIRPERSON: Okay, alright. Mr Hulley?

MR HULLEY SC: Thank you, Chair. Now that is the one matter that he mentions and according to you that the charges had been withdrawn or the case had been thrown out of court on the 28 May of 2012.

MR JOUBERT: That is correct, Chair.

MR HULLEY SC: And then he mentions a second matter and that is the case involving an unlawful use of an official firearm. Was there in fact such a case against you?

MR JOUBERT: Yes, there was such a case against me and then that case never saw light of day in court because it never – I was never charged, officially charged for it. We were on duty, we were doing duty in Kimberley during the John Block trial, each one of us were issued with
10 firearms. There was nothing untoward in any of my actions, I was given a firearm, I signed for it and then when I came back I gave it back, there was nothing whatsoever in my actions that suggested that I had done anything wrong with firearms or unlawful possession or whatever of firearms as Colonel Mhlongo has suggested here.

MR HULLEY SC: Now that particular aspect or that particular case, did it ever result in charges being brought against you?

20 **MR JOUBERT:** No, Chair, that case also died a natural death and nothing happened with that case. I gave my version and that was it.

MR HULLEY SC: So there was some concerns that had been raised, is that correct, about your possession of the firearm?

MR JOUBERT: Yes, this was during the time of Menzi Simelane.

MR HULLEY SC: And when did that issue – you say that nothing further came of it, when did you last hear about that case?

MR JOUBERT: The last time I heard of the case was somewhere in – I think Menzi left in 2011, somewhere in 2011, that was the last time I heard of that case.

MR HULLEY SC: Now when Mr Nxasana came into office,
10 he would come into office on the 1 October 2013, is that correct?

MR JOUBERT: That is correct, he was – ja, I think 2013 October was his first day, to be his first day.

MR HULLEY SC: Did you received any indication from Mr Nxasana or anybody else telling you about the intentions of Mr Nxasana, that it was his intention to “resuscitate” those cases?

MR JOUBERT: No, Chair, nothing whatsoever.

MR HULLEY SC: Now he also says in paragraph 17.8 of
20 the same affidavit on page 210.33, he says that:

“As I sympathise with him he complained about Mr Nxasana targeting people with previous cases when he himself had previous cases, he mentioned to me that he had come across a murder case against Mr Nxasana in the course of vetting him, that is Mr

Nxasana's employment, in the risk and security unit but he was unable to obtain greater detail on the case."

Now the first question is, did you in fact conduct the vetting of Mr Nxasana?

MR JOUBERT: No, Chair. Mr Nxasana was a political appointee, one. And the people that deals with political appointees' vetting at the time was NIA, the National Intelligence Agencies, we had nothing to do with vetting of

10 Mr Nxasana, so that is a lie.

MR HULLEY SC: Very well and insofar as you had acquired knowledge of any murder case that Mr Nxasana was involved in, how would acquire knowledge of that fact?

MR JOUBERT: The only time I got to hear of a murder case that Mr Nxasana was involved in was from Colonel Mhlongo himself. I never know who Nxasana was, I never knew he had a case let alone a murder case for that matter. How would I have known of this? I definitely did not know.

CHAIRPERSON: Mr Hulley...

20 **MR HULLEY SC:** Thank you, Mr Chair.

CHAIRPERSON: While listening to Mr Joubert's evidence I have been trying to familiarise myself with Colonel Mhlongo's affidavit.

MR HULLEY SC: Yes.

CHAIRPERSON: Which I have just finished. It would

appear to me – and I want to confirm whether that is your understanding as well, that Colonel Mhlongo does not deny the content of the recorded conversation but he says that was not the first conversation that he and Mr Joubert had about Mr Nxasana's appointment.

MR HULLEY SC: Correct.

CHAIRPERSON: And they had had previous conversations or a previous conversation and he then says in effect it was Mr Joubert who initiated the discussion between the two of
10 them about Mr Nxasana's appointment and that he wanted to do certain things in order to have Mr Nxasana not to resuscitate disciplinary proceedings against him. I do not know whether some criminal proceedings as well, but he did not want that to happen but – and then he attacks his credibility and reliability on the basis of various matters that he raises. Am I correct?

MR HULLEY SC: You are absolutely correct, Mr Chair.

CHAIRPERSON: Yes.

MR HULLEY SC: Perhaps if I can start here, Mr Joubert,
20 what Colonel Mhlongo says is that this conversation where you recorded the two of you engaged in a discussion, he is saying that was in fact not the first time that the two of you had in fact engaged in a conversation relating to Mr Nxasana.

MR JOUBERT: That is definitely not true, Chair. Me and

Colonel Mhlongo, the only time we spoke about the appointment of Mr Nxasana was the day I recorded this matter.

MR HULLEY SC: Now he also says that the very first time the two of you had a discussion, he says at paragraph 17.1 that he had expressed dismay at the appointment of Mr Nxasana because he firstly knew Mr Nxasana, he had had previous dealings with him and the dealings that he had had with him was not pleasant dealings. Now that was the first,
10 the very first occasion that the two of you had had a discussion.

MR JOUBERT: No, Mr Chair. As I said earlier on, I only had one discussion with Colonel Mhlongo and the recording speaks for itself. You know, I never had any other discussions or meetings with Colonel Mhlongo about Mr Nxasana and his appointment.

CHAIRPERSON: But did he ever say to you that Mr Nxasana had previously treated him badly and that for that reason he did not like because that is part of what he says
20 he shared with you?

MR JOUBERT: Chair, to be honest with you, I cannot recall him making that statement to me. I really and truly cannot.

CHAIRPERSON: Yes. So that is fine. Mr Hulley you may proceed. I just realised I did not switch off my phone.

MR HULLEY SC: Thank you, Mr Chair.

CHAIRPERSON: Ja.

MR HULLEY SC: And then the - according to him the conversation that you recorded took place on the 24 November of 2013, would that be correct?

MR JOUBERT: Mr Chair, what I can remember is that the recording took place on the 18 September as per my affidavit. The affidavit that I had given was given on the 25 November.

10 **MR HULLEY SC:** Was there any conversation ...[intervenes]

MR JOUBERT: Because I remember giving the recording to Advocate Duma and he later on requested that I substantiate my recording with an affidavit, which I did.

MR HULLEY SC: Now according to him, he says that the conversation itself took place on the 25 November. Was there any conversation that took place on the 25 November? You say that the conversation where you recorded him took place on the 18 September, he says it
20 took place on the 25 November. Was there any conversation between the two of you on the 25 November relating to Mr Nxasana?

MR JOUBERT: The answer to that, Chair, is no because after the recording Colonel Mhlongo was evicted from our building and I have never seen him after that. So the

answer to your question is no, we never had a conversation after the recording.

MR HULLEY SC: When you say that after the recording he was evicted from the building, just explain how that happened, how did he go from the recording to the eviction, just explain the process?

MR JOUBERT: After the guys had head office heard of Colonel Mhlongo's shenanigans via the recording they then wrote to the person that he works with an requested
10 he leaves the building with immediate effect.

CHAIRPERSON: How soon after the day of the recording was it that he was – that he left the building, if you are able to remember? A week, a month, two months?

MR JOUBERT: I think about a week, Chair.

CHAIRPERSON: Ja.

MR JOUBERT: I stand corrected.

CHAIRPERSON: Okay.

MR JOUBERT: But I think around about a week or so after the recording he got his marching orders.

20 **CHAIRPERSON:** Yes.

MR HULLEY SC: Now the recording, obviously you said that you had sent it to Mr Duma, is that correct?

MR JOUBERT: Just repeat that please?

MR HULLEY SC: If I recall correctly, your testimony was that you had sent or you had provided Mr Duma with the

recording, is that correct?

MR JOUBERT: That is correct.

MR HULLEY SC: And the affidavit we know was provided on the 25 November of 2013.

MR JOUBERT: That is correct, Chair.

MR HULLEY SC: Now when you speak about Colonel Mhlongo being evicted from the building, was it pursuant to the provision of the affidavit or pursuant to the provision of the recording or both?

10 **MR JOUBERT**: As I have said, I think it was shortly after the recording, after they listened to the recording that he was evicted.

MR HULLEY SC: So that would have been sometime in September then of ...[intervenes]

MR JOUBERT: The correct date thereof I am not in a position to tell you, Chair, on which date he was evicted but it was shortly after the recording.

MR HULLEY SC: Now if I could just ask you to turn with me in the bundle – sorry, in EXHIBIT Y11 at page 326.

20 **CHAIRPERSON**: Is that a different bundle than the one that I have?

MR HULLEY SC: It is not a different bundle, it is still part of the LEA bundle 10, it is just under EXHIBIT Y11, Mr Chair.

CHAIRPERSON: What page is EXHIBIT Y11?

MR HULLEY SC: We are looking, to be specific, page 326.1.

MR JOUBERT: 326 or 236?

CHAIRPERSON: 326.

MR HULLEY SC: 326.

MR JOUBERT: 326, Y11.

MR HULLEY SC: That is correct.

MR JOUBERT: Yes.

MR HULLEY SC: Now this is a letter which is from the
10 SAPS specifically from the Provincial Commissioner
Lieutenant General B M Ngubeni and it is addressed to the
Director of Public Prosecution of Kwazulu-Natal who we
know at the time was Advocate Ngoko and it says,
paragraph 1:

“Attached herewith find a communicae received from
of the office of Priority Crimes Litigation Unit.
Kindly ensure that the members are informed and to
report to their original posts with immediate effect. I
trust that you will find this in order.”

20 And the heading of the letter:

“Request for immediate termination of secondment
of Colonel S W Mhlongo, Sergeant J D Radebe and
WO I Q Shando to the Missing Persons Task Team.”

Do you see that?

MR JOUBERT: Yes.

MR HULLEY SC: And if you go over to the following page, a letter that has been referred to by Lieutenant General Ngubene is that which appears at page 326.2, it is dated the 2 December of 2013 and it is in fact addressed to Lieutenant General Ngubene. And if you go to the last page you will see that it is from Advocate S K Abrahams, Advocate Shaun Abrahams and the essence of it, and I do not wish to take you through it, but the essence of it is to complain about the fact that Colonel Mhlongo was
10 apparently responsible for conducting an investigation against Mr Nxasana.

CHAIRPERSON: I am sorry, are you saying that is in the letters?

MR HULLEY SC: If you look at – if you will see it says:

“The request for immediate termination of secondment of Colonel S W Mhlongo, Sergeant J D Radebe and WO I Q Shando to the Missing Persons Task Unit.”

It says:

20 1. Colonel Mhlongo has been seconded by one of your predecessors to assist the Missing Persons Task Team in the Priority Crimes Litigation Unit in the office of the NDPP in the execution of its mandate in tracing and identifying the remains of persons who disappeared during the struggle for

liberation from apartheid during the period covered by the Truth and Reconciliation Commission.”

