

COMMISSION OF INQUIRY INTO STATE CAPTURE

HELD AT

PARKTOWN, JOHANNESBURG

10

20 FEBRUARY 2019

DAY 52

20

PROCEEDINGS HELD ON 20 FEBRUARY 2019

CHAIRPERSON: Good Morning Mr Maleka, good morning everybody.

ADV VINCENT MALEKA SC: Good morning Chair.

CHAIRPERSON: Yes Mr Maleka.

ADV VINCENT MALEKA SC: Chair today marks the beginning of a different chapter of your mandate that relates to allegations of the state capture project concerning state owned entities.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: You will recall that that part of your mandate is
10 articulated in paragraphs 1.4 and 1.5 of the terms of reference. Of course it is common
knowledge that the number of state owned entities that are affected or implicated in
allegations relating to the state capture project. But we thought it appropriate to
transition the evidence you have heard thus far relating to paragraphs 1.1 to 1.3 of the
terms of reference to this chapter of your mandate by introducing Eskom as the first
state owned entity. We do so because of the fundamental importance of Eskom not
only in relation to our economy but also in relation to the huge procurement budget that
is has and which was targeted in the course of allegations relating to state capture
project. I can assure you that we were not the first to consider Eskom as the priority.
You will recall that the portfolio committee on state owned enterprises of the national
20 assembly did conduct investigations relating to state capture of different entities. And it
too decided to prioritise Eskom in the course of its investigation. May I pause here and
read out for you part of the reasons or rationale articulated by the portfolio committee
when it prioritised Eskom in its investigation. I read from the report which is part and
parcel of the documents presented before you and which I will take you through. For
now Chair can I ask you to go to Volume 3 of the documents that I described as the

Eskom Reports?

CHAIRPERSON: Yes I have got it.

ADV VINCENT MALEKA SC: I will indicate to you how these documents have been prepared and how we propose to present them before you. But for illustrative purposes you will see that Volume 3 begins with an internal index of that volume. And you will see that the index has two items that refers to two reports. The first is the undated report which we describe as the draft report.

CHAIRPERSON: Ja you referring to the table of contents.

ADV VINCENT MALEKA SC: Yes Chair.

10 **CHAIRPERSON**: Ja okay.

ADV VINCENT MALEKA SC: And the second is the report of the same committee dated the 28 November 2018 which we consider to be the final report. There is some difference between the two reports but of no material consequence in terms of substance. It relates to questions of style, formatting and reduction of volume from one as against the other. But for now and for the purposes of my introductory remarks may I ask you to go to internal pagination 0662.

CHAIRPERSON: Oh before we go there you were at the table of contents. The first report you referred to is it the one under 1 part A and then there is two part B or it is something else?

20 **ADV VINCENT MALEKA SC**: Yes. You will see that the first is item or file number 3.

Are you – are you in Volume 3 Chair?

CHAIRPERSON: Did – I am in Volume 3. I am at page 0661 which is he contents.

ADV VINCENT MALEKA SC: Indeed.

CHAIRPERSON: Ja.

ADV VINCENT MALEKA SC: Indeed.

CHAIRPERSON: 1 – number 1 of the contents is part A Overview of the portfolio committee on public enterprises overseeing [indistinct].

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: And then there is 1.1 up to 1.3 and then there is 2 which is part B2 Schematic chapters. Bla, bla, bla. So I just want to identify which one you were referring to as the first report which one you are referring to as the second report?

ADV VINCENT MALEKA SC: The very first one which begins at page 660.

CHAIRPERSON: But the – in the contents that is the one referred to in 1 or not in the contents?

10 **ADV VINCENT MALEKA SC**: Yes it is the one which is referred to as the portfolio committee on public enterprises draft report on the Eskom inquiry. You will see if you go to page ...

CHAIRPERSON: Well before I go there I just want to make sure that the content of the table of contents that I have is the same as yours.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: What you have just read I do not see in the table of contents. Is it something that is not in the table of contents?

ADV VINCENT MALEKA SC: No the first page of that file will be index to Eskom reports.

20 **CHAIRPERSON**: Index to Eskom reports are right at the beginning.

ADV VINCENT MALEKA SC: Right at the beginning.

CHAIRPERSON: I have got that ja.

ADV VINCENT MALEKA SC: Yes Volume 3.

CHAIRPERSON: Ja.

ADV VINCENT MALEKA SC: And you will see that the first column.

CHAIRPERSON: The [indistinct].

ADV VINCENT MALEKA SC: Identifies file numbers.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: They begin from 1 and end at 18. That volume contains file numbers 3 and 4.

CHAIRPERSON: Oh that number there is file number?

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: Oh it just says number.

ADV VINCENT MALEKA SC: Because...

10 **CHAIRPERSON**: Ja okay.

ADV VINCENT MALEKA SC: Because each of the files has a file divider.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: Which is numbered from 1 to the end.

CHAIRPERSON: Okay.

ADV VINCENT MALEKA SC: And in the file before you now you have file dividers numbers 3 and 4.

CHAIRPERSON: Ja I have got that.

ADV VINCENT MALEKA SC: And you will see that the first divider which is number 3 is the draft report of the portfolio committee. It begins at page...

20 **CHAIRPERSON**: Yes I see it – I see it ja. 0660?

ADV VINCENT MALEKA SC: Yes

CHAIRPERSON: Okay. Yes.

ADV VINCENT MALEKA SC: It runs up to page 843.

CHAIRPERSON: That is that just before – ja just before divider 4?

ADV VINCENT MALEKA SC: Indeed.

CHAIRPERSON: Ja okay.

ADV VINCENT MALEKA SC: You do not have to go to any other page except 662 for the present purposes.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: And this explains why we thought it appropriate to start with Eskom in relation to paragraphs 1.4 and 1.5 of your mandate. We do so Chair because it is now publicly reported that allegations of state capture did not manifest for the first time with reference to Eskom. But they came to the public fore in relation to other state owned entity primarily Transnet. Eskom was not the first victim of that project but it is important to deal with those allegations because of the importance of Eskom. And for that reason we have prioritised Eskom ahead of all other state owned entities. If you go to paragraph 1.1.1 of that portfolio committee's draft report you will see that the portfolio committee started with Eskom in the course of its investigation for the reasons set out in that paragraph. And I ask you to read it with me.

CHAIRPERSON: Hang on. You have referred to it a few times as a draft report.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: Now I see that at page 0660 there is draft written by hand.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: Is that what it came with from the portfolio committee?

20 **ADV VINCENT MALEKA SC:** No.

CHAIRPERSON: Okay ...

ADV VINCENT MALEKA SC: We will try and explain to why we consider it to be a draft report.

CHAIRPERSON: Ja, yes okay.

ADV VINCENT MALEKA SC: I can reveal to you that [indistinct] there have been

media reports that – a report of the portfolio committee in draft was leaked before it was finalised.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: And that gave rise to all sorts of difficulties so they are owned but they are neither here nor there for the present purposes.

CHAIRPERSON: Okay.

ADV VINCENT MALEKA SC: So I was at paragraph 1.1.1.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: And I asked you to join me in reading it together. It
10 says: “On 21 June 2017 the portfolio committee on public enterprises unanimously resolved to institute an oversight inquiry into allegations of state capture at South African state owned companies. In doing the so the committee exercised its right to oversee performance and governance within the SOCS in line with the mandate of Parliament of the Republic of South Africa as articulated in sections 56 of The Constitution read together with Rule and it should be Rule 167 and (227)(1) (B)IV of the National Assembly. The committee has made clear its intention to cover all SOCS during this inquiry. Due to the comparatively larger revenue envelope capital expenditure programme and share size of Eskom as well as centrality of its – of the power sector to the South Africa’s – to South Africa’s development an economic growth
20 prospects an urgent response to prima facie evidence of corruption at the utility was identified as a priority. The first phase of the enquiry thus focussed on Eskom with the second and third phase – phases it should be set to turn to Transnet and Denel respectively.” Can I ask you also to consider footnote 1. “Eskom’s annual revenues are close to triple of those of Transnet and six times those of SAA. The scale of its annual expenditure with 55.8 billion on capital expenditure and 139.6 billion on

operating expenses in 2016//2017 alone appears to have made the utility particularly vulnerable to corrupt interests with compounding the urgency of intervening to stop the alleged haemorrhaging of resources from this critical institution.” So Chair you will see why it becomes important for this commission to deal with questions of allegations of state capture relating to Eskom because of its centrality in the economy and also this share scale of its operational budget capital expenditure and also procurement activities. It is for that reason that we have decided to priorities Eskom in the hope that what this committee would do in the course of its investigation will be able to help in the attempt to deal with those allegations and to the extent necessary make sure that they

10 do not resurface again. Chair what we have decided to do is to draw your attention to a number of investigations that have been done before relating to those allegations affecting Eskom. We have decided to do so because we think it appropriate that we should not rerun those investigations. We decided to do so because you as the commission do not have endless resources in order to rerun investigations and enquiries which have been previously done. We have also decided to take you through these reports in the first instance because they contain a number of findings some of which are based on credible evidence which has not been disputed by persons implicated in allegations of state capture. So that at the end of the day the undisputed versions of witnesses who have testified before in previous investigations or enquiries

20 should stand before you as prima facie evidence of weighty importance so as to enable you to make a finding one way or the other. So it is for that reason that we will take you through these reports to show you that they have been properly constituted and properly conducted prior investigations and enquiries which have led to certain findings. Let me be clear. I am not suggesting that all of those findings are justifiable simply because they have been made by previous inquisitors who were merely saying that at

this stage those findings are a first step in order to help you to make sure that you discharge your mandate cost effectively and efficiently.

CHAIRPERSON: Well you may be intending to say but in case you were not intending to it is important to make the point which completes the point that you have just made that those findings that might appear not to be justifiable on the material evidence that was before the bodies that were making the investigations will be looked at and to see whether there is evidence that may be found elsewhere to show that they are justified or not justified. So in other words to the extent that the reports or some of them might have gaps in terms of findings then the commission will be applying its mind to that and
10 the legal team and the investigators will apply their mind to that with a view to seeing which findings need further investigation to see if they can be backed up. Which findings need further investigation to show that there are challenges with them?

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: Ja okay. Thank you.

ADV VINCENT MALEKA SC: Chair that is the fundamental basis of the model of investigation your investigators have undertaken that is a model of presenting evidence that we would follow. And it is a model that we as a legal team have termed as the gap analysis model and so the gap analysis model will investigate, interrogate two forms of gaps and I will get to them in detail later on. But to give you some assurance about
20 how we tend to run the Eskom Inquiry in a cost effective fashion is that the gap analysis model will interrogate two forms of gaps. The first gap would relate to interrogation of those findings previously made by bodies, committees or persons that conducted investigations into Eskom. But whose findings of fact we still have questions around them because we think that they require further analysis in order to justify them in a manner that we believe can stand the test of time wherever they may be challenged.

And so that is the first model of the gap analysis. You look at what has been previously done. You look at the factual findings. You ask yourself “are there enough to resist any form of challenge?” If you come to the conclusion that more is required to do then we will engage in that exercise of re-interrogating the findings by reason of presenting further evidence in order to make sure that by way of some compounded form they can resist any form of challenge. The second form of gap analysis relates to transactions impacted or affected by suspicious conduct relating to state capture, fraud corruption of other malfeasance of a similar kind which have not been previously investigated by any other person or body. And which transactions fall within the mandate of the commission and to that extent that they exist that type of gap we of course with the assistance of the investigators have looked at that gap, have sought evidence and have enquired into whether or not the evidence concerned is sufficient to be presented before you in order to make a finding on those new transactions. And we have found some in respect of Eskom. Obviously I run ahead myself but I can for the present purposes tell you that one of those second category of gaps type of transactions relate to something called “Huarong” H-u-a-r-o-n-g. It is a transaction which we have not come across in any of the prior investigations but is a transaction which upon investigation we were quite satisfied that it is impacted by allegations of state capture. We would like to present that new evidence before you so that at the end of the day you make your finding. So those are the two components of the gap analysis model that we will engage upon in detail as we present the evidence before you.

CHAIRPERSON: I think that the approach commends itself because on the one hand it is cost effective in the sense that we do not just take – we do not rerun processes that have been run by other bodies but at the same time it ensures that we do not just accept findings made by other bodies as they are and the approach requires that we

apply our minds very thoroughly to findings made by other bodies and see whether they are defensible they are justifiable and if they are then we can consider accepting them. And if they are not we do not just reject them but we look at what other evidence may exist to try and either justify them or show that they should not have been made.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: And in the process its – the approach is cost effective and it makes a lot of sense.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: So I think it is a good approach.

10 **ADV VINCENT MALEKA SC:** Chair. We grateful for that Chair and we will try and make sure that we stick within the parameters of that approach. But let me be clear. I am not suggesting that there are no other models and to the extent that there is a need to depart from that model then we will be the first to acknowledge it.

CHAIRPERSON: Yes, ja no that is fine.

ADV VINCENT MALEKA SC: Chair there is another reason why we commend that model and it is a reason which I was going to explore later but I should do it now because it will give you a sense of why beyond questions of resources, beyond the questions of time it is vital that this model should be followed in this case. The reason relates to your powers in the rules of the commission set out in paragraph 3.10 but you
20 do not have ...

CHAIRPERSON: I have got it here but I do not need to have a look at.

ADV VINCENT MALEKA SC: No I will.

CHAIRPERSON: You will read it to me.

ADV VINCENT MALEKA SC: No I will read it out for you and for my colleagues and any other interested person. Rule 3.10 reads as follows: “The Chairperson may at any

time direct any person against whom allegations are made in a witness statement or evidence to respond in writing to the allegations relating to him or her in that statement or evidence and or answer in writing specific questions put to him or her by the Chairperson arising from the witness statement.” We have come to the conclusion that in this round of evidence presentation time has come that we should persuade you to invoke that power because the evidence that we are going to present before you through statements, through transcription of evidence of witnesses who have previously testified elsewhere together with the evidence which will present from witnesses that we have consulted with and from whom we have taken statement. A combination of

10 that body of evidence will clearly implicate certain persons. As far as we have been able to scan the history of previous enquiries on Eskom very few individuals who have been implicated in allegations of state capture have been called upon or have had the initiative to present their own version of evidence relating to what implicates them. We believe the time has come for the commission to have a balanced view of evidence relating to allegations and counter allegations of state capture and to the extent that the body of evidence we will present before you implicates those persons. Time has come for the commission to call upon them to respond to those allegations. We will in due course identify by name, by number or other details available to the commission persons who have been implicated and in respect of whom we will ask you to invoke

20 that power. That we believe it is another important reason why the model that we propose to follow is so vital for the commission in order to get to the bottom of the truth relating to those allegations Chair.

CHAIRPERSON: I do not know what at what stage you were planning to ask me to invoke those powers. It may be that you intend to ask me to invoke them right at the beginning of the Eskom hearings or somewhere during the course of the hearing or

after the hearings have been completed.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: But it seems to me that to the extent that consideration could be given to me invoking my powers to require such implicated persons as may be identified to put up statements or affidavits to deal with allegations against them that already exist in one form or another whether in a statement or in some report. It may well be that you should give consideration to not waiting until the end so that the next two and a half, three weeks that we, we have that could be part of the time the people have to prepare their affidavits. So I just mention that for something that needs mainly
10 to be looked into.

