

COMMISSION OF INQUIRY INTO STATE CAPTURE

HELD AT

PARKTOWN, JOHANNESBURG

10

23 JANUARY 2020

DAY 204

20

PROCEEDINGS RESUME ON 23 JANUARY 2020

CHAIRPERSON: Good morning Ms Hofmeyr, good morning everybody.

ADV KATE HOFMEYR: Good morning Chair.

CHAIRPERSON: Are we ready?

ADV KATE HOFMEYR: We are indeed Chair.

CHAIRPERSON: Thank you.

ADV KATE HOFMEYR: If I may just commence there are two sets of legal representatives here today and I would like to ask that they just place themselves on record before we commence?

10 **CHAIRPERSON:** Yes let us do that.

ADV JOHN MBETHE: Good morning DCJ Zondo.

CHAIRPERSON: Morning please come over here.

ADV JOHN MBETHE: The name if John Mbethe from Mbethe Mlanga Attorneys in Sandton.

CHAIRPERSON: Thank you.

ADV JOHN MBETHE: We are here on behalf of Mr Tsotsi to assist.

CHAIRPERSON: Mr Tsotsi.

ADV JOHN MBETHE: Yes.

CHAIRPERSON: Thank you. Thank you.

20 **ADV MBULELO NDLOVU:** Morning Judge my name is Mbulelo Ndlovu and we are here on behalf of Chwayita Mabude.

CHAIRPERSON: Okay thank you.

ADV KATE HOFMEYR: Thank you Chair. Today we are continuing with what we have been calling the TNA evidence and I thought just at the outset before we begin with Mr Tsotsi who is our first witness today I

might just recap where we ended off last time on the evidence so that I can place it in the context of the evidence for the two days. Chair the evidence on TNA was focussing on state owned enterprises and their contracts with TNA from the time that the company really started functioning in 2011 until about 2017 when it was sold and then in the process of liquidation. Chair previously in the two days that we dealt with this evidence last year we focussed on Eskom and we heard the evidence of three witnesses dealing with in the case of Eskom there were three contracts that were concluded from about 2012 onwards
10 until 2014 and we heard the evidence of first Mr Pretorius then Mr Choeu and then Mr Pamensky. Today we will conclude the Eskom evidence with our first witness who is Mr Tsotsi who at relevant points in time was both a member of the Board of Eskom and then Chair of the Board of Eskom. Once we conclude Mr Tsotsi's evidence we will move to the evidence in relation to Transnet and in respect of Transnet we similarly have three further witnesses. We hope to at least start with one of them today depending on how things go with Mr Tsotsi and then we will have two further witnesses tomorrow. Chair as I mentioned at the outset when we started the TNA evidence some of the witnesses
20 who are being called and are going to be questioned about the TNA contracts are witnesses who have insights on other matters falling within the mandate of the commission. But this session is focussing on the TNA aspects. And – so that is certainly applied to Mr Tsotsi, it applied to Mr Pamensky and one of the witnesses tomorrow Mr Mkhwanazi is another witness who we will be focussing on TNA aspects

with but there is certainly an intention for the other aspects on which they have direct knowledge to be dealt with in other evidence.

CHAIRPERSON: Okay.

ADV KATE HOFMEYR: Chair the final point to make on TNA is there is a last SOE in respect of which TNA evidence will be led. And that evidence will actually be led at the commencement of the next aviation session of evidence. That will look finally and in conclusion at the subscription agreements that SAA engaged in with TNA and the witness there will be Mr Kona who at the relevant point in time was Chairperson
10 of the Board of SAA and then he was moved to the position of Chief Executive. So he will actually commence the aviation evidence dealing with TNA and dealing with certain other matters that he has brought to the attention of the commission. And at that point the commission's investigations into the state owned enterprises contracts with TNA will have been concluded. Thank you Chair.

CHAIRPERSON: Thank you.

ADV KATE HOFMEYR: If I may then request that Mr Tsotsi be sworn in?

CHAIRPERSON: Please – please administer the oath or affirmation?

20 **CHAIRPERSON**: Please state your full names for the record?

MR TSOTSI: Zola Andile Tsotsi.

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

MR TSOTSI: No I do not.

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

MR TSOTSI: Yes I do.

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

MR TSOTSI: So help me God.

CHAIRPERSON: Thank you.

ADV KATE HOFMEYR: Chair Mr Tsotsi has provided an affidavit to the commission.

CHAIRPERSON: Yes.

10 **ADV KATE HOFMEYR:** He also previously gave a statement to the Portfolio Committee when it was investigating matters of Eskom in 2018 and 2017 and 2018. And so the bundle which we request be marked Exhibit MM6 contains first his affidavit then his statement to the Portfolio Committee and then a series of relevant documents thereafter.

CHAIRPERSON: Yes Mr Andile Zola Tsotsi's affidavit and documents in the lever arch file in which that affidavit is will be marked Exhibit MM6.

ADV KATE HOFMEYR: Thank you Chair.

CHAIRPERSON: Hm.

20 **ADV KATE HOFMEYR:** Mr Tsotsi just to orientate you for the purposes of the evidence. What you have directly in front of you is MM6 it is the exhibit which contains your affidavit, your statement as I have indicated and a series of additional documents that I will take you to today. Also available to you are a series of other files which comprise the full set of witness evidence in relation to TNA and that is made available to you because there may be points in the evidence where a document lives in

one of those files that I will need to take you to. And I will identify them by the exhibit number which you see on their spines. Mr Tsotsi I noted from your affidavit and from your statement to Parliament that you indicated in both of them that you had been asked to give an account of certain events years after you had left Eskom and certainly without the benefit of certain documents available to you, is that correct?

MR TSOTSI: Correct.

ADV KATE HOFMEYR: What I wanted to say in that regard is that the
10 commission's investigations have certainly taken that limitation seriously. We have been sourcing documents from Eskom where they become relevant to the matters at hand. Previous witnesses have been taken to them. I intend to take you to those documents today. But we are well aware that some of those documents might not have been seen by you for some time and so please do indicate at any point if you would like extra time to look at documents, if you would like to consider them in context we will certainly take that into account in the course of the evidence.

MR TSOTSI: Thank you.

20 **ADV KATE HOFMEYR:** The other thing is just audibility Mr Tsotsi will you just endeavour to bring your microphone as close to as possible to where you are. It is very important that we get a good recording of these proceedings for our transcript which I think now must be in hundreds of thousands of pages Chair.

CHAIRPERSON: It is hundred of thousands ja.

ADV KATE HOFMEYR: It is. Mr Tsotsi if I can then commence just to – to get a sense of how much of the previous evidence on TNA you may be aware of in the commission. You were in attendance for Mr Pamensky's evidence at the commission hearing, is that right?

MR TSOTSI: Correct yes I was here.

ADV KATE HOFMEYR: I think that is because you – you thought you might come on as a witness but unfortunately it took a bit longer than we had expected. I apologise for that. And then in relation to Mr Pretorius and Mr Choeu were you aware of their evidence? Did you
10 watch it? Did you listen?

MR TSOTSI: Chair I did listen to some of it because not all of it was broadcast but I did get to – to hear some of it.

ADV KATE HOFMEYR: Thank you it just helps me to know the extent to which the matters traversed there might be known to you. But wherever something is unclear you should just indicate that to me and then I can take you to documents etcetera. Mr Tsotsi if we can then just begin with your background. Can you tell us what qualifications you hold and then introduce for us when you joined Eskom and when you left Eskom?

20 **MR TSOTSI:** Yes I hold a honours degree in Mathematics and Chemistry and also hold a honours degree in Chemical Engineering which I did at the University Surrey in the UK. And I have post that done a number of management programs variously throughout the term of my employment particularly at Eskom. I joined Eskom as an employee in 1995 and I worked in two specific areas when I was at

Eskom. I was a senior manager first and foremost responsible for Environmental Affairs in the company. I then proceeded some years later to what we called Corporate Strategy. So I was Head of Corporate Strategy at Eskom for – it could have been about four years before I left. I eventually left the company in 2004.

ADV KATE HOFMEYR: And then you returned to the Board of Eskom, is that correct?

MR TSOTSI: Yes I returned to the Board of Eskom in 2011 as Chairman of the company.

10 **ADV KATE HOFMEYR:** And when did – until what time did you maintain that position?

MR TSOTSI: I was Chairman of the company until the end of March in 2015.

CHAIRPERSON: Having started when – in which year as Chairperson of the Board?

MR TSOTSI: I started Chair as the Chairman on around August of 2011 that was the first term which ended on the 8 December or the 11 December rather 2014 and then my second stint as Chairman was from then until I will say about the 30 March 2015.

20 **CHAIRPERSON:** You only served as Chairperson of the Board you never served as an ordinary member of the Board?

MR TSOTSI: That is correct Chair.

CHAIRPERSON: Okay.

ADV KATE HOFMEYR: Chair I may have in the introduction said something incorrect there so the clarification is useful.

CHAIRPERSON: Yes.

ADV KATE HOFMEYR: Where Mr Tsotsi in his affidavit spoke about being appointed to the Board of Directors in August 2018 Mr Tsotsi you will see that at page 1 and paragraph 2.1 on that page. You later talk about saying you were further appointed as the Chairman and so it was my error to assume you had held a position as a non-executive member but not Chairman prior to holding the position of Chairman. So I thank you for that clarification. You were Chair just to be clear from your appointment in August 2011, is that right?

10 **MR TSOTSI:** Yes that is correct.

ADV KATE HOFMEYR: Thank you. Thank you. If we can then go over the page Mr Tsotsi to page 2 of your affidavit?

MR TSOTSI: Okay I am just trying to find it.

ADV KATE HOFMEYR: Oh it is right at the beginning. Oh let me orientate you. The pages are in the top right hand corner.

MR TSOTSI: Thank you.

ADV KATE HOFMEYR: So if you – if you turn over that first pink division.

MR TSOTSI: Yes. Got it.

20 **ADV KATE HOFMEYR:** You have got it?

MR TSOTSI: Yes.

ADV KATE HOFMEYR: Excellent. And when I refer to page numbers you will always be looking for the number in the top right hand corner. So we are now at page 2 of the affidavit and I would like to pick it up at paragraph 3.1 if we may there? You talk there about TNA Media. That

is where you introduce it in the affidavit and you state there that:

“TNA Media had a contractual relationship with Eskom prior to my arrival as a Director of the company.”

Do you see that?

MR TSOTSI: Yes.

ADV KATE HOFMEYR: Why – why do you say that a contractual relationship existed prior to August 2011?

MR TSOTSI: I understood when I arrived at Eskom that the company
10 had a contract with TNA Media it was prior to my arrival as Chairman of the company.

ADV KATE HOFMEYR: Do you recall who gave you that impression?

MR TSOTSI: This would have been the Chief Executive.

ADV KATE HOFMEYR: And who was that at the time?

MR TSOTSI: That was Brian Dames.

ADV KATE HOFMEYR: Thank you. And you go on and say at paragraph 3.2 what had happened with that contract. Can you tell us about that?

MR TSOTSI: My understanding is that there had been a renewal of that
20 contract at some point. I cannot recall what the dates were. And that during my term of office there was again another renewal which would have been I am not sure whether it was the second or third renewal.

ADV KATE HOFMEYR: And what gave you the understanding that the last of those was a renewal?

MR TSOTSI: Well my understanding that it was a renewal was because

there was no particular process we understood that the people responsible for engaging service providers went into other than just simply negotiating a contract. So I presumed that in effect what was happening was that it was being updated from what it was previously.

ADV KATE HOFMEYR: Did you make enquiries in that regard?

MR TSOTSI: No I did not make enquiries in that regard for the simple reason that these matters are normally operational matters that are dealt with by the executives and would not necessarily come to the Board unless there was a particular situation that caused the – to come
10 to the Board.

ADV KATE HOFMEYR: Mr Tsotsi I focus on those two aspects because the evidence before the commission thus far through the evidence of Mr Pretorius and Mr Choeu and Mr Pamensky – well the latter two to a lesser degree because Mr Pamensky only entered the Board in December of 2014. So let us focus for now on the evidence of Mr Pretorius and Mr Choeu. They have taken us through the first two contracts that Eskom entered into with TNA. And the first contract you may be aware from their evidence and I can certainly take you to documents where it might be relevant for you to do so. But my hope is
20 we can just move over this so that we get some common ground as to the contracts that existed prior to the elevation of the matters to the Board of Eskom which is really where you have personal knowledge of the events. But if at any point you have a reason to – to dispute or question what I am telling you the evidence led thus far has been please raise it and then we can go to the documents. But the evidence

thus far is that the first contract was concluded in April of 2012 so not prior to your arrival. Does that come as a surprise to you?

MR TSOTSI: It does come as a surprise, it does certainly.

ADV KATE HOFMEYR: Why do you think you would have been told that there was a contract in existence already if there was not?

MR TSOTSI: I do not know. I would not – I cannot answer that I do not know.

ADV KATE HOFMEYR: The first contract was for 6 business breakfasts. Do you know what business breakfasts are in the context of
10 TNA?

MR TSOTSI: Yes.

ADV KATE HOFMEYR: Thank you. And that was for – to a value of R7.85 million. And that contract was going to run from the 1 April 2012 to the 31 March 2013. As you sit here now are you aware of those facts or not?

MR TSOTSI: I do not know a lot of the dates but I am just aware of the business breakfasts.

ADV KATE HOFMEYR: Indeed. And the evidence of Mr Choeu and Mr Pretorius was that there was then a second contract concluded in
20 November of 2012 and that was for a further 4 breakfasts. Are you aware of that?

MR TSOTSI: I am aware of the breakfasts yes.

ADV KATE HOFMEYR: But the fact that the second contract was concluded in November 2012, are you aware of that fact?

MR TSOTSI: No I would not have been aware of that.

ADV KATE HOFMEYR: Do you know whether processes were followed before those contracts were entered into?

MR TSOTSI: No Chair I would not have been privy to that information at that time.

ADV KATE HOFMEYR: And did you know whether those contracts were concluded when there was budget available for them or not?

MR TSOTSI: That too I would not have been privy to so I would not have known.

ADV KATE HOFMEYR: There was a point in time where Parliamentary
10 questions started to come to Eskom because there was some interest in the extent to which state owned entities were contracting with TNA. Were you involved in those questions and answers?

MR TSOTSI: I do not recall being involved in those questions because ordinarily when Parliament requests Eskom to appear before it it is the management that goes and appears before the Parliamentary Committee. And we as Board would only know if there was an issue that has been escalated to the Board. But otherwise we would only know insofar as what would be in the public domain as anybody else would.

20 **ADV KATE HOFMEYR:** The engagements from the Public Protector's office with Eskom were you involved in those interactions?

MR TSOTSI: The Public Protector at some point in this whole TNA matter did write to me and what normally happens is I would pass on that correspondence to management and ask them to respond appropriately and that is what happened.

ADV KATE HOFMEYR: Thank you. We will certainly go to the Public Protector engagements in a bit detail later in your evidence. But at the moment we were dealing with the second contract. Now the second contract the commission has heard in evidence concluded on the 31 March 2013. Are you aware of that?

MR TSOTSI: I am not aware of the specific dates no.

ADV KATE HOFMEYR: And the contract that did come to the Board's attention, the third contract, the contract that Mr Matjila entered into to the value of R43 million. When did that come about? Do you recall its
10 time period?

MR TSOTSI: I only recall the fact that Mr Matjila entered into that contract at the beginning of April which is what was reported to the Board.

ADV KATE HOFMEYR: That would be April 2014?

MR TSOTSI: 2014.

ADV KATE HOFMEYR: Is that correct?

MR TSOTSI: Yes.

ADV KATE HOFMEYR: Certainly the evidence before the commission indicates that between the end of March 2013 and April 2014 there was
20 no contract with TNA. Were you aware of that?

MR TSOTSI: Not specifically no.

ADV KATE HOFMEYR: The reason why I raise it is because I am just interested in your use of the word renewal – that these contracts were being renewed. Because certainly there was a big gap in time between the end of the second contract and the conclusion of the third contract.

Did you have an understanding that the third contract was just a renewal of the previous one?

MR TSOTSI: That was the understanding that I had Chairman.

ADV KATE HOFMEYR: Hm and who gave you that understanding?

MR TSOTSI: I got the understanding from the presentation which was given to us from the Audit and Risk Committee when they informed the Board about this problem with the contract at that time.

ADV KATE HOFMEYR: You see Mr Choeu's evidence before the commission was that there was a lot of I think he might of said heat on
10 Eskom towards the end – well during the course of 2013 and 2014 because there was Parliamentary questions that started late in 2012 and then there was the Public Protector's engagement with Eskom about TNA and his evidence was he therefore was not inclined after that second contract to contract with TNA until at least April of 2014 when Mr Matjila was appointed as the Chief Executive of Eskom. Are you aware of any of that context?

MR TSOTSI: No I am not aware of it. I would only become aware of it if there was a particular reference to it in any of the Board meetings or any of the reports that came from management. And usually those
20 would come because the Board has either to make a decision or the Board needs to know.

ADV KATE HOFMEYR: Did the Board ever engage Mr Choeu at all about the R43 million contract?

MR TSOTSI: Not whilst I was at Eskom, no.

ADV KATE HOFMEYR: If we can go to one of the bundles in front of

you which is Exhibit MM1? That is the bundle containing Mr Pretorius' evidence Chair. And if we can pick that up – oh apologies it will be MM1b the second of the volumes and we will pick it up at page 731.

MR TSOTSI: What page?

ADV KATE HOFMEYR: 731.

MR TSOTSI: 731.

ADV KATE HOFMEYR: If you go over the page – apologies Mr Tsotsi I see.

MR TSOTSI: Yes.

10 **ADV KATE HOFMEYR:** You have it excellent. If you go over the page to page 732 you will find the date of this letter which is 30 August 2013. On its face it is a letter written by Minister Gigaba to yourself. Do you recall this letter?

MR TSOTSI: Not unless I read it to remind myself.

ADV KATE HOFMEYR: Of course please take an opportunity.

CHAIRPERSON: Yes, yes.

MR TSOTSI: Yes I see I have read it.

ADV KATE HOFMEYR: Do you recall receiving it?

20 **CHAIRPERSON:** Ms Hofmeyr maybe what we should do if there are going to be quite a few of those letters that you will refer him to which he has not had a chance to read maybe what you could do for the next ones if there will be is to tell him the main points of what it says and if he looks that he might just remember quickly. But if he needs to read it or if he is going to be made to read all of them fully we might have to just find time and give about a thirty minutes you identify all the letters

that you will refer him to – he reads all of them so when we come back it could be much quicker.

ADV KATE HOFMEYR: Certainly Chair.

CHAIRPERSON: Yes.

ADV KATE HOFMEYR: I propose that we endeavour on the first option.

CHAIRPERSON: Yes.

ADV KATE HOFMEYR: Which is I can just highlight?

CHAIRPERSON: Yes.

ADV KATE HOFMEYR: The salient points.

10 **CHAIRPERSON**: Yes.

ADV KATE HOFMEYR: But at any point if you would like to take more time Mr Tsotsi please let us know.

CHAIRPERSON: Yes okay.

ADV KATE HOFMEYR: So on the face of it this is a letter from Minister Gigaba to yourself indicating that the Public Protector has engaged his department and is asking questions about spend with the TNA Media.

MR TSOTSI: Yes.

ADV KATE HOFMEYR: Do you recall receiving this letter in around August of 2013?

20 **MR TSOTSI**: I do recall the letter yes.

ADV KATE HOFMEYR: And your evidence earlier was that you would then have handed it over to management to deal with a response. Is that what happened in this occasion?

MR TSOTSI: Yes.

ADV KATE HOFMEYR: Thank you. And I will take you to the response

that management provided. It is contained at page 749 of the same bundle, Exhibit MM1b. You will see that that is a letter dated the 19 November 2013. Chair we did deal with this in evidence previously but you will see sort of maybe a quarter of the way down there is draft indicated on the first page of the letter 749. The evidence is established that was actually an error. It was not the draft it is the actual letter that finally went to the Public Protector because ...

CHAIRPERSON: Yes.

ADV KATE HOFMEYR: In later correspondence she attaches this letter
10 which she received. So it appears to have been an error to retain draft.

CHAIRPERSON: Oh okay.

ADV KATE HOFMEYR: It was the final letter.

CHAIRPERSON: Okay.

ADV KATE HOFMEYR: And if you go over to page 751 you will see that it was signed there by ...

CHAIRPERSON: Yes.

ADV KATE HOFMEYR: Mr Du Plessis - the General Manager - legal specialist ...

20 **CHAIRPERSON:** *Ja.*

ADV KATE HOFMEYR: Within Eskom.

CHAIRPERSON: Yes.

ADV KATE HOFMEYR: Mr Tsotsi, do you recall ever seeing this letter before it was sent to the Public Protector?

CHAIRPERSON: Did you tell him what it was about?

MR TSOTSI: I do not recall seeing it Chair.

CHAIRPERSON: You did see that?

ADV KATE HOFMEYR: Let - let - well it was the response to her request for information about allegations of fruitless and wasteful expenditure on the part of Eskom with TNA. As I understood your evidence you handed that over to management to prepare a response. What I am interested to know is in that process would you have asked to see the letter before it went back.

We can go to whether you - you had sight of this particular
10 letter, but let us first deal with the process. Would it come back to you before Eskom's response went to the Public Protector ordinarily?

MR TSOTSI: Ordinarily they would - the legal counsel would inform me ...

ADV KATE HOFMEYR: Hm.

MR TSOTSI: That they have responded to the letter that came ...

ADV KATE HOFMEYR: Hm. Hm.

MR TSOTSI: Because the letter was written to me ...

ADV KATE HOFMEYR: Hm.

MR TSOTSI: And they would then just brief me about what their
20 response has been ...

ADV KATE HOFMEYR: Hm.

MR TSOTSI: But I am afraid I do not recall Chair at the time.

CHAIRPERSON: Yes.

MR TSOTSI: *Ja.*

CHAIRPERSON: So you would not - you would not necessarily see the

response they ...?

MR TSOTSI: I would not necessarily see the response no, but I would be briefed as to what ... (intervenes).

CHAIRPERSON: What the response was?

MR TSOTSI: Yes.

CHAIRPERSON: *Ja.* Okay.

ADV KATE HOFMEYR: If I may I would like to take you just too a few aspects of the response, because the evidence that the Commission has already heard indicates that there were aspects of what was stated
10 in this letter that were false at the time that they were stated and I understand your evidence to be you were told that there was a response, but you may well not have looked at the text of the response before it was sent out, but let me take you to the aspects which appear to be false on the basis of the evidence - the Commission has received.

If we start at page 7-4-9 in the second paragraph it says there that:

“Eskom was approached during the first quarter of 2012 by the New Age Newspaper to sponsor some of the business briefing breakfasts it was
20 arranging.”

And then if you go down to the bottom - the last sentence of that paragraph what is recorded there is a reference to the program. Now the program is the 49M Campaign. Are you aware of that campaign?

MR TSOTSI: Yes. I am.

ADV KATE HOFMEYR: And it is a reference to the following:

“As the program had an approved budget it was not necessary to obtain Board approval for the sponsorship or normal sponsorship approval.”

Do you see that?

MR TSOTSI: Yes.