CHAIRPERSON: Ja, what I wanted to ask was, I assume that the only reason you were referring to that correspondence is to ask Mr Joubert whether he might not be mistaken ...[intervenes]

MR HULLEY SC: Correct.

CHAIRPERSON: When he says that Colonel Mhlongo was
10 evicted or left the building within about a week after the recording because this suggests it might have been much later in the year.

MR HULLEY SC: Correct.

CHAIRPERSON: Otherwise the contents do not seem to be of much relevance.

MR HULLEY SC: The contents is just to withdraw or to recall the secondment, that is the purpose of the letter, but it is dated the 2 December of 2013. In other words, it is shortly after 25 November 2013 but several months after
20 the 18 September of 2013.

CHAIRPERSON: Could you be mistaken?

MR JOUBERT: Ja, I do not have this ...[intervenes]

CHAIRPERSON: Correspondence.

MR JOUBERT: Things that you are talking about so could we ask Adv Nicholson to assist me maybe with this

document that you are referring to because it is not part of my bundles.

CHAIRPERSON: Have you got a bundle that is marked bundle LEA10 on the spine of the lever arch file?

MR JOUBERT: That is correct. Yes, I do have that.

CHAIRPERSON: Okay.

MR JOUBERT: And now I see Adv Nicholson has brought to my attention the page in question.

CHAIRPERSON: Yes.

10 **MR JOUBERT**: Yes, yes, I see.

CHAIRPERSON: Those letters, I think there are two. There are two letters, they are both written in December 2013, the heading suggests that – and the contents seem to say the secondment of Colonel Mhlongo to the NPA was being terminated.

CHAIRPERSON: Ja.

MR JOUBERT: Yes, I see that it was dated the 5 December, yes, 2013.

20 **CHAIRPERSON**: Yes. Could it be that you are mistaken about – you were mistaken when you said Colonel Mhlongo you thought left about a week or so after the recording?

MR JOUBERT: A week or so, ja. Yes, Chair, I could have been mistaken about the dates because it happened quite some time back.

CHAIRPERSON: Okay, alright.

MR JOUBERT: But ja, I see it happened in December.

CHAIRPERSON: Okay, alright.

MR JOUBERT: To be exact.

CHAIRPERSON: Okay.

MR HULLEY SC: And just for the benefit, Mr Chair, just to be precise, I had indicated that the letter in fact indicated that there had been an investigation conducted by Colonel Mhlongo against Mr Nxasana, the letter in fact does not say that.

10 **CHAIRPERSON:** Oh, ja.

MR HULLEY SC: The letter simply says that a secondment ...[intervenes]

CHAIRPERSON: Yes, I also wondered because I thought I had read it, ja.

MR HULLEY SC: I have put two different things together.

CHAIRPERSON: Ja. Okay, no, that is alright. I do not think much turns on the date.

MR HULLEY SC: Thank you, Mr Chair. We have got the two affidavits that you had deposed to previously one of
20 which was dated the 25 November that we have already spoken about, there was a second affidavit which was dated the 1 February of 2016. In the second affidavit you – and you have testified about that on a previous occasion in July of 2020 before the Commission. You have acknowledged that both affidavits are in fact yours.

MR JOUBERT: That is correct, Chair.

MR HULLEY SC: Now in the second affidavit that was dated 2016, the 1 February 2016, you distanced yourself as it were from the first affidavit.

CHAIRPERSON: I am sorry, Mr Hulley, I thought you wanted to first finish putting to him Mr Mhlongo's version as to why Mr Mhlongo says his evidence or he is unreliable and dishonest and we get that out of the way.

MR HULLEY SC: Okay. Thank you, Mr Chair, would be
10 perhaps ...[intervenes]

CHAIRPERSON: Because there are still quite a few things to put to him.

MR HULLEY SC: Thank you.

CHAIRPERSON: While you are looking can I then just ask him. Mr Joubert...

MR JOUBERT: Yes, Chair.

CHAIRPERSON: Colonel Mhlongo says in his affidavit:

20 "Soon after the announcement of Mr Nxasana's appointment, Advocate Jiba is scheduled to meet Mr Nxasana in Kwazulu-Natal."

And you were tasked with transporting Advocate Jiba during her visit to the province to meet Mr Nxasana but that you asked if he had assisted Adv Jiba before and he confirmed that he had previously transported her and you asked him to take over from you and transport Adv Jiba

for the meeting with Mr Nxasana and he agreed. Is that factually correct?

MR JOUBERT: No, no, Chair, that is definitely incorrect. I was supposed to pick Adv Jiba up on that given day for a meeting but then I was notified by Jiba's PA for me not to worry, the DPP at the time in KZN Ngoko(?) had asked Colonel Mhlongo to pick Jiba up from the airport.

CHAIRPERSON: Yes.

MR JOUBERT: So...

10 **CHAIRPERSON:** Do you know why Colonel Mhlongo would say such a discussion took place between the two of you if it did not take place?

MR JOUBERT: No, I have got no idea why he would say that, Chair. Colonel Mhlongo used to pick up his executives for – I do not know. Ja, from the airport. He, whilst he was in the DSO he would from time to time – I would – when Mpshe was the Acting NDPP, he would request this WS to go and pick him up and as much as it was perceived to be a risk management thing, I hated this
20 with a passion because it was not on my job description.

CHAIRPERSON: You mean driving them around?

MR JOUBERT: Ja, fetching his people.

CHAIRPERSON: Fetching them, ja. He also says after Mr Nxasana had commenced working as NDPP you informed him, that is Colonel Mhlongo, that you had heard that Mr

Nxasana was going to resuscitate some cases against you. Did you say that to Colonel Mhlongo?

MR JOUBERT: Chair, that is so far from the truth. I never discussed anything like that with Mr Mhlongo. In actual fact I did not know whether Mr Nxasana or whoever else had any intentions to resuscitate any case against me or against anybody for that matter that I know. So that one is a lie, it is definitely a lie.

CHAIRPERSON: Do you know or to the extent that Mr
10 Mhlongo may be talking about the cases that you have told me about, in terms of which you were suspended, I think you said there were four. To the extent that he may be talking about those, that those are the cases you had heard that Mr Nxasana was going to resuscitate against you.

Your position is that they had all resulted in an outcome in your favour before?

MR JOUBERT: That is correct Chair, that is correct ...[intervenes]

20 **CHAIRPERSON:** Had anybody ...[intervenes]

MR JOUBERT: And if they wanted to resuscitate it by all means. I always say you know even if that was the case, I would not have done as this guy has suggested to discuss it with him.

No, I would let them continue with the investigation

waiting for them to come to me, and then deal with the matter as I have been doing all along with these four matters that came my way and I doubt whether I would be discussing anything like that with a guy like Colonel Mhlongo to be honest with you.

CHAIRPERSON: Had you ever met Mr Nxasana in person, either socially or in a work related environment?

MR JOUBERT: The only time I met Mr Nxasana was during the meet and greet that he came to the Durban
10 office, to be introduced to all of us. I do not and oh, ja he came for a prize giving. Those are the two occasions that I saw Mr Nxasana, I do not know Mr Nxasana, I never knew Mr Nxasana. The only person that I knew was the guy that was his advisor, who used to work with me, play soccer with me, which is Advocate Duma.

CHAIRPERSON: Now, at the time of your discussion with Mr Mhlongo, whether it was in September 2013, or whatever month, was that before the meet and greet that on which you say you met Mr Nxasana?

20 **MR JOUBERT:** Ja.

CHAIRPERSON: It was before?

MR JOUBERT: That was definitely before the meet and greet.

CHAIRPERSON: So at the time of the discussion, had you never met, Mr Nxasana?

MR JOUBERT: Never, never met him, never seen him, only saw this guy, the new NDPP on the TV and then I saw him subsequently when he came to - for those two, on those two occasions to our offices.

CHAIRPERSON: Had you spoken to him on the phone?

MR JOUBERT: No.

CHAIRPERSON: At that time.

MR JOUBERT: The person that I spoke to was Duma, even with this affidavit that I that I did, that went to him, it
10 was from the request made to me by Duma, and not Nxasana.

Yes, Colonel Mhlongo says that you complained about Mr Nxasana targeting people with previous cases, when he himself had previous cases. She says you mentioned to him that you had come across a murder case against Mr Nxasana in the course of vetting his employment in the risk and security units, but you were unable to obtain greater detail on the case. What do you say about that?

MR JOUBERT: That is a definite lie, his just trying to
20 mislead the Commission, for lack of a better statement because really, I never, as I said, I never knew Nxasana, I never met Nxasana, I never had any investigation or vetting to do with Nxasana. So that is misleading, that statement.

CHAIRPERSON: I do not know if you might have covered

the question that I have just asked you maybe I have just misinterpreted, you want to take it from there.

ADV HULLEY SC: Thank you Mr Chair. He go on to say in paragraph 17.6, that you had asked him to register an inquiry with the SAPS, as he was still within the SAPS and the inquiry is referring to is an inquiry relating to the murder investigation, of the murder case that Mr Nxasana was apparently involved in. Did you ever ask him to register an inquiry relating to a murder case that Mr
10 Nxasana was involved in or to any other case that Mr Nxasana was involved in?

MR JOUBERT: Mr Chair, I have never asked this guy to register anything with regards to Mr Nxasana.

ADV HULLEY SC: Now he goes on to say that Mr Joubert also mentioned having come across something that had to do with the defrauding of the RAF, the Road Accident Fund. He indicated to me that he wanted to use the information against Mr Nxasana, in the event that he, that is Mr Nxasana were to commence disciplinary proceedings
20 against him. What do you say to that?

MR JOUBERT: Yet again, I did not know that Mr Nxasana was doing work for RAF. The requests that Colonel Mhlongo made, was due to the fact that Mr Nxasana's wife works at RAF. Do I know anybody that could verify as to whether Mr Nxasana did some work or got some work or

more work than he should have gotten from the RAF and to which I said, yes I will assist, I will just bring A to B.

Meaning I would introduce him to the people that I know at RAF and I would want nothing to do with it. But on the same, in the same breath, I would like to say, I do not know anybody at RAF. So I was merely saying this to Colonel Mhlongo to understand, where is he coming from, what does he want, but I do not know, I was not going to help him in any event.

10 **ADV HULLEY SC:** Now, he also says that, when the two of you had the conversation, which was recorded, he puts that conversation as we have indicated on the 25th of November, you put it a little bit earlier than that on the 18th of September, but whatever the date might be, he says when that conversation took place, it commenced from the premise of Mr Joubert having undertaken to arrange concrete proof of the allegations against Mr Nxasana.