ADV VINCENT MALEKA SC: Chair we, we are grateful for that remark. In response I can indicate to you that there have been a variety of responses from persons falling in that category. Some of them have chosen to become whistle blowers and there is an ongoing engagement between them and the Commission. Some have professed cooperation with the Commission. We do not know whether it is framed or real, but nevertheless the Commission's investigation is interfacing with those persons. Some have flatly disputed those allegations and therefore they will be clearly, they would clearly be primary candidates for the invocation of those powers, because as far as their public version is concerned they resist and they dispute implication on their part in
20 allegations of state capture. So it is because of this different brought range of responses that there is an ongoing debate in the legal team and of course the investigators in, in order to make sure that we formulate appropriate attitudes so that when we come to you we are convinced that we would not jeopardise. Instead we will be promoting the efficient working of the Commission. So it is because of those different responses that I am not able to give you an answer.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: At this stage.

CHAIRPERSON: Okay. No that is fine.

ADV VINCENT MALEKA SC: But we accept.

CHAIRPERSON: Hm.

ADV VINCENT MALEKA SC: That the Commission cannot wait until.

CHAIRPERSON: Hm.

ADV VINCENT MALEKA SC: The end of.

CHAIRPERSON: Hm.

10 **ADV VINCENT MALEKA SC:** The end of the Eskom.

CHAIRPERSON: Hm.

ADV VINCENT MALEKA SC: Evidence in order to invoke.

CHAIRPERSON: Hm.

ADV VINCENT MALEKA SC: Or ask you to invoke those powers.

CHAIRPERSON: Yes, *ja*.

ADV VINCENT MALEKA SC: At some point we will do so.

CHAIRPERSON: Yes.

20 **ADV VINCENT MALEKA SC:** And I can assure you that the present proceedings that we are engaging with at the moment it is public notice enough to persuade those who think that they can make a contribution rather than to wait for evidence publically to be revealed of their involvement in state capture to come forward and cooperate with the Commission. So it is yet for that reason that we engaged in this public exercise to give the public and those affected notice that they still have a chance to cooperate with the Commission in order to come clean and clear their breast of these allegations or suspicions to that effect.

CHAIRPERSON: No that is fine.

ADV VINCENT MALEKA SC: Chair so I hope that you are not going to kill us, because I am afraid and probably for the better part of tomorrow you are going to hear us talk instead of the witnesses, but the exercise for today is to go, firstly going to start with the presentation of the reports.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: In order to do that gap analysis.

CHAIRPERSON: *Ja.*

ADV VINCENT MALEKA SC: When we are done.

10 **CHAIRPERSON:** Hm.

ADV VINCENT MALEKA SC: We will take you to the evidence previously presented at least before the Portfolio Committee.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: Of part of the National Assembly.

CHAIRPERSON: Hm.

20 **ADV VINCENT MALEKA SC:** And the body of evidence that the Portfolio Committee has received fall into three categories. The first will be written statements made by a number of persons who were willing to testify before the Portfolio Committee. We have a bundle of those statements and we will present them before you. Again some of the statements we believe that are sufficient enough to constitute *prima facie* evidence that requires a response. Others we believe require further evidence from the same persons or other persons who can corroborate them in order to close the gap. The second body of evidence before the Portfolio Committee was live evidence recorded and ultimately transcribed by persons who testified before it. Often there is an overlap between the statements and the transcription of that live evidence, because most of the

persons who testified had previously given statements to the Portfolio Committee, but the transcriptions are important because they elaborate on a number of questions which members of the Portfolio Committee put to persons. It is important as we go through that in an attempt to persuade you that section, Rule 3.10 Power must be invoked that elements of the transcription indicate at some point admissions without question of clear contravention of the law and failure to fulfil duties. So as we go along we will identify those aspects of the transcription. It is a documentation labour and intensive exercise, but we will get to that point. The last category of the evidence presented before the national, the Committee.

10 **CHAIRPERSON:** Well before, before that just for the sake of completeness it made well, it may well be that the rule that you have referred to, it may well be that the powers to be invoked may be the powers provided for in that rule either read alone or read with Regulation 10.6.

ADV VINCENT MALEKA SC: Indeed.

CHAIRPERSON: Of the regulations obviously because of the various legal aspects relating to the, to, to which and to which we will not go today.

ADV VINCENT MALEKA SC: Yes, yes.

CHAIRPERSON: *Ja.*

20 **ADV VINCENT MALEKA SC:** The, the, the principle and the statutory wisdom of that rule is reflected in Regulation 10.6. It is also reflected in Section 3 of the Commission's Act. They have different purposes, but the principle is the same and to the extent that a legal debate arises about which we will engage on that debate with reference to the specific parts of the regulations and the Act. Chair I was outlining the third category of the body of evidence presented before Parliament and that comprises submissions by interested parties namely NGOs that were made to the Portfolio Committee. Again

that there we have collected them and we will present them before you. They are important because they reflect concerns of civil society on a public owned entity of vital importance to the country and we would submit that the Commission must have regard to them because it is a vital stakeholder in relation to what this ought to present before the Portfolio Committee. That then is the body of evidence that we will present before you, but as against that in order to close the gap we will call witnesses who we thought it appropriate to present before you again in order to complete that gap analysis. Chair may I at this stage hand up to you a timetable that we have prepared outlining the presentation of the Eskom evidence from Friday going forward. We have.

- 10 **CHAIRPERSON**: Is that the one that Ms Norman sent to me some stage last week or is that another one or a revised version [intervenes]?

ADV VINCENT MALEKA SC: I prefer to hand up the one that I have, because it is a final timetable as far.

CHAIRPERSON: Oh.

ADV VINCENT MALEKA SC: As I know.

CHAIRPERSON: Okay.

ADV VINCENT MALEKA SC: She now whispers to me that there have been some minor changes in relation to the one.

CHAIRPERSON: Oh.

- 20 **ADV VINCENT MALEKA SC**: That you received.

CHAIRPERSON: Okay.

ADV VINCENT MALEKA SC: Previously.

CHAIRPERSON: Okay, okay. No that is fine [indistinct].

ADV VINCENT MALEKA SC: Chair I present this time table to you in duplicate because I know that you prefer to have one here and one at home. So that when you

work your way through the endless evidence presented before you, you do not have to be concerned about what was left at the office or at home or vice versa.

CHAIRPERSON: Thank you very much.

ADV VINCENT MALEKA SC: Chair you will see that the timetable deals with the week beginning the 18th.

CHAIRPERSON: *Ja*, I can see that there have been additions.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: But a lot of it seems the same.

ADV VINCENT MALEKA SC: Yes.

10 **CHAIRPERSON:** But there have been additions, *ja* okay. Thank you.

ADV VINCENT MALEKA SC: And we have now dealt with the 18th and the 19th which is the Treasury witnesses. There is one matter that we would like to draw your attention to by way of a diversion. When we close the proceedings relating to the Treasury witnesses.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: You made it quite clear that the lawyers of Mr Van Rooyen must submit an affidavit explaining matters of concern you raised with them both in the letter you directed should be sent to them and in the course of open hearings. We understand and have now been given a copy of a supplementary affidavit
20 that he made and we would like to draw your attention to that fact so that you are aware that there is that affidavit.

CHAIRPERSON: Yes. I was given a copy yesterday by Ms Norman.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: And I have actually read it.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: Yes, yes.

ADV VINCENT MALEKA SC: What would remain Chair is to make logistical arrangements for the set down of the hearing of that application.

CHAIRPERSON: Yes, no, no and I am grateful that you raised that, because after reading it I thought that it is necessary to map out the way forward as to what must well happen by when.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: You will remember that I indicated that it might be necessary to, for me to deal with it in chambers and everybody, nobody had a problem with that, but
10 what does remain before we get there is, is whether everyone who is supposed to apply their minds to it has done so to decide whether there are things to be investigated in the affidavit and whether there will be a need to put up any affidavit.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: If the preliminary view I took of it was that it may be necessary to really apply one's mind to, to, to it.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: So maybe, maybe for now we should have some date by when one will know whether there is, whether there is any work, further work that anybody wants to do in regard to either responding to it or investigating some of the things at the.

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

CHAIRPERSON: That is that is that is for the legal team, but also that is for Mr Fuzile's lawyers as well.

ADV VINCENT MALEKA SC: Yes. Chair.

CHAIRPERSON: So maybe if we, I do not, if we put next week Wednesday, I wonder whether that would not be enough time for, for that or maybe to be generous the

Friday?

ADV VINCENT MALEKA SC: Chair we will.

CHAIRPERSON: Hm.

ADV VINCENT MALEKA SC: Relay those.

CHAIRPERSON: Those, *ja*.

ADV VINCENT MALEKA SC: Questions to the lawyers.

CHAIRPERSON: To the lawyers concerned.

ADV VINCENT MALEKA SC: Of Mr Van Rooyen.

CHAIRPERSON: Yes.

10 **ADV VINCENT MALEKA SC:** And also the lawyers of.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: Mr Fuzile.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: You remember that they indicated to you that they will apply for cross-examination.

CHAIRPERSON: *Ja*, I know [intervenes].

ADV VINCENT MALEKA SC: Of Mr Van Rooyen. I do not know where they get that right but.

CHAIRPERSON: [Laughing].

20 **ADV VINCENT MALEKA SC:** They may be reading the rules different from how we read them.

CHAIRPERSON: Well I, I see that we have not had people representing people who are not implicated applying for that leave. So, but we will look at it when it comes.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: So but, so I think maybe let us simply say if anybody has to file

anything it should be by next Friday. I am just not sure. I have not checked the rules. I do not know whether I maybe cutting short a, a period that people where people might be entitled to a longer period. I do not know whether on your feet you are able to.

ADV VINCENT MALEKA SC: I will ask my colleagues who.

CHAIRPERSON: To look at that.

ADV VINCENT MALEKA SC: Are mathematically inclined.

CHAIRPERSON: Hm.

ADV VINCENT MALEKA SC: To.

CHAIRPERSON: Otherwise what we, what we can do is that you, we can leave it on
10 the basis that you will, the legal team will speak to the lawyers of other parties concerned and indicate that the inclination is to fix next Friday and let them indicate and then either tomorrow or on Friday morning I can then finalise that aspect and there, there can be an indication if that time is seen as too short.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: *Ja*.

ADV VINCENT MALEKA SC: We, we are grateful for that guidance Chair.

CHAIRPERSON: *Ja*, okay.

ADV VINCENT MALEKA SC: And we will report back to you about the progress.

CHAIRPERSON: Yes on Friday morning.

20 **ADV VINCENT MALEKA SC:** On that score.

CHAIRPERSON: *Ja*, thank you.

ADV VINCENT MALEKA SC: Chair then the timetable moves onto the 20th which is today to the, to tomorrow which is the question of presenting the reports in evidence and then we move to Friday which is the first witness who we would want to present before you. It is the Chairperson of the Board of Eskom which was appointed in

January 2018 led by Mr Jabu Mabusa. We have received a statement from him together with annexures which is quite useful. We thought it wise to begin with him Chair because he leads the Board which was appointed on a clear promise that it is “clean up” Board. So we have written to Eskom identifying specific issues that the Board led by him had to deal with because we thought that a Board of that sort when it comes in to clean up it must tell you what it found when it got there, what step it took to clean up and where it is in terms of its clean up exercise. So that his evidence will thematically answer those questions and we are grateful that he has done so. There are questions that of course we would like to probe arising from the version that he has put up.

10

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: So we have reserved Friday the 22nd and Monday the 25th for his evidence.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: And no doubt we know that you too will have some concerns to raise in relation to his evidence. So we think that the period of two days would be enough for that purpose Chair.

CHAIRPERSON: Okay.

20

ADV VINCENT MALEKA SC: And then there is evidence of Mr Mashego which deals with Brakfontein. Ms Hofmeyr has worked at length on this question and you will see when we take you to the Dentons Report that Tegeta as the owner of the Brakfontein Mine is not mentioned in that report in relation to the mines that have supplied Eskom. Tegeta arises for the first time after the Dentons inquiry and the Dentons Report is vital amongst others for that reason, but the presentation of Eskom’s evidence relating to Brakfontein will be led by Ms Hofmeyr and I have no doubt that before she starts with

that evidence she will give to you an opening introduction about how she plans to do it.

We have statements.

CHAIRPERSON: Well I have already seen a memo that she sent to me which gives me quite a good idea of how she intends to do so.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: And *ja*.

ADV VINCENT MALEKA SC: So you would have picked up from that memo that the introduction of Tegeta into that mine arose in 2015 and in circumstances that were worrisome. It was given a preferential treatment in relation to due diligence questions
10 that Eskom always undertakes to make sure that a supplier of that kind would meet his contractual requirements. It was given preferential treatment in relation to the pricing relating to the coal it supplied to Eskom, but those are matters of detail which Ms Hofmeyr will explore with you and I can also mention that your investigators have come up with emails that show exchange of confidential information relating to Eskom that were disclosed by officials of Eskom to person who have had interest in Tegeta in a manner that is worrisome and that in our view ultimately when we make submissions indicate how this project of state capture was implemented in relation to the Brakfontein Mine post acquisition by Tegeta and on the 27th Chair we will get to the first leg of the Optimum Coal Mine acquisition by Tegeta and ultimately Oakbay. We will present
20 evidence of that first leg of the Optimum Coal Mine acquisition through a representative of Optimum Coal Holdings ultimately owned by Glencore. He was the Chief Executive Officer at the relevant time of the company which owned the mine. If I do not misspell his name and surname it is Mr Clifton Ephron. He will present evidence on the 27th. We have, we now have a signed version of his statement.

CHAIRPERSON: Yes, hm.

ADV VINCENT MALEKA SC: And in that statement Chair he implicates a number of people. Due notices have been sent or will be sent in relation to those persons and he will give you a perspective which we believe was not there before relating to the acquisition of Optimum Coal Mine by Tegeta and the operating pressures that were brought to bear on Optimum Coal Holdings to dispose of that asset and my reading of that statement without anticipating his evidence is that there were at least three different kinds of operating pressures that were brought to bear upon Glencore to dispose of that asset. The first was the invocation of the penalty clause in the coal supply agreement that was existing at the time between Eskom and Optimum Coal.