ADV KATE HOFMEYR: Now the facts that have been revealed in the Commission are in summary the following: when the first contract was concluded there was no budget at all for it. What then had to happen is
10 after it was concluded Mr Pretorius had to go to ICAC. That is - let me just - can you help me with the acronym - ICAC? It is the ...

CHAIRPERSON: He might have forgotten over the years.

ADV KATE HOFMEYR: Indeed.

MR TSOTSI: I have forgotten Chair.

ADV KATE HOFMEYR: Indeed. It is the Investment Committee - sorry. I will find it in a moment. The Investment and Capital Assurance Committee. Right. So Mr Pretorius had to go to the Investment and Capital Assurance Committee after the contract was entered into to get
20 an approval for six million of the R44.4 million budget that was being assigned to the 49M to be assigned to the first six business breakfasts. Were you aware of those facts at the time?

MR TSOTSI: No. I would not have been aware of those facts at all.

ADV KATE HOFMEYR: And then the second contract was concluded after Mr Choeu had gone for approval for further budget for the second contract, but the entire Sponsorship Committee except himself and one

other person had voted against entering into the second contract and approving a budget for it. Were you aware of those facts?

MR TSOTSI: No. I was not aware of it.

ADV KATE HOFMEYR: So if you had been aware of them would you have been concerned about the statement in the last sentence of this paragraph?

CHAIRPERSON: Do you just want to read that last sentence?

ADV KATE HOFMEYR: Indeed. It says:

10 “As the program had an approved budget. It was
not necessary to obtain Board approval for the
sponsorship or normal sponsorship approval.”

MR TSOTSI: Well first of all they would not have required Board approval ...

ADV KATE HOFMEYR: Indeed.

MR TSOTSI: But obviously if there was no budget clearly I would have - if I had the opportunity - I would have objected to that.

ADV KATE HOFMEYR: Hm. Then if we go to page 7-5-1 there is another aspect of this response that we have dealt with previously in the evidence of both Mr Pretorius and Mr Choeu. Let - let me give you
20 the background to the statement. One of the things that the Public Protector was interested in was whether these millions of Rands that were being spent by State Owned Enterprises on TNA and the business briefings were not a wasteful and fruitless expenditure and so one of the things that was asked both by Parliament and the Public Protector was well how have you assessed the value of Eskom spend on these

business briefings.

Right, because Eskom should be spending money - I assume the thinking was - on things that give it value. Derive benefit from it. Would you take any issue with that proposition?

MR TSOTSI: Insofar as not assessing the value of the contract prior to spending the money. Certainly that is what we required.

ADV KATE HOFMEYR: Hm. So what Eskom was asked was what does your research show about the impact of this spend - the spend with TNA on your marketing endeavour to reach your audience etcetera and
10 what Mr Pretorius' evidence indicated was that when they went back to the agencies that assisted Eskom with these sorts of measuring tools.

The agency came back and said well we cannot do this exercise, because there is just no way of knowing when Eskom supports the TNA breakfast for example and puts the 49M logo on a screen behind the speaker. Whether that is having any impact on people conserving their electricity use.

So they said we actually cannot do an assessment of its impact. There just is not a tool available for that and they said the same in relationship to newspaper advertising with TNA. Now despite
20 that backdrop and we looked at the email correspondence with the agency at the time called the MediaShop.

What was put into this letter in response to the Public Protector at page 7-5-1 at paragraph 3 is the following:

“Recent research undertaken with regard to the 49M indicated that opportunities such as the

sponsorship of business briefings contributed to a 73 percent awareness by the public of the 49M Campaign.”

Now would you have been concerned about that being included in this response to the Public Protector if you had been told about what the MediaShop had told Mr Pretorius it was able to do insofar as research is concerned?

MR TSOTSI: Insofar as Chair the assessment of the MediaShop and if that was the only criteria that was available for Eskom to evaluate then clearly they would - they should not have stated what they have stated here.

ADV KATE HOFMEYR: Would you say it misrepresented the position?

MR TSOTSI: It is a misrepresentation. Yes.

ADV KATE HOFMEYR: Thank you. I would then like to move to the third contract, because that is the contract - the R49 million contract which Mr Matjila entered into in April 2014 and that is the contract that came to the Board's attention and you had quite a - a level of involvement with that contract. Did you not?

MR TSOTSI: Certainly. Yes.

20 **ADV KATE HOFMEYR:** Thank you. Now in 2014 you have clarified for us you were the Chairman of the Eskom Board. Is that right?

MR TSOTSI: Correct.

ADV KATE HOFMEYR: And if we pick up your affidavit again please at page 2 where you were. That is EXHIBIT MM6. Do you have that Mr Tsotsi?

MR TSOTSI: What number?

ADV KATE HOFMEYR: We are at page 2 and I would like to pick it up in the first paragraph on page 2 which is paragraph 2.2. You will see in - you see in the second line there the sentence begins:

“For the most part my tenure in the Board was very smooth until towards the end of the first Board term when Mr Colin Matjila was appointed as Chief Executive from about April 2014.”

Do you see that?

10 **MR TSOTSI:** Yes. I do.

ADV KATE HOFMEYR: And then at 2.3 you go on and say:

“The instability set in when a whistle blower alleged to the Eskom Board through the Audit and Risk Committee that Mr Matjila had not followed correct procedure as prescribed by the delegation of authority in awarding the renewal of the TNA Media Contract.”

Can you tell us a bit about Mr Matjila’s appointment? How did that occur?

20 **MR TSOTSI:** Chairman, this is a - a bit of a long winded one, but let me try and see if I can - I can recall. What happened was that when Brian Dames who was the substantive Chief Executive at the time was going to leave the company. The Board then decided on two issues - rather took a view on two issues.

Let me say and the view the Board took was that first of all

we should not have any of the Board Members acting as Chief Executive, because we knew that between the time of Mr Dames' departure and that of the inception of the next Chief Executive's term there would be this period where we would require an Acting Chief Executive.

So that was the first thing the Board took a view on. The other matter that the Board took a view on - in fact on this one it was really a decision and the decision was that the Board would ask one of the Executives to avail themselves to act in that period. The individual
10 that we asked was a gentleman named Steve Lennon.

CHAIRPERSON: Steve?

MR TSOTSI: Steve Lennon.

CHAIRPERSON: Lennon?

MR TSOTSI: Yes.

CHAIRPERSON: Yes. What was his position at the time?

MR TSOTSI: He was an Executive responsible for one of the portfolios of the company.

CHAIRPERSON: *Ja*. Okay.

MR TSOTSI: Sustainability it was. I think.

20 **CHAIRPERSON**: Hm.

MR TSOTSI: And one of the reasons why we asked Steve in particular apart from the fact that he was very experienced. Was that he had declared that he would not be interested in contesting for the Chief Executive's position. So we felt that that was an easy thing for us to do.

So that it does not prejudice anybody else who wishes to contest for the position and so as is normal we then - the Board then instructed me to get the Minister's consensus on this matter as would be the case and I met with the Minister and the Minister was quite content and happy that Steve Lennon should act.

ADV KATE HOFMEYR: Mr Tsotsi ...

CHAIRPERSON: And who was the Minister at the time?

MR TSOTSI: This was Minister Gigaba.

CHAIRPERSON: Okay.

- 10 **MR TSOTSI:** Yes. This was in I think around December 2013 when we met and what happened then was that just before the end of Brian Dames' term which would have ended at the end of March 2014. I asked Steve Lennon to ask the Exco Team to have a look at - a strategic look at the business post Dames' time to be able to form of a view of how they see the organisation going forward.

So that when the new Chief Executive comes at least they can engage him from a strategic standpoint to make it easier for him to have a - a better feel for where - you know - the organisation's future should look like.

- 20 **CHAIRPERSON:** I am - I am sorry Mr Tsotsi. I do not know if I missed something. You spoke to the Minister about approaching Mr Lennon to be Acting Chief Executive Officer. The Minister was happy with that. I expected you to then say you approached him. Did he agree and then move on or are you still go - going there in terms of how events evolved.

MR TSOTSI: Yes Chair. I - I omitted to say that Mr ...

CHAIRPERSON: Hm.

MR TSOTSI: Dr Lennon did agree ...

CHAIRPERSON: Okay.

MR TSOTSI: And - and I told him of course that the Minister had consented to this.

CHAIRPERSON: Yes and he assumed the duties on an acting - in an acting capacity?

MR TSOTSI: This is now before he assumed the job.

10 **CHAIRPERSON:** Oh. Before he assumed, but after you had spoken to him?

MR TSOTSI: Yes. After I had spoken to him.

CHAIRPERSON: Ja. Okay. Continue.

MR TSOTSI: And then as I said the Exco spent a couple of days looking at the organisation and looking - taking a strategic view of how best to position the organisation going forward and in that process when they came back. They had a configuration of the business which was slightly different from what existed at the time and then about that same time just before Mr Dames left I got a call - phone call from
20 Minister Gigaba and he was quite irate and this was an experience I had never had with him before and I was extremely taken aback and his manner was very surprising, but I - I managed to calm him down and - and to - and to have a proper conversation with him and this was the time when we were about to go to the Local Government elections in 2014 and he was lambasting me for or rather for the Board to have

requested a White man to act when in fact we were facing - and the ANC was facing an election - a Local Government election and this would prejudice ...

CHAIRPERSON: I am sorry. I just want to make sure I understand which year you are talking about. I thought you ...

MR TSOTSI: 20 - this was 2014. I think.

ADV KATE HOFMEYR: 20 - yes.

CHAIRPERSON: 2014.

ADV KATE HOFMEYR: March 2014.

10 **CHAIRPERSON:** 2014 I think was general election.

MR TSOTSI: Was it the general election?

CHAIRPERSON: *Ja.* Not - not Local Government.

MR TSOTSI: Okay.

CHAIRPERSON: *Ja.*

MR TSOTSI: Sorry about that.

CHAIRPERSON: Okay. Alright. Okay.

MR TSOTSI: Yes and that we were facing an election and we - and here we are. We are appointing a White man to - to lead the organisation and this would prejudice the - the ANC's ability to attract -
20 you know - support and - and I - I said in response in to him that look. I do not think we should be discussing this.

Certainly not over the phone and I - I made it clear to him that I thought that this was not him speaking. That someone had put him up to this and he then said to ...

CHAIRPERSON: Were you saying that because he had approved that

you approached Mr Lennon to act?

MR TSOTSI: No. I was saying that in response to the statement he was making about me - us appointing a White man to act in his - in that position ...

CHAIRPERSON: Oh. Yes. Hm.

MR TSOTSI: And I said this is not you. You - you - this is certainly not you as far as I know you. Someone has put you up to this. So let us just - just not get into this. If you wish to have a conversation let us have a conversation. In any case at the end of it all he said he would
10 write me a letter and then he did write a letter and the letter came and - and basically the letter was saying that we should stop all attempts to - what is the word I am looking for? To ...

CHAIRPERSON: To recruit a new CEO?

MR TSOTSI: No, no, no.

CHAIRPERSON: To ...

MR TSOTSI: To restructure. That is the word I am looking for.

CHAIRPERSON: Oh. Okay.

MR TSOTSI: We should stop all attempts to restructure the organisation until the new Chief Executive comes - comes into and -
20 and is in place and then following that he - at a later date prior to Brian Dames' leaving. We are still at that point before Brian Dames' was due to leave.

He then asked me to inform the Board that he would like Colin Matjila to act. So I went back to the Board.

CHAIRPERSON: I am sorry. I may have missed something. Was that

in the letter or was there a subsequent conversation after ...
(intervenes).

MR TSOTSI: No. That was in a subsequent conversation.

CHAIRPERSON: Conversation?

MR TSOTSI: Yes.

CHAIRPERSON: Okay.

MR TSOTSI: And so I went back to the Board and I informed the Board was unhappy, because flew in the face of the decision that we had made that none of us as Board Members would be - should be eligible
10 to - to act in the position of Chief Executive and of course Mr Matjila was a Board Member at the time.

So that is to the best of my recollection how Mr Matjila came to Act as the Chief Executive.

CHAIRPERSON: Hm. Hm.

MR TSOTSI: Now when I say Chairman - when I make the statement that my term - you know - was a bit turbulent from about that time. This was as a result of the - quite frankly - the unhappiness of many Board Members about what transpired and in particular the fact that Colin Matjila was acting as a Chair - as the Chief Executive.

20 **CHAIRPERSON**: Did you - did you at any stage say to Minister Gigaba - when he criticised you for what you say he called supporting a White man to be Acting Chief Executive of Eskom before elections and when he said he wanted Mr Matjila to be the Acting Chief Executive Officer - did you ever say to him, but I consulted you on the Board's contemplation to approach Mr Lennon to be the Acting Chief Executive

Officer and you gave your blessing. What has changed now? What is wrong?

MR TSOTSI: I certainly did. I do not recall whether it was during the conversation or afterwards, but I certainly made the point to him. Just to remind him that we had the conversation and he - he gave his consent to - to Dr Lennon acting and I obviously was perplexed as to why this change of mind.

CHAIRPERSON: Did he give you an explanation what has changed? What - what had caused him to change his mind?

10 **MR TSOTSI:** No. He did not give me an explanation.

CHAIRPERSON: He did not?

MR TSOTSI: No.

CHAIRPERSON: Hm. Okay. Thank you.

ADV KATE HOFMEYR: Thank you Mr Tsotsi. You then go on at paragraph 2.3 on page 2 of your affidavit and talk about a whistle blower report regarding Mr Matjila's conduct on the R43 million contract with TNA. Can you tell us about what happened with the whistle blower report and how it was taken up further by Eskom?

20 **CHAIRPERSON:** I am sorry Ms Hofmeyr and I am sorry Mr Tsotsi. Just to conclude that part. Did you as Chairperson of the Board then had the embarrassment of going to Mr Lennon to say sorry. We have been told that a Board Member must act. Sorry about that.

MR TSOTSI: Chairman, I - I am glad you raised that, because it was very embarrassing and I felt in a way I thought there was a sense of guilt or whatever, but I did go back to Steve and I could not - in all

conscience - say to him what Gigaba told me.

CHAIRPERSON: Yes.

MR TSOTSI: I just felt that I could not say what ...

CHAIRPERSON: Yes.

MR TSOTSI: The Minister had said.

CHAIRPERSON: Yes.

MR TSOTSI: I do not recall exactly the excuse I gave him, but obviously this did not go down very well with him.

CHAIRPERSON: Yes.

10 **ADV KATE HOFMEYR**:

MR TSOTSI: Already in the industry the word was out that he was going to be acting.

CHAIRPERSON: Even among his colleagues ... (intervenes).

MR TSOTSI: Amongst his colleagues.

CHAIRPERSON: You had asked him to talk to them about restructuring and whatever and they ...

MR TSOTSI: Precisely.

CHAIRPERSON: They knew he was going to be the acting leader.

20 **MR TSOTSI**: To that extent Chair Steve decided that as a result of that he could no longer serving at Eskom. He felt that - you know - his integrity was somehow affronted by all of this and he then requested to retire at that time. So it has a very unhappy ending for him.

CHAIRPERSON: Okay. Thank you. I am sorry Ms Hofmeyr. You - you might have to repeat your question.

ADV KATE HOFMEYR: No. Indeed. Actually Chair before I go to the

whistle blower report. There is an aspect that has arisen out of your latest question. If I may just ask Mr Tsotsi about it. Mr Tsotsi are you aware of the provisions of the Memorandum of Incorporation of Eskom for the Appointment of a Chief Executive?

Do you recall what those provisions say about who makes the final appointment decision?

MR TSOTSI: When I was at Eskom there was a - there was at the time - the Minister had the prerogative to make that final appointment, but I understood that there was some change in - in the MOI on that issue. I do not recall exactly when that change happened. Whether it was during my term or was it after. I do not recall.

ADV KATE HOFMEYR: Thank you. Certainly the version that we have, but I see that it is a September 2014 version. So it would have come after your time. Is a version that said that:

“The shareholder appoints the Chief Executive from a shortlist of candidates provided by the Board.”

Was that operative at your time or was that the new introduction?

MR TSOTSI: Well when we - when we had the - the applications. We followed that - that method.

ADV KATE HOFMEYR: Hm.

MR TSOTSI: Where we submitted a shortlist of three candidates to the Minister and this would have been after ...

ADV KATE HOFMEYR: Hm.

MR TSOTSI: September 2014.

ADV KATE HOFMEYR: Yes. Although I am - I am realising as I ask the

question. The appointment at this point at the end of Mr Dames' term ...

MR TSOTSI: Yes.

ADV KATE HOFMEYR: Was an - an acting appointment. Was it not?

MR TSOTSI: Yes.

ADV KATE HOFMEYR: So who had the final say on acting appointments?

MR TSOTSI: Well I - I do not exactly know what the MOI says on that one ...

10 **ADV KATE HOFMEYR:** Hm.

MR TSOTSI: But in this instance it was the Minister who had the final say.

ADV KATE HOFMEYR: Hm and instructed the Board that it be Mr Matjila. Is that correct?

MR TSOTSI: Yes.

ADV KATE HOFMEYR: Thank you. If we can then move to the whistle blower report. Your affidavit indicates that there was a whistle blower report that went to the Audit and Risk Committee of Eskom. What then happened?

20 **MR TSOTSI:** When the news broke that there was this incident pertaining to the signing of the TNA contract the Audit and Risk Committee then informed the Board and they had made a determination prior to informing the Board that this was an irregular process or irregular occurrence and that this is something that they would like to have a forensic audit on to establish with some independent authority.

In this instance it was the SNG Company who then was asked by the Audit & Risk Committee to investigate just what happened.

ADV KATE HOFMEYR: Thank you. I would like to go to some of the interactions that started to take place within Eskom, after SNG was appointed, and for that purpose I would like you to go in EXHIBIT MM6, which is the one in front of you, to page 218. Mr Tsotsi you will see at page 218 in the second half of the page is the first email that we should be looking at, and it is an email dated the 18th of September 2014, and it is from Mr Colin Matjila to Vusmusi Masilela. Do you

10 know who Mr Masilela was?

MR TSOTSI: Mr Masilela was the gentleman who signed off on this SNG.

ADV KATE HOFMEYR: So he was an SNG employee, is that right?

MR TSOTSI: Yes.

ADV KATE HOFMEYR: Thank you. And if you look at what Mr Matjila is saying to Mr Masilela on that date in this email, the email reads, it is quite short, I will just read it into the record.

“Dear Vusmusi,

20 I refer to the above review requested by the Audit & Risk Committee.”

You will see the subject of the email is TNA Contract review. Mr Matjila goes on:

“I have been informed by our company secretary that you have already met with some of the managers as part of the review. I need to point out that this is irregular as I

expected you to have informed as the CE to ensure proper coordination. Be that as it may be please indicate who else you need to interview, what documentation you require and what key issues you would want to cover in these interviews. This is intended to facilitate productive outcomes of these meetings.

Regards,
Colin”

10 Mr Tsotsi were you aware that Mr Matjila was engaging with SNG like this at the time?

MR TSOTSI: No I was not, this is the first time I see this email.

ADV KATE HOFMEYR: Would this sort of engagement have concerned you at the time if you had been aware of it?

MR TSOTSI: Considering the fact that he was a subject of this matter I would have been surprised at him communicating with SNG. However he being the Chief Executive the people who he was supposed to be consulted by, SNG, report to him, so in a sense I have an understanding of why he is involving himself because it is his people, they report to him, but I would have expected that this kind of
20 communication would have come the ARC not from him, for the simple reason that he was the subject of this investigation.

ADV KATE HOFMEYR: Indeed and in fact that’s precisely what Mr Masilela responds to Mr Matjila with if you go to the email at the top of the page, because Mr Matjila in summary makes it clear that their mandate comes from the Audit & Risk Committee and so they will be

engaging with the Audit & Risk Committee in this investigation, and not with Mr Matjila. They say they are happy to and they will schedule a consultation with him.

But now I have it that your evidence is it would not be appropriate for the subject matter of an investigation to be arranging when and who and on what documents the investigators have access to.

MR TSOTSI: Yes, not only that, but he did not initiate the process, the was initiated or the party that initiated the process should take
10 responsibility.

ADV KATE HOFMEYR: Indeed. Let's then move in time to October, that was happening of September of 2014, we can now move to October of 2014 and if you will pick it up at page 221 of the same bundle, that is EXHIBIT MM6.

Now this is an email from Maselela Kubudje, who is that?

MR TSOTSI: Mr Maselela, this would be – well there is a Maselela who was the company secretary, that is his first name.

ADV KATE HOFMEYR: Indeed.

MR TSOTSI: So I am not sure whether that refers to him.

20 **ADV KATE HOFMEYR:** I think it does because if you just look at the bottom, sorry no, it is Mr Kupudje.

MR TSOTSI: Kupudje yes, that is him.

ADV KATE HOFMEYR: Who is the company secretary, if you see in the top line, writing to Mr Maselela who is the SNG person.

MR TSOTSI: Oh, I see, okay, sorry.

ADV KATE HOFMEYR: Certainly. Now this is 16 October 2014, do you recall when the SNG report was required to be provided on this review, the date that it was due?

MR TSOTSI: It would have been around mid-November, I don't recall the date.

ADV KATE HOFMEYR: No in fairness Mr Tsotsi it is many years ago. As we have been able to piece together it was actually on this date, the 16th of October that ARC had requested that the report be provided to it.

10 **MR TSOTSI:** Okay.

ADV KATE HOFMEYR: And so as I understand this email, and let's take a look at what it says. It is from the company secretary and it is written Mr Maselela at SNG, it says:

"Dear Maselela,

I refer to the above matter [the above matter in the subject line is TNA Media contract review report], write to you to advise that our Chairman of the Board, Mr Zola Tsotsi, has requested that you should not release the report regarding the review to Eskom until he has had an opportunity to meet
20 with the Chairman and CEO of SNG."

Mr Tsotsi do you recall asking the company secretary to send out that email?

MR TSOTSI: I don't recall but I must have, I must have asked him but I don't specifically recall yes.

ADV KATE HOFMEYR: And what was your reason for doing so?

MR TSOTSI: Chair I needed to speak to the Chief Executive of SNG and there reason I needed to speak the lady was because Mr Matjila had clearly stated to me that the company is not treating him properly and fairly and that he has reached a point where he has approached his lawyers and that he has in mind to litigate against Eskom, against the Board, because he feels that he is not being treated fairly and correctly.

So once I got this information from him and this feeling that – that very strong feeling that he had, I then thought that this SNG report
10 would invariably then become subject of evidence in litigation, so I then decided let me speak to SNG before they release the report, to say to them look we could be – the Board could be facing litigation and I just wanted to be quite comfortable and certain that you are quite clear about whether you will be able to support what you have produced, the conclusions you have come to, whatever conclusions that may be, in a court of law, and that Eskom would be protected should there be any litigation against it.

That was the reason and that was the substance of what I talked about to her.

20 **ADV KATE HOFMEYR:** Mr Tsotsi in preparation for your evidence today we obtained the transcript from the Portfolio Committee of your evidence before it in 2017 on the 22nd of November 2017 and in the course of your evidence before the portfolio committee as it is reflected in the transcript you talk about an interaction that you had with Mr Tony Gupta in which he at the time that this issue of Matjila, Mr Matjila's

signing of the TNA contract for R43million was being investigated by Eskom and you indicate that in that interaction Mr Gupta said to you why can't you make this problem go away. Do you recall giving that evidence?