MR JOUBERT: Now, yet again, Colonel Mhlongo is trying his level best to mislead the Commission because there is
20 no way that I was going to get any concrete whatever against Mr Nxasana, I did not know any concrete proof, I did not have any concrete proof, so that is a lie.

ADV HULLEY SC: If you turn over to the following page, at page 210.35. He attacks your reliability and credibility as a witness. I want you to turn to paragraph 21 of that,

he says:

“That you are currently on suspension because you were caught in an operation Umhlanga for soliciting a bribe and taking R38 000,00 from an accused person. You also passed yourself off - he says, as a Colonel Joubert to the officials that arrested him during the operation.”

What do you say to that?

MR JOUBERT: I will say the following, Chair firstly, I
10 never took a bribe from anybody. That is the same R30
100,00 that I spoke about earlier on that maybe this
Colonel Mhlongo was misinformed by whoever told him
this.

Secondly, these guys that were dealing with the
R30 100,00 knew that I was an employee of the NPA
because they saw my appointment card. One I do not know
where does this Colonel Joubert things comes from but I
had never and I will never portray myself to it because it is
an offence to impersonate a Police Officer and I know
20 better.

The R30 100,00 that I am an accused person for is
exactly this that I now have to go fetch from the Police
Station, I was not charged for this particular case and I do
not know what else to say about it, because...[intervene]

ADV HULLEY SC: Sorry, as you correctly point out, it is

in fact a criminal offence to pass yourself off as a Police Officer. The charges that have been referred to over here that you say was the R30 100,00 that was confiscated from you, at the time or taken from you at the time, and where allegations of corruption were levelled against you.

On that particular occasion were allegations of impersonating a Police Officer also levelled against you during the same or relating to the same incident?

MR JOUBERT: Chair, no other case, no case was brought
10 against me.

CHAIRPERSON: Ja, you said you were not charged in regard to the four matters that you have mentioned and they include the matter relating to the R30 000,00, is that right? You have said you were never charged, or you were charged in regard to one, but that did not result in any conviction?

MR JOUBERT: Yes.

CHAIRPERSON: Ja, okay.

ADV HULLEY SC: Now the question that I am asking
20 clearly it is not about whether you were charged, but whether the allegations because they were clearly allegations relating to corruption relating to the R30 100,00 but those allegations also include the allegation that you had impersonated a Police Officer.

MR JOUBERT: No, Chair I was not charged for

impersonating a police officer. That is why I said maybe Colonel Mhlongo the information that he was given by whoever gave him the wrong information.

ADV HULLEY SC: Now, he says here that you had also in paragraph 22, he says:

“Mr Joubert Bay was engaged as part of the investigation teams, assisting the Commission in the Free State.”

And by the Commission, I imagine his referring to the State
10 Capture Commission, the present Commission. Is that correct, were you in fact, to assist the State Capture Commission in the Free State?

CHAIRPERSON: Maybe let us put the whole thing, Mr Hulley. In addition to that, he says you were removed from the team for corruption offenses and he says when you were appointed by the Commission, you did not even mention that you were on suspension for corruption offenses. What do you say to that?

MR JOUBERT: I was part of the AFU's State Capture
20 team that work under, AFU in Pretoria at VGM and we add quite a few cases. I was - part of the cases took us to Free State, the Free State dairy farm. I was part and parcel of that investigation under the AFU banner.

CHAIRPERSON: But start from saying whether it is true or not that you were engaged as part of the investigation

team, oh he says I thought he was saying you were appointed by the Commission. But he says you were part, you were engaged, he does not say by whom but as part of the investigation teams that were assisting the State Capture Commission in the Free State.

So first of all, you were not appointed by the Commission, were you?

MR JOUBERT: No, no I was merely appointed...[intervene]

10 **CHAIRPERSON:** Just hold one second, you were part of the asset forfeiture unit in Pretoria.

MR JOUBERT: That is correct and under that we did State Capture investigations.

CHAIRPERSON: State Capture related investigations in the Free State.

MR JOUBERT: That is right.

CHAIRPERSON: Yes, yes.

MR JOUBERT: Part of that investigation included the Free State dairy farm.

20 **CHAIRPERSON:** Yes, he actually does say in the last sentence of paragraph 22 that when you were appointed by the Commission, you did not even mentioned that you were on suspension for corruption offenses. Were you ever appointed by the Commission?

MR JOUBERT: Now I am getting there Chair.

CHAIRPERSON: Ja.

MR JOUBERT: I am getting there, firstly you cannot be on suspension for corruption and be part of the State Capture team that is utter nonsense for lack of a better word, one.

Two, all of these allegations that were brought against me way back then was dealt with, you know, as I said to you earlier on, I was never convicted or I was suspended yes, but I was then reinstated, I had to work.

10 So I think that this also is being misinformed or trying to attack my credibility without the necessary information, because this is - I almost said rubbish, but this is wrong, this is totally wrong.

CHAIRPERSON: Well he says you were - in February because his affidavit is dated 22 February 2021. As at the time when he deposed to this affidavit, he said, you were on suspension, because you had caught in an operation in Umhlanga Rocks for soliciting a bribe and taking R38 000,00, and then that comes in the passing of a Colonel
20 Joubert. This aspect of being on suspension as at the date when he deposed to this affidavit 22 February 2021. Is that true?

MR JOUBERT: That 21 of his...[intervene]

CHAIRPERSON: It is 22 February 2021, last week, I think it would have been or the other week. He says, when

he was signing this affidavit on the 22nd of February 20, no there are two dates here. Well, it must be 22 February 2021.

I just realised that on the Commissioner of Oaths certificate, the typed one it is written that this affidavit was deposed on the 22nd day of February 2020 but the Police stamp is 22 February 2021. So I do not know what is going on there but I assume that...[intervene]

ADV HULLEY SC: Mr Chair, to be fair I think that was a
10 typographical error, presumably by the attorneys, but the correct address is 22 February 2021.

CHAIRPERSON: Ja, I assume that is the correct one but I do not know why people do not pay attention to, not to cause this confusion because this is not the first affidavit, which comes before the Commission where Commissioners of Oaths particularly those who are at Police Stations, police officers have got two dates, probably it is the third if not the fourth.

ADV HULLEY SC: People do not check that portion of
20 the affidavit.

CHAIRPERSON: Ja, and yet they are certifying in terms of that, but he says as of that date, you were on suspension, namely, credit 22 February 2021, is that correct?

MR JOUBERT: Chair, just to give you again, a highlight

of my - I said I was suspended for four issues. The latest issue was the one of 2019, the 14th of October, where they found R30 100,00 in my vehicle. I also said that I am told now to go fetch my money but as I am sitting here in front of you Chair, I am still on suspension for this particular matter.

CHAIRPERSON: So what he says in insofar as he says as on 22 February 2021 you were still on suspension in connection with - he says allegations of soliciting a bribe
10 that you were on suspension at that time is correct because you are still on suspension even now.

And it is correct that that suspension is connected with the Police finding R30 000,00 in your car, in your possession. But you say you have been on suspension for some time, but you have received a letter from the NPA, which, in effect, says you, you may now come and collect that money that they took from you.

MR JOUBERT: That is correct, Chair.

CHAIRPERSON: Is the position that they would say that
20 if they are not going to charge you or could they say you may come and take the money if they were going to charge you or do you not know?

MR JOUBERT: Chair, I think that the NPA would never give you your money back if they...[intervene]

CHAIRPERSON: Are going to charge you.

MR JOUBERT: If it was soliciting for a bribe of some sort.

CHAIRPERSON: Yes, but you have never been called to appear in court in connection with this money?

MR JOUBERT: No, Chair.

CHAIRPERSON: And you have never been served with a charge, with a summons or anything like that?

MR JOUBERT: No, Chair.

CHAIRPERSON: Were you asked to make a statement about how you came to be in possession of the money?

10 **MR JOUBERT:** Yes, Chair.

CHAIRPERSON: And that was in 2019 or when?

MR JOUBERT: In 2019, the 14th October.

CHAIRPERSON: Yes, and where did you say you got the R30 000,00 from? What was your explanation for having the money in your possession of that amount?

MR JOUBERT: I would, I would say the following Chair, that - let me read the letter first, and then I will answer that question for you.

CHAIRPERSON: Ja.

20 **MR JOUBERT:** Ja, the bottom line, let me start this thing was Director of Public Prosecutions Kwazulu Natal was written for attention, Captain VE Nwada[?] who is the Durban case, Durban North case 135 of 10/2019.

“The above matter referred to this office for Investigative guidance refers, pursuing to the issue

of instructions for investigation. The docket was submitted to this office on the 8th of September 2020 by the above mentioned investigating officer for decision purposes. Having perused the papers, the following has been established, there is insufficient evidence amounting to *prima facie* criminal case arising out of the evidence and circumstances relating to the receipt of cash monies by the suspect Mr Terrence Joubert at the McDonald's take away parking lot gateway Umhlanga on the 12th of October 2019. Accordingly, I have declined to prosecute Terrence Joubert ...[indistinct – no audio]

CHAIRPERSON: Oh, there is a technical glitch

MR JOUBERT: ...mentioned as for being forwarded to the National Prosecuting Authority.”

CHAIRPERSON: Hang on Mr Joubert you froze for some time, you will have to go back to the sentence that starts with something like consequently, I have...[intervene]

20 **ADV HULLEY SC:** Accordingly I declined.

CHAIRPERSON: Oh accordingly I declined to prosecute, start from there.

MR JOUBERT: Ja, okay:

“Accordingly, I have declined to prosecute Mr Terence Joubert in connection with the receipt of

the cash monies in the circumstances referred to above and which forms the subject matter in this instant docket.”

Case, Durban North case 135 of 10/2019.

“The Police docket here in has been forwarded to the National Office of the National Prosecuting Authority.”

And signed by whoever that is.

CHAIRPERSON: So who is it signed by do you - what
10 name appears at the bottom and the police rank that they hold?

MR JOUBERT: I do not know who signed it, Chair.

CHAIRPERSON: Ja, is there a position that they hold that is specified?

MR JOUBERT: There is a person for inquiries is A Walters on top with a reference number and it is dated the 10th of February 2021?

MR JOUBERT: Yes, but at the bottom there should be the position occupied by the author is it not – or does it simply
20 say for the provincial director or something like that?

MR JOUBERT: No, it says for the director public prosecution Durban.

CHAIRPERSON: Okay, no that is fine. So they have the NPA has declined to prosecute?

MR JOUBERT: Yes.

CHAIRPERSON: Which may suggest that they were satisfied with your explanation or whatever the position is, they did not think that there was enough evidence to prosecute here.

MR JOUBERT: Yes, Chair.

CHAIRPERSON: Okay, alright, Mr Hulley, you want to proceed?