10 The result of which was to suggest an imposition of penalties in the order of R2.1 billion on Optimum Coal. As a result of that Optimum Coal Holdings decided to declare what is called the Hatched Clause because that would have led to the financial ruinous circumstances and that put ultimately the coal mine into business rescue. The second part of his evidence relating to the pressures brought to bear upon that entity to dispose of the mine relates to a failure of what it is called the fourth, the draft fourth addendum arising from negotiations between Eskom and Optimum Coal Mine to reach an agreement to resolve questions of penalties that were intended to be imposed, questions of price and questions of quality of coal. The negotiations were held and were ultimately supported by the Executive Committee of Eskom. They failed at the

20 level of Board approval and the new CEO who took over at the relevant time and the result of that failure was that Tegeta was facing the potential, sorry Optimum Coal Mine was facing the potential of penalties. The last element of the pressure was the issuance of the so called Section 54 Notices on different mines owned by Glencore in order to bring about pressure for it to dispose of that mine and that in sum will be the operating pressures that Mr Ephron will converse in the course of his evidence to show

how ultimately Glencore of course as the ultimate owner of the Optimum Coal Mine took the commercial decision to dispose of that mine to Tegeta. We have sat down his evidence for a day and we hope that will complete it within a day and if we do not of course we will appeal to him to come back on a date convenient to him and the Commission and then on 28 May (sic) Chair you will see that Mr Emmanuel will come to testify on 1.1 to 1.3 in terms of reference. He will testify on a matter that is now public, publically a matter of common knowledge relating to what was said by one member of the MEC of the ANC concerning his appointment to office as a Minister and then on Friday the 1st and Monday 4 March you will hear evidence relating to Huarong. My
10 learned friend Ms Norman will deal with that issue. As I have indicated to you previously Huarong is a new issues. It reflects a model of state capture of state owned resources which we have not seen before, but I have been asked to convey to you that that model was attempted in relation to resources of South African Airways and that when Ms Hofmeyr deals with South African Airways state capture project at least as far as allegations go you will see the commonality between the Huarong model and also the SA model. Of course through different players.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: So.

CHAIRPERSON: Hm.

20 **ADV VINCENT MALEKA SC:** That is going to become important Chair, because it reflects a totally different model of state capture. As I said Ms Norman will lead our team in that regard and then there will be Mr Naga and Mr Opperman who will testify on the same date. Again we have received statements and relevant notices have been actioned. There will be Mr Bester who will testify on Brakfontein again and his evidence is likely to go to 7 March and from 7 March at least after the completion of

Mr Bester's evidence we propose to begin with the evidence of McKinsey relating to its contractual relationship with Eskom. I can tell you that we have had meetings with their legal representatives. We have invited them to submit a statement, to deal with specific issues that we have raised concerning their contractual involvement with Eskom and they have undertaken to give us that statement. Of course the choice is theirs. If they do not give us a statement as we hope they would then we will come back to you via Rule 3.10 to call them to respond to the issues that we have raised and let me be clear on that score. You will recall that the question of McKinsey's contractual relationship with Eskom and consequences that are arising from that relationship have become a

10 subject matter of ongoing litigation. I believe that Eskom's application to set aside the so called Master Services Agreement with McKinsey will be heard on the 23rd and 24 March or April, I am not too sure, but we have made it quite clear to McKinsey or let me interrupt myself, you would know also that that litigation still continues despite the fact that McKinsey and Eskom have reached a settlement agreement in terms whereof McKinsey undertook, and ultimately paid the fees it has earned from Eskom as a result of the Master Services Agreement. There is still a question mark and we have McKinsey to deal with that question mark. Whether the payment that it has made back to Eskom relates to the services it has earned from Eskom only with reference to the so-called Master Services Agreement, or a prior agreement which is identified as the

20 Corporate Services Agreement, we have concern in relation to both agreements and we have raised those concerns with McKinsey and we hope that they will address them, and we believe that despite the settlement that they have reached we as a Commission, and you as the Chairperson, are entitled to interrogate allegations of State Capture on those two transactions, to see whether or not they are not affected or are infected by some possible wrongdoing which include commission of an offence, or

some other impropriety.

We ask you to do so despite the settlement agreement because both the Fundudzi report that we will refer to on Eskom as well as the report of the National Assembly's Portfolio Committee have recommended that criminal investigations should be undertaken relating to a number of persons who are involved in amongst others those transactions.

So it is for that reason that we would ask you Chair to consider the question of McKinsey. Of course it will affect its BEE partner which we now know from the evidence we've gathered the relationship between it and the BEE partner had
10 terminated, some time in – is it March or April, March 2016, and it's a question of whether McKinsey has had a BEE relation with an entity called Trillion Management Consulting Management Company or Trillion Capital, there are a number of Trillions, the evidence will indicate where each of them falls.

Chair you have before you the affidavit made by one of the whistleblowers which we presented before you when Mr Fuzile testified, I did not mention the name because I wanted to keep the name confidential, and I am not going to reveal it, but that affidavit is before you and it explains how this relationship between McKinsey and Trillion had some problems which raises enough basis to investigate whether or not there were no improper conduct.

20 **CHAIRPERSON:** Yes.

ADV VINCENT MALEKA SC: Chair that will take us to the 8th of May and then on the 11th of ...(intervention)

CHAIRPERSON: By the way we must immediately rearrange because the 8th of May will be a public holiday.

ADV VINCENT MALEKA SC: Sorry, I said the 8th of May instead of 8th of March, my

apologies.

CHAIRPERSON: Oh okay, 8th of March, okay.

ADV VINCENT MALEKA SC: Yes, my apologies, 8th of March.

CHAIRPERSON: But for what it's worth we should look ahead in regard to 8th of May and make arrangements, reschedule if we have already put in something, okay.

ADV VINCENT MALEKA SC: The Transnet team who would hopefully be busy then will have to take account of that date.

CHAIRPERSON: Of that ja okay.

ADV VINCENT MALEKA SC: And then Chair we then get to the 11th of March, on that
10 day we propose to present evidence of two individuals, the one representing Standard
Bank, and it's a witness that you have heard before, but in a different context, it is Mr
Ian Senton, I believe that he is present here, and he gave us a copy of his affidavit on
the strength of which he is going to testify. His evidence Chair will reveal something
that's – we believe has not been investigated before by others who had become
engaged with allegations of State Capture relating to Eskom and that is the movements
of funds from some of the entities who purportedly provided professional services to
Transnet and Eskom in accounts that were held in Standard Bank and Standard Bank
raised concerns around those accounts and the way money and balances were moving
in those accounts, and Standard Bank called for explanations, and the explanations
20 that were given were not sufficient and for that reason Standard Bank decided to fulfil
its banking regulatory obligations by filing what they call STR which is the suspicious
transaction reports with the Financial Intelligence Centre and also by counselling some
of the accounts.

The evidence of Standard Bank becomes important as a vital piece of
proving State capture on how money was laundered from State owned entities and

moved to different components of account holders who had nothing to do with the services purportedly provided by contractual partners of Eskom and/or Transnet. Mr Senton will testify on that score, and we will look at the draft that he has given us today with a view to action it in terms of the rules.

And then we will get to the evidence of Mr Pierce Marsden, who is co-business rescue practitioner in charge of Optimum Coal Mine Holdings Pty Limited when it was still under business rescue. He will give you an additional perspective of the evidence he has in relation to the acquisition of that mine by Tegeta and the report that he filed in terms of Section 34 of the Corruption Act relating to knowledge he
10 gained about something that he thought raises suspicions of corruption in relation to that transaction. He has given an additional statement and we obviously have looked at it and to the extent that it implicates people we will action it in terms of the rules.

And Chair there will be the 13th and 14th which we have planned in case there is a need for you to hear additional evidence. The 13th relates to the evidence of a cyber specialist, we have been drawn to his attention and the work he has done by the lawyers of Eskom, and the evidence of that cyber specialist as far as we have seen elements of it, would become vital for you because it will show whether aspects of the Fundudzi report relating to the exchange of email by persons who were the executives at the time of Eskom, firstly as between themselves and secondly as between
20 themselves and third parties who had some interest in Eskom, that evidence is well-founded and secondly that cyber specialist will tell you about how he went about procuring the emails from the central server of Eskom, purporting to emanate from Eskom's Executive to third parties who had no legitimate basis to receive confidential information from Eskom.

When I take you through the Fundudzi report you will see how the exchange

of email evolves and you will see how the evidence of that cyber specialist would become important, in order to provide sound evidence in relation to State Capture project.

Chair may I say even here that the lawyers of Eskom have drawn our attention to two disciplinary processes which Eskom initiated in earnest against some of its executives and some of those emails which it received through this cyber specialist were put to these executives in order to call for them to explain, none was forthcoming and the little that if ever came forward as explanation was not enough and so the evidence of the disciplinary process will become important. I raise it at this stage
10 because you would recall that the affidavit of Mr Mabuza does indicate and deal with some of those disciplinary steps taken and we will ask him to give us more to the extent necessary on the outcome of the disciplinary processes and the body of evidence that Eskom introduced and on the 14th Chair we would propose to lead evidence of two whistleblowers, the one as I said we have the statement before, the other you will see her evidence as we present the transcription and the statements made in or before the Portfolio Committee.

That Chair is the body of the evidence that we would present to you in what remains of this month and the first part of next month.

CHAIRPERSON: Well thank you very much, yes.

20 **ADV VINCENT MALEKA SC:** Chair again I apologise that you have to listen to me for most of the day but we are now going into the next phase and that is to present various reports to you. I wonder whether this is not an appropriate time to adjourn for tea.

CHAIRPERSON: I think it is, we will take the tea adjournment and we will resume at half past eleven. We adjourn.

INQUIRY ADJOURNS

INQUIRY RESUMES

CHAIRPERSON: Yes Mr Maleka.

ADV VINCENT MALEKA SC: Chair in the next round of the presentation we are going to deal with the reports via a document we have prepared called the Gap Analysis on Eskom. I believe that a copy of that document has been presented to you

CHAIRPERSON: Yes I have got it.

ADV VINCENT MALEKA SC: I will ask Mr Jac Swarts to present and illuminate some of those lines on the monitors so that those concerned may see precisely what our analysis in terms of the slides is. And so Chair as I was saying the analysis begins with
10 a presentation of the reports to you and we are grateful to our learned friends Ms Norman and Mr Mokoena because they are the ones who took the effort of asking the investigators to source and produce and also compile these reports in a format and form that is readily accessible and under-stanchion that the files before you have been marked on the spine through volumes for easy identification and that in due course your files will be marked with a clear descriptive indicator on the spine precisely what the contents are.

CHAIRPERSON: Yes that will be very helpful ja.

ADV VINCENT MALEKA SC: I have been assured by Ms Norman.

CHAIRPERSON: Yes.

20 **ADV VINCENT MALEKA SC:** That by resumption of the proceedings after lunch today they will be in the form that you had indicated.

CHAIRPERSON: That is fine, that is fine.

ADV VINCENT MALEKA SC: So Chair just before I start with the gap analysis in terms of the slides I would like to take you to a report which is in Volume 6.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: And if the first page of Volume 6 you will see it is again an index and file number 16.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: Is the report on an enquiry conducted by the National Energy Regulator of South Africa NERSA relating to the load shedding and electricity supply shortage which occurred on the 12 May 2008. We take you to this report as a starting point not only because of what NERSA did but the repeat of what is happening in relation to Eskom regarding load shedding activities. This report recalls for the first time as far as we are aware and we confess our knowledge may be limited that a
10 regulator in our country decided to conduct a statutory enquiry in terms of Section 4.2B of the Electricity Regular Act relating to the activities of a licensee such as Eskom relating to questions of load shedding that had fundamental consequences for the country and which raised serious national concerns. We are not aware of any other enquiry which NERSA may have undertaken arising from the repeat of the difficult experiences suffered by Eskom in terms of the supply of electricity. We take you to this report for now Chair because when the Chairperson of Eskom testifies we will raise issues around questions of load shedding and hopefully he will indicate to you how Eskom is busy dealing with those difficult questions. But the key question which we would really ask you to consider for the purposes of the commission is what are the
20 other options consumers such as you and I have when these things happen or it is a normal consequence that we have to live with as consumers in the face of the powers conferred upon the regulator to consider those aspects? So Chair when – you will see that the report begin at page 1976 and there is a table of contents on 1977. I ask you to go to the introductory portion of the report at page 1978 and I ask you to read with me the second paragraph from the top. “In the light of the above the energy regulator

decided that an enquiry be conducted in terms of Section 4(B)II and 4(B)IV I can ask you to strike out that section because I have looked at the Electricity Regulation Act there is no Section of that sort in that Act.

CHAIRPERSON: Is that the roman figure that is not there or the whole?

ADV VINCENT MALEKA SC: The roman figure IV as far as I am aware the latest version of that Act.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: Ends with roman figure III.

10 **CHAIRPERSON**: Okay and it was not there and has since been repealed a bit later or something?

ADV VINCENT MALEKA SC: No I have also looked at the previous version of the amendment I could not find it but I confess that you know in these sorts of things one is wrong. I can assure you the latest version does not have roman figure IV.

CHAIRPERSON: Hence for the sake of completeness if you have not had enough time somebody can just check whether as at 2008.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: It was – it was not there.

20 **ADV VINCENT MALEKA SC**: Yes. Into the national electricity – roman figure II of the Electricity Regulation Act 4.02.06 into the National Electricity supply shortage and the subsequent load shedding by Eskom and other licensees during the period 1 November 2007 to 31 January 2008. I ask you to note that the relevant period covered by NERSA's investigation was for more or less a period of a month or slightly more. But it is for that period that NERSA decided that it was going to engage into load shedding because of the consequences of it. And then Chair you will see that in...

CHAIRPERSON: Is that not two months, November to 31 January?

ADV VINCENT MALEKA SC: Ja it is about.

CHAIRPERSON: Or actually three?

ADV VINCENT MALEKA SC: Well three months.

CHAIRPERSON: Three months ja.

ADV VINCENT MALEKA SC: Three months effectively yes. You are correct it is three months. The purpose of this enquiry is to inform the energy regulator of the reasons for the current electricity supply shortage resulting in the national load shedding of the electricity and recommended measures to be adopted to mitigate against the electricity supply shortage and to reduce the adverse impacts thereof. The scope of the enquiry
10 focuses specifically on events in the period 1 November 2007 to 31 November 2008 and yes my notes indicate that that is a period of 3 months.

CHAIRPERSON: To 31 January I think you said November.

ADV VINCENT MALEKA SC: 31 January – 1 November 2007 to 31 January 2008 and that is the period of.

CHAIRPERSON: Ja.

ADV VINCENT MALEKA SC: Paragraph 2 talks about the methodology of the investigation. I am not going to ask you to consider it.

CHAIRPERSON: Ja.

ADV VINCENT MALEKA SC: Paragraph 3 gives you some background about Eskom
20 and it is a background that I will develop when I ask you to consider the Denton Reports but at that stage it was quite clear according to NERSA the regulator that Eskom was controlling 92% of the generation of electricity in our country. And then Chair the next part of the report which is important is at page 1981 paragraph 4. Load shedding was experienced during the months of November 2007 to January 2008 the high number of load shedding incidents in January attracted national attention. There

were five load shedding incidents in November and four in December arising mainly out of generation capacity shortages. In January fourteen incidents occurred due to both energy and capacity constraints. The high frequency of load shedding in January was related to the increasing demand about 3000 megawatts after the December holiday period and an increase in the unplanned outage raid as shown in figure 1. And then Chair I skip the rest and ask you to go to paragraph 5.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: Measures of an adequate and secure power supply is the ability to continuously balance supply of power that is generation and demand for power load. The balance is maintained by controlling the frequency to 50 Hertz. If demand exceeds generation the system slows down and the national – and the Eskom national control centre instructs power stations to increase generation from available plant. Where there is no more available plant the system will slow down and eventually collapse unless the load is reduced. Chair that gives you some kind of a non-technical explanation around how load shedding happens. Even I as an un-engineer I am able to follow the relationship between the demand for electricity and the supply of it and how ultimately if there is an imbalance between the two the system if not properly managed would give rise to the national collapse and a national blackout. And Chair I ask you to go to page 1982. Just before the figure 1 there is a paragraph which gives you the indication of what was the extent of load shedding.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: It is the second number paragraph.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: The November and December incidents were mainly caused by inadequate generating capacity resulting mainly from generator trips. The

more severe load shedding incident of up to 4000 megawatt occurred on numerous occasions seventeen days in January as a result of both capacity and energy shortages. The extent of the capacity and energy constraints and the applicable reasons are discussed later in the report. Then they give them to you Chair in that figure beginning from 13 November cutting across through the Y axis up to ...