MR TSOTSI: Yes I do.

ADV KATE HOFMEYR: What I am interested in Mr Tsotsi is just trying to place that in time, that interaction, because your evidence before the portfolio committee as we read it, it didn't make it clear as exactly when in the course of this year, since April 2014 and Mr Matjila
10 concluded this contract that you had this interaction with Mr Gupta. Can you help us with that?

Did it for example proceed this email on the 16th of October where you ask for the report not to be released until you have spoken to the Chief Executive of SNG or was it after that?

MR TSOTSI: I honestly can't remember specifically whether it was before or after, but it was certainly after the issue was before the Board.

ADV KATE HOFMEYR: Let's just go into a bit more detail about that interaction, because it was actually quite brief your explanation of it as
20 I have it from the transcript. Tell us how it comes about. Why are interacting with Mr Gupta, and where did this conversation take place, if it was a conversation?

MR TSOTSI: Chair I – to my recollection this is one of the few occasions that I have had contact with Tony Gupta. He called me and he asked me if I could see him, and I said to him your opportunity I

would have is when I am going to a meeting in Pretoria and he said it's fine, before I get to Pretoria can I stop at the Sahara offices, which would be in Midrand ...[intervenes]

CHAIRPERSON: Can I just interrupt you Mr Tsotsi, do you recall whether this was the first contact you were having with him or you knew each other or had been in touch with each other before?

MR TSOTSI: Chair we had been in touch before.

CHAIRPERSON: Okay, alright, okay.

MR TSOTSI: So I then said fine and when the time came I went and
10 stopped at the Sahara offices and indeed he was there and I met him briefly, it was quite brief. He said to me Chairman we have a problem here that there is some issue to do with the signing of our contract and that there is some problem which we don't exactly understand and what we understood is that Mr Matjila did something wrong in signing this contract.

So I said okay and then, and then he says to me well you were the Chairman and as far as I am concerned this is a matter that we can deal with. So I asked him how do you suppose I can deal with it, what is it that you want. So he said what I would like to see happen is for
20 this thing to go away, so can you make this thing go away.

CHAIRPERSON: The thing, was the thing the investigation? The reference to the thing was it a reference to the investigation?

MR TSOTSI: Well I think it was the investigation which obviously was a thing that impeded the signing of the contract, so I am assuming he is talking about that.

CHAIRPERSON: At least that was your understanding?

MR TSOTSI: Yes.

CHAIRPERSON: Okay.

MR TSOTSI: And then I said to him Tony there are – first of all there processes in the organisation that have to be followed. Secondly I don't have the operational authority to intervene in decisions that are made by management and besides that there is a formal process now under way which is an inquiry into what transpired in the signing of this contract and that I don't have the authority to prevent or interfere with,
10 so I am afraid I cannot help you, and he was – well for the first time I have to say since I have dealt with him he was visibly upset, and he did make a statement that it appears that I am not interested in assisting him.

CHAIRPERSON: Please just repeat the statement that he made.

MR TSOTSI: He said to me it appears to him that I am not interested in assisting him, which was a statement he was to make in a much more threatening way much later on. That's where the matter ended.

CHAIRPERSON: Oh, okay.

ADV KATE HOFMEYR: Can I ask just Chair we are at the tea break
20 but if I may just conclude this aspect, there are a few follow-up questions.

CHAIRPERSON: *Ja.*

ADV KATE HOFMEYR: Was there anyone else in the room with you when you had this discussion with Mr Gupta?

MR TSOTSI: No, there was nobody else.

ADV KATE HOFMEYR: And I am going to try and locate this conversation in time, I am interested to know whether Mr Gupta made any reference to invoices that had already been issued in relation to that contract that were unpaid, did he make any reference to that?

MR TSOTSI: Chair I don't specifically recall that he made reference to invoices.

ADV KATE HOFMEYR: But is it fair based on what you have said to at least be able to locate the interaction in time after the investigation had commenced, because I understand part of what you said to Mr
10 Gupta is there's a formal process under way and I don't have any authority to prevent it, so can we at least say it happened at some point after SNG was appointed by ARC to run the investigation?

MR TSOTSI: It was during the time of the investigation certainly yes, but exactly at what stage I don't recall.

ADV KATE HOFMEYR: Thank you, thank you. Chair it may be convenient to take the tea break now.

CHAIRPERSON: Okay, we will take the tea break now, it is twenty past on my watch and we will resume at twenty five to twelve. We adjourn.

20 **REGISTRAR:** All rise.

INQUIRY ADJOURNS

INQUIRY RESUMES

CHAIRPERSON: Before we proceed just so that everybody knows we will take a break at quarter past twelve because I will be needing to have a media conference next door or behind where I am. Because

certain members of the media have been requesting certain information in an interview so to make it easy and avoid having multiple interviews it is better to have one media conference with all of them there so they can – we can deal with their questions at the same time. So I thought I must just make sure everybody knows we will take a break at quarter past twelve and we will not return until after lunch. Okay thank you. Yes we may proceed.

ADV KATE HOFMEYR: Thank you Chair. Mr Tsotsi we are in around October 2014 at the moment if we following the chronology of events
10 because you will recall that email that the Company Secretary sent out asking for the report not to be released until you had engaged with the Chief Executive of SNG was dated about the 16 October. Were you aware at that time about media reporting regarding this contract?

MR TSOTSI: I do not specifically recall media reporting about – about this contract.

ADV KATE HOFMEYR: Okay. But would it surprise you to learn that ...

MR TSOTSI: Sorry Chair just in terms of timing I am – I do know that there were media reports about the contract but in terms of timing precisely I do not recall well.

20 **ADV KATE HOFMEYR:** Alright. Well I do not need to take you to them but certainly the first one that we were able to find was a Mail and Guardian report of the 24 October and then there is a later one in November. So it is around the end of October it seems from our investigations that the media gets wind of this, understands that the Board – that the allegations are Mr Matjila entered into the contract

without authority and there is some concern about whether committing R43 million at this stage of Eskom's precarious financial position to TNA Media is a sensible decision to take. Do you recall being aware generally of those reports?

MR TSOTSI: Yes I am. I am aware.

ADV KATE HOFMEYR: I would then like to go to the end of October, the 29 October because on that date you received a letter from the Public Protector. You will remember that there was that previous engagement in 2013 that we dealt with around August where Minister
10 Gigaba writes to you because the Public Protector is interested in generally SOE's and their contracting with TNA and the response to that was produced and signed by Mr Du Plessis and we looked at that response. Our investigation reveals the second time that the Public Protector engaged Eskom in relation to these matters occurred on the 29 October 2014. And you will find her letter in your bundle which MM6 at page 364. Mr Tsotsi you will see that this is a letter dated 29 October 2014. It is addressed to you and over the page it appears to be signed by Advocate Madonsela when she was in the office of the Public Protector. Do you recall this engagement towards the end of
20 October 2014?

MR TSOTSI: Yes I do remember.

ADV KATE HOFMEYR: Let us just look at what Ms Madonsela – Advocate Madonsela was saying at the time. In paragraph 1 she refers to the letter from Mr Du Plessis dated 19 November and she indicates to you that she is finalising the investigation and she is in the process

of drafting a provisional report. Do you see that?

MR TSOTSI: Yes.

ADV KATE HOFMEYR: She goes on and she says:

“It has since come to my attention through the media.”

So you will recall I indicated to you the Mail and Guardian reporting that we have managed to find was 24 October so within about five days she appears to be writing this letter. And she says that she has learnt through the media that notwithstanding her ongoing investigation of the
10 above matter Eskom’s former interim Chief Executive officer, Mr Matjila has subsequently entered into a new and similar breakfast sponsorship deal worth R43 million with the New Age newspaper. And if you go over that page she says:

“It has been further alleged that the new deal was concluded against the advice of the Board and in total disregard of internal legal advice. The deal is also alleged to be an audit risk as it exceeded the sponsorship budget.”

And she goes on at paragraph 5 on that page to say:

20 “In the interest of cooperative governance, transparency and accountability I implore that Eskom’s new sponsorship deal with the New Age newspaper should be held in abeyance pending the release of my provisional report.”

And then she asks for certain documents to assist her. She wants the

minutes of the Board meetings and resolutions where the new agreement was deliberated upon. And she wants a copy of the R43 million contract between TNA and Eskom. Do you see that?

MR TSOTSI: Yes.

ADV KATE HOFMEYR: What did you do in response to this letter?

MR TSOTSI: Chair as was the practice I asked our legal department to look at this letter and respond appropriately. And then they would have done so and come back to me with the letter for me to sign.

ADV KATE HOFMEYR: Thank you. We will pick up that letter in due
10 course if we may, your response back to her? At the moment I am just trying to follow the chronology because that response ends up actually only going back to her on the 9 December but we will get to it in a moment if we may? Now she makes reference to – in this letter Eskom’s former interim Chief Executive Officer Mr Matjila. Do you recall that at page 346 at the bottom at paragraph 2?

MR TSOTSI: 346?

ADV KATE HOFMEYR: Sorry 364 apologies I have inverted the numbers. 364 at paragraph 2 at the bottom there she says:

“The media indicates that Eskom’s former interim Chief Executive
20 Officer Mr Colin Matjila has subsequently entered into a new and similar breakfast sponsorship.”

Do you see that?

MR TSOTSI: Yes.

ADV KATE HOFMEYR: She is referring to him as the former interim Chief Executive Officer. So what has happened to Mr Matjila by this

stage?

MR TSOTSI: No nothing as far as I can recall he was still the interim Chief Executive.

ADV KATE HOFMEYR: Do you remember when he seized being interim Chief Executive?

MR TSOTSI: Chair this probably would have been some time in – is it early December?

ADV KATE HOFMEYR: Now our records...

MR TSOTSI: I suspect.

10 **ADV KATE HOFMEYR:** Seem to indicate it was a few days after this at the end of October 2014.

MR TSOTSI: Was it?

ADV KATE HOFMEYR: Would that – but after Ms Madonsela's letter certainly.

MR TSOTSI: Yes.

ADV KATE HOFMEYR: But the records that we have obtained from Eskom indicate he held the position until 31 October 2014. Do you recall who replaced him?

20 **MR TSOTSI:** No the likelihood is that the substantive Chief Executive would have been in place by then following him.

ADV KATE HOFMEYR: Mr Matona?

MR TSOTSI: Mr Matona yes.

ADV KATE HOFMEYR: Certainly our investigations reveal that Mr Matona was in that position from 1 November. When – why was Mr Matjila removed as interim Chief Executive at the end of October?

MR TSOTSI: Well the reason was because the process of appointing a new Chief Executive had been completed and that Mr Matona was available to take up the position as of the 1 November.

ADV KATE HOFMEYR: So it had nothing to do with his involvement in the TNA contract?

MR TSOTSI: No.

ADV KATE HOFMEYR: No. And what position did Mr Matjila then hold at Eskom when he was no longer interim Chief Executive?

MR TSOTSI: Well he reverted back to whose position he was which
10 was the – he was a member of the Board.

ADV KATE HOFMEYR: And do you recall how long he held that position?

MR TSOTSI: That is when I think early December comes into the picture. I think he – I think he – ja because I was thinking about his actual departure from Eskom.

ADV KATE HOFMEYR: Yes.

MR TSOTSI: Ja I think he left Eskom in early December.

ADV KATE HOFMEYR: Yes. Was it within the reshuffle? Because
20 remember the reshuffle happens on the 11 December and as I understand the facts and we have had these facts presented in evidence before the commission he was not one of the Board members who was kept on in the new Board, is that right?

MR TSOTSI: Yes but I think there is more to it than that. I think – I stand to be corrected here Chair. I think he actually resigned from the Board before the Board's term was over.

ADV KATE HOFMEYR: Thank you. And that would have been some date in December but before 1 December.

MR TSOTSI: Yes.

ADV KATE HOFMEYR: Because that is the date of the change, is that correct?

MR TSOTSI: Yes.

ADV KATE HOFMEYR: Thank you. So at no point was there any decision to move him out of a Chief Executive role because of the investigation in the TNA matter. It was simply that the process for the
10 new Chief Executive had completed. Is that right?

MR TSOTSI: Correct.

ADV KATE HOFMEYR: Thank you. Now the next thing that happens is on the 7 November 2014. The ARC Chairperson Ms Luthuli sends the SNG report to the Board. Do you recall that?

MR TSOTSI: I recall – I recall that action yes.

ADV KATE HOFMEYR: Yes. I do not think we need to go there. Just for the record it appears in your bundle MM6 at page 233. So on the 7 November the Board of Eskom gets the SNG report and it is circulated by the ARC Chairperson. And then if we follow the chronology Mr
20 Tsotsi there is a series of Board meetings that follow receipt of that report. Do you recall those Board meetings?

MR TSOTSI: I do recall Chair the fact that there were a number of Board meetings.

ADV KATE HOFMEYR: Well let us go to each of them if we may? And we will now need to move into the bundle containing Mr Pamensky's

evidence. Because we dealt with this first with him. You will find that in Exhibit MM3. And we need to go to page 336 in that bundle.

MR TSOTSI: 336. Okay.

ADV KATE HOFMEYR: Thank you. Now you will see 336 is a document entitled Minutes of the Eskom Board Meeting. And then there is a particular number given to the Board meeting held on 24 November 2014 in a relevant boardroom at Megawatt Park from 5 in the evening. Do you see that?

MR TSOTSI: Yes.

10 **ADV KATE HOFMEYR:** Now Mr Tsotsi before we go into what is recorded about this meeting in the minutes can you just tell us alongside SNG's investigation into this matter there were the interim financial results of Eskom that needed to be finalised, is that correct?

MR TSOTSI: Correct.

ADV KATE HOFMEYR: And what issue had SNG raised in relation to those financial statements around the TNA contract for R43 million?

MR TSOTSI: Chair the – the issue for the auditors was that – because there was an alleged irregularity the audit regulator requires that this be reported in the financial statements. And so we have had – we had
20 an engagement with the auditors we then explained to the Board precisely what steps need to be taken in regard to addressing an irregularity in the financial statements.

ADV KATE HOFMEYR: Indeed as we have previously looked at the interim financial statements in Mr Pamensky's evidence but they did disclose in those interim financial results that there was this allegation

of irregular expenditure and that the Board was presently considering the findings of the revue that had been conducted. Now as I have it this meeting that you convened on the 24 November was precisely to deal with how this was going to be reported in the interim financial statements. Does that accord with your memory?

MR TSOTSI: Yes.

ADV KATE HOFMEYR: Let us go then to page 337. Because in this – you – were you present at this meeting Mr Tsotsi?

MR TSOTSI: Yes I was present at this meeting.

10 **ADV KATE HOFMEYR:** And you were in the position of Chair at that stage, correct?

MR TSOTSI: Correct.

ADV KATE HOFMEYR: So when we see at page 337 midway down the page just after the middle of the page there is a paragraph there that says:

20 “The Chairman reported that he had received an email from Mr Matjila in response to Ms Masitele’s email around the legality of the previous days’ proceedings at the request of members it was read out for the record as follows verbatim.”

And then it appears that you read the whole of Mr Matjila’s email to you. Do you recall this?

MR TSOTSI: Yes I do.

ADV KATE HOFMEYR: And if you go on we will not go through it in too much detail but what was your understanding of Mr Matjila’s chief

complaint at that stage?

MR TSOTSI: Okay Mr Matjila's complaint has to do with principally two things. The first one was that he was contending that he is alleged to have committed an irregularity and yet there is no – essentially saying there is no evidence to that effect. And that he is being accused of having committed something which nobody has proof to have taken place. The other thing that he was very concerned with and he linked this to the first one was that he had approached me and complained to me that in fact the Chairperson of the ARC Ms Luthuli and I recall he
10 indicated that the FD at the time also were – had some relationship or contact with the – a certain company which he felt was an irregular because this company was a service provider to Eskom or was going to – or was contending to be a service provider to Eskom and then he felt that these individuals should also be subjected to an inquiry in the same way that he is being subjected to an inquiry because their irregularity as he indicated was as much an irregularity that should be investigated as his is being investigated. So that was the essence. I have not read this letter but that is the essence of what I recall he was complaining about.

20 **ADV KATE HOFMEYR:** And Mr Tsotsi you made reference to the FD the Financial Director who was that at the time/

MR TSOTSI: That was Tsholofelo Molefe.

ADV KATE HOFMEYR: And were you aware that it was Ms Molefe when she was sent the TNA Contract signed by Mr Matjila who first raised concerns about whether there was any budget at all for that

contract and also indicated that her understanding was that any contract that was going to be entered into by – with TNA was going to be of a much smaller proportion and it was going to be for one year and 12 breakfasts rather than three years and I think what ended up being about 36 breakfasts. Were you aware of that at the time?

MR TSOTSI: I was aware of some of the discussion that she raised on the Board. I think the first issue you spoke of I recall that she had raised it. I do not recall the bit about the contract being one year versus three years. That bit I do not remember but the first one I do.

10 **ADV KATE HOFMEYR:** We do not need to go there we looked at it with Mr Choeu Chair but when she has sent the contract from Mr Choeu on the 7 May 2014 her response to receiving the signed contract for R43 million and three years is – and I will just read it into the record. She addresses it to Chose – Mr Choeu’s first name.

20 “I thought you said the contract was for a twelve month period for twelve briefings only and to be aligned with Eskom’s sponsorship framework and strategy. I do not understand why the contract value is now R43.2 million. To my understanding the total sponsorship budget was around R30 million. Any unbudgeted expenditure must get approval from IFC.”

So is your evidence you were not aware of those complaints that she had made at the time?

MR TSOTSI: No. I would not have been.

ADV KATE HOFMEYR: But certainly there had been a whole

investigation that was going to unfold and had been completed by the stage of this meeting. And SNG what do you recall SNG concluded about whether there was an irregularity in the process?

MR TSOTSI: I recall two shall I say principle conclusions that SNG came to. One was the fact that there was indeed an irregularity that had occurred at the instance of Mr Matjila by assuming that the contract was – fell under the delegation of authority of – what he called investment as against sponsorship. And hence he did not follow the – the guidelines that were set out for a contract that fell under
10 sponsorship. The other conclusion that I recall is that the contract or rather the termination clause in the contract had been removed. Again at the instance of I do not recall whether it was both Mr Matjila and Mr Cheou or at the instance of Mr Choeu but that was one of the conclusions that she came to. I would have to read the conclusions to refresh myself further.

ADV KATE HOFMEYR: Well can I say your memory is very good Mr Tsotsi because that as we have it and we probably read it more recently are precisely the conclusions that SNG draw. Subject to one or two revisions. Do you recall them having concluded that – that decision to
20 remove the termination clause was against the advice of the legal department in Eskom?

MR TSOTSI: Yes that did come through in the Board meeting. Yes.

ADV KATE HOFMEYR: And in relation to the first point the irregularity. Just to assist you in time Mr Matjila's representations about it being an investment and not sponsorship I am going to ask you about when

precisely when you received them but they on our best understanding of the chronology actually came after the SNG report was finalised. So that view that was taken about investment and sponsorship is something that comes up later in the Ledwaba Mazwai opinion and the review that the legal firm was asked to do at the next Board meeting. I will take you to it. But just to be clear SNG according to the report and your good recollection of it concluded he did not fall within the delegation of authority Mr Matjila when he concluded the contract and secondly that he and or Mr Choeu were responsible for removing a
10 termination clause in the contract against the advice of the legal department. Does that square with your recollection?

MR TSOTSI: Yes.

ADV KATE HOFMEYR: Thank you. And then Mr Tsotsi if you go on in the Minutes of this meeting you spent time, you read out Mr Matjila's entire email and then as we understand it the remainder was really about what recording was going to be made in the interim financial statements around this issue. Do you recall that?

MR TSOTSI: Yes.

ADV KATE HOFMEYR: And if we go finally to the end it concludes
20 that what the Board is going to do and what the interim financial statements will reflect is that there has been a review, the Board is considering the review and is looking at implementing corrective action. Does that accord with your recollection?

MR TSOTSI: Correct.

ADV KATE HOFMEYR: And we saw in Mr Pamensky's evidence Chair

that is precisely what was then reflected in the interim financial statements. Also issued it seems on the same day as that meeting the 24 November 2014. So now if we can move to the next meeting and that occurred on the 3 December and you will find those minutes at 343 in the same bundle Exhibit MM6 – sorry MM3.

CHAIRPERSON: What is the page again?

ADV KATE HOFMEYR: 343 Chair.

CHAIRPERSON: 343?

ADV KATE HOFMEYR: Yes.

10 **CHAIRPERSON:** Okay.

ADV KATE HOFMEYR: Mr Tsotsi did you attend this meeting on the 3 December 2014?

MR TSOTSI: Yes I did.

ADV KATE HOFMEYR: And if you go over the page to page 344 you will see there under paragraph 7 which is headed TNA Sponsorship Legal Report. There is a report to the Board that the Chairman and the Chairman of the Audit and Risk Committee had met with Ledwaba Mazwai to give them a brief for their investigation. Tell us about that? What – what was going on now by about the 3 December 2014?

20 **MR TSOTSI:** Okay one of the recommendations that came from the SNG Report was that Eskom will be well advised to seek legal opinion as to how to proceed with the infraction occasioned by or at least alleged infraction occasioned by the two gentlemen Mr Choeu and Mr Matjila. In other words what disciplinary steps can be taken and what position the company can take in that regard. And then we as a board

then decided let us commission a law firm which would look at this and we – I think we extended the brief of the law firm really to look at not just that matter but a few other matters and I would have to – to look at the document to see what else we asked them to look at. But we did ask them to look at one or two things because I think we were beginning to get concerned about a few things that were as a fallout essentially of the whole report.

ADV KATE HOFMEYR: Indeed if we go to page 344 you will see that Mr Mazwai starts a report back at least the minutes reflect that he
10 reported to the Board and that is the second paragraph under the heading TNA Sponsorship Legal Report. It records that Mr Mazwai reported that a forensic review had been undertaken around the contract. He had received the preliminary findings and had been requested to provide a legal opinion and what action should be undertaken against Mr Matjila and Mr Choeu who had facilitated the contract. And it goes on and records that Mr Mazwai reported that because Mr Matjila was no longer the acting Chief Executive this meant that he was no longer an employee of Eskom. Prior to his appointment as acting Chief Executive Mr Matjila had been a non-executive member
20 of the Board. And then he records there that Mr Choeu still remained an employee of Eskom. Does that correctly reflect the facts at the time?

MR TSOTSI: Correct.

ADV KATE HOFMEYR: Thank you and if you go over the page to page 3-4-5. I would like to draw your attention to the third paragraph from

the bottom. It is recorded there that:

“The decision around whether the contract could be regarded as an irregular expense depended on the view of the contract.”

And it is recorded there that:

“If the contract was ratified then there would be no irregularity.”

And it goes onto record that:

10 “It was summarised that the complaint was that Mr Matjila exceeded his authority to approve and sign the TNA Contract and that Mr Choeu removed the termination clause against legal advice. It appeared that Mr Matjila was not aware that the termination clause had been removed.”