CHAIRPERSON: Thank you, Mr Chair and what if you continue with his narrative and page 210.35. He goes on
10 to say that when you, he says that you were appointed by the Commission. Now you saying that is not correct. You were appointed by the AFU to investigate State Capture matters in the Free State.

MR JOUBERT: That is correct, Chair.

ADV HULLEY SC: Now, he says that when you were appointed, presumably by the AFU, then he gets that wrong, but you say it was the AFU. He says that you did not mention that you were in fact on suspension for corruption cases.

20 **MR JOUBERT:** Because when I was appointed, I had no corruption cases against me. This R30 000,00 thing is something that happened on the 12th of October 2019 and I was subsequently suspended after this before this, I was working like everybody else.

CHAIRPERSON: Your association with the asset

forfeiture unit, when did it start?

MR JOUBERT: It started in 2017, Chair.

CHAIRPERSON: 2017?

MR JOUBERT: Yes.

CHAIRPERSON: The asset forfeiture unit or is part of the NPA, is it not?

MR JOUBERT: That is correct, Chair.

CHAIRPERSON: So when you go to the - when you went to the AFU did you need a specific appointment, or you
10 were just asked to go and assist in the AFU, do you need a specific appointment?

MR JOUBERT: Ja, no, I took a cross transfer, a transfer from where I was working risk management to Asset forfeiture...[intervene]

CHAIRPERSON: Now that was in 2017.

MR JOUBERT: Because my qualifications is in investigation.

CHAIRPERSON: And that was in 2017?

MR JOUBERT: So I could then assist in the investigations
20 on that side.

CHAIRPERSON: Yes.

MR JOUBERT: The State Capture came later on, whereby they formed the team to deal specifically with State Capture investigations.

CHAIRPERSON: When did your suspension in relation to

- so your suspension in relation to the R30 000,00 would have happened in 2019 because that is when the Police found it, and you were already with the asset forfeiture unit by then.

MR JOUBERT: That is correct.

CHAIRPERSON: Ja, you were then suspended after that while you were within the asset forfeiture unit.

MR JOUBERT: That is correct, Chair.

CHAIRPERSON: And you remain suspended at the
10 moment.

MR JOUBERT: That is correct Chair.

CHAIRPERSON: And maybe the suspension will be lifted now that you have got this letter from the NPA declining to prosecute.

MR JOUBERT: That is correct Chair.

CHAIRPERSON: But that is your expectation.

MR JOUBERT: That is correct Chair.

CHAIRPERSON: So, is the position that when you were transferred to the asset forfeiture unit, you were not on
20 suspension, and therefore, you did not have to tell the asset forfeiture unit that you were on suspension?

MR JOUBERT: That is correct Chair.

CHAIRPERSON: Okay, alright Mr Hulley.

ADV HULLEY SC: Thank you Mr Chair.

CHAIRPERSON: It is taking long, much longer than I

thought it would.

ADV HULLEY SC: Yes.

CHAIRPERSON: Let us try and wrap it up.

ADV HULLEY SC: Thank you, Mr Chair. What - can I perhaps in the interest of saving time, one of the things that he says in paragraph 27 of his - on page 210.36. He says that in the ordinary course you ought to have reported to your immediate supervisor if an instance or if something that you along the lines of what you claim in fact happened –
10 in other words the conversation between him and yourself. If it had in fact happened in the way that you allege then in the ordinary course you ought to have reported that to your direct supervisor. Now who was your direct – firstly who was your direct supervisor at the time?

MR JOUBERT: At the time my direct supervisor was Mr Lucas Pieterse. Something of this nature that involves the NDPP is sent to him and you obviously inform your immediate supervisor of what had happened so that they bear knowledge thereof and that is something I did. I
20 informed my immediate supervisor who was a Mr Lucas Pieterse of the incident and that was that.

ADV HULLEY SC: Now he says that you ought to have informed a Mr Ramana who would then be the person responsible for forwarding it to the National Director of Public Prosecutions. Now who is Mr Ramana?

MR JOUBERT: Mr Ramahana he is the head of security – of security and risk management but we work on protocols here. I cannot skip my immediate supervisor and go to Ramahana without informing my immediate supervisor. So it was the immediate supervisor's duty to then inform Ramahana of what had happened not mine.

ADV HULLEY SC: Now how did it come about that you ended up informing after you – oh sorry. You say that you reported to your immediate supervisor Mr Pieterse and you
10 also reported to Mr Duma – how did it come about that you reported to Mr Duma?

MR JOUBERT: Mr Duma is the – the person that I knew in that – in the NDPP's office. Mr Duma is the person that I informed of the recording that I have made of my conversation with Colonel Mhlongo and that is why I – Mr Duma then requested that I bring him the recording and subsequently I obviously had to depose of an affidavit explaining the recording to him.

ADV HULLEY SC: No he says that...

20 **MR JOUBERT:** Which I did.

ADV HULLEY SC: Sorry – he says that your affidavit was in fact used before the commission of inquiry into the fitness of Advocate Jiba to – to practice as or to hold office within the NDPP that is the Mokgoro Commission of Inquiry. Were you involved at all – did you testify before the Mokgoro

Commission of Inquiry; did you provide an affidavit for the Mokgoro Commission on Inquiry, were you approached by any of the evidence leaders in that Mokgoro Commission of Inquiry?

MR JOUBERT: Mr Chair I – I was never involved with the Mokgoro Commission. I was never – I never testified in the Mokgoro Commission. Yes my affidavit was used in – at the Mokgoro Commission and I bear no knowledge as to how I would think that before anybody could utilise or use your
10 affidavit they would inform you of the intentions to use this which never happened. That is why I did not know. I had no dealing with the Mokgoro Commission.

ADV HULLEY SC: Now you also subsequently had a discussion – sorry you had a discussion with a certain Queen Mhlongo, is that correct?

MR JOUBERT: That is correct Chair.

ADV HULLEY SC: And that discussion related to the – the recording of Mr – that you had made of your conversation with Colonel Mhlongo, is that correct?

20 **MR JOUBERT:** That is correct.

ADV HULLEY SC: Could you just tell us briefly who Ms Queen Mhlongo or Advocate Queen Mhlongo is?

MR JOUBERT: Ms Queen Mhlongo is – is a colleague who worked at AFU. At the time she worked at the AFU she is now also back working at the AFU and we had this

discussion that she had in fact recorded Mr Mhlongo or Colonel Mhlongo during a visit to his office and I shared with her that I did the same.

ADV HULLEY SC: So when you had a conversation with her she mentioned that she had recorded a conversation that she had with Colonel Mhlongo and you mentioned to her that you had also done the same to him?

MR JOUBERT: Exactly.

ADV HULLEY SC: And do you recall when that conversation
10 between – in other words the conversation between you and Ms Mhlongo took place?

MR JOUBERT: Ja it took place shortly after her meeting with Mr Mhlongo or should I say after – just shortly after she recorded Colonel Mhlongo.

ADV HULLEY SC: And she has deposed to an affidavit which appears at page 325 of the bundle before you.

MR JOUBERT: Yes.

ADV HULLEY SC: And she says here that:

20 “On Friday the 15th that is paragraph 2 of that affidavit – she says on Friday the 15th of November of 2013 during the day I went to the third floor of the Southern Life building to see Colonel Welcome Sithembiso Mhlongo as I usually do. We sat – we sat and we started talking about the appointment of Mxolisi

Nxasana as the new National Director of Public Prosecutions and how happy I was as someone who is from Durban who happens to be a close person to me. I thought he was going to share the same sentiments as he knows Mxolisi as well. However he started saying that he hopes that Mxolisi can let Richard Ndluli off the hook as he was – he has been appointed to lead the intelligence –
10 sorry to lead the intelligence unit in the KZN if Ndluli is not charged – recharged. He also mentioned that the right candidate was Nomgcobo Jiba. I then thought that the conversation was becoming serious and I decided I would record him and started a sort of interview to find out his true feelings.”

She says in paragraph 3:

“He started telling me that Mxolisi Nxasana was not a kind man as I thought and that he
20 knew this from interviewing his relatives. At the time I did not understand what was going on. He continued by telling me – by telling that he knows Mxolisi Nxasana from a long time ago where they had an altercation about a client of Nxasana whom he – that is

Mhlongo – had arrested. He then continued to tell me that Nxasana was – has many properties around Durban and he mentioned Ntsuma, Umlazi, Pinetown and Kloof amongst others.”

She then goes on to – to say on the following page:

“That amongst the people who heard the recording”

That is at paragraph 5.

10 “Amongst the people who heard the recording was Terence Joubert who works in the security and risk department and he told me that he had recorded Colonel Mhlongo as well and I listened to his recording.”

Now did you – did that in fact take place? The interaction between yourself and Queen Mhlongo?

MR JOUBERT: That is correct Chair that definitely did take place.

ADV HULLEY SC: And did you have an opportunity to listen
20 to her recording? She listened to yours did you have an opportunity to listen to hers?

MR JOUBERT: Yes – yes Chair I had an opportunity to listen to her recording.

ADV HULLEY SC: And do you recall what was – what was captured on that recording?

MR JOUBERT: I remember hearing the part of RAF on her recording the fact that they are looking for information on the RAF whatever Nxasana did at RAF that is what I can remember of her recording. And the fact that Jiba was the best candidate for the job and not Nxasana. Those were the two things that I remember from her recording.

ADV HULLEY SC: And then just in the interest of saving time if we can turn to page 306 of the same bundle.

MR JOUBERT: Yes.

10 **ADV HULLEY SC:** Now you will recall I have referred you to this affidavit previously. This is the affidavit which is dated the 1st of February of 2016 if you turn to page 308 you will see there at the foot of the page the date stamp that has been provided by the Commissioner of Oaths.

MR JOUBERT: Yes.

ADV HULLEY SC: Now in this affidavit it appears that – and I say appears because the affidavit is not very specific but it appears that you distanced yourself from the affidavit of the 25th of November of 2013. Now we know that this affidavit
20 which is 1 February of 2016 was in fact deposed to by you. You have confirmed that already.

MR JOUBERT: Yes Chair this affidavit here to be honest with you I deposed of this affidavit merely to distance myself from ever having given Willie of my affidavit because the first affidavit I stand by it. I still stand by it but that is the

correct one. When I was asked as to did you give Willie Hofmeyer an affidavit this was my response and hence the fact that I distanced myself from that because I never gave any affidavit to Willie Hofmeyer and I still stand by that.

ADV HULLEY SC: Now when you say you did not...

MR JOUBERT: So –

ADV HULLEY SC: Sorry.

MR JOUBERT: So the – the affidavit that I made was merely to distance myself from – remember what distant to paint the
10 picture what had happened is that I gave this affidavit the first one to Duma with the recording.