CHAIRPERSON: Yes that is figure 1 with.

ADV VINCENT MALEKA SC: The bar charts.

CHAIRPERSON: Ja.

ADV VINCENT MALEKA SC: Yes.

10 **CHAIRPERSON**: Yes.

ADV VINCENT MALEKA SC: And you will see that the bar charts are again in all these diagrammatic expressions of the horizontal line and the vertical line which we were told that the one represents the X axis the other represents the Y axis. The horizontal line gives you the degree of load shedding from the date 13 November 2007 it goes across to January 31 09. And then as we look at the vertical line you will see the amount of megawatts of electricity that were shed during each month.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: And you will see that the peak of ...

20 **CHAIRPERSON**: I see – I see that the – the last vertical line relates to 31 January 2009.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: And the one immediately before that in 30 January 2008?

ADV VINCENT MALEKA SC: It should be 30 January 2008.

CHAIRPERSON: The last one?

ADV VINCENT MALEKA SC: Yes because that is the period of investigation.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: Conducted by NERSA.

CHAIRPERSON: Yes. Yes I thought so too.

ADV VINCENT MALEKA SC: So you are quite correct I think it is 2008.

CHAIRPERSON: Ja. Thank you.

ADV VINCENT MALEKA SC: And Chair for the purposes of completing our attention to this figure we merely point out that the peak period of sharing of 4000 megawatts of electricity occurred on 24 January 2008 this is where we find 4000 megawatts of electricity shared on one day. The rest is a variation from 1000 up to 3000 but we
10 would ask you to note that the worst form of load shedding occurred on 24 January 2008 and that is when...

CHAIRPERSON: I think I can see that in terms of those vertical bars that is correct but I thought you said 4000 it appears to me to be close to 7000, am I – do I misunderstand something in this?

ADV VINCENT MALEKA SC: No, no I think the load shedding if you look at it is darkness – it a dark.

CHAIRPERSON: Oh okay.

ADV VINCENT MALEKA SC: It is the darkest shaded because if you look at the
legion.

20 **CHAIRPERSON**: Yes.

ADV VINCENT MALEKA SC: Just below the heading Correlation Between Load Shedding and Unplanned Outages.

CHAIRPERSON: Yes okay.

ADV VINCENT MALEKA SC: The darker one is load loss.

CHAIRPERSON: Yes okay. Okay so it was just under 4000?

ADV VINCENT MALEKA SC: Indeed.

CHAIRPERSON: Ja okay.

ADV VINCENT MALEKA SC: Well the report suggest that it is 4000.

CHAIRPERSON: Or maybe it is 4000.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: Well the red line goes up to 4000, the darker line is just below the line for 4000.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: Okay.

10 **ADV VINCENT MALEKA SC:** And Chair the next is once you have the appreciation of what NERSA's investigation reveals. The next important question which NERSA had to engage with is at page 1985.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: At the top the economic impact of load shedding events is not readily available however for generation capacity planning purposes the costs of not supplying electricity is deemed to be R75.00 per kilowatts of electricity. This implies that the load shedding in the period cost the South African economy approximately R50 billion. There is NERSA's estimation without reference to scientific research but simply an indication of what happened or what happens when the country suffers
20 consequences of load shedding and the cost to the economy. We would like to develop that issue later on as soon as we get to the issues relating to Eskom and hopefully those who have information will help us in that regard. Chair I leave the rest and go to the findings and recommendations.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: And that you will find – it is...

CHAIRPERSON: Well there is reference to recommendations on the same page but I do not know if that [indistinct].

ADV VINCENT MALEKA SC: No it is not that one. It is at page 2015. I am not going to read them to you I merely want you to note where they are to be found.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: And then the recommendations follow at page 2017. And the sum total of it was a request by NERSA that Eskom should do certain things to prioritise corrective measures so as to avoid these consequences. And some of them were directed at specific departments of Eskom like Primary Air Energy. For instance if
10 you go to page 2017 the further investigation and the recommendation reads as follows: “Primary Energy Procurement and management and in particular Coal management in Eskom the availability, adequacy and optimum utilisation of Eskom’s generation plant in emergency and in view of the midlife of these plants. These are critical areas of operation that affects Eskom which the regulator recommended that they should be looked at in order to take corrective measures.” We will get to the Dentons Report because it comes almost seven years after this recommendation by NERSA and it raises numbers of questions relating to the operations of Eskom and it makes findings at the request of Eskom and present them before Eskom with a view to take corrective action. What follows thereafter is no longer the implementation of the
20 observations made by Denton but something else and it is that something else which we submit begins to provide a clear indication of the state capture projects. So that is why we started here. That this report is important in sequence in order to show you that questions of load shedding were not new as and when they repeated themselves in 2015 and as and when they still occur this year. We have always been on Eskom’s radar NERSA’s a regulator it inquired into the reasons, it got the reasons and NERSA

made recommendations and yet the problems still occur.

CHAIRPERSON: Well one will hear all the evidence and look at all the reports but it certainly is a matter of concern that when load shedding happened and to go and add my recollection is that the executive admitted that it had been warned.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: About if I recall correctly eight years earlier.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: By the management at Eskom that if certain things were not done that is what was going to happen and from my recollection there was an admission that
10 not much was done and load shedding happened.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: And then it is more worrying that notwithstanding that lesson it happened again was it 2015 and it is happening again in 2019 and with even more intensity and seriousness. So ja okay alright.

ADV VINCENT MALEKA SC: Chair if it is necessary we will consider that issue and seek to present clear undisputed evidence about what happened when that warning came to the fore and what happened thereafter. But anecdotally you are correct. There was a clear warning given to the executive authorities of our country at the time that they should not luxuriate in the surplus capacity that they found in Eskom when
20 they took office. Because it – let us be clear Eskom has always had capacity which was surplus to its requirement and it was for that reason that it extended all sorts of benefits to the major consumers of electricity such as the mining industry to procure electricity as subsidised rates. I hope they do not kill me but it was at that level but things changed when our country after democracy decided to put Eskom where it ought to have been by making sure that each and every household is electrified at reasonable

costs. It is at that point in time when the strategic shift of Eskom occurred that what was surplus capacity became capacity constraints and at that point the executive was warned and nothing was done. So Chair to now get back to the gap analysis may I ask you to go to page 2 of the slides.

CHAIRPERSON: Well it is – we will hear – we will look at the Denton Report – Dentons Report and we will look – hear the witnesses. One hopes that people who were supposed to be taking measures in line with the recommendations of the NERSA report and the Denton report were not doing other things when they were supposed to be doing that.

10 **ADV VINCENT MALEKA SC**: Yes, yes. Chair I am tempted to go to the Dentons Report in order to address your concern but I am not too sure whether I should do it now or leave it later.

CHAIRPERSON: I am happy that you do it later.

ADV VINCENT MALEKA SC: Okay, okay.

CHAIRPERSON: Ja.

ADV VINCENT MALEKA SC: Oh is Mr Mokoena tempting you?

ADV VINCENT MALEKA SC: Yes. Can I ask you to go to Volume 2?

CHAIRPERSON: Yes thank you. Yes I am there.

ADV VINCENT MALEKA SC: Chair we...

20 **CHAIRPERSON**: No I see Mr Mokoena tempted you successfully. Yes.

ADV VINCENT MALEKA SC: I hope it is not a poison pass from him.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: Chair you will see that on page 356

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: Is the report by Denton dated 2 July 2015.

CHAIRPERSON: Ys.

ADV VINCENT MALEKA SC: The date is important and I would ask you to mark it because at some point the investigators gave us the executive summary of the draft preliminary report which is from Dentons on the face of it but it is marked a different date which is 5 July 2015.

CHAIRPERSON: Oh.

ADV VINCENT MALEKA SC: You do not have it yet.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: And we will make it available to you.

10 **CHAIRPERSON**: Okay.

ADV VINCENT MALEKA SC: But it raises fundamental concerns around the dates of these reports and had happened because there is anecdotal evidence that this report became – it mysteriously disappeared.

CHAIRPERSON: It would be the latter one. The latter of the two?

ADV VINCENT MALEKA SC: The draft...

CHAIRPERSON: Oh the draft executive summary.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: Ja okay.

CHAIRPERSON: It became what?

20 **ADV VINCENT MALEKA SC**: We could not get it.

CHAIRPERSON: Oh. There was difficulty in sourcing it.

ADV VINCENT MALEKA SC: Yes I think some members of Parliament when they ask questions in the inquiry they wanted to find the whereabouts of this report and nothing by way of a satisfactory explanation was given and for that reason we as the investigators make sure that the commission has it and Eskom kindly produced it.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: But in these versions that we now have.

CHAIRPERSON: Okay.

ADV VINCENT MALEKA SC: I have asked you to mark the date of 2 July and you will see at page 357 going to 359 it is the table of contents. It is a long report I am not going to take you through it I will try as best I can to take you through the key features of it. At page 360 there is an introduction of how Denton got involved. Paragraph 1.1 this document constitutes the report of Dentons South Africa in respect of the investigation commissioned by Eskom Limited pursuant to a request for proposal
10 issued on 8 April 2015 under number – in terms of a resolution adopted by the board or directors of Eskom on 11 March 2015. So that there is no doubt that this investigation was commissioned by the haste decision making body in Eskom and that is the board. 1.2 the investigation commenced on 20 April 2015 a draft report was required to have been provided on 20 July 2015 with the final report to follow 31 July 2015. May I stop here and make the following observations? You will see that the time lines in terms of the board's expectation was that the investigation should immediately commence and it should produce a draft report on 20 July and the final report should be presented at 1 July 2015. What you have and what we have managed to obtain and we would like to confirm with Eskom is why do we not have the final report? At best we have the draft
20 report. What happened to this mandate of Denton and that is a key feature because as a state body having obligations of accountability you follow through the decisions you make but I can tell you that we tried the best we could when we interfaced with Eskom to see whether or not they can ask Dentons to waive privilege, but from the sum total of what we received and we were able to get is that there has never been anything beyond this draft executive report. So that is the first question we will raise and I am

sure Eskom ...

CHAIRPERSON: Well to the extent that Eskom is not able to give us the final report or does not have it or does not have a satisfactory explanation about why there, there was not or there is not such a report I guess that any approach to be made directly to Dentons to find out whether their final report was produced by them.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: And whether they do have a copy and if they say they do have and see whether they can make it available or whether they have some ground on the basis of which they might claim that they should not make it available.

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

CHAIRPERSON: *Ja.*

ADV VINCENT MALEKA SC: Chair the next paragraphs of the report that I will read out to you answer that question.

CHAIRPERSON: Oh, okay.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: *Ja.*

ADV VINCENT MALEKA SC: “1.3, on 11 June 2015 we were requested to

prepare a detailed presentation to the Board in addition to a draft report dealing with the state of the investigation to date.

20 We understand that this was due to the need to meet the deadlines for various other commitments that had been made by the Board in respect of the time frames of the investigation. A detailed presentation to the Board was delivered on the 25th/26 June 2015 which was followed by our draft preliminary report. For these purposes investigatory activities seized

shortly after 11 June 2015 and resources were directed from the normal course of investigation to the, to the development of preliminary findings preparation of the above mentioned presentation and preparation of a draft report. 1.4, subsequent to our presentation to the Board we were advised that one, the Board was satisfied with the investigation and the degree of detail covered in a very short period of time. Two, the investigation had provided the Board with the information it needed to take decisions as to how best to manage the affairs of Eskom and three, no further investigatory activities were required.”

So Chair the deadlines which the Board itself had set out requiring the finalisation of a report into this investigation was cut short because there was a presentation to the Board and on the basis of that presentation the Board said Dentons you do not even have to finalise, but it is in the context where Dentons tells them that we had not yet completed our investigation. We are going to stop our investigation because you are telling us that you require a presentation and you require some draft report and Chair:

“1.5, a draft preliminary report was submitted to the Board on 3 July 2015. This was followed by an executive summary on 6 July 2015. A presentation was made to the Minister of Public Enterprises on 9 July 2015. We were then requested to prepare this report as our last submission. This report represents a snapshot of the investigation at the midpoint of the investigation period about 18 June 2015 and is provided to Eskom on the specific request of Eskom. The findings, views,

conclusions and recommendations set out in this report are accordingly one, subject to verification and testing; two, provided to Eskom as a record of the investigation as at the midpoint of the investigation period and three, do not constitute definite findings, views, conclusions and recommendations.”

It is a normal disclaimer you hear from investigators who had not yet completed their investigation for obvious reasons. So Chair this accord, this report becomes vital as a starting point of our investigation into Eskom because it was authorised by the Board but the investigation was not completed and the investigators being Dentons told them
10 that they had stopped at the midpoint of the investigation and the views expressed herein should not be regarded as definitive from them. So Chair that is where we are and I am sure questions will arise about why this report was not completed and you will see that the importance of Dentons records in this introduction is that there was presentation made to all relevant stakeholders of Eskom in terms of decision making, the Board and the Minister at the time. Chair I am going to quickly take you through some of the key issues of the Dentons report and some of them you have raised with us and we thought that we should give you an indication of how they have been answered by an investigator such as Dentons.

CHAIRPERSON: Yes. Before you do that is there not something strange that on the
20 first page that is 0356 of the report right, the one where you said I must note the date.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: The date of the report seems to be 2 July 2015.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: But just immediately below it, oh so it is, it is, it, it relates to investigation as at 18 June the previous month?

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: 18 June.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: But it is, it is finalised on 2 July.

ADV VINCENT MALEKA SC: Indeed.

CHAIRPERSON: Okay. That will be fine.

ADV VINCENT MALEKA SC: So the midpoint of the investigation when Dentons stopped was 18 June.

CHAIRPERSON: 18 June, *ja*.

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

CHAIRPERSON: *Ja*, okay. No that is fine.

ADV VINCENT MALEKA SC: But the report was subsequently provided.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: Almost two weeks later.

CHAIRPERSON: *Ja*.

ADV VINCENT MALEKA SC: *Ja*.

CHAIRPERSON: Okay.

ADV VINCENT MALEKA SC: Chair in paragraph 2 on page 370 Dentons gives an appreciation of where Eskom stands, supply of electricity. In 2.1 it says the following:

20 “Eskom is South Africa’s major electricity supplier and is wholly owned by the South African Government. Eskom generates about 95 percent of electricity used in South Africa and is and about 40 percent of electricity consumed on the African continent.”