Do - do you recall any discussion about that or where that statement came from that Mr Matjila was not aware that the termination clause had been removed?

MR TSOTSI: I do not specifically recall who said this ...

ADV KATE HOFMEYR: Hm.

20 **MR TSOTSI:** But I do recall that it was mentioned. Yes.

ADV KATE HOFMEYR: Hm. You see the challenge I - I have with that is in the evidence of Mr Choeu we were able to track down the email correspondence between Mr Choeu and Mr Matjila around the final stages of the contract being concluded and - and this was also confirmed in Mr Choeu's evidence.

Mr Choeu in fact alerted Mr Matjila to the very fact that this termination clause had been removed and he did so on 2 May 2014 prior to the contract finally being concluded. Was that brought to your attention at the time?

MR TSOTSI: No. We would not have known about that at all.

ADV KATE HOFMEYR: Hm. Hm. It would be somewhat concerning to be proceeding on the basis that Mr Matjila had no knowledge that the termination clause had been removed. If the facts were that it was drawn directly to his attention. Would it not?

10 **MR TSOTSI:** Under the circumstances I would think so.

ADV KATE HOFMEYR: Hm. Hm. Chair, I do not suggest we go there. It has been dealt with in the evidenced ...

CHAIRPERSON: Yes.

ADV KATE HOFMEYR: But what Mr Choeu did on 2 May 2014 is send directly to Mr Matjila copied to Mr Ndou copies of the signed contract that he had received from TNA and he says:

20 “Attached are two copies of the contract version signed by TNA. I had final discussions with them on Wednesday. We have reached agreement on almost all clauses, but still in dispute is the clause regarding termination. The TNA does not want Eskom to include the following clause.”

That was always going to be the clause that would give Eskom at its election a right to terminate on 30 days’ notice and Chair you will recall we received evidence from Mr Pretorius and Mr Choeu

that those sorts of termination clauses in contracts of this nature were standard at the time, because of Eskom's precarious financial position.

Eskom - you - was in a financial state of great instability. The interim financial results Mr Tsotsi indicated that you had received 20 billion at that stage from Government. Do you recall that?

MR TSOTSI: Yes. 23 billion.

ADV KATE HOFMEYR: 23. Every time I say 20. Mr Pamensky also corrected me on that. Those of you who were in the day ...

10 **MR TSOTSI:** It is a lot of money.

CHAIRPERSON: *Ja.*

ADV KATE HOFMEYR: It is a lot of money. Indeed.

CHAIRPERSON: I think so.

ADV KATE HOFMEYR: In this Commission three billion becomes part of what everyone is ... (intervenes).

CHAIRPERSON: It is - it is permissible to have aspirations.

ADV KATE HOFMEYR: Yes. It is. So it was a 23 billion and - and certainly the - would you dispute the evidence of Mr Pretorius? He said you need a termination clause like this in a contract, because you are
20 committing R43 million of Eskom's budget to sponsorship and the tides may change and it might not be viable for Eskom to continue to commit that amount of money to a nice to have like sponsorship in a state of financial difficulty.

MR TSOTSI: Yes. I certainly would.

ADV KATE HOFMEYR: Then if we can just go back to 3-4-5 where we

were in Bundle MM3, because I want to pick it up in that second last paragraph. We have dealt with the point about Mr Matjila not being aware that the termination clause had been removed, but then the last sentence of that paragraph says:

“It was agreed that it was not the Board’s responsibility to take action against Mr Choeu as he did not report to the Board and was an employee of Eskom.”

Do you see that?

10 **MR TSOTSI**: Yes.

ADV KATE HOFMEYR: Do you recall a discussion around that issue?

MR TSOTSI: Yes. I do.

ADV KATE HOFMEYR: And - and what was the nature of the discussion?

MR TSOTSI: Essentially what - what we were talking about there was - do not forget the - the lawyers were present at this meeting. If I recall well. If I just look at the ...

ADV KATE HOFMEYR: That is indeed correct. Yes.

MR TSOTSI: Is that correct? Yes. So they had then come up with a -
20 shall I say - position which simply stated that under the circumstances we would have to look to see what action - what recourse we can take to - in terms of disciplining the individuals who allegedly were involved here.

ADV KATE HOFMEYR: Hm. Hm.

MR TSOTSI: Now in the discussion the Board felt that the - although

the accountability rested with the Board - the responsibility for the actions that needed to be taken against an employee of the company would be that of the Chief Executive and Management. That is where this comes from.

ADV KATE HOFMEYR: Hm. Hm. Mr Tsotsi, was it a requirement for the Members of the Board of Eskom to familiarise themselves with the requirements of the Public Finance Management Act?

MR TSOTSI: What do you mean what are the requirements?

ADV KATE HOFMEYR: Well were the Members of the Board of Eskom
10 required to know what their responsibilities were under that Act?

MR TSOTSI: Yes Chair. The reason I am saying what I am saying is precisely because of the understanding of the requirements of the PFMA.

ADV KATE HOFMEYR: Hm.

MR TSOTSI: That the accountabilities rest with us to ensure that actions that need to be taken against any employee of the organisation rests with the Board, but the responsibility to carry out those actions is delegated to Management. It does not absolve the Board from not overseeing that those actions take place, but that the - the actual
20 responsibility for carrying out those actions rests with Management. That is the understanding we have of the PFMA.

ADV KATE HOFMEYR: So - just so that I - I can probe the understanding of it further. Did the Board understand that it was as the accounting authority of Eskom ultimately responsible for ensuring that disciplinary steps were taken against an employee who breached the

PFMA or engaged in irregular expenditure?

MR TSOTSI: Yes. The Board is - was quite aware of that. Yes.

ADV KATE HOFMEYR: But as the matter of execution you would hand it over to Management. To the Chief Executive. Is that correct?

MR TSOTSI: Yes.

ADV KATE HOFMEYR: You see that is not as I read what is recorded here and that is why I wanted to probe it with you. You see what is recorded here is:

10 “It was agreed that it was not the Board’s
responsibility to take action against Mr Choeu as he
did not report to the Board and was an employee of
Eskom.”

Do you see how that at least to me, but you are going to give us the benefit of the discussion and having been there. It seems to suggest that it is not the Board’s responsibility. Do you agree with me that that appears to be conveying that?

MR TSOTSI: Well since I was at the meeting ...

ADV KATE HOFMEYR: Hm.

20 **MR TSOTSI:** I - I would not - perhaps this may convey that to someone
who is reading it, but certainly that was not what the - the intent was in
the discussion.

ADV KATE HOFMEYR: That is very helpful.

CHAIRPERSON: Okay. I think we will stop there.

ADV KATE HOFMEYR: Oh. Yes.

CHAIRPERSON: Yes.

ADV KATE HOFMEYR: Apologies Chair.

CHAIRPERSON: No. That is alright. We are going to take the adjournment now. I am thinking that if at all possible maybe we should not say we will - we should not say we will resume at two. We should see if we could resume a little earlier than normal resumption time after lunch. I am thinking about either half past one or quarter to two. Either would be fine with you?

ADV KATE HOFMEYR: Absolutely Chair from our side.

CHAIRPERSON: Mr Tsotsi.

10 **MR TSOTSI:** Yes.

CHAIRPERSON: Either would be fine with you?

MR TSOTSI: Yes Chair.

CHAIRPERSON: Hm.

ADV KATE HOFMEYR: Quarter to. I have had a request Chair just from the lawyers of Mr Tsotsi that it be quarter to two if possible.

CHAIRPERSON: Oh. Okay. Alright. Alright. Let us resume then at quarter to two. We adjourn.

ADV KATE HOFMEYR: Thank you.

REGISTRAR: All rise.

20 **INQUIRY ADJOURNS**

INQUIRY RESUMES

CHAIRPERSON: Okay, let's continue.

ADV KATE HOFMEYR: Thank you Chair. Mr Tsotsi just before the break we were dealing with the question of disciplinary steps taken against an employee and you had clarified for me what had actually

been discussed at the meeting on the 3rd of December, and as I have your evidence what's recorded on page 345 is not accurate insofar as it suggests that the Board thought it wasn't its responsibility to ensure that disciplinary action was taken against Mr Choeu is that correct?

MR TSOTSI: Insofar as the Board understood that the responsibility lay with management but the accountability for those actions rests with the Board.

ADV KATE HOFMEYR: Yes and on that point if I could ask you just to open up the legislation Bundle, Mr Tsotsi it's been placed on the top
10 of the box there, it's a legislation Bundle Exhibit MM legislations you'll see it at the top. Thank you and I'd like to just go to section 51 of the PFMA which is the statute contained in the file. You'll find it at page 23, Mr Tsotsi we had evidence from Mr Pamensky previously that he thought members of the Board of State owned enterprises only had to come to learn about their obligations under the PFMA over the course of their appointment, I think he said two or the years in, you should know what the PFMA requires of you, do you hold that view as well?

MR TSOTSI: Chair my view is that when you are inducted, which is normally what happens and given all the relevant documents which
20 you're supposed to acquaint yourself with, you do the best you can to acquaint yourself with those documents from day one but what is important is that you continue to rely on the availability of the experts in the company in those specific areas that you need advice on.

ADV KATE HOFMEYR: Indeed.

MR TSOTSI: Clearly you can – I can read this PFMA for the next five

years but I can guarantee I will not be able to quote from the PFMA verbatim from page one to the end of it because it's not in my area of expertise but the important thing is, be aware of what your obligation is as a Director and secondly where you need to acquaint yourself with the information that is pertinent to your responsibility. You ensure that you have the cover of the experts in the organisation, whatever you encountered and required to make a judgement on issues that pertain to, in this instance, the PFMA.

ADV KATE HOFMEYR: Thank you, I don't think any of us who even
10 regard ourselves as lawyers could quote, verbatim, the PFMA so at least we're agreed on that. Mr Tsotsi if we look at page 23 Section 51 of the PFMA you'll see at the bottom there and the one that's relevant for present purposes is Section 51.1 and then you go over the page to E but let's just read it from 21,

“An accounting authority for a public entity and then if you go over the page to sub-paragraph E, must take effective and appropriate disciplinary steps against any employee of the public entity who and then it lists one of three things, two are relevant for present purposes. An employee who contravenes
20 of fails to comply with the provision of this Act or an employee III who makes or permits an irregular expenditure or fruitless and wasteful expenditure is one of the employees against who appropriate disciplinary steps must be taken”,

Did you understand that to be the Board's responsibility at the time that you were debating this R43million contract?

MR TSOTSI: That's correct.

ADV KATE HOFMEYR: Thank you. Now if we go back into the file containing Mr Pamensky's evidence and you'll find that in Exhibit NM3 we were in the minutes of the Board meeting of the 3rd of December and I'd like to take you further on in that to page 347 – apologies let's go back to 346 first if we may.

MR TSOTSI: 346?

ADV KATE HOFMEYR: Yes, you'll see midway down the page just after the midline there's a reference to a recordal of something you had
10 requested, it says there,

“The Chairman had requested that this be done”,

This was a request to the lawyers that they interpret and provide guidance to the Board about irregular expenditure as compared with fruitless and wasteful expenditure and it's recorded there that you requested that this be done in order to allow members to understand the issues and give direction to the action of the Board would want to take and then it says,

“It was noted that if the Board or Exco or the Chief Executive were of the opinion that this was a bad contract, not much
20 could be done against Mr Majila as he was not an employee of Eskom”,

Can you tell us a bit about that, where did that conclusion come from with, was there a debate about it?

MR TSOTSI: Yes Chair there was a discussion in the – you recall that we had the lawyers [indistinct] with us to come and brief the Board on

what it had established when we asked them to do a review of the SNG report and in the course of their discussion with us the issue of what to do with Mr Majila and Mr Choeu came up, because it was one of the issues that they were supposed to address and in that their view was that because Mr Majila had left the business, then pursuing him would be, to quote, if I remember what they said , an academic exercise. So that to me then, meant to say that it would not be worthwhile for us to attempt to discipline him because he was no longer part and parcel of the organisation.

- 10 **ADV KATE HOFMEYR:** Well at this stage he wasn't an employee as I understand the fact, remember we're on the 3rd of December but he had reverted to the position as non-executive Director, is that correct?

MR TSOTSI: Correct yes.

ADV KATE HOFMEYR: So that's why, as I understand it you're talking and this certainly comes out in the later opinion of Ledwaba Mazwai, they were saying insofar as he's not an employee anymore, there aren't disciplinary processes that can be taken against him but insofar as he remained a non-Executive member of the Board, was there any discussion about that?

- 20 **MR TSOTSI:** The discussion only limited itself observation that because he's a Board member the matter will have to be dealt with by he Shareholder.

ADV KATE HOFMEYR: Indeed.

MR TSOTSI: So that was the extent of the discussion.

ADV KATE HOFMEYR: How would the Shareholder be alerted to the

issues around Mr Majila?

MR TSOTSI: The Shareholder would ordinarily be written to, to inform the Shareholder what has transpired and what, in fact, was being alleged in terms of the transgression.

ADV KATE HOFMEYR: Why was that not done?

MR TSOTSI: Well the reason it was not done was, from what I said earlier, that Mr Majila had now resigned from the company so it was not feasible for us to – in the context of Eskom to deal with that matter.

ADV KATE HOFMEYR: Did you not regard it as till necessary to alert
10 the Shareholder to financial misconduct on his part?

MR TSOTSI: The Shareholder was aware of the matter, if you recall, I had, to the best of my recollection Chair, when the first time the Audit and Risk Committee reported this matter to the Board or one of those earlier periods, I had to go and see the Minister and inform the Minister of what had transpired. One of the reasons why I needed to do this was that it was important that the Shareholder become aware of what had transpired before this matter went out to the public domain because clearly it was going to be out in the public domain sooner than later. So we took the view that we will not want the Shareholder to
20 hear about this in the public media, so that's then the reason why we went out, and I specifically went and informed the shareholder of this. So the Shareholder was aware of what had happened.

ADV KATE HOFMEYR: Was that done informally?

MR TSOTSI: By informally you mean how?

CHAIRPERSON: Not in writing.

MR TSOTSI: Oh I don't recall that we wrote a letter, I do recall specifically that I'd gone to see the Minister and sat down with her and spoke together with the DG and reported this issue to them.

ADV KATE HOFMEYR: You see the reason why I ask, and we're not there yet but in the 8th December meeting, which is five days later than the one you're in now, it's recorded that the attorneys advising Eskom made a note of the fact that the Board was required, under the treasury regulations to notify a National Treasury the Minister and the Auditor General about Mr Majila's conduct and there's no recordal that any
10 point was made then that, that had taken place already, can you assist us on that?

MR TSOTSI: I don't recall, I must say, whether in fact there was a – subsequent to that meeting, whether the Minister was written to and informed that this had occurred, I don't recall.

ADV KATE HOFMEYR: Certainly our records don't show that, that was followed up, when we get to the 8th of December meeting I'll ask you, amongst other things, why that wasn't done but I understand your evidence to be now, at some point, even prior to the 3 December meeting of the Board you had, yourself alerted the shareholder to the
20 fact of Mr Majila's alleged involvement in the irregular contract, is that right?

MR TSOTSI: That's correct.

ADV KATE HOFMEYR: And when in time would that have been?

MR TSOTSI: That, I think, would have been a few days before the meeting – Board meeting of the 24th.

ADV KATE HOFMEYR: Right so back in November?

MR TSOTSI: In November yes, 24th of November.

ADV KATE HOFMEYR: Okay, thank you. Let's go over the page to 347 then, now what occurs in the second half of that page is a sort of summary as I read these minutes of what was agreed and what's reflected there is, it was agreed that the matter would be finalised at a meeting to be held on the 8th of December 2014. Until this point in the minutes Mr Tsotsi there's conversation amongst the Board members because of course they're facing their imminent potential removal right, 10 you have a schedule change of the Board of Eskom a matter of a week later around the 10th of December is that correct?

MR TSOTSI: Correct.

ADV KATE HOFMEYR: So my reading of the minutes, and you'll correct me if I'm wrong, is that it was envisaged that you would hold another meeting five days later on the 8th of December so that the matter could be finalised but by the Board who knew all about his, had been involved in the investigation, the review, is this a fair summary?

MR TSOTSI: That is a fair summary.

ADV KATE HOFMEYR: And it goes on to say, 20 "in response to a discussion as to whether the contract could be regarded as a good or bad it was agreed from the standpoint of the financial status of Eskom the contract could not be regarded as a good contract".
And then it goes on to say,
"That couldn't be finally resolved until Mr Majila had made

representations to the Board and explained why he was of the opinion that it was a good contract”,

Do you see that?

MR TSOTSI: Yes.

ADV KATE HOFMEYR: Is that a good recordal of the view of the Board prior to Mr Majila’s representations, is it fair to say the Board on that day, the 3rd of December didn’t regard it as a good contract in the context of Eskom’s financial position at the time?

MR TSOTSI: Yes that is the case, you’ll remember that we, Chairman,
10 had to meet up with the auditors and the auditors made it expressly clear, according to the audit process that this irregularity had to be reflected in the interim financial statements. So what the Board was focused on here is that this irregularity is reflecting negatively on Eskom and Eskom’s business and from that perspective it is intrinsically not a good contract. I’m not talking commercial value, I’m talking intrinsic value of the contract to Eskom, so that was a –that’s what prompted this particular note here.

ADV KATE HOFMEYR: Mr Tsotsi, you said you weren’t talking about commercial value when you were – when the Board was discussing
20 whether it was a good or a bad contract but it is noted here in the context of the financial status of Eskom, doesn’t that suggest that you were interested in the commercial value of the contract when you were having this conversation?

MR TSOTSI: That’s correct, we were interested in the commercial value of the contract yes and I think that is reflected, I think, in the

meeting of the 8th.

ADV KATE HOFMEYR: Yes indeed, I'm just picking it up for the first time, it seems on the 3rd and you'll tell me if you disagree, the Board is keen to have another meeting to resolve this because they know their term is coming to an end, is that correct?

MR TSOTSI: Correct.

ADV KATE HOFMEYR: And the Board is, amongst other things, considering whether there is commercial value in this contract and it is – they are concluding that it is – shouldn't be regarded as a good
10 contract, given the financial situation of Eskom but they leave open that they need to hear from Majila on the question, is that accurate?

MR TSOTSI: Yes, that's correct yes.

ADV KATE HOFMEYR: And then let's move to the meeting of the 8th of December, you'll see the minutes commence on page 349 in the same Bundle MN3. Oh, but sorry, Mr Tsotsi we have to go to one other document before that because we're tracking the chronology carefully. You'll recall 3 December is the Board meeting, the next Board meeting is scheduled on the 8th of December but between those two events, the Board actually got Ledwaba Mazwai's final report and that occurred on
20 the 4th of December 2014 and we need to go to page 180 in the same Bundle MN3 just to see that report and there's just one aspect of it that I'd like to draw to your attention.

MR TSOTSI: 180?

ADV KATE HOFMEYR: Yes, is that document familiar to you?

MR TSOTSI: Yes.

ADV KATE HOFMEYR: What is it?

MR TSOTSI: This is the report summary of the findings of Mazwai Ledwaba which we had requested them to provide us with.

ADV KATE HOFMEYR: And what I wanted to draw your attention to is what is recorded at page 190 of that report because you'll recall, one of the things that Ledwaba Mazwai was asked to assist the Board on was what its options were in relation to the contract and amongst its options, whether the Board should ratify the contract, do you recall that?

10 **MR TSOTSI:** I do.

ADV KATE HOFMEYR: And if you go to paragraph 4.1.3.2 on that page what the authors are dealing with there are ratification and they record,

20 "Any ratification of the TNA contract by the Eskom Board of Directors would, in our view, be predicated on one or both of the following primary considerations namely and then the first one there is, if the Board determines or considers from a commercial perspective that the TNA contract represents a good value for money proposition as measured against the costs of the sponsorship on the one hand and the benefit to be derived therefrom by Eskom on the other, and/or and then it goes on to talk about the consequences that might follow if you don't ratify the contract",

And the last point on the page I'd like to just emphasise is at 4.1.4 what Ledwaba Mazwai made clear there is that, they are not able

to offer any advice regarding the commercial value to Eskom of the TNA contract. Is it fair to say, on your understanding of events as they developed that Ledwaba Mazwai was leaving the question of commercial value to the Board of Eskom to resolve?

MR TSOTSI: Yes that's correct.

ADV KATE HOFMEYR: And then we can pick it up again at the 8 December minutes if we may and you'll find that at 349. Were you in attendance at that meeting?

MR TSOTSI: Yes I was Chairing the meeting.

10 **ADV KATE HOFMEYR:** Right and you'll go over the page to 350 and you'll see again, under item 7 is the TNA sponsorship legal report, is it fair to say it was occupying quite a bit of the time of the Board at this stage, this whole issue?

MR TSOTSI: You mean at that meeting?

ADV KATE HOFMEYR: Yes.

MR TSOTSI: I think the primary purpose of the meeting was this issue.

ADV KATE HOFMEYR: Indeed.

MR TSOTSI: Yes.

20 **ADV KATE HOFMEYR:** And if you go over to page 351 you'll see the point that I was making earlier to you about what is recorded as having been conveyed by the lawyers at this meeting in the second last paragraph it is recorded that the lawyers were of the opinion that Mr Majila's conduct constituted a wilful misconduct in terms of the PFMA. The National Treasury stated that if there was financial misconduct by

an employee then the Board must ensure that an investigation was conducted and relevant disciplinary action was taken. Furthermore, the Board had to advise the relevant Minister, National Treasury and the Auditor General thereof in respect of the reportable irregularity it was reported that the external auditors had made the disclosure thereon. So what I was interested in there, Mr Tsotsi is this obligation on the Board to advise the Minister, National Treasury and Auditor General of Mr Majila's conduct, to your knowledge, did that take place, other than the informal conversation you had with the Minister prior to this?

10 **MR TSOTSI:** I don't recall whether that matter was dealt with, I must be honest, I don't recall it was.

ADV KATE HOFMEYR: Should it have been?

MR TSOTSI: Well in accordance with the advice we got that's what should have happened.

ADV KATE HOFMEYR: Do you have any insight as to why it didn't?

MR TSOTSI: Well I don't have insight as that it did not occur, I'm just saying I don't recall. Chair I think, one of the difficulties in the issue of recollection...[intervenes].

CHAIRPERSON: Yes.

20 **MR TSOTSI:** Is that you're talking about the 8th of December though Eskom does not shut down as ordinarily other businesses do, a lot of people go on leave and there's basically a skeleton staff that's left, certainly at the head quarters where I was and so this break could very easily have led to us not connecting with the continuity that's required on these issues and that coming back it might not have been picked up

immediately because there's always one thing or another that came on the scene. So I'm saying this to simply say that, ordinarily there would have been continuity if it had been any other time of the year and one would have seen through these things happening but because of that break, it's just possible that people just dropped the ball at that time. So I think that's probably what could have happened, but I'm not saying that it did not happen we'd have to check with the – with either the Minister's office or the – Eskom's office.

ADV KATE HOFMEYR: Yes, certainly we have endeavoured in our
10 investigations to uncover any such notification and have not found any
barring one letter that I'll come to but that was written in June of 2015,
after your time on the Board. What I'm interested in is, for as long as
you were Chairperson of the Board, which I understand ended in – at
the end of March 2015, you have no knowledge of this matter being
taken forward, is that correct?