CHAIRPERSON: Ja hang on, hang on.

MR JOUBERT: While I waited for the next...

CHAIRPERSON: Hang on Mr Joubert.

MR JOUBERT: The next thing that should have happened.

CHAIRPERSON: Hang on Mr Joubert.

ADV HULLEY SC: Hold on for a moment Mr Joubert.

CHAIRPERSON: Hang on Mr Joubert. I do not want us to waste time. It is late. You did not distance yourself from
20 giving the affidavit to Mr Hofmeyer as I read your affidavit unless I have missed something. You distanced yourself from the contents of the affidavit. You were simply saying that is not me saying those things that are in that affidavit, is that not true?

MR JOUBERT: Ja, no, no. That is why I tried to explain. I

am...

CHAIRPERSON: No, no,no. Let us get that right first.

MR JOUBERT: Ja.

CHAIRPERSON: You accept that you were not distancing yourself simply from saying – you were not distancing yourself from having given Mr Hofmeyer that affidavit you were distancing yourself from the affidavit itself saying whatever is said in that affidavit it is not you saying those things. Is that – do you accept that?

10 **MR JOUBERT:** Yes, yes, yes.

CHAIRPERSON: Ja. Okay.

MR JOUBERT: I ...

CHAIRPERSON: So the question is why did you say that?

MR JOUBERT: Do that.

CHAIRPERSON: When you knew that the contents of that affidavit were your contents?

MR JOUBERT: Okay I was busy explaining to you Chair as to how – why I did what I did.

CHAIRPERSON: Yes you can explain.

20 **MR JOUBERT:** I merely – I am merely a small fry in this – in this whole incident and what happened is that I became aware that my affidavit was used to – for a fight between executives. That is now your Jiba and Mrwebi and Nxasana and Hofmeyer. This thing was all over the newspapers. My name was all over the newspapers and I saw this as me

being used as a pawn within the – a fight between two elephants. At that point in time I said I did not give this affidavit. That is it in a nutshell because

1. As I am saying to you now I stand by my first affidavit.

The second affidavit was requested by some journalist that phoned on numerous occasions about me making the first affidavit and to him I said no I have no knowledge of the first one because the first affidavit was sent to Advocate Duma and Nxasana via email on
10 the 25th of November 2013.

CHAIRPERSON: So...

MR JOUBERT: No one else should have gotten a copy of that affidavit.

CHAIRPERSON: So am I right to...

MR JOUBERT: The people that should have – that should have called me were the people that were supposed to investigate the matter which is the IMU in the NPA.

CHAIRPERSON: Let me stop you there Mr Joubert. Am I right to say you accept that it was factually not true and not
20 correct for you to distance yourself from the contents of that affidavit – the first affidavit? Am I correct to say you accept that?

MR JOUBERT: Yes I accept that Chair.

CHAIRPERSON: And that it was not right to distance yourself?

MR JOUBERT: Yes, yes Chair.

CHAIRPERSON: And that the explanation you are giving for doing that is that you are saying that you understood that your first affidavit was at the centre of what you considered to be a fight between some executives within the NPA.

MR JOUBERT: That is correct Chair.

CHAIRPERSON: But as you sit here you are able to take responsibility and say you should not have distanced yourself from that affidavit. Is that correct?

10 **MR JOUBERT:** That is correct Chair.

CHAIRPERSON: Okay alright.

ADV HULLEY SC: As a final question would it be fair then to say having regard to what you have testified to thus far would it be fair to say that the content of the second affidavit that is the affidavit of 1 February 2016 that the content of that affidavit is incorrect?

MR JOUBERT: That is correct Chair.

ADV HULLEY SC: And this affidavit the one of 1 February 2016 to whom was that affidavit given?

20 **MR JOUBERT:** At this point in time Chair because I do not have access to my emails I requested assistance from the Labour Advocate Chando when she refused me because now I cannot for the life of me remember who did I send this thing to. I could only do that if I have access to my email.

CHAIRPERSON: Did you not send it to the journalist that

you said had called enquiring whether you had deposed to the first affidavit? Shall I repeat that?

MR JOUBERT: Just repeat that

CHAIRPERSON: Did you not send it to the journalist that you said called – called you to find out whether you had deposed to the first affidavit?

MR JOUBERT: I said that but in hindsight I remember – I cannot recall as to who I sent it to.

CHAIRPERSON: Okay alright.

10 **MR JOUBERT**: That was my – my response.

CHAIRPERSON: Okay alright.

ADV HULLEY SC: So are you saying you cannot recall whether you sent it to the journalist or you cannot recall the name of the person – the name of the journalist that you sent it to?

MR JOUBERT: I cannot recall who I sent it to meaning that I doubt whether I would ever send an affidavit to a journalist under any circumstances.

CHAIRPERSON: Okay.

20 **MR JOUBERT**: Because that would be asking for trouble. But with all due respect to this – to this commission because of the fact that I do not know who I sent it to I am not in a position to verify because of the fact that I was told in no uncertain terms no I cannot so I will not be able to answer that one

CHAIRPERSON: Okay.

ADV HULLEY SC: Thank you Mr Chair I have got no further questions.

CHAIRPERSON: Thank you very much Mr Joubert for availing yourself to us as the commission. I will now release you.

ADV HULLEY SC: Thank you Chair.

CHAIRPERSON: He would not be coming back for anything or would he at some stage? There is nothing else that he
10 was to testify about?

ADV HULLEY SC: I do not believe there is any further evidence that he needs to testify.

CHAIRPERSON: Ja okay alright. You are now excused Mr Joubert. Thank you very much.

MR JOUBERT: Thank you, thank you Chair. Thank you Mr Hulley.

CHAIRPERSON: Okay alright.

ADV HULLEY SC: Thank you.

CHAIRPERSON: Counsel for Colonel Mhlongo are you still
20 there?

ADV MANALA: Yes good evening Chairperson.

CHAIRPERSON: Yes good evening again. Is Colonel Mhlongo ready to give evidence?

ADV MANALA: I understand so yes Chair.

CHAIRPERSON: Colonel Mhlongo can you hear me?

COL MHLONGO: Yes Chair I can – good evening to you I can hear you Sir.

CHAIRPERSON: Oh good evening Colonel. Thank you for – thank you for availing yourself to give evidence and to assist the commission.

COL MHLONGO: Thank you very much Sir.

CHAIRPERSON: Okay alright. The Registrar will administer the oath or affirmation to you and Mr Hulley will then lead your evidence and question you on your evidence.

10 **ADV HULLEY SC:** Mr Chairperson.

CHAIRPERSON: Mr Hulley.

ADV HULLEY SC: Perhaps before we start that.

CHAIRPERSON: Ja.

ADV HULLEY SC: I understand that Colonel Mhlongo has requested to testify through an interpreter.

CHAIRPERSON: Oh.

ADV HULLEY SC: Once the 00:22:26 has been made available so perhaps ...

CHAIRPERSON: And where is the interpreter?

20 **ADV HULLEY SC:** I understand that he is in fact present.

CHAIRPERSON: Has the necessary documentation been prepared?

ADV HULLEY SC: I am told that it has been prepared.

CHAIRPERSON: Can I see it? Can I see it? And his CV and qualifications is everything there?

ADV HULLEY SC: I understand that it is all there. I have only just been given it myself.

CHAIRPERSON: Okay. Nzotho come forward it does appear from the documents that you have given me that you have magistrates who say that you are proficient in the English and Isi-Zulu language and that you have satisfied them with your knowledge and proficiency in the two languages when you have interpreted in the cases in which they have presided. Maybe – maybe you could sit that side if there is a
10 microphone that works from that side so he can see the witness because the witness will not appear there is it not? Or will he – will he appear there as well? He will appear there – it is better here. Okay no that is fine then. Has he got these documents or the ones I have are the ones he should have? Okay Registrar give him this – sanitise before you give it to him. I think what you have prepared here today in terms of something to be signed by me is not the same thing that I have done before. At least that is not my recollection.
20 Okay have you sanitised it and given it to him? Ja, well I don't know what they say but I have no recollection of this one. Mr Mzombe(sic), write your full names where you are supposed to write them on the oath in front of you. Just write. Have you written your names?

INTERPRETER: [No audible reply]

CHAIRPERSON: Do not sign yet. Take the oath first.

Okay. Will you read the oath aloud including your names?

INTERPRETER: [No audible reply]

CHAIRPERSON: Put on your mic.

INTERPRETER: I, the undersigned, *Kulelane Dumelake Nzotho*, hereby states under oath:

1. I am proficient with English and isiZulu and am able to interpret and translate from English to isiZulu and vice versa.

10 2. The code to translate or interpret from isiZulu to English or from English to isiZulu.

3. In proceedings of this Commission, I undertake to do so honestly and to the best of my knowledge and ability.

So help me God.

KULELANE DUMELAKE NZOTHO: (d.s.s.) (Interpreter)

CHAIRPERSON: Thank you and then you may sign now.

INTERPRETER: Thank you Chair.

CHAIRPERSON: Okay. And then that, you taking the oath
20 goes into the record and the document here is signed, will need to be taken and filed. But tomorrow, Reverend Stimela, will you show me one that I have signed before because this looks unusual to me but if I see one that I have signed before then maybe I will sign it. Okay. You may be seated Mr Mzombe(sic).

INTERPRETER: Thank you Chair.

CHAIRPERSON: It is Nzotho or Mzombe?

INTERPRETER: Nzotho.

CHAIRPERSON: Nzotho?

INTERPRETER: Yes.

CHAIRPERSON: You are not related to the Mzombe's, hey?

INTERPRETER: I am not.

CHAIRPERSON: Okay alright.

10 **INTERPRETER:** Thank you.

CHAIRPERSON: Okay alright. Thank you. Of course, when there is the intervention of the interpreter, proceedings take longer than when there is no interpreter but let us try. The interpreter has been sworn in now, Colonel Mhlongo. So we will start.

Mr Hulley, you can start leading your evidence and questioning him. And I think Mr Hulley, as you do so, it is important to confirm with him right up front that he does not dispute what was recorded, if that is the case, 20 because that is how I understand his affidavit because that may affect a number of things. But if there is anything he disputes, then he can specify. Okay. So that might just help as we go along.

ADV HULLEY SC: Thank you Mr Chair. We are speaking, of course, specifically about the recording.

CHAIRPERSON: The transcript of the recording.

ADV HULLEY SC: Ja. Thank you.

CHAIRPERSON: Ja. So I am saying. It will be important, quite early, you do not have to start with it ...[intervenes]

ADV HULLEY SC: Sure.

CHAIRPERSON: But quite early to get to that point because how much of the – of what he said to have been recorded he disputes, may be important.