So you will see that from 2008 the extent of electricity generated by Eskom had

increased from 92 percent as recorded by NERSA to 95 percent as recorded by Dentons in June 2015. Of importance Chair is that:

“Eskom generated electricity for consumption not only locally, but also trans-jurisdictionally to other parts of the country. Eskom [indistinct] and distributes electricity to its industrial, mining, commercial, agricultural and residential customers. Eskom also supplies electricity to municipalities who in turn distributes electricity to end users within their designated areas.”

- 10 There is a concern and I am sure the Chairperson of the Board when he testifies will deal with it about the extent of recoveries that Eskom suffers as a result of failure by some municipalities to pay their bills to it.

“2.2, Eskom owns and operates 27 power stations in South Africa with a total nominal capacity of approximately 41 995 megawatts. Eskom’s generating capacity comprises around 35 726 megawatts from coal fired power station, power stations, 1 860 from nuclear power that would be Koeberg in the Western Cape, 2 409 megawatts from gas fired power stations fuelled by a geyser and 2 000 megawatts from hydro and pumped storage station as well three megawatts from wind, from a wind farm at Klipheuwel.”

20

I suppose that the hydro power pumped storage would reflect to Eskom’s capacity in stations such as the Ingula Hydro Power Stations and then says:

“Eskom’s generation fleet is currently divided into five operational units coal one, coal two, coal three, nuclear and

picking each comprising of the following stations: a, those which are mentioned there Kendal, Kusile, Majuba, Matimba and Medupi. B...”

On page 371:

“... Duvha it is a name that you will hear a lot, Kriel, Lethabo, Matla, Tutuka Power Stations. C, coal three: Arnot...”

You will also hear a lot about that:

“...Camden, Grootvlei, Hendrina...”

You will also hear a lot about Hendrina:

10 “...and Komati Power Stations. D, nuclear, Koeberg Power Station.”

I do not think much turns on Koeberg in this enquiry. You heard a lot about attempts to increase the nuclear capacity. Chair 2.3, it is another issue which has arisen in the context of the public debates that are taking place in our country relating to so called IPPs.

20 “Eskom purchases electricity from IPPs as well as from electricity generating facilities beyond the country’s borders. The company also maintains more than 360 kilometres of power lines and sub stations with an accumulative capacity over 203, 230 00 MVA.”

I am told that MVA is the cables, these high velocity cables that transmit electricity from one point to the other across the length and breadth of our country.

“2.5, Eskom has embarked on a capital expansion program and is currently constructing new power stations and major power lines to meet South Africa’s growing energy demand.”

It raises questions around Kusile and Medupi and so Chair those are the statistical data relating to the assets of Eskom relating to its capacity to generate electricity and we have given them to you via the Dentons Report because we wanted to understand what this animal called Eskom is. We would respectfully suggest that this report gives a very good indicator of what Eskom is all about and what it goes, how it goes about in seeking to fulfil its mandate to provide electricity to consumers at reasonable or affordable costs. Chair unless you want me to take you through the rest I am going to skip the rest of the technical data.

CHAIRPERSON: Yes, you may skip, *ja*.

- 10 **ADV VINCENT MALEKA SC:** And take you to page 410 and again I do so not to read it, but simply to note paragraph 2.3.

CHAIRPERSON: I am sorry.

ADV VINCENT MALEKA SC: Page 4.

CHAIRPERSON: Four.

ADV VINCENT MALEKA SC: 401, sorry 401.

CHAIRPERSON: Oh.

ADV VINCENT MALEKA SC: My apologies.

CHAIRPERSON: Okay, okay.

ADV VINCENT MALEKA SC: And I ask.

- 20 **CHAIRPERSON:** Yes.

ADV VINCENT MALEKA SC: Ask you to consider 2.3, because it is a primary issue that Dentons had to consider in relation to the costs relating to the generation of electricity by Eskom and in 2.3 Dentons noted the following:

“Overall Eskom has over the past few years seen a significant increase in its primary energy costs and a key question is

whether these increased costs are due to prevailing market forces, contractual arrangements and whether or not these costs are commercially supportable.”

Again that begins to take you to questions that we have sought to interrogate with reference to the Brakfontein issue.

CHAIRPERSON: Huh-uh.

ADV VINCENT MALEKA SC: And with reference to the Optimum Coal Mine issue in order to see whether or not the increases in costs suffered by Eskom in that regard were supportable on a commercial basis or there were other reasons which explained
10 the increases in costs. Chair I am going to skip the rest. These are matters of a technical nature, but I would like to take you to paragraph which deals with the cost indicators relating to the procurement of coal by Eskom. It is at page 409.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: It says:

“Table...”

I am reading at paragraph 5.1:

“Table 1 below provides the current coal prices for each of the coal supplier contracts. Cost plus fixed price and medium terms contracts and the power stations to which the coal was
20 supplied. The prices in the long term fixed price and cost price contracts vary from 135 to 686 per ton. The average price of coal for the longer term cost price contracts is R285,00 per ton including transport costs. All cost price agreement deliveries are by the conveyor.”

Chair I would ask you to note this, because that element of the costs relating to the

delivery of coal for some reason has fundamentally shifted and now borne by Eskom insofar as the investigations that have been conducted reveal. Let me be clear. There may be a good reason why a mine such as Brakfontein may shift the cost of transportation to Eskom. If there are good reasons we would like to hear them, but if they are not well there has to be an explanation.

“The average price of coal for long term fixed price contracts is R250,00 per ton including transport costs.”

Only Majuba Power Station incurs transport costs.

10 “The average price across all long term contracts is R270,00 per ton.”

That is the data given to you by Dentons at the time indicating how the price components in relation to the supply of a primary input of Eskom’s production and that is coal and transport is calculated. Chair I would like to give you some evidence of something that I said earlier about Tegeta in relation to Brakfontein in relation to the contracts which Eskom had as at 2015, June when Dentons engaged in this exercise. You will see that evidence beginning at page 411.

CHAIRPERSON: Yes.

20 **ADV VINCENT MALEKA SC:** And there Eskom gives you, I am sorry Dentons gives you detailed information relation to the suppliers of coal to Eskom by name. You will see the names of the suppliers in the second column from the left. It starts with Anglo Coal (Pty) Ltd and it tells you in the next column the power station to which the coal was supplied and the column thereafter tells you the date when the coal supply agreement started and thereafter you will see the CSA and date which is the date when that long term supply agreement would have come to an end and then it gives you the volumes of metrics per ton of the coal which was going to be supplied and the next one

is what they call CV which is the Calorific Value of the coal supplied and I am told by Ms Hofmeyr that that relates to the burning capacity or quality of the coal. So that as you burn it more it produces electricity, but as you burn it less it produces less electricity. I am told that I am, I hope that I am not representing her expertise in that regard.

CHAIRPERSON: Well she seems to nod. So [laughing].

ADV VINCENT MALEKA SC: Yes and Calorific Value is important in the calculation of the price Chair. You get the prices in the next one which is Rand per ton and you will see that the lowest point of Rand per ton is 135 and the highest point is 686 and the
10 highest point Chair you will find with reference to Exel which was supplying amongst others to Arnot.

CHAIRPERSON: Somewhere in the middle?

ADV VINCENT MALEKA SC: Somewhere in the first top third.

CHAIRPERSON: Well first top, first third *ja*.

ADV VINCENT MALEKA SC: *Ja*, first third.

CHAIRPERSON: *Ja*.

ADV VINCENT MALEKA SC: The top third.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: Hm.

20 **CHAIRPERSON**: I have seen it.

ADV VINCENT MALEKA SC: Yes and again some of the documentation that we will present to which was before Parliament includes the representation by Exxaro explaining all of these things because the; Exxaro supply to Arnot was terminated on the basis that they were supplying at an expensive price. So what you will see from this is that as at the date that Dentons compiled this report there was no reference to

Tegeta as the supplier of coal to Eskom and Tegeta got.

CHAIRPERSON: And this is June, June the 2nd or July, the 2nd 2015?

ADV VINCENT MALEKA SC: Yes Chair.

CHAIRPERSON: Ja, hm.

ADV VINCENT MALEKA SC: When Brakfontein and Optimum Coal are going to be explored it will be in the context of this historical data sets and data points in order to give an appreciation of what was the price of coal and what changed thereafter. Chair the last part of this report without going into the scientific elements of it relates to the recommendations that were made and you will find them at page 425.

10 **CHAIRPERSON:** Yes.

ADV VINCENT MALEKA SC: “10.1, it is recommended that the following issues be revisited to secure better prices for coal: point 1, conduct the necessary feasibility assessment to determine if the long term cost plus collieries can be refurbished or expanded to increase production to contracted levels or even higher.”

So there Eskom was told that in order to make sure that there are better prices to secure in order to ensure security of supplier for coal it is important that you should invest in the cost plus mine because once you do so you will have an assurance of
20 better prices and security of supply. It is a key recommendation.

“Point 2, develop a transparent and a structured framework for credible BEE participation in the primary energy suppliers.”

I emphasise credible BEE participation, because it is through that narrative of BEE participation where all manner of problematic conduct was undertaken which we would submit ultimately when we make submissions reflect how the narrative of BEE was

captured in order to bring about those ill consequences, but Dentons said whatever you do in relation to BEE must be structured and must be transparent and should lead to credible participation by people such as me and you in the primary energy supply for Eskom and then:

10 “1.3, investigate how long term cost plus agreements can be restructured in order to improve BEE ratings where it is required and investing in these mines if feasible to increase production which will have large impact on reducing the transport costs significantly. Four, changing the approach on securing medium term and short contracts to a competitive tender basis or conduct a prequalification process to qualify for suppliers. Point 5, conduct competitive tender for the coal logistics especially coal transported, coal transported by road.”

And Chair the rest is there. The one that I would like to draw your attention is 10.2.1, because it is important for Brakfontein.

 “For future supplies a more rigorous supplier due diligence procedure should be put in place.”

And you will hear a lot about how the process of due diligence in relation to Brakfontein through Tegeta unfolded.

20 “10.2.2, direct purchases from the Chevron Refinery in Cape Town should be revisited and a way to secure more reliable long term supply should be found.”

That relates to diesel Chair.

 “10.2.3, competitive tenders for the diesel logistics should be conducted especially for the diesel transported by road.”

So those were the recommendations Chair. The rest of the report deals with financial challenges that Eskom face and what were the financial recommendations that have been made. I am not going to deal with them and really we would submit that what is key and what is before you is how state capture project unfolded in Eskom and the primary way in which it unfolded and was executed was through procurement. So these are procurement issues and recommendations recorded by Dentons plays before the Board which required to be investigated and implemented if the recommendation were sound and so Chair that is the Dentons Report. I have taken you to it ahead of the slide presentation on the gap analysis because it was a matter that you felt strong
10 about and I would like now to go back to the slide presentation and again with the gap analysis start at page 4 and the first report will reflect Chair on page 4 is the Public Protector's Report.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: The genesis of this Commission.

CHAIRPERSON: Hm.

ADV VINCENT MALEKA SC: This report has already served before you as EXHIBIT A1 as I recall when it was presented to you in the beginning by Ms Norman. You will see that the slide refers to parts of the terms of reference that are relevant to this Commission and they are identified right at the bottom left hand corner. You will see
20 that they begin with 1.1, 1.2, 1.3, 1.5 skip 1.6 and 1.7 and they go to 1.9. For the present purposes Chair we would like you to highlight only 1.4 and 1.5.

CHAIRPERSON: [Chair not talking into mic].

ADV VINCENT MALEKA SC: It is there. It is on page 4.

CHAIRPERSON: Oh.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: Thank you.

ADV VINCENT MALEKA SC: Chair can I please ask you insofar as the Eskom evidence is concerned to highlight 1.4 and 1.5, because those are the terms of reference that are relevant to the evidence which will unfold.

CHAIRPERSON: Yes I found it, 1.4 and 1.5, ja.

ADV VINCENT MALEKA SC: Yes, and page 5 tells you how the investigation started, I am going to skip it because we have dealt with it for quite some time, and page 6 also deals with the key findings which were made by the Public Protector flowing from the investigation she had done. There are about 16 that we have identified for you Chair,
10 beginning from page 6 to page 8, I am not going to repeat them, but the GAP analysis in earnest on the Public Protector's report begin from page 9, you will see the question posed was can the report or the evidence be placed before the – or accepted by the DCJ the answer is unequivocally yes, and then we begin to underline the outstanding issues, or gaps or procedures.

The first is investigate a possible dispute between a private company co-owned by the President's friends and his own son, I think you know which company that relates to, it is the Tegeta and Oak Bay entities, and you will know that the shareholders of Oak Bay include an entity called Mabengela, owned in large measure by the son of the former President, and then two, interview Minister Zwane in order to obtain his
20 version of events.

Chair I am going to stop here, and ask you to go to Volume 1.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: In order to illustrate why we think that that gap we have identified flowing from the Public Protector's report becomes important and why you as the Commission should interrogate that gap. In Volume 1 you will see that on page

309.

CHAIRPERSON: Yes

ADV VINCENT MALEKA SC: The Public Protector deals with Minister Zwane at the time in paragraph O, she says:

10 "Minister Zwane needs to be interviewed in order for his version of events to be obtained. It cannot be disputed that Minister Zwane indeed travelled to Zurich, Switzerland, for negotiation between Glencore and Tegeta, furthermore the Minister did not complete his travel itinerary and mysteriously ended up in Dubai without boarding his scheduled flights from Zurich to Dubai, from Dubai to Delhi and from Delhi to Dubai. Furthermore it appears that an additional flight was booked from Dubai to Johannesburg. This amounted to expenditure being incurred to the amount of R96 630, if not contradicted or fully explained it appears to be an indication of fruitless and wasteful expenditure.

 Furthermore it appears as though Minister Zwane acted in personal interest whilst on this trip and as such it appears as though his conduct is not in line with Section 2 of the Members Executive Ethics Act."

P:

20 "If Minister Zwane travelled in his official capacity to support Tegeta's bid to buy the mines in his conduct would give Tegeta an unfair advantage over interested buyers. Further it is potentially unlawful for the Minister to use his official position of authority to unfairly and unduly influence a contract for a friend or in his instance his boss' son at the expense of the State. This scenario would be further complicated if his actions were sanctioned by the President. This scenario will be investigated further in the next phase of the

investigation.”

So there is the gap that the Public Protector left for you to consider and fill Chair. So we would respectfully suggest that part of the gap is something that the Commission cannot avoid and the Commission must investigate. In fairness Minister Zwane must be given an opportunity to give his version of the events. As part and parcel of completing that gap we will call the evidence of Mr Clifton Ephron as we have indicated to you on the 27th of February to begin to fill the gap in relation to that part of the inquiry and we have obtained his statement and he will tell us what happened in relation to trip in Zurich and of course we would not accept his version for the sake of it. We will
10 probe it to see whether or not it is in line with the probabilities of commercial engagement of this kind.

So that’s the one part of the Public Protector where we ask you to fill the gaps.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: And Chair that takes me to paragraph 3 on page 9, paragraph 4:

“Investigate the conduct of the Bank of Baroda in relation to the pitches of all shares in OCH by Tegeta and the rehabilitation fund.”

CHAIRPERSON: Sorry you have gone back to?

20 **ADV VINCENT MALEKA SC:** Page 9 of the sales.

CHAIRPERSON: Page 9, oh, okay. Thank you.