MR TSOTSI: No recollection of it.

ADV KATE HOFMEYR: And would you regard it as quite an important
matter to have taken forward Mr Tsotsi?

MR TSOTSI: Well certainly from the perspective of governance and
20 the requirements thereof its something that is important that should
have been taken care of.

ADV KATE HOFMEYR: Indeed. If we can then go over the page to
page 352, in the course of this page, the discussion that is now being
minuted is the discussion about commercial value, you'll recall you and
I recalled earlier in our discussion that it was really at the 8 December

meeting that, that issue was ventilated, is that correct?

MR TSOTSI: Correct.

ADV KATE HOFMEYR: And you're actually recorded there in the second paragraph in the middle of that second paragraph as saying,

"The Chairman stated that the Board had to be convinced that the contract was not a bad one",

Do you remember saying that?

MR TSOTSI: Hang on, what page?

ADV KATE HOFMEYR: So we're at 352 it's the second paragraph
10 and its at the middle of that paragraph towards the right-hand side of the page, there's a sentence that begins, "the Chairman stated", do you have that?

MR TSOTSI: Yes.

ADV KATE HOFMEYR: "The Chairman stated that the Board had to be convinced that the contract was not a bad one".

MR TSOTSI: Are you sure that's page 352?

CHAIRPERSON: Ja I'm also looking I can't find it.

ADV KATE HOFMEYR: Right have you got a second paragraph on that page reading, "it was noted"?

20 **CHAIRPERSON:** No – oh no there is one, it is noted ja.

ADV KATE HOFMEYR: Okay.

MR TSOTSI: I see, "it was noted" that's the second paragraph.

ADV KATE HOFMEYR: Yes and then if you go six lines down in that paragraph...[intervenes].

MR TSOTSI: Okay I see it.

ADV KATE HOFMEYR: Sorry the – when I said the second paragraph it's the first full paragraph...[intervenues].

CHAIRPERSON: I thought that would confuse him.

ADV KATE HOFMEYR: That is certainly what's led to the confusion I apologise, you'll see a sentence there that says,

“The Chairman stated that the Board had to be convinced that the contract was not a bad one”,

Do you see that?

MR TSOTSI: Yes.

10 **ADV KATE HOFMEYR:** Do you remember taking that view?

MR TSOTSI: Yes I do and the reason I remember is because there was an insistence earlier if you recall that the onus is on Colin Majila to come to the Board and inform the Board and give the Board the reasons why he thought this was a good contract. So this is why I stated this.

ADV KATE HOFMEYR: Had he provided you with his representations yet, by this stage, the 8th of December because remember on the 3rd of December the Board says, we don't think there's value in this contract but we want to hear from Mr Majila right. Then there's a meeting on
20 the 8th of December, do you have a recollection whether you got representations from him in that gap?

MR TSOTSI: Yes I recall that Mr Majila wrote a response or a explanation of what had happened and he put forward some justification as to why he did what he did and I think that came in between these two meetings.

ADV KATE HOFMEYR: Yes certainly if we put the chronology together that seems likely. What I must say is we have not been able to find email records of precisely when it came through to you or to the Board but the document itself is dated quite a bit back. There is a date on it at the end bearing 27 November. There is a date on it on the front bearing 5 November. If Mr Matjila had been available to us to engage we certainly would have probed this with him. On the chronology it seems possibly that the 5 November is an error. It might have been 5 December.

10 **MR TSOTSI:** December.

ADV KATE HOFMEYR: Because then it would make absolute sense in the chronology. 3 December you do not have it. 8 December you do have it because you now discussing pointedly commercial value. Is that your recollection?

MR TSOTSI: That is correct.

ADV KATE HOFMEYR: And you will see at the bottom of that paragraph that we were in a moment ago there is a recordal that Ms Luthuli stated that the handover report had to reflect that the Board had considered whether or not the contract was a bad one and had
20 concluded that the contract was not good at this time. Do you see that?

MR TSOTSI: Yes.

ADV KATE HOFMEYR: So is that a fair summary of the view that this Board took on the 8 December 2015 that its view was that it was not a good contract and that that should be reflected in handover reports for

the new Board?

MR TSOTSI: That is correct yes.

ADV KATE HOFMEYR: Thank you. And then it resolves, this meeting over the page at 353 that you will see there is a bolded words Resolve That. And under that at point 2 Ledwaba Mazwai Attorneys and the company secretary should prepare a summary and final resolution on the discussions and decisions around the New Age sponsorship contract for signing by the Chairman of the Board and Chairman of the Audit and Risk Committee for inclusion in handover report to the new

10 Board. Do you see that?

MR TSOTSI: Yes.

ADV KATE HOFMEYR: And if Ms Luthuli's insistence and recordal was followed through that handover report should include an indication that the old Board had assessed commercial value and had determined that it was not a good contract for Eskom at the time. Is that right?

MR TSOTSI: Yes.

ADV KATE HOFMEYR: Thank you. And then we get the 11 December Mr Tsotsi what happened on the 11 December 2014?

MR TSOTSI: Well on the 11 December Chair is the date that the new
20 Board came in to place and obviously signalled the end of the term of the – of the previous Board. So there was a new Board in place on the 11 December.

CHAIRPERSON: But was the – was it the envisaged end of the term of the Board or did the term of the Board come to an end maybe abruptly is not the right word. Was it the end of the full term that had been –

that the Board was supposed to serve?

MR TSOTSI: That is difficult to say Chair because the – normally the term of the Board is determined by the intervals between the annual general meetings. Now in this instance we had gone past the annual general meeting which would have taken us into a term of three years because that AGM took place sometime in October I think it was.

ADV KATE HOFMEYR: Hm.

MR TSOTSI: It could have been earlier, August.

ADV KATE HOFMEYR: August.

10 **MR TSOTSI**: But also what came into play as well was the change of Ministers.

CHAIRPERSON: Maybe – maybe to assist you when you get up – when you got appointed I assume there would have been a letter saying this is your term, you are appointed with effect from that date either to a specific date or until the next AGM. And so – and I think you had – you have already said that you had served your first term. I do not know whether you had also actually finished your second term so I am just trying to look at whether when you talk about the end of the term of the Board on the 11th and the new Board took over whether that was
20 because that is when it had been envisaged the term would end of that Board or whether there were other events which required that there be an end anyway by then of the term of the Board.

MR TSOTSI: Chair I think like I said I think – well from the standpoint of the Minister who appointed us our term was supposed to have ended at the AGM that took place in 2014.

CHAIRPERSON: Yes.

MR TSOTSI: Now...

CHAIRPERSON: And that would have been which month if you are able to remember?

MR TSOTSI: That would have been around September – August/September somewhere around there.

CHAIRPERSON: Yes. Okay. And you are now in December?

MR TSOTSI: December.

CHAIRPERSON: Ja.

10 **MR TSOTSI:** Now what had transpired is that the Minister who appointed us had left office by then and there was a new Minister. And we got an indication that the Minister wants to review the position insofar as the Board is concerned which generally means that she was looking to make some changes in the Board. Now I am assuming that it took that long for her from the time she came in because she could not do it within the timeframe when the AGM occurred. So she – I assume she needed more time so we were essentially just holding fort until she was ready and that occurred then by December – 11 December.

20 **CHAIRPERSON:** Hm. And would that – did that occur by way of resignations?

MR TSOTSI: No Chair. All that happened was that the Minister because she has the prerogative to appoint the Board simply wrote to Board members to say they are either being reappointed or their term has completed and they are no longer being reappointed.

CHAIRPERSON: Hm. Okay.

MR TSOTSI: Yes.

CHAIRPERSON: Maybe it was something you were still going to deal with.

ADV KATE HOFMEYR: Hm.

CHAIRPERSON: I am sorry.

ADV KATE HOFMEYR: Indeed Chair if I may – not at all. If I may just follow up there? One thing that may be of assistance to you Mr Tsotsi which you may not be aware of is Mr Pamensky gave evidence that
10 there was certainly advertisements for applicants for positions of Boards of SOE's around September of 2014. I assume that was a product of the new Minister coming in and just to be clear for the record who was the new Minister?

MR TSOTSI: It was Minister Lynne Brown.

ADV KATE HOFMEYR: Thank you. And then there were – there was a process where applications were made and submitted and then a process that was taken under the wing of the Department of Public Enterprises and then persons who were going to be appointed to the new Board were contacted and those who would remain were given
20 reappointment letters, is that correct?

MR TSOTSI: Correct.

ADV KATE HOFMEYR: And just one point of clarification also to be of assistance the memorandum of Incorporation of Eskom talks about the appointment of – for three years of any Board members and then it can be renewed. So when you were initially appointed in August of 2011

was that a three year appointment?

MR TSOTSI: Yes it was.

ADV KATE HOFMEYR: Right so that is why it would coincide with the annual general meeting in 2014 but you have described why not exactly in time with that the new Board was changed then in December, is that right?

MR TSOTSI: Correct.

ADV KATE HOFMEYR: Thank you. So this process we heard evidence from Mr Pamensky ran its course we assume. Advertisement
10 applications but then on the 11 December the new Board is announced, is that right?

MR TSOTSI: Right.

ADV KATE HOFMEYR: Mr Tsotsi how many of the old Eskom Board members remained in the new Board? Do you recall?

MR TSOTSI: Yes there were only two non-executive Board members who remained and of course there are two executive Board members also who are in management were still on the Board.

ADV KATE HOFMEYR: Right. And is that a concern at all for
20 continuity reasons that you would only retain two of the non-executives or not?

MR TSOTSI: Well I will be giving a personal opinion here Chair if I was to say so but I am happy to do that. I think that it would serve any institution such as Eskom or any other entity if there is sufficient continuity. So I – I had hoped that there would be such continuity where at least maybe one third of the Board would have been retained

in the rotation.

ADV KATE HOFMEYR: Mr Tsotsi in your evidence before the Portfolio Committee you did deal with this aspect of the new Board's appointments and an engagement you had after the appointments with Minister Brown. It is not an aspect that you have traversed in your affidavit at all but in our preparation for today we considered that testimony. Can you tell us what happened in that interaction about the appointment to Board committees?

MR TSOTSI: Oh I see what you are talking about. Yes. Chair this is a
10 process which ordinarily occurs when there is a new Board that comes into being. In the instance of Eskom what happened was that because of the number of sub-committees that have be put in place there needs to be an allocation of Board members to the sub-committees. Now this allocation is ordinarily done by the Chairman and in consultation obviously with the members of the Board who are involved and of course with the – with the Minister. The exception would be the Audit and Risk Committee which is a statutory committee over which the Minister has got direct authority in who serves on that Board. But the rest of the committees I normally I ordinarily the Chairman would assist
20 in the case of Eskom as I say. So I went about doing this when the new Board was in place and in the process of doing this I received an email from a certain Essa – what is Essa's first name now? I just forget his first name.

ADV KATE HOFMEYR: Saliem.

MR TSOTSI: Saliem Essa yes. And Mr Essa drew my attention to a

selection of Board members into various committees which he had done. And he then asked me to have a look at that and pass it on to the Minister. Now I was quite clearly taken aback around this because I did not understand what his role was and the reasons why he was involved in this. And so I pretty much ignored what [indistinct].

CHAIRPERSON: Sorry had you had any interactions with him before this?

MR TSOTSI: I had met Mr Essa in the – these breakfast meetings.

CHAIRPERSON: Yes. Okay.

10 **MR TSOTSI:** Yes. I had come to know him at that time.

MR TSOTSI: Yes okay alright.

MR TSOTSI: Yes. So he then...

CHAIRPERSON: When you said you ignored this email, is that right?

MR TSOTSI: Yes. And then I proceeded to do the selection the way I thought it should be done based on people's CV's and what they can contribute to the various committees. And I passed this onto the Minister which is what I ordinarily would have to do. And the Minister responded back to me and sent me what she purports was from her point of view what should be done. And when I looked at it it was
20 precisely what Essa had sent me. So I got the impression that there must be some collusion of some kind between Mr Essa and the Minister insofar as this matter is concerned. So...

CHAIRPERSON: You say it was exactly the same?

MR TSOTSI: It was precisely the same.

CHAIRPERSON: Hm.

MR TSOTSI: So that was what had happened there in relation to the matter of Board members and their allocation to various committees of the Board.

ADV KATE HOFMEYR: Mr Tsotsi do you recall in your evidence before the Portfolio Committee talking about a meeting you had at the home of Minister Brown at which this issue was discussed?

MR TSOTSI: Yes I do recall that yes.

ADV KATE HOFMEYR: Because what you have relayed to us now is that the interactions you had with Minister Brown on this aspect was
10 done in writing as I understand it. You proposed to her and she came back in writing with a list that accorded with Mr Essa's list, is that right?

MR TSOTSI: Yes.

ADV KATE HOFMEYR: What about if any involvement at her home? Was that something that occurred? Your testimony previously said that you were called to her home.

MR TSOTSI: Yes I – the Minister did call me to her home and I duly went and this is the time when Chair we were still working on finalising the allocation to the Portfolio – to the committees of the different Board
20 members.

CHAIRPERSON: This would have been towards the – this would have been what – towards the end of – of the year of 2014?

MR TSOTSI: Yes correct. This would ordinarily have occurred shortly after the appointment of the Board members. So that would have been in December.

CHAIRPERSON: Oh okay. Yes.

MR TSOTSI: Shortly after the 11 December.

CHAIRPERSON: Okay. Hm.

MR TSOTSI: And when I arrived at the Minister's residence there were two other people there. One was Tony Gupta, the other one was Saliem Essa. And I really did not spend more than maybe two, three minutes. In fact I did not even sit down. The Minister just simply indicated to me that I should please proceed on the basis of what she had indicated to me in terms of the allocations of the Board members into the different
10 sub-committees of the Board. And I did not say much except to say that yes I have seen what you sent back to me and that is what we will proceed to do.

CHAIRPERSON: Let me just understand this. This was at a time when new members of the Board had been appointed.

MR TSOTSI: That is correct.

CHAIRPERSON: Towards the end of 2014.

MR TSOTSI: That is correct Chairman.

CHAIRPERSON: You were asked by the Minister to meet her in – at her residence, is that right?

20 **MR TSOTSI:** Correct.

CHAIRPERSON: So you went there.

MR TSOTSI: Yes.

CHAIRPERSON: On your own or with somebody else like DG or another Board member?

MR TSOTSI: No, no I went on my own.

CHAIRPERSON: You went on your own.

MR TSOTSI: Yes.

CHAIRPERSON: At that stage did you know what she wanted to discuss with you or not before you got to the meeting?

MR TSOTSI: She did say to me that she just wants to clarify the issue of the appointments to the sub-committees of the Board.

CHAIRPERSON: Yes. And this was at a time when she had already sent you her allocation?

MR TSOTSI: Correct.

10 **CHAIRPERSON:** Okay. You had not responded yet to – to her allocation to her?

MR TSOTSI: No I had not responded yet.

CHAIRPERSON: You had not responded.

MR TSOTSI: No.

CHAIRPERSON: Okay. So you go – you get to her residence and you find that there are two people there whom I suspect you did not expect to be there. Mr Tony Gupta and Mr Saliem Essa.

MR TSOTSI: Correct.

20 **CHAIRPERSON:** And the Minister comes and discusses or tells you what you have just said in their presence?

MR TSOTSI: That is right.

CHAIRPERSON: And basically she was saying she would like you to proceed with the allocation as indicated in the allocation that she sent you?

MR TSOTSI: That is correct.

CHAIRPERSON: And the two gentlemen were there hearing her listening?

MR TSOTSI: Yes that is correct.

CHAIRPERSON: And you did not have much to say in response?

MR TSOTSI: Yes that is correct Chair.

CHAIRPERSON: Was that then the end of the meeting or the meeting continued?

MR TSOTSI: No that was the end of the meeting. I just left and I left them there.

10 **CHAIRPERSON:** Oh. Did you ever get to understand why you needed to be told this in the presence of these two gentlemen?

MR TSOTSI: No Chairman I did not ask the Minister.

CHAIRPERSON: Yes. Yes. Okay. Thank you.

ADV KATE HOFMEYR: Mr Tsotsi how were they introduced at the meeting to you?

MR TSOTSI: They were not introduced at all. I think...

CHAIRPERSON: You knew them?

MR TSOTSI: I think the understanding that I – was that I knew them.

20 **ADV KATE HOFMEYR:** Hm. Indeed I think your testimony has confirmed you did know both of them.

MR TSOTSI: Yes.

ADV KATE HOFMEYR: Prior to this, is that correct?

MR TSOTSI: That is correct yes.

CHAIRPERSON: But – I am sorry – but did the Minister know that you knew them already at that time? Because if she did not know that you

knew them one would have expected her to introduce them to you.

MR TSOTSI: That is right Chairman I would have – I mean – I assume that the Minister must know that ...

CHAIRPERSON: You knew them.

MR TSOTSI: I knew them. Yes.

CHAIRPERSON: Oh okay.

ADV KATE HOFMEYR: And Mr Tsotsi how sure are you about this meeting at her home at which these two other people were present? I am asking because Ms Brown gave testimony after you before the
10 Portfolio Committee. As we read the transcript of her evidence she does not actually deny the meeting itself she denies ever having consulted with anyone about the appointments of Boards or their allocation to Board committees. But in the event that Ms Brown comes to give evidence and she is certainly scheduled to do so in the aviation session it is fair to ask you how certain you are that this meeting took place and the people there were the people who you say were present?

MR TSOTSI: Chair I am very certain. It is as simple as that. I am very certain.

ADV KATE HOFMEYR: Hm. Where is Ms Brown's – Minister Brown's
20 home, do you recall?

MR TSOTSI: Minister Brown at that time her home was in the government complex.

CHAIRPERSON: This would – official residence.

MR TSOTSI: The official residence yes.

CHAIRPERSON: Okay.

MR TSOTSI: Yes.

ADV KATE HOFMEYR: Thank you.

CHAIRPERSON: And did these two men ever say anything during this meeting as far as you recall? Anything of importance about this subject that was being raised?

MR TSOTSI: No Chair they did not say anything. Not – not something related to the meeting or to the discussion.

CHAIRPERSON: And – did you say the meeting lasted something like three minutes, five minutes?

10 **MR TSOTSI:** I would say about three minutes.

CHAIRPERSON: Yes okay alright thank you. And the – I am sorry – and the – the documents the one that you received from Mr Essa and the one that you received from the Minister and Ms Hofmeyr will tell me if we have got them – do – are we going to have them or we do not have them?

ADV KATE HOFMEYR: That was going to be my next question Chair.

CHAIRPERSON: Oh okay alright.

ADV KATE HOFMEYR: We have used every means available to us to try and find these emails and as the commission currently stands we
20 have not. So can you give us better guidance on that? Do you recall whether it was sent to your Eskom email address or possibly some other email address?

MR TSOTSI: It would have been my Eskom email address for sure.

ADV KATE HOFMEYR: Hm. And your response back would that have been – oh apologies you did not ever respond to Mr Essa. As I

understand it you then corresponded with the Minister, is that right?

MR TSOTSI: Yes.

ADV KATE HOFMEYR: And again would that have been done from your Eskom email?

MR TSOTSI: Yes.

ADV KATE HOFMEYR: Hm. Chair it is not conclusive that we have not been able to find it. There are certain mail boxes that are available, certain of them have been imaged, certain of them are not. But I can certainly say as matters currently stand we do not have those emails
10 despite efforts to obtain them.

CHAIRPERSON: Okay. Yes. Yes.

ADV KATE HOFMEYR: And look for them.

CHAIRPERSON: But Mr Tstosi is quite clear that he did receive an allocation as suggested by Mr Essa and he did receive an allocation as determined by the Minister and that the two were exactly the same.

MR TSOTSI: That is correct Chair.

CHAIRPERSON: Ja.

ADV KATE HOFMEYR: Thank you. And then if we could move to 2015 because the next event that happens relative to the TNA contract as we
20 have pieced it together is a Round Robin resolution that circulated on the 3 February. Before we get there though on the 16 January 2015 there was the first Board meeting of the new Board, do you recall that?

MR TSOTSI: Yes.

ADV KATE HOFMEYR: And we will need to go to Mr Pamensky's bundle again Exhibit MM3 in order to find that minute.

CHAIRPERSON: What page again?

ADV KATE HOFMEYR: That Chair let me just find it if I may? Will be at page 366.

CHAIRPERSON: 366?

ADV KATE HOFMEYR: Yes. Mr Tsotsi this is Minute of a Meeting of the Eskom Board in committee held on the 16 January at Megawatt Park from nine o'clock. Do you recall being in attendance at this meeting

MR TSOTSI: Yes.

10 **ADV KATE HOFMEYR:** Mr Tsotsi – Chair just before the lunch break because it was a bit of an extended break we did seek to indicate to Mr Tsotsi some of the documents we would take him to so that he could use the time to familiarise himself.

CHAIRPERSON: Yes. Yes okay.

ADV KATE HOFMEYR: Mr Tsotsi you will let us know if you – you need any further time. But again just to summarise these minutes what we have done in looking at the minutes is checked whether the issue of the TNA contract came up at all at this meeting. And certainly the Minutes do not reflect that it was discussed. Do you have any different
20 recollection?

MR TSOTSI: No I do not recall that the TNA issue was discussed.

ADV KATE HOFMEYR: Right. It really is an introductory meeting initially. Sorry apologies. I took you to the in- committee meeting there is actually a prior minute at 354 that we need to go to. That is the full meeting of the Board on the 16 January.

MR TSOTSI: 35?

ADV KATE HOFMEYR: 354. And in the full meeting – the meeting of the Board again no issue was raised about the TNA contract as we read the minutes. Can you confirm that?

MR TSOTSI: This is now the Minutes of the 16 January?

ADV KATE HOFMEYR: Yes so what happens is there seems to have been two meetings. We will pick it up later. This clearly was something that happened at Eskom. You would have an in-committee meeting of the Board and then you would have the full Board meeting often on the
10 same day. So what I had done was I had initially taken you to the in-committee meeting minutes.

MR TSOTSI: Okay.

ADV KATE HOFMEYR: But we now just going backwards in the bundle to the full Board.

MR TSOTSI: The full Board ja.

ADV KATE HOFMEYR: And the reason why I knew I had made the error is because I was looking for the welcome that you gave which happened at the main Board meeting and that is at page 354. Because at the bottom of 354 you as the Chairman of the Board welcome
20 members to the first Board meeting for 2015. Do you see that?

MR TSOTSI: Yes.

ADV KATE HOFMEYR: Now the one thing that does happen in this meeting is that the Board has been given their handover reports. The members of the Board have been given their handover reports and you will see at page 362 there is an item number 7 there committee

handover reports. And what is recorded is direct – by the direction of the Chairman and members the committee handover reports for the Board’s sub-committees included in the meeting pack were taken as read and noted. Do you see that?

MR TSOTSI: Yes.

ADV KATE HOFMEYR: Now Mr Tsotsi we – we were able to get copies of the handover reports that were given to the Board members and you will find those in your bundle MM6 at page 318.

MR TSOTSI: Alright.