ADV HULLEY SC: Thank you Mr Chair. Before we
10 commence Mr Chair. I am not sure if Colonel Mhlongo has been sworn in yet. I think I interrupted that ...[intervenes]

CHAIRPERSON: Oh, yes. You did, actually. Let us... Thank you for reminding me. The... I think what – you will leave time for the interpreter to interpret whatever you say to the witness in terms of the oath. Okay?

REGISTRAR: [No audible reply]

CHAIRPERSON: Go ahead.

REGISTRAR: Colonel Mhlongo, will you be taking the oath or affirmation?

20 **COL MHLONGO:** I will take the oath.

REGISTRAR: Please state your full names for the record.

WITNESS: My names are Welcome Sthembiso Mhlungo.

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

WITNESS: I have no objection.

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

WITNESS: I do.

REGISTRAR: Do you solemnly 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.

WITNESS: So help me God.

WELCOME STHEMBISO MHLUNGO: (d.s.s.) (through
10 interpreter)

CHAIRPERSON: Thank you very much.

ADV HULLEY SC: Thank you Mr Chair.

CHAIRPERSON: I just want to say Mr Nzotho that I have heard interpreters here and it did not take for me to be dissatisfied with their interpretation. You are still to interpret further, but from the little that I have heard, you give me confidence that you know what you are doing.

INTERPRETER: Thank you Chairperson.

CHAIRPERSON: Yes.

20 **INTERPRETER:** I am quite humbled.

CHAIRPERSON: Alright. Please proceed Mr Hulley.

EXAMINATION BY ADV HULLEY SC: Thank you Mr Chair. Colonel Mhlongo and for the benefit of the Chairperson, you ought to have a bundle which is marked LEA Bundle
10.

COL MHLONGO: That is correct. I do have it.

ADV HULLEY SC: Now if you would not mind just turning with me to page 210.27. Now just to assist you. There are two sets of numbering systems on the documents. There is one that is in red which is in the top right-hand corner and there is one which is in black which is in the top left-hand corner. I want you to focus on the one which is in black at the top left-hand corner.

COL MHLONGO: [No audible reply]

10 **ADV HULLEY SC:** Now if you could turn to me to page 210.27 in the top left-hand corner.

COL MHLONGO: I found it Chair.

ADV HULLEY SC: Thank you. And if you can keep ...[intervenes]

COL MHLONGO: Is it the one between LEA and 210 and then there is a four? Is that the one you are talking about?

ADV HULLEY SC: There is LEA 10-210.27.

COL MHLONGO: Is it a document with the recording that was made by Joubert?

20 **ADV HULLEY SC:** No, that is ...[intervenes]

CHAIRPERSON: Let me assist him. Colonel Mhlongo?

COL MHLONGO: Yes, Chair.

CHAIRPERSON: The lever arch file you have got, on the spine, is it written Bundle LEA-10?

MR MHLONGO: That is correct Chair.

CHAIRPERSON: Okay alright. Then what you need to do is. Go to page 210 using the black numbers on the left – top left-hand corner. Page 210 is the last page of a letter written by the acting Secretary of the Commission at the time, Ms K B Shabala.

MR MHLONGO: I apologise for delaying you.

CHAIRPERSON: Okay alright. Now, now that you have found page 210 ...[intervenes]

ADV HULLEY SC: Mr Chair, sorry, if I could just interrupt
10 you?

CHAIRPERSON: H'm?

ADV HULLEY SC: I have been asked to request Colonel Mhlongo to position himself in such a way that when he looks at the document he is, his face is not – does not go off the screen.

CHAIRPERSON: Yes, okay.

ADV HULLEY SC: Thank you Mr Chair.

COL MHLONGO: Okay.

CHAIRPERSON: Okay alright. Now if you go to the next
20 page, the page that comes after page 210, you will see that that page is written 210.1. Can you see that?

MR MHLONGO: Yes, I see that Chair.

CHAIRPERSON: Okay. Now you must count and go to page 210.27. And that page, namely 210.27, is the first page of your affidavit.

MR MHLONGO: [No audible reply]

CHAIRPERSON: Are you able to find it?

MR MHLONGO: I find the one that says 210.25.

CHAIRPERSON: Go two pages further.

MR MHLONGO: [No audible reply]

CHAIRPERSON: What is the next page after page 210.25?

MR MHLONGO: It is then 210.26.

CHAIRPERSON: Yes, and then the next page is page
10 210.27, is it not so?

CHAIRPERSON: Okay. Have you got ...[intervenes]

MR MHLONGO: ...Chair.

CHAIRPERSON: Okay. Have you got a red number on the right-hand page at the top of the next page?

MR MHLONGO: [Speaker vernacular – no interpretation]

CHAIRPERSON: Okay I think there is a problem.

ADV HULLEY SC: I can see what the problem is. I think that his file probably has not been updated.

CHAIRPERSON: Ja.

20 **ADV HULLEY SC:** Because his affidavit - Colonel Mhlongo's affidavit, obviously, it came in afterwards ...[intervenes]

CHAIRPERSON: Yes.

ADV HULLEY SC: ...since the bundle was originally sent to him. There was an additional – some additional

documents that were sent.

CHAIRPERSON: Yes.

ADV HULLEY SC: I assumed that he had that bundle.

CHAIRPERSON: Yes.

ADV HULLEY SC: But it seems that he does not have it.

CHAIRPERSON: Yes. Would it be a matter of slotting in his affidavit in the right place and paginating it or would it involve more than that?

ADV HULLEY SC: It ought to be a simple matter of just
10 slotting it in because there are 13-pages to his affidavit.

CHAIRPERSON: Yes. Okay. Have you got your latest affidavit in your possession?

MR MHLONGO: Yes, I do.

CHAIRPERSON: Okay alright. That affidavit, the first page of that affidavit is supposed to be page 210.27. You understand?

MR MHLONGO: I understand Chair.

CHAIRPERSON: What we are going to do. We are going to – we are not going to use the page numbers or if we do
20 use page numbers in regard to your affidavit, ignore the page numbers when we mention page numbers but we will focus on the paragraph numbers of your affidavit when we refer to what you say in your affidavit.

MR MHLONGO: I understand Chair.

CHAIRPERSON: Okay alright.

ADV HULLEY SC: Thank you Mr Chair. What I will do for the benefit of our record Mr Chair is. I will read our numbering into the record but I will advise Colonel Mhlongo on which page of his document it is.

COL MHLONGO: No, that is fine. Ja.

ADV HULLEY SC: Thank you Mr Chair. Colonel Mhlongo, if you could keep that page open. In other words, the first page of that affidavit and then turn with me to the last page. For you, it will appear at the bottom right hand
10 corner which will be page 13 of 13. For the purpose of the record, it will be page 210.39 Mr Chair.

COL MHLONGO: [No audible reply]

ADV HULLEY SC: The signature at the top of that page, is that your signature sir?

COL MHLONGO: Yes, that is my signature.

ADV HULLEY SC: And you deposed to this before a commissioner of oaths according to the date stamp which says the 2nd of February 2021. Is that correct?

COL MHLONGO: That is correct Chair.

20 **ADV HULLEY SC:** Thank you. And then if you look at the certificate that has been provided by the commissioner of oaths. It says there that it was:

“This affidavit was signed and sworn to before
me at...”

And I cannot make out where it has been sworn

to, on the 22nd day of February. It says 2020. That is, in fact, incorrect. It should be 2021. Is that right?

COL MHLONGO: Yes, that is correct. That is an error. I confirm that.

ADV HULLEY SC: And you confirm that this is the affidavit that you have provided to the Commission – to this Commission relating to your testimony regarding Mr Joubert's affidavit. Is that correct?

COL MHLONGO: That is correct Chair.

10 **ADV HULLEY SC:** Now before we get into the – into the content of your affidavit and I will take you through that shortly. As you know, a very material part of – a dispute between yourself and Mr Joubert relates to a conversation that the two of you have had.

COL MHLONGO: That is correct Chair.

ADV HULLEY SC: And that conversation was in fact recorded by Mr Joubert or at least a portion of the conversation was recorded by Mr Joubert. And you have – you have been provided with the transcript of that
20 recording. Is that correct?

COL MHLONGO: That is correct Chair.

ADV HULLEY SC: Now if you would turn with me to page 243 of the same bundle of documents that you have.

COL MHLONGO: 243 on black or 243 in red?

ADV HULLEY SC: Black. We are only going to be

speaking about the black.

COL MHLONGO: Chair, if I may ask because I do not seem to understand these documents that are in front of me. Perhaps if you can indicate what that page relates to.

CHAIRPERSON: Okay. No, I think we might have to attend to making sure that he has exactly the same pagination and documents as everybody because I thought maybe insofar as it might be his affidavit only that was not properly paginated, we would be able to make do without
10 him having to do that. But if there are other documents that would be referred to and he does not have the same pagination, we are going to have a problem.

ADV HULLEY SC: ...Chair but that ought not to be the case in relation to this document.

CHAIRPERSON: H'm?

ADV HULLEY SC: There is potentially one other document that he might have a problem with but this document is not.

CHAIRPERSON: It should not be a problem?

20 **ADV HULLEY SC:** This document, he should have had three weeks ago when he first came to – when he was first available to testify.

CHAIRPERSON: Yes, tell... Okay just tell him what it is and then see whether he has got the pagination or not. But if he does not have the pagination but the document

has paragraphs then that will help. But if he does not have paragraphs, then we will have...

ADV HULLEY SC: Thank you Mr Chair.

CHAIRPERSON: We might have a problem.

ADV HULLEY SC: Colonel Mhlongo, this is the document which is a transcript of the recording of the conversation between yourself and Mr Joubert. It should appear at page 243 in the top left-hand corner.

COL MHLONGO: Chair, according to the documents
10 before me, a document containing the transcripts of the conversation between Mr Joubert and myself appears on page that is written LEA-10.135.

ADV HULLEY SC: Okay.

CHAIRPERSON: Is the page of the recording or the transcript of the recording that you have written video recording VN-2013/11/25?

COL MHLONGO: Yes, Chair.

CHAIRPERSON: Okay alright. It looks like you have a pagination that is not the same as our respective
20 paginations but you have the same document. It will be possible, I think Mr Hulley, to refer – to use the page numbers at the bottom of the particular document. And for our purposes you can mention again the paginated page number.

ADV HULLEY SC: Thank you Mr Chair.

CHAIRPERSON: And the page number of the document as well and then you can always refer to the marginal numbers.

ADV HULLEY SC: The Y numbers?

CHAIRPERSON: Ja.

ADV HULLEY SC: Thank you Mr Chair. Mr Chair, can be able of assistance, actually, what Colonel Mhlongo is referring to is the identical document. It is just an annexure to his bundle.

10 **CHAIRPERSON:** Ja.