ADV VINCENT MALEKA SC: Again the Public Protector did enquire into but did not complete her investigation on these issues. We would like to present evidence that fills the gap in that regard, and in relation to the purchase of shares and the involvement of the Bank of Baroda we will present additional evidence of the business rescue

practitioners who ultimately filed a report on the Section 34 of the Corruption Act concerning how their suspicion arose in relation to the acquisition of shares Chair. I will not anticipate the evidence but what you will hear also from the evidence of witnesses within Eskom that we will call is that those shares were backed-up by two forms of funding, the one was the use of a R1.6billion guarantee that was given by Eskom for the benefit of Tegeta held in the custody of ABSA Bank. That of course was not enough because the price was R2.5billion. The balance was procured late in the day through an advance prepayment by Eskom to Tegeta for coal supplies anticipated, the combination of both was enough to meet the purchase price and acquisition of those

10 shares.

What is key Chair is that when proof of funding was called at that point in time the Bank of Baroda became involved and gave the assurance to the business rescue practitioners that there is indeed this adequacy of funding and the guarantee was presented as part and parcel of the proof of it. Again that's an attempt to close the gap.

The next issue Chair relates to the rehabilitation fund. There has been lots of litigation around it, part and parcel of the reports we will present to you relates to the OATA, what do they call them these days Organisation Against Tax Abuse, Organisation for Undoing Tax Abuse. I must confess I came across them in a different context when

20 the acronym reflected something different and it was in opposition to – in opposition of alliance to tolling, this was when I came across them for the first time but here Chair there has been all sorts of litigation, they have made representation to the Commission around matters such as those and we will deal with to the extent necessary, again to close the gap.

And Chair the next – that takes me to five, investigate further whether any

State functionary in any organ of State or other persons acted unlawfully, improperly, or corruptly in connection with exchange of gifts to the Gupta linked companies or persons.

Chair at this stage I would not want to suggest that we will close that gap in this round of the hearing. I can indicate to you that we have suggested a way forward about how we deal with this issue and I am not going to reveal here in public about the way forward.

CHAIRPERSON: Okay.

ADV VINCENT MALEKA SC: And six, phase one of the investigation did not touch on
10 the award of license to the Gupta Family and superficially touched on the State financing of the Gupta – Zuma businesses while only selecting a few State contracts. Further investigation is required. For the purposes of this round of investigation Ms Hofmeyr will deal with the Brakfontein angle.

And then Chair in page 10 the GAP analysis concluded by the following commentary; the report guides the Commission was key in identifying errors of investigation pertaining to Eskom and let me give you a list of what we're going to canvas in relation to other key investigation pertaining to Eskom. McKinsey/Trillion/Richmond insofar as they deal with Eskom. My colleagues from Transnet will deal in detail with McKinsey/Richmond insofar as it relates to
20 ...(intervention)

CHAIRPERSON: Your colleagues dealing with Transnet?

ADV VINCENT MALEKA SC: Transnet yes.

CHAIRPERSON: Ja.

ADV VINCENT MALEKA SC: They will deal with the McKinsey relationship
...(intervention)

CHAIRPERSON: It's as if they are employed by Transnet.

ADV VINCENT MALEKA SC: My apologies chair.

CHAIRPERSON: Ja, your colleagues dealing with Transnet ja, okay.

ADV VINCENT MALEKA SC: It has been a long night and it will be a long day.

CHAIRPERSON: Ja.

ADV VINCENT MALEKA SC: But my colleagues dealing with Transnet will explore the contractual relationship between McKinsey as the primary service provider for consultancy and related services to Transnet together with its BEE partner, Regiment. For our part and for the purposes of Eskom we will explore the relationship between
10 McKinsey and Trillion insofar as it relates to provision of services on two contracts, the Corporate Plan and the Master Services Agreement, we will explore that part.

I have already indicated to you that we've asked McKinsey to assist us in that regard. The next issue Chair which we will deal with quite quickly because it cuts across all different entities it's a subject which we have dealt with when we looked at the various State departments, including GCIS, is the TNA issue. You have heard a lot about TNA's procurement of media buyer business from GIS and the provinces. TNA also became involved in Eskom. There is a report which I will take you to, which we believe that it is enough for the present purposes of closing the gap, which deals with TNA, it's a report from an audit and forensic company called Sizwe Ntsaluba Gobodo
20 called SNG and so we will refer to it. We are not going to suggest to you that complete investigation. We mention it now in Eskom because it cuts across various other State owned entities.

Then Warong will be the one that – it's a new issue that we will ask you to note as additional matter for investigation. Then it will be the Brakfontein and the OCM issue, and then Chair the key thing will be the relationship between Eskom's executives

and third parties, which raises questions from the emails that have been referred to in the report of Fundudzi, that is chapter 3 on that report, I will take you through it, and that is important because what comes out from those emails require for the investigation in order to close the gaps, and then there will be – we would like to at this stage Chair to note that there are question marks raised relating to the costs overrun for the Medupi and Kusile Projects. At this stage we as the legal team have merely noted them and have asked the investigators to look into it, because from the Dentons Report it is quite clear that there are substantial costs overrun. We don't know what the precise explanation is, there may be a good explanation, we don't know, but there has

10 to be some sort of explanation, especially whereas here one of the power stations cost overrun is fourfold the original cost estimation, Chair I mean we are not project managers, we are not project analysts but the very fact that the project overruns in terms of cost and time to four times than the estimate raises fundamental questions which the nation is entitled to ask and call for an answer.

And Chair those will be the areas that we will investigate, that we will deal with in the course of GAP analysis arising from the Public Protector's Report, and Chair unless you want me to deal with other issues arising from the Public Protector's Report in terms of the GAP analysis that we have done we will then move to the next report.

CHAIRPERSON: Ja, let's do that.

20 **ADV VINCENT MALEKA SC:** The next one Chair is the Dentons Report, I have dealt with it and I am not going to waste your time by taking you through it. I merely would like to make some observations around the areas of investigation which Denton was required to investigate. They are set out in page 12 of the slides and Chair I merely ask you to note them I am not going to take you through them, and the key findings from the Dentons ...(intervention)

CHAIRPERSON: I'm sorry, that's paragraph, that's page 12?

ADV VINCENT MALEKA SC: Page 12 of the slides.

CHAIRPERSON: Yes okay. Yes.

ADV VINCENT MALEKA SC: The key findings are set out in page 13, and again I am not going to waste your time by taking you through them, except to ask you to know them, and then the next slide is page 14, and Chair I am not going to ask you again to waste time on them, and finally the other comments that appear on page 15.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: And you will see that the first comment relates to the
10 snapshot when the investigation was cut short on the 18th of June 2015 and the second relates to the fact that there were no further verification and corroboration processes that Denton wanted to do in order to make sure that its findings are sound. Four, repeats the same concern that Denton could not guarantee the soundness of its conclusions and lastly Chair I've added that you should also note the procurement deficiencies which Denton identified which later became a problem.

Chair the next report is the Portfolio Committee on Public Enterprises. I had previously indicated to you that you will find both reports in Volume 3 and I would like to take you to some aspects of the final report in Volume 3 from page 984 Chair it's the GAP analysis arising from that report, if you are at page 984.

20 **CHAIRPERSON:** Yes.

ADV VINCENT MALEKA SC: You will see that the Portfolio Committee makes several recommendations and before I detail all of those recommendations I would ask you to jump to page one, sorry 985 in paragraph 4.13, because it reflects how the Portfolio Committee in its wisdom sought to fill the gap and it says in paragraph 14.3 the Portfolio Committee recommends to Parliament to hand over this report together with

documentation and the entire record of evidence collected in the course of the inquiry to the Zondo Commission for further investigation.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: It is for that reason Chair we thought it wise to bring the record of the Portfolio Committee before you.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: Because a very important organ of our elected representatives say that you must consider it for further investigation.

CHAIRPERSON: Ja, no it's very important but I think even if they hadn't said so as you
10 know already last year we had said that we – I'd said I wanted all reports that emanates from Parliament and the other bodies that relate to what – to the matters we are investigating so that we could have a look and see what we can take and what can be of use to us and what might not be of use and see where we might have to supplement, so it's in line with what we originally thought should happen.

ADV VINCENT MALEKA SC: Thank you Chair. Chair I see it's almost one o'clock, may I ask that we adjourn at this stage because I am going to get to matters of detail relating to the recommendations.

CHAIRPERSON: Okay, no that's fine. We are going to adjourn for lunch, and resume at two o'clock, the Commission adjourns.

20 **INQUIRY ADJOURNS**

INQUIRY RESUMES

CHAIRPERSON: Yes Mr Maleka.

ADV VINCENT MALEKA SC: Chair we were at Volume 3 page 984 and we were highlighting the issues on which the Portfolio Committee recommended further action.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: Some of them are operational and relate to the board of Eskom and others directly affect the work of the commission. If you go to paragraph 493 – 4.9.3 on page 984.

CHAIRPERSON: Just one second. 4.?

ADV VINCENT MALEKA SC: 9.3.

CHAIRPERSON: Okay.

ADV VINCENT MALEKA SC: You will see that the committee required the board to take disciplinary measures against implicated individuals and on Friday the Chairperson of Eskom will tell you how far Eskom has gone in that regard and then 4.10.1 the
10 committee required Eskom's executives and senior staff to undergo live audits examinations and also to the extent that they are subjected to professional regulatory obligations to be referred to those regulatory board is for investigation. And then 4.10.2 the Eskom executive board members and staff, external persons who unduly influenced Eskom's decisions must be identified. 4.10.3 the committee recommends criminal investigations into possible cases of fraud, corruption and other unlawful conduct with respect to actions of listed individuals and firms. And possibility of financial crimes. Again we will take that issue further as I explained with reference to the evidence we will present before you. 4.10.4 South African Law Enforcements Agencies must review or conduct independent audits of implicated companies specifically those that had
20 dealings with Eskom and where necessary institute the following actions. Blacklisting, recovery of unlawful proceeds and reporting to relevant authorities. And so Chair here there may well be the question of overlap between what the commission is doing and what other law enforcement agents are doing. You would know that the commission is interfacing with amongst others the SIU, the NPA and the Hawks with a view to ensure that their investigations are not hampered or prejudiced by reason of what the

commission is doing. And we have some suggestions to make to you at the end of the Eskom inquiry. How that interface should be taken further because you know Chair that there are some allegations that some of the law enforcement agents are not prepared to take forward their constitutional and statutory obligation because of what the commission is doing. There is a suggestion that they have put on hold their investigation and or prosecutorial functions and duties because of what the commission is doing. We do not understand why that should be the case and therefore at the end of the Eskom inquiry we have some suggestions to make.

CHAIRPERSON: Well that might not – there might not be a reason in regard to
10 persons who are not giving any co-operation to the commission who are not assisting the commission with its investigation but when it comes to person who may be giving evidence in the commission and assisting the commission to unearth more wrongdoing.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: They may have to wait a bit.

ADV VINCENT MALEKA SC: Yes understand. But where they have enough evidence
Chair.

CHAIRPERSON: Ja.

ADV VINCENT MALEKA SC: And the work of the commission would not add much to
the evidence they have I do not understand why they should stop executing their
20 mandates simply because they are waiting for the commission.

CHAIRPERSON: Ja. No I think – I think there is engagement going on.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: And I am sure it will clarify things.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: Ja.

ADV VINCENT MALEKA SC: And the last recommendation Chair is that Eskom must make applications in terms of Section 162 of The Companies Act to have any former board member who acted within the immediately preceding 24 months and implicated in fraud corruption and or other unlawful behaviour declared a delinquent director you recall that those are the court powers which once are exercised and you are declared a delinquent director you will no longer be entitled to occupy an office of a director in this country. And that...

CHAIRPERSON: I have not looked at Section 162 but I am wondering whether the limitation to 24 months has anything to do with something that might be in that section?

10 **ADV VINCENT MALEKA SC:** No, no, the section as far as I read it.

CHAIRPERSON: Because – ja.

ADV VINCENT MALEKA SC: Gives any of the listed persons a shareholder, a creditor and other persons mentioned to approach the court to have a director declared delinquent on grounds specified in that section. As far as I know it does not have a limitation.

CHAIRPERSON: Yes because I mean then there may well have been people who acted in a certain manner around five years ago.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: Why should they be spared?

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

CHAIRPERSON: Ja.

ADV VINCENT MALEKA SC: I suspect the committee made this recommendation on the basis of the information placed before it but we accept that...

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: That there is no reason to confine.

CHAIRPERSON: Ja.

ADV VINCENT MALEKA SC: The commissions' power insofar as it is entitled to make recommendation to Eskom to that time period.

CHAIRPERSON: Ja.

ADV VINCENT MALEKA SC: And so Chair those are the gaps which the committee identified in relation to the remedial measures it recommends.

CHAIRPERSON: Ja.

ADV VINCENT MALEKA SC: It remains for us Chair to draw your attention to the last aspect of the committee's recommendation that affects the closing of the gap analysis.

10 It is at page 981.

CHAIRPERSON: 981?

ADV VINCENT MALEKA SC: Yes Chair.

CHAIRPERSON: Okay.

ADV VINCENT MALEKA SC: And it talks to the earlier issue raised concerning your power under Section 310 as if the committee would have presciently been aware that we are going to ask you to consider the exercise of those powers.

CHAIRPERSON: Yes.

20 **ADV VINCENT MALEKA SC:** At page 981 paragraph 4.4.1 the committee says the following: "The committee recommends to the national assembly that the witnesses mentioned below must be requested to present themselves to the Zondo Commission of Inquiry in order for them to shed more light on the allegations of corruption and state capture at Eskom during their tenure. The lists are mentioned there.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: And I do not think that I would like to mention them here Chair.

CHAIRPERSON: Ja.

ADV VINCENT MALEKA SC: But there – those are the lists of persons who we will respectfully suggest.

CHAIRPERSON: Well some of them are quite well known to lots of people but that does not necessarily mean we mention them but ja.

ADV VINCENT MALEKA SC: Yes. And Chair it is important that these persons must present themselves to the commission to put up their version because their version was not fully explored before the commission. And we can.

CHAIRPERSON: Before the Portfolio Committee.

10 **ADV VINCENT MALEKA SC**: Before the Portfolio Committee. And we can also indicate Chair that those who have had the privilege of appearing before the Portfolio Committee have subsequently been accused of misleading the commission.

CHAIRPERSON: Oh.

ADV VINCENT MALEKA SC: The portfolio commission sorry the Portfolio Committee.

CHAIRPERSON: I assume some of them not all of them?

ADV VINCENT MALEKA SC: No not all of them.

CHAIRPERSON: Ja. Okay yes.

ADV VINCENT MALEKA SC: Again I will not mention name for now.

CHAIRPERSON: Yes.

20 **ADV VINCENT MALEKA SC**: But some of them have been accused and Eskom has charged some of them.

CHAIRPERSON: Ja.

ADV VINCENT MALEKA SC: For misleading the Portfolio Committee in the course of the investigation.

CHAIRPERSON: I think I seem to remember that – at least one name ja.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: Or maybe two.

ADV VINCENT MALEKA SC: I can recall two off hand.

CHAIRPERSON: Ja. Ja and I think – I see the names that I am remembering here.
Ja.