10 **ADV KATE HOFMEYR:** What commences at 3-1-8 is one of the Subcommittee reports. This is the report of the IFC and what then follows are various other committee reports. The one that we were interested in was the Audit and Risk Committee Report which you will find at page 3-6-1.

MR TSOTSI: Okay.

ADV KATE HOFMEYR: You will see under “Outstanding Issues” is the heading there. Under the third major bullet there is a record there that:

20 “Reportable irregularity of - identified by the external auditors during the review of 30 September 2015 interim results. This matter was reported to and dealt with by the Board.”

Do you see that?

MR TSOTSI: Yes.

ADV KATE HOFMEYR: Mr Tsotsi that is the only reference that we could find in any of these handover reports to the TNA Contract which

had precipitated that reportable irregularity. Do you know of any other recordal that might have appeared in the handover reports?

MR TSOTSI: My understanding after the tabling of the summary that Mazwai Ledwaba did was that that document would form part of the handover report ...

ADV KATE HOFMEYR: Hm.

MR TSOTSI: On this TNA issue ...

ADV KATE HOFMEYR: Hm.

MR TSOTSI: And I am really surprised that there is no evidence that
10 this transpired.

ADV KATE HOFMEYR: Hm.

MR TSOTSI: What in fact I do recall was that in tandem with the report the idea was to avail the minutes where these discussions were taking place.

ADV KATE HOFMEYR: Hm.

MR TSOTSI: Especially the three sets of minutes?

ADV KATE HOFMEYR: Hm.

MR TSOTSI: From the time we started talking about it that was end of November. I think the 24th ...

20 **ADV KATE HOFMEYR:** The 24th.

MR TSOTSI: And then the subsequent two Board Meetings of the 3rd and the 8th.

ADV KATE HOFMEYR: Hm.

MR TSOTSI: So that to me was supposed to constitute the handover report ...

ADV KATE HOFMEYR: Hm. You see ...

MR TSOTSI: And I think you recall also that the Chairman of the Audit Committee also insisted on ...

ADV KATE HOFMEYR: Hm.

MR TSOTSI: On that report ...

ADV KATE HOFMEYR: Indeed.

MR TSOTSI: Being part of the - of the handover notes, but I do not know Chair what - what in fact transpired at this ...

ADV KATE HOFMEYR: Hm.

10 **MR TSOTSI:** Did not happen ...

ADV KATE HOFMEYR: Hm. (Intervenes).

MR TSOTSI: And I must confess to that I was not aware at this time that this had not happened.

ADV KATE HOFMEYR: Hm. It certainly appears from the records we have not to have happened, because this is the Audit and Risk Committee Report that was part of the bundle of handover reports and as you have seen. It makes no reference to the minutes of the previous Board Meetings.

20 No reference to the matter that the Head of Audit and Risk said must be in the handover report ...

MR TSOTSI: Yes.

ADV KATE HOFMEYR: Which is that the former Board had concluded that there was - this was a bad contract for Eskom. In fact when we traversed it with Mr Pamensky, because remember Mr Pamensky is one of the new Members of the Board. Right. Certainly his reading of this

matter was reported to and dealt with by the Board.

He did not have a clear recollection of having read that at the time, but that signalled to him that the matter had been resolved.

Right. The matter has been reported to and dealt with by the Board.

MR TSOTSI: Yes.

ADV KATE HOFMEYR: How would you understand that if you read it?

MR TSOTSI: Do not forget I was part - party to this.

ADV KATE HOFMEYR: Indeed.

MR TSOTSI: So I - I ...

10 **ADV KATE HOFMEYR:** You cannot disabuse yourself.

MR TSOTSI: I cannot - no.

ADV KATE HOFMEYR: Indeed.

MR TSOTSI: I do not think so.

ADV KATE HOFMEYR: Indeed, but would you say it is fair for a new Board Member to read this as not requiring more of them?

MR TSOTSI: Yes. I think it is not fair on the new Board Member. Certainly there are a couple of other things which I observed also.

ADV KATE HOFMEYR: Hm.

MR TSOTSI: I mean you are talking about the round robin resolution. I
20 mean I actually Chair became aware of the fact that the new Board did not get the level of communication on this TNA matter. At the meeting - the last Board Meeting that I attended which would have been ...

ADV KATE HOFMEYR: 19 March ...

MR TSOTSI: 19 March.

ADV KATE HOFMEYR: 2015.

MR TSOTSI: Yes, because there - there was a discussion now on the - on the TNA matter and there was some very strong views that came from - from Board Members and there were - they did not - you know - hold back their feelings about the fact communication was very bad in regard to information that should have gone to the Board on - on that matter.

CHAIRPERSON: Now communication when you talk about communication from management to the Board?

MR TSOTSI: That is correct. The - the ...

10 **CHAIRPERSON:** Hm.

MR TSOTSI: Precisely the - the documents that we ...

CHAIRPERSON: Yes.

MR TSOTSI: Ms Hofmeyr is talking about. Yes.

CHAIRPERSON: *Ja*. Hm.

ADV KATE HOFMEYR: Whose responsibility would it have been to ensure that the handover reports contained that information?

MR TSOTSI: This is the Secretariat. The - the Secretariat of the Board.

20 **ADV KATE HOFMEYR:** Hm. There were only two Board Members from the previous Board who came over to the new Board. Is that right?

MR TSOTSI: That is correct. *Ja*.

ADV KATE HOFMEYR: And that was yourself and Ms Mabude. Is that correct?

MR TSOTSI: That is correct. Yes.

ADV KATE HOFMEYR: Would you have accepted the proposition that

as Chairperson of the Board and one of the Members of the Board who came over to the new Board. You held some responsibility to ensure that the handover reports correctly reflected what that meeting of 8 December required to be included.

MR TSOTSI: Yes. Of course. I mean the responsibility rested with me, because I am the person who chaired the Board ...

ADV KATE HOFMEYR: Hm.

MR TSOTSI: And the Secretariat had essentially ...

ADV KATE HOFMEYR: Hm.

10 **MR TSOTSI:** In - in content reports to - to me ...

ADV KATE HOFMEYR: Hm.

MR TSOTSI: As the Chairman.

ADV KATE HOFMEYR: Hm.

MR TSOTSI: For the dereliction of duty I suppose the responsibility rests with me, but I certainly would have wanted to know what - what happened, because nobody said to me that information was not transmitted as it should have been transmitted.

ADV KATE HOFMEYR: Hm.

MR TSOTSI: So I - I was in the dark as far as that is concerned.

20 **ADV KATE HOFMEYR:** And why - can I ask - did you not put the TNA Contract on the agenda for the meeting on 16 January?

MR TSOTSI: Chair, I do not exactly recall, but however the - these meetings were what we call special meetings or extraordinary Board Meetings. The idea would have been to raise this matter at the ordinary Board Meeting which would have taken place - the first

ordinary Board or scheduled Board Meeting was due to take place on 26 February, but after this meeting I recall that we all of a sudden woke up to the fact that this TNA matter has not been raised - has not been concluded and unfortunately this happened after this meeting had occurred.

So there could have been a possibility for us to have raised this issue at this first Board Meeting. Notwithstanding the fact that it was not in the agenda originally. This meeting was requested by the Executive, because they wanted to appraise the new Board as early as possible about the problems that were - the company was experiencing.

Particularly the issues around the going concern which was really the top of mind at that point in time. In other words the financial stress that the - the company was - was experiencing. So in all likelihood the idea that this matter with the TNA did not make it to this Board Meeting.

I think would have been the consequence of what was really living in the minds of - of the Board at the time and of management. Hence after this meeting it was then that we realised that look there is a problem. We need to have done something about this. Do not forget also there was the requirement by the Audit Authority of the 30 days within which we have to respond as to what we have done about the irregularity.

ADV KATE HOFMEYR: You had received an extension of that 30 days though. Had you not in the previous year?

MR TSOTSI: Yes. That is right. Yes.

ADV KATE HOFMEYR: But I - correct me if I am wrong. I - I understand your evidence to be that there was some urgency in the matter. Is that right?

MR TSOTSI: There was some urgency in the matter. Yes.

ADV KATE HOFMEYR: Hm. Hm, but not in enough to put it on the agenda on 16 January?

MR TSOTSI: I would not say it was a burning platform.

ADV KATE HOFMEYR: Hm.

MR TSOTSI: You know. It was not up there in terms of the priorities at
10 that time.

ADV KATE HOFMEYR: But then why Mr Tsotsi try to resolve the issue by round robin resolution on 3 February then?

MR TSOTSI: There were a couple of things that were considered in - in respect of this decision - the round robin decision. One of them is one I have just mentioned now. We were coming Chair to the end of the financial year of the company and you recall that the interim - interim financial statements had included this irregularity in the statements and on top of that there was also the going concern problem that we were faced with.

20 So there was a position that was taken by management to say look we need to resolve on this irregularity issue and part of that has to do with what decision the Board will take in respect of the advice that it sought from the law firm and in terms of what the T - T - the SNG (indistinct) had come up - SNG Report had come up with.

 So there was that aspect. There was also an aspect of

pressure that management was saying they were receiving from the TNA, because of lack of payment. There had been - I think - an invoice that was - been carried over from the previous year and that they were experiencing some performance issues around the contract from the TNA.

So those were some of the considerations that were in - in mind at the time when we thought look we - we need to do something about resolving this - this contract.

ADV KATE HOFMEYR: Mr Tsotsi, do you accept that a round robin
10 resolution for a very new Board - of which I think it was eight members were new. Is not an ideal way in which to debate an issue or at least bring them up to speed with what had happened in relation to the matter on which their decision is required?

MR TSOTSI: I do have - if I may call it - sympathy you know for - for someone who is new in the Board and has to deal with an issue like that with a round robin. Notwithstanding the fact that they would have been familiar with the round robin system in any case, but ...

ADV KATE HOFMEYR: Hm, but the round ...

MR TSOTSI: But ...

20 **ADV KATE HOFMEYR:** Apologies.

MR TSOTSI: You know I - I am saying this because I subsequently got that idea - that feeling at this meeting of 19 March where members were expressing their disquiet about the way information was not available to them to - to be able to do ...

ADV KATE HOFMEYR: Hm.

MR TSOTSI: What they would ordinarily do what they would ordinarily do in trying to decide where - what - how to view this - this contract.

ADV KATE HOFMEYR: Hm. You see Mr Tsotsi when we interrogate the reason for using the round robin process. I think it is also relevant to place in context that there was another meeting of the Board on 16 February. Just - just less than two weeks later than the date on which the round robin was circulated and so to put to you in fairness that the - the issue that arises is to the extent that it was a pressing issue.

10 The opportunity of the full Board Meeting on 18 January was not utilised for the discussion that needed to take place. There was another meeting to be held a month later on 16 February. That meeting was also not used properly to debate and discuss the issues, but instead in the middle on 3 February someone takes a decision that the right way to deal with this issue is by round robin. Did you take that decision?

MR TSOTSI: With the round robin what happens is that management normally come to the Board via the Chairman to raise an issue with they feel needs to be dealt with. So in this instance they came to
20 board that is the Chief Executive and indicated that this matter has dragged on and needs to be dealt with and so the suggestion that we should go on a round robin to get this matter done.

Then was put on the table and I said I do not have a problem with that. I think it is something that can be done.

ADV KATE HOFMEYR: Hm.

MR TSOTSI: On the proviso that - you know - the adequate information is made available to members. So they can understand and be able to make the appropriate decisions regarding the issue. So yes I had no difficulty with the round robin being instituted.

ADV KATE HOFMEYR: Let us go to the round robin resolution that was circulated. You will find it in your bundle - MM6 - at page 2-3-4.

MR TSOTSI: I am going to ask as to which one is my bundle. There are so many of them around.

ADV KATE HOFMEYR: Apologise. We are now in EXHIBIT MM6.

10 **CHAIRPERSON:** That is the one that has that report ...?

ADV KATE HOFMEYR: Yes.

CHAIRPERSON: Or not really?

ADV KATE HOFMEYR: Yes.

CHAIRPERSON: The same one as - *ja*. Same one that has got ...

ADV KATE HOFMEYR: Had the - indeed Chair.

CHAIRPERSON: Yes.

ADV KATE HOFMEYR: And we are at page 2-3-4.

CHAIRPERSON: Hm.

20 **ADV KATE HOFMEYR:** Chair, I hope I am correct. Have you got an email at page 2-3-4?

CHAIRPERSON: I think I have got - *ja*. It is an email. *Ja*.

ADV KATE HOFMEYR: Of 3 February?

CHAIRPERSON: Let me - yes.

ADV KATE HOFMEYR: Excellent. Mr Tsotsi do you have that page.

MR TSOTSI: 2-3-4.

ADV KATE HOFMEYR: Now this is the email that the company Secretary sent out on 3 February to the Members of the new Board and the email reads:

“Dear Board Members, the Chairman of the Board has requested me to forward the attached documents to you. The contents of which is self-explanatory.”

He goes on and says:

10 “I will send the password to open the report by SMS tomorrow morning.”

Do you see that?

MR TSOTSI: Yes.

ADV KATE HOFMEYR: So did you instruct the Company Secretary as to sending this out and to what to attach?

MR TSOTSI: Well I do not literally instruct him, but that is just process.

ADV KATE HOFMEYR: Right.

MR TSOTSI: Yes.

20 **ADV KATE HOFMEYR:** Yes, because he says you have requested him to forward those documents. So were you involved in the selection of the documents that accompanied the resolution?

MR TSOTSI: No. I would not be involved in the process of selection of the documents, but in terms of indicating what should be in the round robin. Yes. I would be.

ADV KATE HOFMEYR: Okay. I will come back to that in a moment.

Let us go to pages 2-3-6 and 2-3-7. At 2-3-6 is a document entitled “Summary of Facts”. Do you see that?

MR TSOTSI: Yes.

ADV KATE HOFMEYR: Do you recall this document? It goes over two - over two pages.

MR TSOTSI: This is the - one of the attachments of the round robin. Yes.

ADV KATE HOFMEYR: And you will see at the bottom at page 2-3-7 there is a place where it can be signed and your name is included there
10 and beneath your name is your recorded:

“Who hereby represents that the above information
is correct.”

Do you see that?

MR TSOTSI: Yes.

ADV KATE HOFMEYR: Had you contented yourself that this information was correct before it was sent out?

MR TSOTSI: Chairman I must - I must confess that this round robin I did not peruse to the extent that I can say comfortably that all information is correct. Subsequently I discovered there were some
20 errors in it.

ADV KATE HOFMEYR: Hm.

CHAIRPERSON: But did you - did you sign it?

MR TSOTSI: I signed it. Yes.

CHAIRPERSON: You sign - oh. Okay.

MR TSOTSI: I certainly signed it.

CHAIRPERSON: Okay. Okay. Hm.

MR TSOTSI: I think what was happening for me certainly was that, because I knew all the facts and I knew all the information.

CHAIRPERSON: Hm.

MR TSOTSI: I did not scrutinise the round robin. I mean there were mistakes which were quite glaring which when I looked - looked at them subsequently I realised that they should not have occurred, but they did occur and I assigned the document with those errors in it simply because I did not focus too much on the content of it and the reason
10 was because I was very familiar with what should be sent out to members and what had actually occurred.

ADV KATE HOFMEYR: Hm. Mr Tsotsi, is that not more of a reason to check that what was going out to them was accurately?

MR TSOTSI: No, no. Understand me. By the time I realised that there were these errors it was much - much later.

ADV KATE HOFMEYR: When about did you realise that there were the errors?

MR TSOTSI: This was a time when I recall one of the Board Members asking - I do not know whether it was Ms Klein or I cannot remember
20 who of them - asking me for clarification about something to do with the - this resolution. So I looked at it and I realised that there was a mistake here.

ADV KATE HOFMEYR: Did you ...?

MR TSOTSI: I think it had to do with whether Chose Choeu was still in the company or not. I think that was one of the things I see. I do not

remember who it was, but one of the Board Members was not - seemed to be confused about the fact that the round robin indicates that the people who were - the parties here were no longer in the - in the company.

ADV KATE HOFMEYR: Hm. Do you recall when that feedback came to you?

MR TSOTSI: No. I do not remember. I do not ... (intervenes).

ADV KATE HOFMEYR: Shortly after the round robin?

MR TSOTSI: It was shortly after the - this document was circulated.

10 **ADV KATE HOFMEYR:** Hm.

MR TSOTSI: Yes.

ADV KATE HOFMEYR: And then what steps did you take to correct the errors in the document?

MR TSOTSI: That was after the round robin had - had been circulated.

ADV KATE HOFMEYR: Hm.

MR TSOTSI: This was after the responses had come back and it was done.

ADV KATE HOFMEYR: So ...

20 **MR TSOTSI:** So I did not - at the time when I was informed I did not immediately go to the document. I just simply answered that individual to say no. The person you are concerned with is part - is still part of the business. He is in the - in the company.

ADV KATE HOFMEYR: Hm.

MR TSOTSI: But it was only afterwards when I then took the time to look at this document and I realised that ...

ADV KATE HOFMEYR: Hm.

MR TSOTSI: That is where the confusion came from.

ADV KATE HOFMEYR: So when did you take the time to look at the document and realise that there were errors in it?

MR TSOTSI: This was when the responses for the round robin had come in ...

ADV KATE HOFMEYR: Hm.

MR TSOTSI: From the various Board Members.

ADV KATE HOFMEYR: Hm, and before the meeting on 19 March?

10 **MR TSOTSI:** Yes. Oh. Yes.

ADV KATE HOFMEYR: Hm.

MR TSOTSI: It was before the meeting of 19 March. Yes.

ADV KATE HOFMEYR: Because I think on our record of the responses the last response came in on 16 February. So somewhere in February still.

MR TSOTSI: Somewhere in February.

ADV KATE HOFMEYR: Would that be fair?

MR TSOTSI: Yes.

ADV KATE HOFMEYR: And then when it became known to you did you
20 think it was necessary to go back to Board Members who had made -
who had cast their votes on a summary of facts that was false to alert
them to those errors?

MR TSOTSI: No. My expectation was that we would deal with those particular issues when we sit at the meeting.

ADV KATE HOFMEYR: On 19 February?

MR TSOTSI: When the next meeting would have been.

ADV KATE HOFMEYR: Yes.

MR TSOTSI: Yes.

ADV KATE HOFMEYR: Yes.

MR TSOTSI: On 19 March.

ADV KATE HOFMEYR: Yes. Did you raise the errors at that meeting?

MR TSOTSI: I do not recall specifically whether I raised the errors at that meeting, but there were some questions which came along ...

ADV KATE HOFMEYR: Hm.

10 **MR TSOTSI:** And I responded to some of them. I remember making an apology to some of the Board Members about something. I cannot remember exactly what it was ...

ADV KATE HOFMEYR: Hm.

MR TSOTSI: But I suspect it had to do with the fact that this document was not as it should have been.

ADV KATE HOFMEYR: Hm. You - you see Chair actually last night at 20 past seven we received a statement from Ms Naidoo who was one of the Members of the Board at the time and who had received a Rule 3.3 Notice consequent upon Mr Tsotsi's testimony. Among the documents
20 attached to her statement is a transcript that she made of the discussion; at the meeting of 19 March and she has furnished that to the Commission.

Between 20 past seven last night and this morning se asked our investigators to go back and get the recording. It has not been officially transcribed, but at least to sit with her transcription and the

recording to test if it is in the realm of accuracy and we have received confirmation today that it is.

I am going to take Mr Tsotsi to that in due course, but what is clear from the discussion at the meeting is when these issues are raised there is a point in the discussion where Mr Ngubane says in a sense;

10 “I do not know why we debating all of this. The vote has been cast. The resolution has passed, because you achieved the 75 percent vote on the resolution.”

Are you aware of that?

MR TSOTSI: I am aware - I am aware of the discussion - of the conversation pertaining to Mr Ngubane.

ADV KATE HOFMEYR: Hm. Hm.

MR TSOTSI: But the numbers at the time I probably was not - was not aware.

20 **ADV KATE HOFMEYR:** Certainly. We will - we will come to the transcript as we have it of that meeting, but at the moment what I am interested in is you - as I understand your evidence - had been alerted to the fact since this statement of facts went out and prior to 19 March meeting that this did not correctly reflect the facts related to the TNA Contract. Is that right?

MR TSOTSI: There were errors of omission.

ADV KATE HOFMEYR: Of omission?

MR TSOTSI: Yes.

ADV KATE HOFMEYR: Right. Well let us go to what is in fact stated here, because in the fourth line - we are at page 2-3-6. The fourth line there - well at least the fourth paragraph says:

“The (indistinct) the report at a special meeting ...”

That is a reference to the SNG Report that had been sought and obtained. It says:

“The (27:48) the report at the special meeting of the Board held on 8 December 2014.”

That is not correct. Is it?

10 **MR TSOTSI:** Absolutely.

ADV KATE HOFMEYR: No. It was presented to the Board on 24 November. Was it not?

MR TSOTSI: Yes.

ADV KATE HOFMEYR: Right. So that is the first of the errors as we have picked them up. The second appears on the same page, because it is that first bullet that you were going to earlier. It says:

“The parties that were involved in this matter are no longer within this sphere of Eskom’s operations.”

That is false too. Is it not?

20 **MR TSOTSI:** Absolutely.

ADV KATE HOFMEYR: Hm. Who was still within the sphere of Eskom’s operations?

MR TSOTSI: Mr Chose ...

ADV KATE HOFMEYR: Hm.

MR TSOTSI: Choeru.

ADV KATE HOFMEYR: Hm and then I had difficulty with this paragraph you might recall it from Mr Pamensky's evidence, because in that first sentence it is talking about parties which it is fair to assume is a reference to Mr Matjila and Mr Choeu, but then the - you see - then you lose all understanding, because the second sentence says:

“This emanates from the rotation of a former Board which took effect on 11 December 2014 and the appointment of a permanent Chief Executive.”

When you read that sentence it appears that we are only talking about
10 Mr Matjila. Does it not?

MR TSOTSI: Yes.

ADV KATE HOFMEYR: Because it's only Mr Matjila in respect of which the rotation of the Board would have impact isn't it?

MR TSOTSI: Correct yes.

ADV KATE HOFMEYR: And then in the last sentence the parties again, you're not clear who they are, involved, had divergent views on the specific aspects of the matter and as such scarce resource it will have to be deployed to bring these contentious matters to finality. What does that mean Mr Tsotsi?

20 **MR TSOTSI:** I'm afraid it doesn't make sense.

ADV KATE HOFMEYR: No.

MR TSOTSI: If the parties are the parties they talk about in the first line then it obviously doesn't make sense.

ADV KATE HOFMEYR: It doesn't make sense to you sitting here despite all your background, I wonder how much sense it made to the

new members of the Board that had to vote on it? Let's go to the second bullet; considering the representations made by the then interim Chief Executive. There exists a difference of interpretation regarding the provisions of the company's delegation that needs to be reviewed and clarified further in order to close any gaps which may be present, do you see that?

MR TSOTSI: Yes.

ADV KATE HOFMEYR: Now were you aware that at the time that Ledwaba Mzwai, the lawyers appointed to look at the legal aspects of this, were asked for their view on Mr Matjila interpretation of the delegation of authority. They had no difficulty rejecting his interpretation and saying that this was clearly a sponsorship and his attempts to justify it as an investment were unpersuasive, are you aware of that?