ADV HULLEY SC: I am happy to refer to that document if that is what he has got. For your benefit, Chair, it is page 133 of the bundle that is in front of you.

CHAIRPERSON: 133?

ADV HULLEY SC: Correct Mr Chair.

CHAIRPERSON: Okay if we can use the one and the same document then we can do that. Then that is going to be easier. Okay alright. So let us use that one.

ADV HULLEY SC: Thank you Mr Chair.

20 **CHAIRPERSON:** Ja. Before we do so. Reverend Stimela, we are at about quarter to eight. IN terms of staff, are there people who might have transport problems if we go on to half-past eight?

REV STIMELA: [No audible reply]

CHAIRPERSON: Okay alright.

REV STIMELA: [No audible reply]

CHAIRPERSON: Okay alright. Thank you. Mr Hulley, before we start. Let us take a short adjournment.

ADV HULLEY SC: Thank you Mr Chair.

CHAIRPERSON: We are just going to adjourn for five to seven minutes and then we are going to adjourn. We adjourn.

INQUIRY ADJOURNS

INQUIRY RESUMES

10 **CHAIRPERSON:** Okay, let us continue.

MR HULLEY SC: Thank you, Mr Chair. Colonel Mhlongo, we were looking at page 133 of the bundle of documents. Now it does indeed start LEA10 in the top left hand corner, but for our purposes you can ignore the LEA10, I am just going to refer to the number that appears alongside that but in this case it is 133. Those are your page numbers.

COL MHLONGO: Yes.

CHAIRPERSON: Please put on your mic, Mr Interpreter, put on your mic.

20 **COL MHLONGO:** Yes, that is correct. Thank you.

MR HULLEY SC: Now from page 133 to 139 that is a transcript of that purports to be a transcript of the recording of a conversation or part of a conversation that took place between you and Mr Joubert.

COL MHLONGO: That is correct, Chair.

MR HULLEY SC: And you have in fact seen this document previously, is that correct?

COL MHLONGO: Yes, Chair, I have seen it.

MR HULLEY SC: And you have had an opportunity to consider the contents of this document, is that correct?

COL MHLONGO: That is correct.

MR HULLEY SC: And would it be correct to say that – well, let me ask you, do you agree that this document accurately records or captures the conversation that took
10 place between yourself and Mr Joubert?

COL MHLONGO: I can confirm, Chair, although it has been quite some time since the conversation took place but I still remember portions of it.

CHAIRPERSON: Just to be fair to you, Colonel Mhlongo, there are spaces in the transcript that reflect that the person who typed or transcribed the conversation did not hear what was being said and wrote indistinct and so on but I think the question was meant to say to you in essence you accept that it captures important parts of your
20 conversation with Mr Joubert.

COL MHLONGO: That is correct, Chair.

CHAIRPERSON: Thank you.

MR HULLEY SC: Thank you, Colonel Mhlongo. Now I am going to deal with the background to the matter before we get into the conversations and so forth and I just want to

get some information relating to your own background and how you became involved in this affair that we now have to lead evidence on. If I understand from the affidavit that you have deposed to, you are currently a colonel in the Directorate for Priority Crimes Investigation or what is commonly referred to as the Hawks, is that correct?

COL MHLONGO: That is correct, Chair.

MR HULLEY SC: And the DPCI is the successor to the Directorate for Special Operations which is the DSO, is
10 that correct?

COL MHLONGO: That is correct.

MR HULLEY SC: And you had been employed within the DSO in 2004, is that right?

COL MHLONGO: Even though I do not remember the exact date but we were amongst the first to be employed by the DSO, it could have been around 2001.

CHAIRPERSON: I am not sure, Mr Hulley, will I need to go back, that far back his...?

MR HULLEY SC: It is not really relevant.

20 **CHAIRPERSON:** Ja.

MR HULLEY SC: I think it is relevant to Colonel Mhlongo's urgent – of how we came to know Mr Joubert.

CHAIRPERSON: Well, is the fact not that there should be no dispute about how they came to know each other?

MR HULLEY SC: Correct.

CHAIRPERSON: Of if there is, it should not matter to us.

MR HULLEY SC: There is not really much of a dispute.

CHAIRPERSON: Yes. Ja, I think you need to come closer to the day of the recording particularly because it does not dispute the correctness of the transcript and that is what this whole – is and Mr Joubert is really about.

MR HULLEY SC: Thank you, Mr Chair.

CHAIRPERSON: Ja.

MR HULLEY SC: Before we get into the transcript, now if
10 I understand from your affidavit correctly, you testified – or you have deposed to an affidavit in which you say that the two of you, that is you and Mr Joubert, were quite close, you were the first person to welcome him when he came to Kwazulu-Natal in 2004 and after that the two of you had a very close relationship.

COL MHLONGO: That is correct, Chair, and I can explain how it all unfolded.

MR HULLEY SC: Well, for present purposes we do not need to get into that unless it becomes necessary at a
20 later stage but your understanding or your appreciation of the relationship that you had was that the two of you were close friends.

COL MHLONGO: That is correct, Chair, we were close friends and when he came in some of the duties that he had to do are works that had previously been done by

myself in the province of Kwazulu-Natal.

MR HULLEY SC: Now if I understand correctly, the friendship persisted or continued until approximately the 25 November or the 26 November 2013 shortly after you became aware of an affidavit or a statement that he had deposed to and made available to Mr Nxasana, is that correct?

COL MHLONGO: If you may repeat?

MR HULLEY SC: Do I understand correctly that the two of
10 you, that is yourself and Mr Joubert had been close friends until approximately the 25 of 26 November 2013?

COL MHLONGO: That is correct, Chair, our friendship continued and we remained close until I learnt that he had gone to or he had communicated to Mr Nxasana's office that I was investigating Mr Nxasana. It was from that stage that I started to have my reservations about him.

MR HULLEY SC: And how did you find out about the fact that he has gone to Mr Nxasana's office to complain to him that you had been investigating Mr Nxasana?

20 **COL MHLONGO:** I was informed, Chair, by the lady that I worked with, was from the NPA, I worked with in the office, who informed me that I had to vacate the offices, that an instruction has been given that I should leave the offices because information had come to the fore that I was investigating Mr Nxasana and she further informed me that

on inquiring as to where did that information come from, that she then informed me that it was made to understand that it came from Terrence Joubert.

CHAIRPERSON: Mr Hulley, may I suggest that you question Colonel Mhlongo on the main features of their conversation as reflected in the transcript. The reason why I would like you to do that because if indeed the position is, as I understand it, that there is nothing of any importance that differs from Mr Joubert's version that
10 Colonel Mhlongo advances it may well be that all these things about whether they were friends or stopped to be friends, whether one is generally unreliable, they may be neither here nor there if there is no dispute between them of any significance on the main features of the conversation and there might be no need to really take too much time about all of those issues about who is telling the truth about this or that.

MR HULLEY SC: Thank you, Mr Chair.

CHAIRPERSON: If what we are talking about there is no
20 material dispute. So far Colonel Mhlongo has said the transcript correctly reflects the substance or gist of what they discussed. So I think what may be important is to highlight certain features.

MR HULLEY SC: Thank you, Mr Chair.

CHAIRPERSON: And question him on some of the issues

that are important.

MR HULLEY SC: Thank you, Mr Chair. Now if we can consider the transcript that I have referred you to a moment ago, Colonel Mhlongo, if you would turn with me to page 135. Do you have it?

COL MHLONGO: I do.

MR HULLEY SC: Now if you look in the left hand column you will see that there is a line numbering system, you will see the number 5, the number 10, the number 15 and the
10 number 20, right at the bottom you will see a number 25, do you see that?

COL MHLONGO: I do, Chair.

MR HULLEY SC: Now at line 16, this is Mr Terrence Joubert speaking, he says:

“Our thing here with the boss, these guys from RAF tomorrow morning, all I am going to do, I will link you up with them so that you can get all the documentation. The thing that I do not want is not – I am just bringing A to B.

20 Do you see that, sir?

COL MHLONGO: I am just trying to find it, Chair, because the number is 5, L15, 20 and 25.

CHAIRPERSON: Okay, let me explain it to you, Colonel Mhlongo. Where it says 5, can you see that?

COL MHLONGO: Yes.

CHAIRPERSON: If you count upwards, the next line will be line 4. If you count upwards, the next line will be line 3, the next line will be line 2. The first line will be line 1, but it is not written 1 next to it. So when you count also from where it says 5, that 5 means that is line 5 on the page. So if you go to the next line counting downwards, the next line will be line 6, the next one would be line 7 but it is not written, the next one will be line 8, the next one will be line 9, the next one it is line 10 and then it is
10 written 10, so that is how it works. So if you are referring to line 7, you count from 5 two lines, then you are on line 7. If you are referred to line 12, you look at line 10 and count two lines, then you are on line 12. That is how it works.

COL MHLONGO: Yes, I understand, we were on page 35, right?

MR HULLEY SC: That is correct. Now if you look at line 15.

COL MHLONGO: Yes.

20 **MR HULLEY SC:** The 15 in the left column.

COL MHLONGO: Yes, I see it.

MR HULLEY SC: Now that sentence begins:

“No, I mean the whole – our whole point here is the collection – sorry, it is one collection, no, no, no.”

And then the important part that I want you to look at is:

“Our thing here comes here with the boss, these guys from RAF tomorrow morning, all I am going to do, I will link you up with them so that you can get all the documentation. The thing that I do not want is not – I am just bringing A to B.”

Do you see that sentence?

COL MHLONGO: I see that, Chair.

MR HULLEY SC: Now this is Mr Terrence Joubert speaking and he is speaking to you, is that correct?

10 **COL MHLONGO**: That is correct.

MR HULLEY SC: Now you in your response at line 19 you say yes.

COL MHLONGO: That is correct.

MR HULLEY SC: Now when he speaks about our thing here with the boss, what was he in fact referring to?

COL MHLONGO: I would like to start by saying that this conversation, yes, it did happen but there is a portion that he did not record, that portion would indicate where this whole conversation originated from.

20 **MR HULLEY SC**: In other words, a portion that preceded a point at which the recording commenced?

COL MHLONGO: That is correct, Chair.

MR HULLEY SC: So a portion that occurred during this very same conversation, not on a conversation on a previous day.

COL MHLONGO: I am referring – Chair, I am referring to a conversation that took place the previous day on the recorded transcribed conversation, it is when he came the following day in the morning. On reading this conversation it becomes apparent that there is a conversation that preceded this one.

MR HULLEY SC: Then you say that there was a conversation that preceded this one? Are you saying that there was conversation that preceded this conversation?
10 In other words, that took place either at an earlier time in the day or on a previous day or are you saying that this recording is incomplete in respect of a conversation that took place on this day?