ADV VINCENT MALEKA SC: Some of the names are there. I think the two that you are thinking about I can see some of them here.

CHAIRPERSON: Ja, ja.

ADV VINCENT MALEKA SC: So it is vital that those persons Chair regardless of Rule
10 310 powers that they have to present themselves before you. And that Chair is the report of the Portfolio Committee. It takes me to page 23 of the slides. Chair and that

CHAIRPERSON: Ja.

ADV VINCENT MALEKA SC: Get to the first chapter – the first of the Fundudzi Report.

CHAIRPERSON: Oh when you say took you to page 23 you mean you have covered up to page 23 of the slides?

ADV VINCENT MALEKA SC: Indeed.

CHAIRPERSON: Ja okay. Yes and where do I find the Fundudzi Report?

ADV VINCENT MALEKA SC: Volume 4.

20 **CHAIRPERSON:** Yes.

ADV VINCENT MALEKA SC: And Chair you would remember that the Fundudzi Report of relevance to the work of the commission has been presented in Chapters 2 and 3 of that report. The first one before you begins at Volume 4 page 986.

CHAIRPERSON: Is that under File 5?

ADV VINCENT MALEKA SC: Under File 5 indeed.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: And you will see that it is Chapter 2 dealing with the investigation on behalf of National Treasury relating to McKinsey Trillian and Regiments.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: The first part of that report relates to Transnet and for the present purposes we will skip it. We will ask you to go to page 1225 which is where it begins with its investigation into Eskom concerning the involvement of Mc Kinsey.

CHAIRPERSON: 1225 I have got. For convenience should we not have a divider there
10 that can help? Or will that cause confusion?

ADV VINCENT MALEKA SC: No, no I think it is – we will ask them to put a file divider not as big as the one that divides the volumes.

CHAIRPERSON: Yes just something to indicate this is where the portion relating to Eskom starts.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: Ja. And that the other portion is something else.

ADV VINCENT MALEKA SC: Indeed. And...

CHAIRPERSON: Okay.

ADV VINCENT MALEKA SC: Chair Fundudzi investigated the so called the Top
20 Engineers Programme relating to the appointment of McKinsey at Eskom. It is a programme which began in 2015 April during the proposal stages. You will see the date is given in paragraph 7.7.1. And then they explain the nature of the programme and they detail how it evolved ultimately into some kind of a service level agreement and Chair I am not going to ask you at this stage to look into the process because it is a matter that we will deal with when we present evidence of oral witnesses. Having

outlined the nature of the programme the issue that Fundudzi engaged with related to payment of several invoices to both McKinsey and its BEE partner Trillian. You will see that they identify the issue of the invoices on page 1244 and you will see that in relation to McKinsey the amounts of – is set out in paragraph 7.1.106 divided into two tranches. The total amount is slightly in excess of R1 billion in regards to two invoices. You are given invoice numbers. And then if you turn over to page 1245 there is an explanation of invoices from TMC which Trillian Management Consulting they are given in detailed Chair at page 7.1.110.

CHAIRPERSON: Paragraph hey?

10 **ADV VINCENT MALEKA SC**: A paragraph yes.

CHAIRPERSON: Ja.

ADV VINCENT MALEKA SC: The total amount is shy of half a billion in rand figures and after its investigation Fundudzi came to the conclusion that that contract was unlawful because it was a risk based contract which did not comply with treasury guidelines and instructions. It also came to the conclusion that it was unlawful because Eskom failed to follow its procurement procedures. I have indicated to you that in the end Eskom took court action to set aside that contract. It is before the courts I am not going to say anything more about it. But what is quite crucial beyond the validity of the contract are the recommendations that Fundudzi made in relation to the conduct of the parties involved. You will find it at page 1281.

20

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: There Fundudzi says based on the conclusions discussed above we recommend the following: DPCI which I take it to mean the Hawks should investigate if Singh who we assume is Mr Anoj Singh the Chief Financial Officer of Eskom at the time. Mr Sagar who we assume is Mr Vic Sagar an employee of

McKinsey at the time. McKinsey itself, Regiment and any other role player did not receive gratification in terms of the Prevention and Combatting of Corrupt Activities Act. You will recall that the Corruption Act in that regard Chair has a wide definition of what gratification means. It is no longer like in the past limited to the question of receiving financial benefits of some sort. It extends to even receiving some kind of official favour in the execution of duties and Fundudzi says you must investigate that issue in relation to those specific individuals. The next recommendation reads as follows: “DPCI should investigate if Mr Singh, Sagar, McKinsey Regiment and any other role player did not contravene Section 34 of The Prevention of Organised – Prevention and Combatting of

10 Corrupt Activities Act. Again here Chair you recall this is a section which is different to direct acts of corruption and reception of gratification. It is a section that imposes on obligation on any person in authority to report his or her knowledge of corrupt activities that take place in his presence or otherwise.” And the – what is quite interesting about this recommendation is that the business rescue practitioners when they pick up suspicions around the payment relating to the Optimum Coal Mine Acquisition they fulfil their duty to report that suspicion in terms of Section 34.1 of the Corruption Act. And we would submit that this recommendation by Fundudzi is even more applicable here because these are the individuals who would have been aware of suspicions of corrupt activities in relation to their involvement or knowledge of the transactions involved. So

20 that is the issue that we will explore when we come to the McKinsey Trillian issue.

CHAIRPERSON: Okay.

ADV VINCENT MALEKA SC: And Chair that is the first part of the Fundudzi Report.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: You will see that we deal...

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: We deal with that report in the slides from page 24 and at page 26 of the slides we summarise the findings for you.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: There are many they end up at page 28. And at page 29 we identify the gaps and those are the gaps that I have already dealt with.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: With reference to the body of the report.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: But the summary of it is at page 29 and we respectfully
10 submit that the commission would be well within its power and in fact is obligations to fill up those gaps. That takes me to Chapter 3 of the Fundudzi Report which you will find in the next volume that is Volume 5.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: Chair you will see that this report begins at page 6.

CHAIRPERSON: File 6 or page 6?

ADV VINCENT MALEKA SC: Sorry did I say page 6?

CHAIRPERSON: Ja.

ADV VINCENT MALEKA SC: File 6.

CHAIRPERSON: File 6 ja.

20 **ADV VINCENT MALEKA SC:** And it is page 1282 and you will see that the heading is Chapter 3. It relates to the investigation specifically of Eskom.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: There are several aspects of the Eskom investigation and I am just going to highlight for you for the purposes of your notes. You will see at page 1326 they deal with the Brakfontein contract.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: I am not going to say anything more about it. All I want you to note is that at page 1360 they deal with the question of coal testing and the signing of CSA in regard to coal from that area. And...

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: At page 1372 they deal with the performance of Tegeta relating to that [indistinct] around coal deliveries and Chair the same issue of coal quality is dealt with and investigated and of course reported on from page 1381 from paragraph 6.16.6. And then Chair there is a question of payment – 6.16.6.

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

ADV VINCENT MALEKA SC: And they give you chapter and verse of the persons involved and Chair it involves a lot of detail that you will be told about when Brakfontein evidence is presented.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: And then at page 1415 they give you a table of the amounts that were paid as against invoices for coal delivered.

CHAIRPERSON: Yes.

20 **ADV VINCENT MALEKA SC:** And it is R1.1billion. And then they begin to identify issues raised by National Treasury regarding its investigation of that coal quality from Tegeta and the responses of Tegeta from page 6.29 – sorry from paragraph 6.29.22. They deal with all sorts of things including SAB testing and you name it. And ultimately Chair they make some conclusions and I am not going to waste your time other than to ask you to note that their recommendations based on their findings are set out in page 1420 from paragraph 6.29.40.5. Again they recommend in regard to those issues that the Hawks should investigate which role players did receive gratification and which role

players contravened Section 34 of the Corruption Act. They also recommend the taking of disciplinary steps and that is the gap which Fundudzi in relation to the Brakfontein contract ask the commission to consider and it is a gap that we would fill when we present the Tegeta leg of the evidence. Chair they go to the next topic relating to Tegeta and it is at page 1421. It is the question of the prepayment to Tegeta for the supply of coal in paragraph 7.1.1 they give you the amount of 6.59 million by way of prepayment. On any version Chair there will not be a dispute as far as we are aware between the protagonists who support the question of prepayment and any implicated person who may contest that prepayment that as a matter of fact Eskom did make

10 prepayment. There was an attempt to suggest that that was not a prepayment when the Portfolio Committee heard evidence from some of the executives of Eskom. We would like to hear what is the justification for the suggestion that that was not a prepayment? But we feel confident at this stage that the body of evidence indicate without doubt that that was a prepayment. And you will see when we also present the evidence the former director of the Department of Mineral Resources that even at that stage when DMR was asked to become involved.

CHAIRPERSON: When the former Director-General?

ADV VINCENT MALEKA SC: Former Director-General indeed.

CHAIRPERSON: Yes.

20 **ADV VINCENT MALEKA SC:** I think we refer to him as Dr Ramontja. Even at that early stage the question of prepayment was [indistinct] and was [indistinct] in a different narrative of trying to assist whoever would be the new owner of the Optimum Coal Mine to fulfil their duties. So we would submit that whatever contrary version been put before Parliament it would not be sustainable by the reference to the body of the evidence presented to the Portfolio Committee and of course in the light of the investigation by

Fundudzi as we are now discussing and Chair from paragraph 7.2 onwards it gives you a wholesale background in relation to that prepayment. I am not going to ask you to go into it. We will take it further via the, the, the evidence and then in paragraph 7.4 they discuss the question of Optimum Coal Holdings as a coal supplier under the CSA and it is a long, long, long discussion, but where it ends Chair is at, at page 1431.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: Paragraph 7.8.4, the selling of Optimum Coal Mine and you will see that they deal in subparagraph 1 about the penalties that Eskom imposed on Glencore of 2.1 billion. That is the first leg of the penalties and Chair what is
10 interesting is they jump quite quickly from the penalties that Eskom imposed on Optimum Coal Mine when it was still under the regime of Glencore control to a total set of penalties after the ownership of Optimum Coal Mine was transferred to Tegeta and you will see that they record on page 1432.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: Paragraph 7.8.4.4.

CHAIRPERSON: *Ja.*

ADV VINCENT MALEKA SC: “The exact value of the penalties remained a
bone of contention....”

CHAIRPERSON: Hm.

20 **ADV VINCENT MALEKA SC:** “...until resolved by an Arbitrator at a reduced total of R577 million. The said reduction occurred after the sale of Optimum Coal Holdings subsidiaries to Tegeta in a sale agreement concluded on 14 April 2016 after the payment of 2.15 billion by Tegeta.”

So there are the scenarios which we would ask you to consider when we deal with that

issue is the quantum of the penalty before the sale 2.1 billion and the quantum after the sale when the mine is now owned by a different entity of almost something in the order of R600 million. That is a substantial reduction.

CHAIRPERSON: The difference is just more than substantial.

ADV VINCENT MALEKA SC: Indeed.

CHAIRPERSON: *Ja.*

ADV VINCENT MALEKA SC: Indeed.

CHAIRPERSON: Hm.

ADV VINCENT MALEKA SC: And we would like to hear the Eskom Executive who
10 have been involved in this regard and I do recall that some of the emails that we will refer you to hopefully through the evidence of the Eskom cyber experts that there were some of them which deals with exchange of confidential information on that score and we would like to deal with that part of the evidence Chair and then Chair I am not going to waste time by pointing out to you that there was a competition by other rivalry or rivals of Tegeta for the acquisition of Optimum Coal Mine. One of them is mentioned in paragraph 7.8.6, but who ultimately fell out simply because of the way the pressure was put on the business rescue practitioners and Chair on 1434, paragraph 7.8.7 deals with the transfers or transfer of shares and Chair I am going to move quite quickly in the interest of time to take you to a different topic which is related to the Optimum Coal sale
20 of shares and that is the 1.6 advance bidding which is mentioned at page 1438.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: And then on page 7, page 1739 they deal with the Absa guarantee.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: And Chair one of the emails that we discovered which

we will present before you of course through the lawyers of Eskom was an email that copies a number of people relating to this guarantee requiring external services providers who had nothing to do with that guarantee to advise Eskom on it and a number of questions arise from that email. I can indicate to you that it was sent to representative, representatives of Trillian.

CHAIRPERSON: *Ja.*

ADV VINCENT MALEKA SC: Including Mr Wood or Dr Wood.

CHAIRPERSON: Hm.

ADV VINCENT MALEKA SC: To advise Mr Singh on it.

10 **CHAIRPERSON:** *Ja.*

ADV VINCENT MALEKA SC: And we wonder what their interest in it was.

CHAIRPERSON: Hm.

ADV VINCENT MALEKA SC: Because they were not contracted to advise Eskom on.

CHAIRPERSON: Hm.

ADV VINCENT MALEKA SC: That guarantee.

CHAIRPERSON: Hm.

ADV VINCENT MALEKA SC: And that raises fundamental questions.

CHAIRPERSON: Hm.

ADV VINCENT MALEKA SC: About their involvement in that part of the guarantee.

20 **CHAIRPERSON:** *Ja.*

ADV VINCENT MALEKA SC: And Chair you see then that from page 1443 Fundudzi begin to talk about electronic mail communications between on the one hand Eskom's Executives and some of the Directors relating to that transaction.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: And you will see that at page 1444 they talk about the

shortfall of 600 million relating to the purchase price of Optimum Coal Mine and there are email, I am at page.

CHAIRPERSON: I am trying, I am trying to see a shortfall of 600. I see 600 million. I see 500 million. Is that what you are referring to on page 1444?

ADV VINCENT MALEKA SC: Yes Chair. If you see, if you look at the heading in paragraph 7.8.2.4 the heading is “Tegeta Short of 600 Million”.

CHAIRPERSON: Oh. Oh, yes I was looking two paragraphs above that.

ADV VINCENT MALEKA SC: Okay.

CHAIRPERSON: Yes, okay.

10 **ADV VINCENT MALEKA SC:** And again that is well known topic which indicates that by 11 April 2016 Tegeta was short of R600 million to fund the 2.15 billion acquisition of shares in Optimum Coal Mine and remember at that time the clock was ticking for the fulfilment of the CPs and as I recall the critical date was 13 April for the fulfilment of the conditions precedent. One of which was demonstrate the money because if you did not by that day then the transaction falls away.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: And so between the 11th and the 13th 600 million had to be found.

CHAIRPERSON: Hm.

20 **ADV VINCENT MALEKA SC:** In order to provide for that shortfall. You will hear a lot of evidence Chair about how officials of Eskom one of, one of whom it will be Mr, I think it is Mr Naga who will come to you and explain how within a period of a morning Eskom’s processes were accelerated to bring about payment of 600 million by way of a prepayment.

CHAIRPERSON: Hm.

ADV VINCENT MALEKA SC: And again there are email exchanges of a private and confidential nature which were exchanged between officials of Eskom and third parties who had no right to receive that information, but who had interest in this transaction Chair and that is another element of filling the gap Chair. That Chair talks to the elements of the Tegeta acquisition of the, the, the, the, the Optimum Coal Mine. Perhaps I am not doing justice Chair on that score if I do not draw your attention to page 1448.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: Which deals with the Board Tender Committee Meeting
10 of 11 April 2016 which was convened for the purposes of approving this prepayment. Fundudzi makes some observations in that regard Chair that a special Board Meeting was convened which by round robin late in the evening authorised this prepayment. In circumstances where there was a scheduled board meeting already to take place on 13 April, two days later. So.