MR TSOTSI: Yes I am.

ADV KATE HOFMEYR: So why did you include in bullet that there was still a difference of interpretation, why not reflect the lawyers appointed by Eskom to look into the matter have concluded that there was no merit in Mr Matjila's suggestion that this was an investment?

MR TSOTSI: Chair I have – if I was to be – let's suppose I was one who wanted to include this sentence I would not construct it in this way, because it is confusing, but I would indicate that on the one hand the view of the lawyers is there is no merit in what Mr Matjila is contending. On the other the matter has not been tested in any kind of environment, particularly that Mr Matjila didn't have the opportunity to

represent himself on this issue.

So I think I would have dealt with it in that way.

ADV KATE HOFMEYR: Mr Matjila had made representations though on the issue hadn't he?

MR TSOTSI: Not to the Board, well he had made representation in writing but the idea was that he needed to substantiate himself.

ADV KATE HOFMEYR: Well he had resigned hadn't he?

MR TSOTSI: That's the reason why he was not able to do that.

ADV KATE HOFMEYR: But you – between the 3rd and 8th, remember
10 those two meetings at the end of last year, you end on the 3rd saying we have got to ensure the best value in this contract and the view of the Board is there isn't but we need to hear from Mr Matjila. The Board got Mr Matjila's representations on the 5th of December and so on the 8th of December the Board agrees there is no value in this contract and they want that reflected in the handover report for the next year. Do you recall those facts?

MR TSOTSI: Yes.

ADV KATE HOFMEYR: Yes. So Mr Madjila had been heard on this topic hadn't he?

20 **MR TSOTSI:** Well he had not been heard, he had only been represented.

ADV KATE HOFMEYR: Apologies, that's lawyer speak for he had made representations in writing, had he not?

MR TSOTSI: Yes that is a fact yes.

ADV KATE HOFMEYR: Indeed.

CHAIRPERSON: I guess he may not have been heard but he had been read.

ADV KATE HOFMEYR: Indeed, a far more accurate way to put the proposition, thank you Chair.

MR TSOTSI: I am not a lawyer Chairman.

ADV KATE HOFMEYR: Of course. Mr Tsotsi you said if you had constructed this bullet you would have framed it differently, who did construct it if you did not, who wrote this document?

MR TSOTSI: This document was prepared by then Secretariat. I don't
10 know Chair whether the – I should say anything about the way the Board operates and the processes that ...[intervenes]

CHAIRPERSON: Well you can if that might explain some of the things that somebody who might not know how the Board used to operate would not understand.

MR TSOTSI: Yes.

CHAIRPERSON: So it just depends if there is something that in terms of answering the question or any of the questions where you think that explaining, taking sometime to explain how the Board operated would throw light that's fine.

20 **MR TSOTSI:** I think I should Chair because I notice that Ms Hofmeyr has asked me a similar question.

CHAIRPERSON: Yes, no, no do share that with us.

MR TSOTSI: Would suggest that I would be expected to be involved. What happens is there is a clear delegation of authority in terms of how the secretariat should function *vis-a-vis* the service it provides to

the Board, and what happens is that documents which are meant for the Board are generated at the secretariat and when those documents have now got to be dealt with by the Board the head of the Secretariat would come to me and present those documents to say Chairman these are the things that we have put together, be the minutes or this kind of document etcetera, and we will sit and agree that these documents are in order or they are not in order.

So if there is something that is not satisfactory or something is a mess we would then say go back and deal with it and either correct or
10 whatever. If it means going back into the organisation to get more information or whatever you need to do you do that, but the documentation that will come back to me and then we will again look at it, and say right let's proceed on this basis.

Now in this instance we didn't do a proper job, quite clearly, so we vetted documents which we did not peruse carefully enough and hence these documents got into the Board system and should not have gotten into the Board system in the manner they are in now.

So in essence I don't get involved in the actual writing, I may get involved in formulation of something depending on what it is. If it
20 is not the normal process type things, if it's a letter which has to go about you know ...[indistinct] in Soweto or something like that for example then I would have to be involved directly in the construction of that particular document, especially documents that go to the public domain.

ADV KATE HOFMEYR: Mr Tsotsi thank you for you that, and in

fairness to you notwithstanding the background that you have given a moment ago I don't take you in your evidence to be shirking from your responsibility as the signatory of this document to have represented that the information was correct.

You see at the bottom it says you are in a sense confirming that the information above is correct, do you accept that was your responsibility?

MR TSOTSI: Yes.

ADV KATE HOFMEYR: Yes so then I would like to go to the point after
10 the bullet on page 237, because this is the one that probably represents the most egregious misrepresentation of the position because what's recorded there is the Board recognises that there is value in platforms that enable Eskom to interact with the public to communicate and garner support for the work that it is doing to ensure that South Africa has sufficient energy.

In this regard the contract provides an opportunity for Eskom to achieve the foresaid objective.

Okay, if we can just stop there. Remember the previous Board had concluded that there was not value in the contract, agreed?

20 **MR TSOTSI:** Yes.

ADV KATE HOFMEYR: And then previous Board had charged ...[intervenes]

CHAIRPERSON: Sorry Mr Tsotsi, I know it's late afternoon, make sure that your voice doesn't go down so it can be recorded properly. When you said yes your voice was quite low.

MR TSOTSI: Yes, yes Chair.

CHAIRPERSON: Okay thank you ...[intervenes]

ADV KATE HOFMEYR: And the Board ...[intervenes]

MR TSOTSI: Certainly there's a caveat there, but anyway we will talk about that.

ADV KATE HOFMEYR: The Board had also agreed ...[intervenes]

CHAIRPERSON: Well I am sorry, if there is a caveat and make sure that you put it because if you never put it the transcript won't read that there was a caveat.

10 **MR TSOTSI:** When we had a discussion as a Board, this was no on the either the 3rd or the 8th, when we were discussing the value of this contract the discussion was focused on the fact that the contract was irregular and it having been irregular had created a situation where Eskom was put in a position where the financial statements had to reflect this irregularity, and also the fact that the contract didn't have a termination clause so these issues were issues which the Board agreed certainly that they disadvantaged Eskom.

So the understanding that this is a bad contract stems from that, because those are facts that we had before us.

20 Now what we did not have as facts was the commercial value of the contract and like I say unfortunately what is written here does not make that distinction. The Board did not say that there is no commercial value in the contract, that was not raised with the Board, because the legal advisors said to us that the Board would need to verify that there is indeed commercial value in the contract, they were

not competent to pronounce themselves on that, nor did FMG go into that matter, hence Ludwaba Mzwai Attorneys suggested to us that – they in fact suggested we should go back to the auditors and ask them to do a commercial review of the contract.

Now the other aspect which was not known, I don't believe was known to the Board, was the fact that ordinarily in any contract that Eskom enters into the commercial value of that contract would be established in the process of negotiating that contract.

Now we were not privy to the fact that that did happen because
10 Mr Matjila did not avail himself for us to engage him on that particular matter. Hence in the legal advice that the lawyers gave us they did indicate that it would be prudent for us to engage with Mr Matjila, to establish whether in fact there was commercial value that he saw in the contract.

So I would say then in response to the question or to the observation that perhaps this paragraph does not do justice to precisely what the Board's intent was when they said this is a bad contract, that is my understanding.

ADV KATE HOFMEYR: Mr Tsotsi is your evidence before this
20 Commission that you circulated a Round Robin resolution to the Board of Eskom to approve a R43million contract for Eskom in circumstances where the Board of Eskom had not assessed the commercial value yet of that contract?

MR TSOTSI: The fact is that the Board did not assess the commercial value of the contract no, that is a fact.

ADV KATE HOFMEYR: So you asked the new Board to approve a contract in respect of which no assessment as to its value to Eskom had been done?

MR TSOTSI: Chair I don't believe that is a point for me, if you were to ask me why we ratify the contract I would simply say that is advice we got from our legal advisors.

CHAIRPERSON: Well I'm not sure if that is correct because as I understand your evidence and some of the documentation they answered certain things, that is your legal advisors, but they said when
10 it comes to whether this contract has commercial value we cannot tell you.

Now I was going to say this to you that my expectation would have been that whatever Board if they are asked or if they got to – or if an issue arises about any contract that management might have entered into or if they are asked to approve any contract the first thing would be how does this contract help us as Eskom, that goes to the commercial value.

Now of course there may be things that an entity such as Eskom might do which where they might not put commercial value quite
20 high up but there are other considerations because it is a public entity blah-blah-blah, but nevertheless I would expect that the Board would take a view on the commercial value and if they say the commercial value is not high but we are justified in doing it nevertheless because of A, B, C, D, at least they have applied their mind to whether what they are going to approve is something that

should be approved.

So my own idea or expectation is certainly that you should not ask a Board to extend or renew a contract if that question has not been resolved in your own mind, or at least you must alert them, but I would expect that is a question to be decided first before you say okay we renew, because if you renew and later on you find that there's no commercial value you are stuck with a contract and you might lose a lot of money.

10 That's my expectation, I don't know what you might have to say.

MR TSOTSI: Thank you Chair. I think what happened is that Ms Hofmeyr asked the question before I had the opportunity to explain previously to that what had transpired.

CHAIRPERSON: Okay, okay.

MR TSOTSI: And I think if the question was asked why did I ratify the contract I would then have dealt with what we are talking about now.

CHAIRPERSON: Okay, okay.

MR TSOTSI: So may I go into that?

CHAIRPERSON: Yes go into that.

20 **MR TSOTSI:** Because I think that will then help us in terms of the matter that you address now. Chair on the meeting of I think it's the third, I stand to be correct, either the third or the eight meeting, I am not exactly certain I think it was the 3rd, the lawyers were present in the meeting, and there were a few things which we were dealing with which they had observed in the SNG report, and one of which was the

value of the contract.

They said to us that in order for us to ratify the contract it would be advisable for us to establish whether there is value in the contract, meaning commercial value. And then they went on to say when they were now dealing with cancellation of the contract, they went on to say that if we took the route to cancel the contract we will be doing so with no legal basis to terminate.

So the Board was sitting with these two positions, and there was quite an extensive discussion in the Board about these two issues.

10 One of the things that was raised in the board meeting which was also a consequence of what our lawyers indicated is what were the consequences of cancellation of your contract.

So the discussion then narrowed to essentially between cancellation and ratification, which position are we going to be better in, the terms of securing the interest of the company, and as I say this is quite a long discussion.

At the end of it the conclusion was that we are better off ratifying the contract than terminating it. That is what transpired in, I am not sure whether it's the 8th or the 3rd, it was somewhere there,
20 where there is an indication that we had a discussion and the things that were on the table at the time were the things that I am just referring to now, the two positions, cancellation or ratification and the consequences of each of those positions.

So in response to what you said there were certainly a recognition that the best way to determine the value of the contract

would be to do – I mean a commercial value is to do some evaluation, some forensic enquiry into that aspect. But given all the considerations that were put on the table it was agreed or it was thought that the best thing to do would be to ratify the contract, considering what financial implications it would have if we did not ratify the contract.

ADV KATE HOFMEYR: Mr Tsotsi that's not reflected in the minutes of either the 3rd or the 8th of December and the reason why I raised with you is if your recollection is correct then the old Board would have
10 ratified the contract, wouldn't they?

MR TSOTSI: I am not saying that the old board would not have ratified the contract, I am just simply saying that in that discussion there was an indication that it is better for us to ratify the contract than not to ratify it or cancel it.

ADV KATE HOFMEYR: Are you suggesting that was a consensus position of the Board?

MR TSOTSI: No I don't think it was a consensus position, not in the sense of – this was not a Board meeting ...[intervenes] he sense of us having, sitting there on our own and sitting having a discussion. We
20 would have needed to sit down and meet and arrive at a solution.

ADV KATE HOFMEYR: Indeed.

MR TSOTSI: So that is not a consensus seeking meeting if you like.

ADV KATE HOFMEYR: No so there wasn't agreement on the 8th of December that it was better for Eskom to ratify the contract, was there?

MR TSOTSI: I am talking about a discussion that took place in front,

in the presence of our lawyers, what they said to us was that it would not be – I can't remember the words they used exactly but it would not be a good thing for us to cancel, rather it would not be – it would be advisable for us, if you like, not to cancel the contract because we don't have a legal basis for doing so. We would have to look at the specific minute as to what it is that it says.

ADV KATE HOFMEYR: That is a fair summary of the Ledwaba Mzwai advice, certainly, but where things ended on the 8th of December was that a whole lot of information was going to be put into handover reports confirming the position that the previous Board had taken that it was a bad contract, and you will have seen that didn't happen, correct?

MR TSOTSI: Yes.

ADV KATE HOFMEYR: Yes, and then when you circulated the Round Robin resolution you – statements are reflected in the summary of facts that suggest that there is value in the contract for Eskom, that's the paragraph we were looking at previously.

MR TSOTSI: This one yes.

ADV KATE HOFMEYR: Yes. Do you accept that that was not correct?

MR TSOTSI: Well insofar as it reflects the fact that there is no commercial value in the contract then I would say that should have been explicitly stated, but the way it appears here *vis-a-vis* what was said earlier, one would get the impression that there is no value in the contract.

ADV KATE HOFMEYR: Well I think on the contrary what is reflected there is that the contract does give commercial value and what I am

putting to you is that that either had not been established.

MR TSOTSI: Yes.

ADV KATE HOFMEYR: Or was in fact contrary to the view taken by the previous Board.

MR TSOTSI: No, I disagree. It was not contrary to the view that was taken by the previous Board. I agree with you when you say it was not established, that is correct, but the previous Board did not take a view that there is no commercial value in the contract.

ADV KATE HOFMEYR: Mr Tsotsi let's leave it there, previously in the
10 evidence, just to be fair to you, what we had established was that on the 3rd of December it was understood that commercial value needed to be established.

MR TSOTSI: Yes.

ADV KATE HOFMEYR: On the 5th of December Mr Matjila was given an opportunity and made representations about that very value. I can take you to his representations if you would like, because previously you seemed to indicate that he didn't address commercial value, he did. He went into some detail about it, he spoke about 17% score because you wouldn't have to go to the agency and he spoke about the platform
20 as "a phenomenal success for 49M" and then the Board met on the 8th of December and the recordings there are that an insistence was made by Ms Lethuli that the handover report reflect that it was the common position of the Board that it was a bad contract.

So what I would like to put to you for your comment at this point is if you read those events in context and as they develop over

time it is fair to understand what happened on the 8th of December was that the old Board had concluded, it regarded it as a bad contract, from a commercial value perspective, and it wanted that to be relayed to the new board.

Do you have a comment on that?

MR TSOTSI: My comment is quite clear in that my understanding of the reflection of that in the contract had to do with the way the contract was arrived at, and the fact that the provisions of the contract were not in Eskom's favour or advantage, but that in terms of the commercial
10 value of the contract we couldn't pass an opinion on that because that had not been done.

ADV KATE HOFMEYR: And by the time it was ratified that it had still not been done, correct?

MR TSOTSI: Yes.

ADV KATE HOFMEYR: If we can then move to the votes, Chair I want to deal with this briefly, because we concluded with Mr Pamensky's evidence on the basis that we actually weren't certain whether the Round Robin resolution had passed because we'd only managed to obtain records of nine responses and there was a total of 13 board
20 members and you need 10 to achieve a 75% requirement for a Round Robin resolution to pass, but Ms Naidoo overnight actually has provided us with the requisite information there and that is the transcript of the meeting that occurred on the 19th of March Mr Tsotsi.

It is not necessary to go there, it is in the record now, we have placed her statement and its annexures at the back of Mr Tsotsi's

bundle. The upshot of it is that they did actually receive ten responses and the only members of the Board who did not vote in favour of the resolution were Ms Kline, the finance director at the time, Ms Molefe, and Mr Baloyi, but nonetheless the matter is taken up at the 19th of March meeting, is that correct?

MR TSOTSI: Yes the matter was dealt with on the 19th.

ADV KATE HOFMEYR: Why was it dealt with at the 19th March meeting if the resolution had already passed?

MR TSOTSI: No I think what the intention was, first of all was to
10 report what the resolution's outcome was and there was outstanding issues that were addressed which needed to be dealt with and that was the issue of the action that should be taken in respect of Mr Majila and Mr Choeu, the disciplinary processes.

ADV KATE HOFMEYR: Let's come to that in a moment, one thing just in relation to the round robin resolution, I forgot to ask, you didn't attach a copy of the actual contract that the new Board was being asked to ratify when you sent out the round robin resolution, why was that excluded?

MR TSOTSI: My recollection Chair if I can recall, was that it was
20 meant to be included and secondly that it was intended also to be included in the hand-over notes that we'd asked to be handed over to the new Board. So I was not aware that these things had not happened.

ADV KATE HOFMEYR: And you also mentioned earlier that you would have expected that all of those minutes of the previous meetings,

to show the deliberations that the previous Board had, had on the matter would also be made available to the new Board is that right?

MR TSOTSI: Correct.

ADV KATE HOFMEYR: None of that was accompanied at the round robin resolution either did it?

MR TSOTSI: No I discovered, no.

ADV KATE HOFMEYR: So would you say it's fair that the set of facts about this contract that the new Board was equipped with, when they received your round robin resolution, were incomplete and in some
10 respects incorrect?

MR TSOTSI: They were incomplete yes and in some respects incorrect, yes.

ADV KATE HOFMEYR: And by the time we get to the 19 March meeting you've been alerted to some of these errors, why did you not, at that point, think they should be raised with the Board?

MR TSOTSI: You see, I did indicate to you that by the time I established what had actually happened we had the responses from the Board members and in fact it was as a consequence of my receiving the responses that I now looked at the round robin and realised that there
20 were errors in it, so I then thought, the best thing to do would be to try and deal with those issues in the next Board meeting which was on the 19th and see if we can address them but at that meeting because I didn't see the need to call a special Board meeting for that purpose.

ADV KATE HOFMEYR: Mr Tsotsi we have an excerpt of the recording that's been transcribed by Ms Naidoo, I have to say to you I

have not listened to the full recording, this was brought to our attention last night but did you ever, in that meeting, say to the Board members,

“I’ve now identified that there were factual errors in what you were given when you made this decision previously and I need you to know what they are and take matters from there”.

MR TSOTSI: Chair I don’t recall specifically that, that is the case but what I can recall is that the Board members had raised the fact that there was some information that they did not have that would have helped them to make – in their decision making and I think I responded
10 at that time, in terms of the fact that I did notice that there was information that was missing that should have been there. I don’t recall, myself initiating the conversation as you’ve put it.

ADV KATE HOFMEYR: Mr Tsotsi I would then like to move to that issue of the disciplinary action against either Mr Majila or Mr Choeu, right because you’ve already identified that the round robin resolution was inaccurate insofar as it conveyed that Mr Choeu was no longer within the employ of Eskom. Why were disciplinary steps never taken against Mr Choeu?

MR TSOTSI: Chairman the ...[intervenes].

20 **CHAIRPERSON:** I’m sorry Ms Hofmeyr, please don’t forget your question. Just to take one step back, you said that you don’t recall ever having said to the Board members, I’ve discovered or I’ve realised that you were not given a complete picture before you made a decision on the round robin on this contract, do you accept that after you had realised that they were not given a complete picture, do you accept that

you should have said that to them, you should have alerted them to the fact that they were not given an accurate picture or a complete picture because there were certain omissions?

MR TSOTSI: Chair I accept that I should have done that but my intention was to do it at the meeting.

CHAIRPERSON: No, no, no I accept – I'm not particularly talking about you doing it at a particular time. I'm just asking whether, at some state, there is a time when you obviously it should have been as soon as possible, whether you did, at some stage say to the Board, I've
10 had a look again at the document that was given to you as setting out the facts and on the basis of which you took the decisions you took but I've realised that it was not complete, the picture was not complete and I'd like to tell you exactly what you were not told and then take it from there. So you accept that you should have done that at some stage?

MR TSOTSI: Yes.

CHAIRPERSON: And you say you did not, as far as you can recall did do it at any stage.

MR TSOTSI: Not immediately after I'd seen what had happened yes.

CHAIRPERSON: Yes but you can't remember why you wouldn't have
20 told them after you'd realised it because it seems to me a natural thing to do because that document had your signature, not only that, in it you were warranting that the facts given above were correct and if there were omissions of material facts, that they should have been included, then you would have been concerned that they made decisions on the basis of an assurance by you that these facts were correct, when in

fact they might not have been correct by virtue of the fact that certain material facts were not included.

MR TSOTSI: I do take the point Chair, I think the meeting was – a matter of a week or so prior to my observation here so I – to my mind I just thought, well the Board is going to be gathering soon so that will be an opportunity for me to indicate what I'd seen to them.

CHAIRPERSON: Ja I'm not sure if we are not at cross-purposes. Did you, at the next meeting whatever meeting that you are talking about, did you then say this to them?

10 **MR TSOTSI:** I don't recall Chairman whether I actually said that to them I would have to look at the minutes.

CHAIRPERSON: Okay.

MR TSOTSI: I honestly don't recall.

CHAIRPERSON: But you would expect that it was something that you would do?

MR TSOTSI: I would expect it's something I would do certainly yes.

CHAIRPERSON: Yes, okay, alright thank you.

ADV KATE HOFMEYR: Mr Tsotsi I can alert you to the fact that it's not minutes, that you drew any attention to the Board members that
20 there were errors in the round robin resolution that you circulated and certainly in the transcript that we've received, there's no indication but we will listen to the full recording and if there's any issue arising we'll alert you but as we have it today you did not flag that issue at the 19 March meeting. Chair if I may we are shortly before four and I just wondered what the arrangements will be, if we'll sit a bit later, how

would you like to continue?

CHAIRPERSON: One, I can sit beyond 4 o'clock but not much beyond because of a commitment I have at five. So we could sit maybe until about twenty-five past four or so.

ADV KATE HOFMEYR: Certainly.

CHAIRPERSON: How long do you think we need before Mr Tsotsi's is able to finish his evidence?

ADV KATE HOFMEYR: I'm optimistic we'll finish in that time, I have two further topics, simply the disciplinary process and then the
10 engagements with the Public Protector.

CHAIRPERSON: Yes okay no that's fine and in terms of the other witness's tomorrow, how does it look like?

ADV KATE HOFMEYR: Well we have three which is generally quite a tall ask to complete them all, would it be convenient to start a bit earlier tomorrow just so that we can try and ensure completion, they are all actually shorter witnesses certainly.

CHAIRPERSON: No there is a chance we could start maybe at half past nine.

ADV KATE HOFMEYR: Indeed.

20 **CHAIRPERSON:** Ja we could possibly look at starting at half past nine. Mr Tsotsi will it be fine with you if we go beyond our normal time for adjournment maybe beyond 4 o'clock to about twenty-five past?

MR TSOTSI: Yes Chair.

CHAIRPERSON: It will be fine okay, I think I would like to take a very brief adjournment and then we can – five minutes and then we come

back.

ADV KATE HOFMEYR: Chair may we release the witness who would have started today but who will be starting then tomorrow morning?

CHAIRPERSON: Ja that's fine.

ADV KATE HOFMEYR: Thank you.

CHAIRPERSON: Okay we'll take five minutes adjournment, we adjourn.