COL MHLONGO: Yes, that is correct. Chairperson, when we heard the recorded and transcribed conversation it was a continuation of a conversation that had taken place the previous day. So when he came and we had this recorded conversation it was a continuation of things he had spoken to me about the previous day.

20 **MR HULLEY SC:** Now you wanted to explain what had happened on the preceding day.

COL MHLONGO: Thank you, Chairperson, thank you for the opportunity. When Mr Joubert came to me, he came to me quite upset and said – and then he said and I quote, said to me, my friend, you know, that on a number of

occasions I have been suspended and there has been cases against me, now I am deeply worried that this newly appointed man, Mr Nxasana, now wants to revive or resuscitate all those cases against me.

CHAIRPERSON: Did you also say Colonel that he said to you he had been suspended on a number of occasions and dismissed when you were speaking a few minutes?

COL MHLONGO: Chair it is just that we were told to just go into the transcripts so I thought I would give the
10 background of where this all started, because it did not record this location when he came to me, he only recorded the portion that is now transcribed, so I wanted to give the Commission a background of what had happened before this conversation.

CHAIRPERSON: I think you misunderstood my question. About three minutes ago you were telling me what Mr Joubert said to you about Mr Nxasana, do you remember that? When you spoke about him being suspended on a number of occasions, do you remember telling me that a
20 few minutes ago?

COL MHLONGO: Yes I remember.

CHAIRPERSON: My question is whether when you were saying that a few minutes ago you also said he said he had been suspended on a number of occasions and dismissed, so the question is whether you also included that he said

he had been dismissed.

COL MHLONGO: Chair perhaps it is a choice of words that I have opted for, I did not mean dismissed as in the strict sense of the word, I meant she was suspended, in other words caused to refrain from his usual duties.

CHAIRPERSON: But you confirm that you did use – you did say he said he had been suspended on a number of occasions and dismissed?

COL MHLONGO: I confirm that I did use the word
10 perhaps by mistake.

CHAIRPERSON: Okay no that is fine, I just wanted to clarify that because your interpretation Mr Interpreter did not include that word.

Alright, Mr Hulley

ADV HULLEY SC: Now Colonel Mhlongo you were telling us about what would have happened on the day preceding the day on which you had the conversation that is recorded and transcribed, so we are talking now about on your version a conversation that took place on the 24th of
20 November of 2013, is that correct?

COL MHLONGO: Yes that's correct.

ADV HULLEY SC: Now in this conversation you say that he had come to you and he had mentioned that as you know, which presumably he is saying you, Colonel Mhlongo know, I have been suspended on several occasions, you

used the word also dismissed but for present purposes that is not relevant, he mentioned you know I have been suspended on a number of occasions and I am deeply concerned about the new National Director of Public Prosecutions, do I understand that part right?

COL MHLONGO: That is correct you had understood that well and then he continue, he then told me that he was concerned about the new NDPP in that he wanted to resuscitate those cases concerning to himself that being
10 mentioned there and he also indicated that what also bothered him is that he – that is Mr Joubert had information at his disposal concerning some cases that the newly appointed NDPP then had had in the past and then he said to me since I am a police officer I do have at my disposal the sources and the ability to commence inquiry into those cases that the newly appointed NDPP has had with the singular intention of discrediting or exposing the dirt on the newly appointed NDPP.

ADV HULLEY SC: Now when he spoke about the fact
20 that he was concerned that the new National Director of Public Prosecutions may resuscitate the cases against him, was he saying that the National Director or that somebody had said that to him that the National Director of Public Prosecutions intended to resuscitate the cases against him, or was he saying that the National Director of Public

Prosecutions had told him that, or was he saying that – a third option – that he had just surmised that this is what was going on?

COL MHLONGO: He indicated Chair that he was definitely sure that Mr Nxasana was going to reopen those cases, resuscitate them as it were, and he had indicated that he has heard from people from the National Office in Pretoria that that is what Mr Nxasana was going to do.

ADV HULLEY SC: Now what happened after that, so he
10 mentioned to you that it was the intention – from the information that he had it was the intention of Mr Nxasana to resuscitate the cases and he mentioned also that he had found – that he had found certain information or dirt on Mr Nxasana that he wanted you as a police officer to investigate.

COL MHLONGO: Chair he indicated to me that since he was working in the Risk and Security Unit they are the one that – the ones that were responsible for vetting of people prior to their appointment and that he had indicated to me
20 further that he had gathered information in the capacity of being in the risk and security to that. There was a case of murder against the National Director of Public Prosecutions that he, the NDPP, had not disclosed.

ADV HULLEY SC: And anything more relating to that conversation that took place on the 24th of March, ag, the

24th of November that is relevant to the recording that you wanted to tell us about.

COL MHLONGO: Yes Chairperson he further indicated to me that Mr Nxasana whilst practicing as an attorney he had dealt with the Road Accident Fund claims and that there were occasions whereby when those claims were paid out by the Road Accident Fund and there were instances whereby Mr Nxasana did not pass those claims to his clients, the recipient of those claims, and then he indicated
10 to me further that he had people that he had spoken to who were going to be able to assist me in that regard and people would then be able to even identify those clients whose funds embezzled.

ADV HULLEY SC: And was there anything else that took place, or anything else that is said in the course of that conversation that is relevant to the events of the 25th of November?

COL MHLONGO: Chair he was over and above this whole conversation insisting that I should move quickly in
20 initiating this process before Mr Nxasana commences with investigating him and thereby suspending him and to quote his exact words he was saying I must work or move sharp-sharp.

ADV HULLEY SC: And this all took place of course on the 24th of November?

COL MHLONGO: Yes Chair I believe that the date, even though I cannot say with utmost certainty it is quite some time that has since lapsed.

ADV HULLEY SC: Now you were going to deal with the content of the transcript, but before we deal with the content of the transcript is there anything else in respect of that previous conversation, in other words the one of the 24th of November, that is relevant to explain what you want to explain in respect of the transfer of the 25th of
10 November?

COL MHLONGO: As I have indicated Chair that quite some time has lapsed since this incident occurred but perhaps as we go through the transcripts perhaps other things will then come back to me.

ADV HULLEY SC: Now I had asked you where he says, going back to page 135, when Mr Joubert says our thing here with the boss, this is line 16, what is “the thing with the boss” that he is referring to?

COL MHLONGO: He was referring to the thing that he
20 had told me the previous day that there is someone that he knows from RAF.

CHAIRPERSON: Mr Hulley I am not sure whether we should go into the transcript because of the time. Obviously it is taking longer than we thought it would – part of it must be because there is an interpreter, who is

necessary in order to make sure that Colonel Mhlongo understands everything.

I think that we must adjourn and arrange a date when we will then go into the transcript. But I think – I have just been looking at the transcript again it may be that what may be necessary is to let Colonel Mhlongo tell his side of the story on what happened, insofar as he might not have completed doing so, as he had, and then put Mr Joubert's version as contained in his affidavit rather than
10 the transcript, because the indistinct and inaudible and the gaps in the transcript might make it difficult but if we – Colonel Mhlongo has given us his full version and you have been able to put Mr Joubert's version to him and he has dealt with that then when we go to the transcript we would be doing so with an understanding of the versions as we see them in the affidavits.

If the transcript entail so many gaps it might have been easier the way I thought we would do it, so I am sorry that I may have taken you astray by suggesting what I
20 thought would be a shortcut but I realise I think there are too many gaps, because as I understand Colonel Mhlongo's version it is suggested that the person who wanted Mr Nxasana, who wanted investigations to be done into Mr Nxasana was Mr Joubert and not him, whereas Mr Joubert's version is that Colonel Mhlongo told him that he

was investigating in effect Mr Nxasana, he wanted to find dirt on him having been asked I think by Mr Joubert.

So when you go into the transcript you might find a line that might indicate what was said, but you might find that it says well we were talking about this because this is what he had said before, which we can't see because the transcript is not complete.

So I am thinking that that might be better. What do you think?

10 **ADV HULLEY SC:** No, no I think there is merit in dealing with the allegations that Mr – Colonel Mhlongo has given. I am familiar with his affidavit, so I know what his version is.

CHAIRPERSON: Yes, ja.

ADV HULLEY SC: And I would imagine that he has listened to the testimony of Mr Joubert, so I understand where the areas of dispute are.

CHAIRPERSON: Yes.

ADV HULLEY SC: What I wanted to deal with previously
20 was to get into the context because I understood that this recording captures a portion of the conversation but not the entire conversation, and I want to get the context in which – whatever preceded it, whether it was preceded by – on the same day or be it on the previous day, whether that – what was that context that they had discussed.

CHAIRPERSON: Ja, no, no, I think ...[intervenes]

ADV HULLEY SC: I think perhaps we should get – because I understand what the version is and maybe when we reconvene we can actually get into that context again, because we understand where the areas of dispute are.

CHAIRPERSON: Ja. Okay let me talk to Colonel Mhlongo's counsel. Can you hear me?

ADV MANALA: Yes we can hear you Chair.

CHAIRPERSON: Yes, I am thinking that we should
10 adjourn at this stage, it is taking longer than I may have thought but maybe it is because we have to make room for the interpreter and that is fine, because that is important.

So I am thinking that we should adjourn, maybe not to a specific date now because I am not sure what date I will give you, but another date be arranged soon, when we can continue and finish. Is that fine with you?

ADV MANALA: Yes Chair we have no difficulty with that.

CHAIRPERSON: Yes, okay, alright, we will adjourn and the – if we choose a date that is close then the legal team
20 will discuss with you about your availability but if we choose a date that we think gives you reasonable notice then we will just fix that date, probably it would be evening, but it might – ja probably it would be evening, and then we continue.

ADV MANALA: Yes but Chair you would have noted thus

far that we have no difficult with doing the sessions, particularly where we also have been permitted to appear remotely, it makes it very easy in terms of planning.

CHAIRPERSON: Yes, no, no that is fine. We would continue with the same arrangement next time.

Okay alright then Mr Interpreter I assume that the legal team for Colonel Mhlongo will contact you once a date is known so you could make yourself available.

Yes, no, no that is fine. We would continue with the same
10 arrangement next time.

Okay alright then Mr Interpreter I assume that the legal team for Colonel Mhlongo will contact you once a date is known so you could make yourself available.

INTERPRETER: Very well Chair, I will do.

CHAIRPERSON: Yes, we will adjourn for the day and tomorrow I will continue with Eskom related evidence.

ADV HULLEY SC: Thank you Mr Chair.

CHAIRPERSON: Okay thank you to everybody for staying until this time so that we could continue with – or hear
20 Colonel Mhlongo's evidence.

We adjourn.

REGISTRAR: All rise.

INQUIRY ADJOURNS TO 3 MARCH 2021