INQUIRY ADJOURNS

INQUIRY RESUMES

10 **CHAIRPERSON:** Thank you. Let us proceed.

ADV KATE HOFMEYR: Thank you Chair. Chair, just before an interaction between you and Mr Tsotsi I had asked the question why was Mr Choeu not disciplined. Can you give us your answer to that Mr Tsotsi?

MR TSOTSI: Oh. Okay. Thank you. Chair, I understood the process would be that we needed to finish with the issue of the contract first and foremost. Following that then focus on the issues around the disciplinary processes. Now by the time we got to that stage I was about to leave the company.

20 In fact I had left at the end of that month. So I do not know what happened subsequently. Whether the Board continued to pursue that issue.

ADV KATE HOFMEYR: Had you remained on the Board would you have taken it up?

MR TSOTSI: Yes. It was part and parcel of what the fiduciary duty of

...

ADV KATE HOFMEYR: Hm.

MR TSOTSI: The Board Members was or is. So clearly I would - would have had to have pursue. We would have had no choice but to pursue it.

ADV KATE HOFMEYR: Indeed. Let us move then to the topic of the Public Protector if we may, because you will recall I took you previously to a letter that you received on 29 October 2014. It was just after the media had begun reporting about this TNA Contract for 43 million ...

10 **MR TSOTSI:** Hm.

ADV KATE HOFMEYR: And Ms Madonsela - the former Public Protector - said to you I am going to include this in my investigation, because she had a pre-existing investigation. I am concerned. Please hold over - I think she said held in a - hold in abeyance the contract and then she wanted certain information from you.

Mr Tsotsi, you then responded to her and your letter responding to her is at page - in your bundle MM6 - at page 4-4-4.1.

CHAIRPERSON: Page 4-4 ...

ADV KATE HOFMEYR: Four. Three fours.

20 **CHAIRPERSON:** *Ja*. Point one?

ADV KATE HOFMEYR: Point one. Indeed Chair.

CHAIRPERSON: Okay.

MR TSOTSI: 4-4-4?

ADV KATE HOFMEYR: Yes. Point one.

MR TSOTSI: Point one. Okay.

ADV KATE HOFMEYR: Now you will recall previously she had asked for a copy of the contract and a copy of Board Minutes dealing with the issue. Right. Now you respond. This is a letter dated 9 December 2014 from yourself - if you go over the page to Ms Madonsela. I - I note that it is not signed. Do you recall this letter?

MR TSOTSI: I recall the - the requirement to respond to her. Yes.

ADV KATE HOFMEYR: Hm. Hm. Do - do you remember writing this letter or - or at least reviewing it before it was sent out?

10 **MR TSOTSI:** It would have come to my office. I would have sat down and discussed it.

ADV KATE HOFMEYR: Hm. Hm.

MR TSOTSI: And before I signed it.

ADV KATE HOFMEYR: Right and do you recall signing it, because we just have not been able to find a - find a signed version.

MR TSOTSI: I would have ...

ADV KATE HOFMEYR: Hm.

MR TSOTSI: Would have had to sign it. Yes.

ADV KATE HOFMEYR: Hm. Hm.

20 **MR TSOTSI:** It would have gone out in - in my signature.

ADV KATE HOFMEYR: Right. It seems to have been reviewed at least over the page by someone in the Content Development and Language Services. Does that mean anything to you that stamp?

MR TSOTSI: Yes. Yes.

ADV KATE HOFMEYR: What does that mean?

CHAIRPERSON: I am sorry. Where is the - the stamp you are talking ...

ADV KATE HOFMEYR: Apologies. At page 4-4-4.2.

CHAIRPERSON: Yes.

ADV KATE HOFMEYR: Chair, I - I mean I am calling it a stamp. Maybe that is - there is a block in blue.

CHAIRPERSON: Oh. The one at the bottom?

ADV KATE HOFMEYR: Yes. It seems to say reviewed. What does that signify Mr Tsotsi?

10 **MR TSOTSI:** What happens is that any document that goes out in - in the name of a Chairman certainly is subjected to an - a language review.

ADV KATE HOFMEYR: Oh. Right.

MR TSOTSI: So we have people who look - they will look at - if - if the Legal Department produces ...

ADV KATE HOFMEYR: Hm.

MR TSOTSI: A letter.

ADV KATE HOFMEYR: Hm.

20 **MR TSOTSI:** That letter has got to go to the Language Department for correctness to make sure that it is correct in - in language.

CHAIRPERSON: Hm. Hm.

ADV KATE HOFMEYR: So this had been reviewed. Is that correct?

MR TSOTSI: That is what this means. Yes.

ADV KATE HOFMEYR: Right. Let us go back ...

CHAIRPERSON: I am sorry. So sometimes it would be reviewed by the

Legal Department. Sometimes by somebody else or was there always the same unit that would review?

MR TSOTSI: No Chairman. It is the same unit. It does not matter which part of the business ...

CHAIRPERSON: Yes.

MR TSOTSI: The letter comes from.

CHAIRPERSON: Yes.

MR TSOTSI: It would go to this unit ...

CHAIRPERSON: Yes.

10 **MR TSOTSI**: And they would look and - and examine it for correctness in terms of language.

CHAIRPERSON: Oh. So the - the focus was the language?

MR TSOTSI: Focus is the language.

CHAIRPERSON: Language ...

MR TSOTSI: And presentation.

CHAIRPERSON: Language and presentation?

MR TSOTSI: Yes.

20 **CHAIRPERSON**: Okay. I thought that when for example you talked about it going to the Legal Department. I thought maybe it is just for checking things that may be related to law especially if it is about contracts and so on or did it encompass everything?

MR TSOTSI: No. It did not. The example of the law - Legal Department simply says the Legal Department would take if it is a legal matter.

CHAIRPERSON: Hm.

MR TSOTSI: They would then do the legal then ...

CHAIRPERSON: Hm.

MR TSOTSI: And when they are done ...

CHAIRPERSON: *Ja.* Bring it back to you.

MR TSOTSI: They would bring it to the Language Department.

CHAIRPERSON: Oh. Okay ...

MR TSOTSI: And ...

CHAIRPERSON: But in - if for example it was your letter such as this one was.

10 **MR TSOTSI:** Yes.

CHAIRPERSON: Would the - would the position not be that after they have done whatever including this group. It would come to you ultimately before you sign just to check whether whatever corrections or amendments they may have done still reflects what you wanted to convey?

MR TSOTSI: Yes. Certainly

CHAIRPERSON: So they would do the reviewing before you sign?

MR TSOTSI: Oh. Absolutely.

CHAIRPERSON: Oh. Okay. Alright.

20 **MR TSOTSI:** It is a question of the letter going via ...

CHAIRPERSON: Yes. Okay.

MR TSOTSI: Them.

CHAIRPERSON: Okay.

ADV KATE HOFMEYR: Hm.

CHAIRPERSON: No. That is fine.

MR TSOTSI: From where it - from whatever source it comes from.

CHAIRPERSON: Okay. Okay.

MR TSOTSI: Yes.

ADV KATE HOFMEYR: Indeed. Thank you Chair. Mr Tsotsi, if we go to page 4-4-4.1 which is the first page of the letter. You record there certain matters that were discussed between officials of Eskom and the Public Protector at a meeting on 27 November and what I am interested in is paragraph 2.2. You say that:

10 “At that meeting what was discussed was that the
 new contract concluded between Eskom and TNA
 Media is a different type of contract ...”

 That is a reference to different to the previous two, because she was already investigating those two pursuant to her inquiries in August and it goes on and says:

 “...and that in Eskom’s view the two matters should
 be investigated separately by the Public Protector’s
 Office. As they arrived from two different contracts
 albeit between the same parties.”

20 Did you hold that view at the time that they were two different
 contracts and should be dealt with - that they were different types of
 contracts and should be dealt with separately?

MR TSOTSI: On - on the basis of the explanation that was given to me.

ADV KATE HOFMEYR: Hm.

MR TSOTSI: This is what I understood. Now I am limited in the knowledge that I would have ...

ADV KATE HOFMEYR: Hm.

MR TSOTSI: To the extent of what they have to tell me.

ADV KATE HOFMEYR: Hm. Hm.

MR TSOTSI: So I have to accept what they are telling me, because that is the information that they have in their - in their files or possession or ...

ADV KATE HOFMEYR: Hm.

MR TSOTSI: They - they have been involved in these issues. So I would have no choice but to ...

10 **ADV KATE HOFMEYR:** To rely on that?

MR TSOTSI: Rely on what they had to say.

ADV KATE HOFMEYR: Hm. The reason why I ask it is, because when you started your testimony and both in your affidavit to the Commission and your statement to the Portfolio Committee you regularly referred to the contract as a renewal. Do you remember that?

MR TSOTSI: Yes.

ADV KATE HOFMEYR: And in your testimony you said you were told that when you first came. It was a renewal and it is against that backdrop that I am querying why you would then be saying to the Public
20 Protector it is a different type of contract if the prior understanding was it was a renewal of an existing contract.

MR TSOTSI: Yes. I only be - began to understand you know what - what in fact this last TNA Contract was. The one - the one we were involved with now. Only when we went into the inquiry with the SNG and that matter came to the Board. It is then I understood that in fact

this is a separate - separate contract to the previous ...

ADV KATE HOFMEYR: Hm.

MR TSOTSI: Ones that they were - that they were engaged in. So all along I was under the impression that they were as a continuity of what had been - happened before.

ADV KATE HOFMEYR: But at least by the time you did your affidavit for the Commission and the statement to the Portfolio Committee you had understood that it was a new contract. Is that right?

MR TSOTSI: Yes.

10 **ADV KATE HOFMEYR:** Okay, but you still described it as a renewal?

MR TSOTSI: I - it must have been a - I think it is just ...

CHAIRPERSON: Got too accustomed to it.

ADV KATE HOFMEYR: Hm.

MR TSOTSI: Yes.

CHAIRPERSON: You must have got too accustomed to saying it is a renewal.

MR TSOTSI: Yes.

ADV KATE HOFMEYR: Right, because the renewal makes it sound like it is something that was existing and it is easy to just roll over.

20 **MR TSOTSI:** *Ja.*

ADV KATE HOFMEYR: Does it not?

MR TSOTSI: Yes.

ADV KATE HOFMEYR: Yes, but it was an entirely new contract for 43 million. Correct?

MR TSOTSI: (No audible reply).

ADV KATE HOFMEYR: And then if we go to paragraph 3. You say:

“As agreed in the meeting referred to above I attach for your attention a copy of the new contract between TNA and Eskom.”

So certainly you - you ensured that Ms Madonsela got a copy of the contract, but as we have seen previously unfortunately the Board itself did not get a copy.

MR TSOTSI: Yes.

ADV KATE HOFMEYR: Correct?

10 **MR TSOTSI:** Yes.

ADV KATE HOFMEYR: And then you go on and you say:

“I am not however able to provide you with the minutes of the Board Meetings and the pursuant resolutions at which the new agreement was deliberated upon. As this matter was never discussed by the Eskom Board of Directors.”

Do you see that?

MR TSOTSI: Yes.

ADV KATE HOFMEYR: Why would you have said that Mr Tsotsi on
20 9 December when the Board of Eskom had discussed this at three previous meetings over the course of the last few weeks?

MR TSOTSI: The reason is because the Public Protector was not talking about those discussions.

ADV KATE HOFMEYR: Oh.

MR TSOTSI: I understood in her letter to me to - be talking about the

discussions that brought about the signature of the contract. The engagements that took place and I suppose she was under the impression that the Board would have been involved ...

ADV KATE HOFMEYR: Hm.

MR TSOTSI: In the engagement that took place to the conclusion of the contract and I think if you look at her letter that is what it sounds to me like. So I was responding to that.

ADV KATE HOFMEYR: To - to meetings of the Board prior to the conclusion of the contract.

10 **MR TSOTSI:** That is correct. Yes.

ADV KATE HOFMEYR: Is that correct?

MR TSOTSI: Yes.

ADV KATE HOFMEYR: Thank you and tell me she then responds on 15 December. You will see that at page 4-4-5. She refers to your letter of 9 December and what I would like to just draw attention to. She does not agree at paragraph 2 that these contracts are different, but she goes on at paragraph 3. That is over the page at 4-4-6 to say:

20 “As I am still investigating the previous contract I believe it would have been prudent or *bona fide* of Eskom not to proceed with the conclusion of the current contract pending the issuing of my final report and/or having apprised me of such explorative meetings prior to concluding the current contract.”

Do you see that?

MR TSOTSI: Yes.

ADV KATE HOFMEYR: She - she is in a sense saying I have already flagged an issue here and yet you have gone off and conclude another contract for 43 million and at paragraph 6 she implores Eskom again as she did previously in August that:

“Eskom’s current sponsorship deal with the TNA should be held in abeyance pending the release of my provisional report as well as the conclusion of the fact finding review by the Board.”

10 Do you see that?

MR TSOTSI: Yes.

ADV KATE HOFMEYR: Mr Tsotsi, your statement of fact and your round robin resolution that was circulated to the Board did not refer to this at all. Did it?

MR TSOTSI: No.

ADV KATE HOFMEYR: Did you - do you not think it - you ought to have conveyed to the new Board that this was a matter that was receiving the attention of the Public Protector and that she had requested that you hold in abeyance your decision until she had
20 released her report on these matters?

MR TSOTSI: It could have been useful to - to ...

ADV KATE HOFMEYR: Hm.

MR TSOTSI: To inform the Board, but in terms of what the content of what she is addressing here Chair. When I asked our lawyers - internal legal people - how do you respond to this, because I - I noted this in

particular and I said. There is a signed contract in the hands of the service provider and I said TNA.

How do you go to them and say can we hold this contract in abeyance and I did not quite understand what holding a contract in abeyance means. I had to ask. I understood it to mean to halt the contract.

ADV KATE HOFMEYR: Hm.

MR TSOTSI: So I was told that they were not able to perform that particular function - whatever it was - to hold the contract in abeyance.

10 That is something they could not do, because the contract is already commenced. So the response that I was looking for was to say can we then comply with what the Public Protector is asking us here and the response I got was that we could not.

ADV KATE HOFMEYR: Hm.

MR TSOTSI: I - I do not recall how I responded to this in a letter, but I - I do remember dealing with this issue of abeyance, because I did not understand what it was about ...

ADV KATE HOFMEYR: Hm.

20 **MR TSOTSI:** And like I say what I was told was that it means holding the contract. Like suspending it. So - so to speak.

ADV KATE HOFMEYR: Hm. Mr Tsotsi, just one or two final questions. Was it ever considered by the Board to approach TNA and say to TNA this contract was concluded without the requisite authority and a termination clause was removed from the contract despite legal advice within Eskom and we want to renegotiate a new contract?

MR TSOTSI: No. That is - that never came up.

ADV KATE HOFMEYR: Hm.

MR TSOTSI: That did not come up.

ADV KATE HOFMEYR: Do you think it might have been an option?

MR TSOTSI: In fact it was an option in - in a sense. In that it was mentioned in the Ledwaba Mazwai Report ...

ADV KATE HOFMEYR: Hm.

MR TSOTSI: But what they said - what the lawyer said was that it would be dependent on the good will ...

10 **ADV KATE HOFMEYR:** Hm.

MR TSOTSI: Of TNA and I at that time I was under the impression that I did not think Eskom would see any good will from TNA under those circumstances.

ADV KATE HOFMEYR: It was a substantial supporter of TNA. Was it not?

MR TSOTSI: Yes, but then it will be Eskom's initiative ...

ADV KATE HOFMEYR: Hm.

MR TSOTSI: To have to go to TNA and say can we renegotiate the contract for these various reasons.

20 **ADV KATE HOFMEYR:** And Mr Tsotsi, a last question from my side. At no point did you - this is a question. Did you at any point receive advice that you could have gone to court to set aside the contract to extricate yourself from it, because it had been irregularly concluded?

MR TSOTSI: No. That advice we did not get and I - I did not know there was such a thing ...

ADV KATE HOFMEYR: Hm.

MR TSOTSI: But I understood much - much later there was something to that effect, but we did not get that advice.

ADV KATE HOFMEYR: Right. Chair those are our questions. I - I have been informed by the lawyers for Mr Tsotsi that they would like an opportunity to re-examine on two or three aspects, but they have requested that they may be afforded an opportunity to do so at the commencement tomorrow morning. We are quite close to the conclusion time.

10 **CHAIRPERSON:** Ja. Okay. No. That is fine. At the commencement of Mr Tsotsi's evidence you mentioned that he may have knowledge of more things that the Commission would like to hear about than what you were going to ask ...

ADV KATE HOFMEYR: Yes.

CHAIRPERSON: Him about today. Do - do you know whether the plan to make sure that the Commission - he comes back in regard to such matters is in place?

ADV KATE HOFMEYR: It - it certainly is.

CHAIRPERSON: It is.

20 **ADV KATE HOFMEYR:** It is an aspect of the investigations that are being conducted and will be presented in the next Eskom session.

CHAIRPERSON: Oh.

ADV KATE HOFMEYR: That ...

CHAIRPERSON: In Phase 2 of Eskom?

ADV KATE HOFMEYR: Indeed. That is my understanding. Yes.

CHAIRPERSON: Oh. Okay. No. That is fine. I think I - I may have one or two questions for Mr Tsotsi. Can I take you back to the time when you received Mr Essa's email about the allocation of responsibilities or allocation of Members of the Board to various committees and when you received the Minister's allocation?

Now is there any Member of the Board or any Member of the Board or any other person even if they are not Members of the Board with whom you ever shared this information to say you know what something very strange happened. I got an email from somebody
10 outside of Eskom telling me that the allocations should be like this and then later on I got exactly the same allocations from the Minister.

Is there somebody else with whom you ever shared that kind of inform - that information who could be approached to - and might be able to - to say yes. Actually Mr Tsotsi shared this with me and maybe I was shocked how - how that could have happened.

MR TSOTSI: Chairman, I do not - I do not recall that there is someone I - I shared ...

CHAIRPERSON: With whom you shared that?

MR TSOTSI: Yes. What - what I did. I have or I had an Executive who
20 worked in my office. Who was in my office full time ...

CHAIRPERSON: Yes. Yes.

MR TSOTSI: And he would work with me ...

CHAIRPERSON: Hm.

MR TSOTSI: On - on this kind of thing ...

CHAIRPERSON: Yes. Yes.

MR TSOTSI: And quite honestly I do not recall whether he was actually there, because you know this was December ...

CHAIRPERSON: Yes. Yes. There was a skeleton staff.

MR TSOTSI: And a lot of people had gone on leave ...

CHAIRPERSON: Yes.

MR TSOTSI: And I do not recall that he was around at the time when this was happening.

CHAIRPERSON: Yes.

MR TSOTSI: I - I could have Chair. I could have in passing just said
10 to him. Hey man listen.

CHAIRPERSON: Yes.

MR TSOTSI: This is what is going on. I - I do not really recall.

CHAIRPERSON: Yes.

MR TSOTSI: Yes.

CHAIRPERSON: Well I ask because it might help if the - if there was, because my own thinking is that it is the kind of thing that might stick in somebody's mind. Especially if it was a Board Member, but maybe with somebody else to say how - how is it possible. Unless the Minister and Mr Essa had some communication about this.

20 **MR TSOTSI:** *Ja.*

CHAIRPERSON: So if after today you - you do recall that you shared it with somebody or if the Executive that you said was working in your office. If he - he remembers please get in touch with the Commission. So that somebody can interview that person and take a statement.

MR TSOTSI: I will do that Chair.

CHAIRPERSON: Yes. There was a - okay. Maybe this - you must tell me if what I am going to ask is something that belongs to the evidence that you are still going to - to bring. Earlier on when you were telling me what transpired when you met with Mr Tony Gupta and he was asking you about the contract and what was happening.

You said that you referred to him having said something. I do not know whether which reaffirmed what you were thinking or something quite - quite more remarkable later on. Did you recall talking about that?

10 **MR TSOTSI:** Yes. Yes. I do.

CHAIRPERSON: Yes. Is that something that will come with your evidence that you are still going to bring?

MR TSOTSI: Yes Chair, because I already - as Ms Hofmeyr was saying I have already - I am about to submit another affidavit ...

CHAIRPERSON: Okay and it will cover that.

MR TSOTSI: And I have had a meeting with the ...

CHAIRPERSON: Yes.

MR TSOTSI: With the Commission on this ...

CHAIRPERSON: Okay.

20 **MR TSOTSI:** And we have been through that material.

CHAIRPERSON: Okay. Okay.

MR TSOTSI: As it appeared also in my - in my submission to the Portfolio Committee.

CHAIRPERSON: Yes. Okay.

MR TSOTSI: So I will be going back to that ...

CHAIRPERSON: Yes. Okay. No. Thank you.

MR TSOTSI: And I dare say Chairman that it looks like in my retirement I am working for the Commission. Maybe - maybe there should be some concentration of some kind or another.

CHAIRPERSON: Well some - some people say they become busier after retirement ...

ADV KATE HOFMEYR: Indeed.

CHAIRPERSON: Than before. Thank you very much Mr Tsotsi. Thank you for coming to share with the Commission what you know about
10 these matters. We will see you again, but now you are excused.

MR TSOTSI: Thank you Chair.

CHAIRPERSON: Thank you.

ADV KATE HOFMEYR: Chair, if I may just raise one point. It will literally be a minute.

CHAIRPERSON: Yes. Yes.

ADV KATE HOFMEYR: The Secretariat has informed us over the course of today that they have received correspondence from Mr Gigaba indicating that he had not been given prior notice about the testimony of Mr Tsotsi today insofar as that question of Mr Matjila's
20 appointment is concerned.

CHAIRPERSON: Yes. Yes.

ADV KATE HOFMEYR: His absolutely correct. He was given no prior notice.

CHAIRPERSON: Yes.

ADV KATE HOFMEYR: I would like to just indicate why that is the

case.

CHAIRPERSON: Yes.

ADV KATE HOFMEYR: It is because no aspect of Mr Matjila's appointment ...

CHAIRPERSON: Yes.

ADV KATE HOFMEYR: At that evidence that Mr Tsotsi gave today was traversed in his affidavit to the Commission and Rule 3.3 Notices are sent out based on the evidence that it is known ...

CHAIRPERSON: Hm.

10 **ADV KATE HOFMEYR:** To the Legal Team of the Commission will be given.

CHAIRPERSON: Yes.

ADV KATE HOFMEYR: Nonetheless clearly it has come to Mr Gigaba's attention. Had it not I - I had actually at the time sent a note to my learned friend, Mr Mbikiwa that we should do a Rule 3.3 Notice following the evidence ...

CHAIRPERSON: Yes. Yes.

ADV KATE HOFMEYR: But he has been alerted to it and we will engage him about any submission he wishes to make.

20 **CHAIRPERSON:** Okay.

ADV KATE HOFMEYR: I did just want to make that note publically.

CHAIRPERSON: Yes. Okay. No. That is fine. We will adjourn then and then tomorrow we will start at half past nine. Is that right.

ADV KATE HOFMEYR: Indeed Chair.

CHAIRPERSON: For today then the proceedings are adjourned.

REGISTRAR: All rise.

INQUIRY ADJOURNS TO 24 JANUARY 2020