CHAIRPERSON: So it was brought forward or it was just an additional meeting?

ADV VINCENT MALEKA SC: It was a special meeting

CHAIRPERSON: *Ja.*

ADV VINCENT MALEKA SC: Called for this purpose.

CHAIRPERSON: Hm.

20 **ADV VINCENT MALEKA SC:** When there already existed a call for the meeting.

CHAIRPERSON: Hm.

ADV VINCENT MALEKA SC: Two days later.

CHAIRPERSON: *Ja.*

ADV VINCENT MALEKA SC: So there must have been something urgent around authorisation of this prepayment.

CHAIRPERSON: Hm, hm.

ADV VINCENT MALEKA SC: And let me be clear I am not suggesting that there is no explanation.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: Of course there may well be.

CHAIRPERSON: Hm.

ADV VINCENT MALEKA SC: But for now Chair do not see an explanation why.

CHAIRPERSON: Hm.

ADV VINCENT MALEKA SC: There ought to be an urgent meeting held in the evening
10 via a round robin resolution in order to authorise a payment of this scale and amount
and so Chair that would take me to the conclusion Fundudzi has reached and the
recommendations they make and they appear on page 1465 and Chair the
recommendations are set out from page 1468 that the persons mentioned in that
paragraph at the bottom of the page and again I will not mention their names for the
purposes of our introductory submission.

CHAIRPERSON: *Ja.*

ADV VINCENT MALEKA SC: That they should be investigated for possible
contravention of the Corruption Act. The names go over the page Chair and there are
many and the last issue Chair which relates to the closing of the gap analysis as far as
20 we pick up from that report begins at page 1475. It deals with emails exchanged
between Eskom's Executive relating to requests for private, for payment of monies into
certain accounts. Paragraph 8.7.5 begins the analysis Chair and I am not going to
mention the names, but you can see the names of Executives involved there.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: And in paragraph 8.7.6 you are given the private emails.

CHAIRPERSON: I think and Non-Executives at least one Non-Executive.

ADV VINCENT MALEKA SC: Indeed Chair.

CHAIRPERSON: Ja, hm.

ADV VINCENT MALEKA SC: And you will see the body of the email quoted in that paragraph.

“Hello so and so, how are you? I need you to prepare and wire a transfer for a payment. Let me know if you are available so I can send the transfer details. Thanks, sent from iPhone.”

[Indistinct] there and then the next email Chair is, is dealt with in the next paragraph
10 that follows of 9 November 2015. If you go over the page you will see a further trail of emails which gives you details of the bank accounts and Standard Bank is one of them and you will hear evidence of Standard Bank and then at paragraph 8.7.6 Fundudzi says that:

“We analysed Mr or Ms “Dash” emails and determine that on 9 December 2015 at 10:07 there was indeed an email sent from the email address concerned to so and so. We further established from those emails that Mr so and so indeed sent an email enquiring whether it was so and so who sent the email.”

Again Chair the same email addresses are used in respect of further requests for the
20 transfer of money. I will not mention the names and the details, but they are there and then in paragraph 8.7.7.3 there is an interesting conclusion that Fundudzi make.

“The above communication is just a snippet of the transactions that took place relating to the request to make payments into certain bank accounts by either “Dash” or an individual who calls himself “Dash” to “Dash”. The fact that “Dash”

participated in the said communication and appears to have executed the instructions without asking any questions reinforced the fact he knew that the individual he was communicating with was “Dash” or a person purporting to be “Dash”.

I have tried to extract the quotation as fairly as I can Chair, but it is important because that is the conclusion which is before you. We would seek to reinforce it via production of the relevant hard copies of the email before, emails before you and Chair look at the response when Fundudzi.

- 10 **CHAIRPERSON**: Hm, hm, you may already have done this or you might not have done it. It would be helpful if when one goes or when one reads and comes across certain important findings in any particular report to one, one has something to refer one to where the material is that could be looked at to examine if the finding is justifiable.

ADV VINCENT MALEKA SC: Indeed Chair.

CHAIRPERSON: *Ja*, okay.

ADV VINCENT MALEKA SC: Indeed. So what we will do is we will have a, an analysis of where the findings are with reference.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: To the paginated papers.

- 20 **CHAIRPERSON**: Yes.

ADV VINCENT MALEKA SC: And where we say they are justified or not.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: And if not we say why.

CHAIRPERSON: *Ja*.

ADV VINCENT MALEKA SC: But it will be in the form of columns.

CHAIRPERSON: I think that will be helpful, *ja*.

ADV VINCENT MALEKA SC: And Chair Fundudzi did not end up there in terms of making its own conclusion. It took a further investigatory step which it deals with at page 8775.

CHAIRPERSON: You mean paragraph.

ADV VINCENT MALEKA SC: Sorry, paragraph 8.7.7.5.

CHAIRPERSON: Five, *ja*.

ADV VINCENT MALEKA SC: And it says:

10 “In his response to your questions relating to the requests for
transfer discussed above “Dash” through his attorneys
responded as follows: the emails referred to in the draft report
were not authentic due to various email domains being hacked.
A criminal case was filed with the South African Police Service
in the respect under case number.”

And the case number is given. No payments were effected in accordance with this
bogus email instruction referred to in this report and Chair Fundudzi did what any
reasonable investigator would do is to go to the relevant police stations to ask for
details relating to that case number. They found nothing. Instead the case number
relating to the same person related to a totally different incident and you will see that
20 they summarise their findings on further investigation they did on 1479 and I read from
8.7.7.5.4.

“Captain Mutsai further stated that the [indistinct] Police Station
has no record of a criminal case opened by “Dash” in respect of
alleged email domains or any other criminal activity.
Captain Mutsai stated that the only record appearing on the

system registered by “Dash” was in respect of a car hijacking which took place in Durban during 2012 and the case was opened at Durban Central Police Station with case number “Dash”.

And that is the gap which we would like to fill, because on the face of it the legitimacy of the emails has not been questioned. The explanation does not detract from the legitimacy of those emails. Chair again there are further emails. I am not going to bother you. You will find them from page 1480. They go on and on up to page 1483, but again revealing the same analysis which from Fundudzi undertook around emails from Eskom’s officials exchanged between themselves and/or third parties and the conclusions they make. One of the email addresses that I would like you to note, because it is going to play a central role going forward is the email address identified at page 1484, paragraph 9.2.1.4. You will see that there is an email address referenced as infoportal1@zoho.com. It features quite a lot in the various emails. The holder of that email address seems to move from one person to the other, but what is clear is that the holder of that email was not an employee of Eskom. In fact it was the employees of Eskom who sent confidential emails, confidential information via email to this address. So as and when witnesses come to you we would like to explore precisely who was the holder of that email address. We have our own suspicions, but they are irrelevant. What is relevant is the evidence. So Chair ultimately Fundudzi based on all of those investigations make recommendations and you will find the recommendation at page 19, 1491 and the recommendation is that:

“The Hawks should investigate if the relevant Senior Executives and a Non-Executive Board Member of Eskom have not leaked confidential information to the benefit of a third party.”

And thankfully Eskom has done, has started with that investigation and we would obviously ask them to make the product of that investigation available to us and we will present it to you and so that that analysis Chair is the one that we identify in the slide analysis, the slide presentation which you will see at page 37 of the slides and Chair we confidentially believe that we can rely on that that, that that report. Chair I am going to skip the next report, because it is one of the technical reports. It is discussed from page 39 of the slides. With your permission I would like to move to the report which is at page 1492 from file, I think it is seven. It is the so called G9 Report.

CHAIRPERSON: [Chair not talking into mic]?

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

CHAIRPERSON: [Chair not talking into mic]?

ADV VINCENT MALEKA SC: 1492.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: Chair this is the entity that was engaged in order to assist whether the service level agreement that was executed between McKinsey and Eskom was lawful.

CHAIRPERSON: You, you, you, you gave some acronym to the report. I am trying to look for the acronym here.

ADV VINCENT MALEKA SC: G9.

20 **CHAIRPERSON:** Is it not to be found here?

ADV VINCENT MALEKA SC: It is not to be found here and I will tell you why Chair.

CHAIRPERSON: [Laughing] okay.

ADV VINCENT MALEKA SC: But.

CHAIRPERSON: So what is the official name for the, this report?

ADV VINCENT MALEKA SC: We call it G9.

CHAIRPERSON: Hm, unofficially.

ADV VINCENT MALEKA SC: Because there is, okay let me explain to you why we call it G9.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: Can I ask you to go to page 1510?

CHAIRPERSON: 1510

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: You will see in the middle of that page after numbered
10 paragraph 5 G9 also recommends that Eskom give serious consideration to undertake civil action.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: Possibly against McKinsey but definitely against Trillian for its conduct at various levels and they are mentioned.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: And the last paragraph says G9 it is further recommend that G9 be considered to assist further in terms of supporting criminal investigations and civil recovery of funds. This route will provide continuity and it is the most practical, it is most practical to embark on in our respectful submission.

20 **CHAIRPERSON:** They're asking for the continuation of the brief.

ADV VINCENT MALEKA SC: Chair what we did was to ask the investigators to see whether or not there is something else relating to G9 and they have now discovered a report under the logo and heading of G9 which deals with these matters and the report reveals how – this was the introduction or the summary of it.

CHAIRPERSON: Oh okay, yes.

ADV VINCENT MALEKA SC: But the real report outlining the mandate, who gave the mandate, their methodology of the investigation, their preliminary findings and the steps they suggested going forward is contained in that report. We will make it available to you.

CHAIRPERSON: Okay.

ADV VINCENT MALEKA SC: Because we got it more recently.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: And it reveals that their mandate was cut short.

CHAIRPERSON: Oh, almost like the Dentons.

10 **ADV VINCENT MALEKA SC:** Almost like Dentons yes.

CHAIRPERSON: So are you going to suggest that I make a note here to say G9 or are intending to replace this with ...(intervention)

ADV VINCENT MALEKA SC: Now we don't want it to replace it but we would add immediately after page 1511 a copy of the real report.

CHAIRPERSON: Yes, okay.

ADV VINCENT MALEKA SC: So if you could make note.

CHAIRPERSON: I will just say "G9" report, G9 being in quotes.

ADV VINCENT MALEKA SC: Yes,

CHAIRPERSON: Ja okay thank you.

20 **ADV VINCENT MALEKA SC:** And Chair you will see that we deal with it from page 41 of the slides I believe that nothing more other than what we have said to you is important.

CHAIRPERSON: Okay.

ADV VINCENT MALEKA SC: The next report is the so-called CDH report, you will find it from page 1512.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: It's a very useful report because it's detailed and ... (intervention)

CHAIRPERSON: What is this one called?

ADV VINCENT MALEKA SC: Cliff Dekker Hofmeyr report.

CHAIRPERSON: Oh okay.

ADV VINCENT MALEKA SC: It relates to the allegations about Mr Koko relating to the involvement of someone close to him in an entity called Impulse Trading or Impulse International.

10 **CHAIRPERSON:** That was a stepdaughter or something, it doesn't matter for now.

ADV VINCENT MALEKA SC: Yes, you will find the name of the person graphically illustrated at page 1526.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: And the suggestion was that Mr Koko did not declare an interest which raised questions around conflict of interest regarding that company, Impulse International Pty Limited, and there were investigations and ultimately findings were made in the CDH report and Mr Koko was ultimately charged in the course of disciplinary proceedings.

20 Purely out of interest chair I would ask you to note the following, at page 1593.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: CDH set out the version of Mr Koko from paragraph 8.1.3 and they analyse whether that version is sustainable on page 1594 from paragraph 8.1.4 and they indicate why even on that version the explanation given was not enough to avoid a conclusion of conflict of interest and the conclusion is expressed

at page 1596, paragraph 8.2.1, there are sufficient anomalies in the explanation actually given by Mr Koko and further many unanswered questions from the explanation given by Mr Koko, Mrs Koko, Ms Choma and Mr Pather for Eskom simply to be satisfied that the matter can be closed, and Chair as I've indicated that was one of the charges that was put to him in the second round of disciplinary process which Eskom initiated in earnest and Chair that is one of the issues which the Chairperson of Eskom, the current Chairperson, talks to in his statement and he will give you an indication of how far the disciplinary process concerned evolved, but the issue for the Commission is not whether or not there were disciplinary processes, it is whether or not
10 that transaction was impacted by legitimate concerns relating to your propriety and if so we would obviously ask you to make a finding in that regard.

And so Chair that is what we analysed in the slides and at page 48 of the slides we indicate outstanding questions or gaps which we believe the commission should deal with and it is one of those gap analysis method of investigation where we would say to you Chair there is a report, there are disciplinary processes and proceedings, there is a case put by Eskom and it has not been answered, and unless Mr Koko comes to answer it we would submit that we are entitled to make serious findings on it.

Chair that takes me to the Bowmans report, it starts at page 1598, it's one of
20 those reports which again deals with the McKinsey contract with Eskom, I think I have said enough about it and I am not going to repeat myself by taking you through the report and the issues it has raised and quite clearly one of the recommendations of importance to the Commission is that it recommended the recovery of the amounts concerned through civil processes, and that as we know is a matter which is ongoing and it also recommended the recovery of money paid to McKinsey's BEE partner and

the key findings in relation to the Bowmans report on that score are set out from page 54.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: Sorry, sorry, I'm misleading you Chair.

CHAIRPERSON: That looks like that's a different one.

ADV VINCENT MALEKA SC: That's a different report sorry, I am misleading you. On page 50 going to 51, my apologies Chair.

CHAIRPERSON: That's fine. Page 50.

ADV VINCENT MALEKA SC: Yes the next report is the Budlender report, it was a
10 report undertaken by our colleague Budlender, at the request of the Chairperson of Trillion Capital Partners. Again Chair you will remember I told you that there are different Trillion Group of Companies.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: The one is Trillion Management Consulting, you have seen its name when we dealt with the Van Dudes Report, this is Trillion Capital Partners but it belongs to the same group, more or less the same shareholders and there is Trillion Property, I'm not too sure where it's going to fit in, in the course of the hearings

CHAIRPERSON: Are you at 1637?

ADV VINCENT MALEKA SC: 1637 Chair.

20 **CHAIRPERSON:** Okay.

ADV VINCENT MALEKA SC: The useful thing about this report is not only the fact that it analysed the various transactions that McKinsey had with Transnet and Eskom and the role involved but it also gives a clear impression of the history of Trillion as an entity and how it was developed, and who was involved in it, and the report also gives you some indication of information relating to the dismissal of Minister Nene, apparently

heard by the then CEO of Trillion or Regiment, depending on where you place him at a given time and the report discussed in details what information he appears to have had and what he said to his colleagues about that information, and Chair the gap that we would like to close on that score, although it not does relate to Eskom's inquiry directly, will arise from the evidence that was presented before Parliament and also the statement of the whistleblower that we have already given to you. Of her personal account of what this CEO of Trillion or Regiment said to her about what he had known of that confidential information, and this report is useful in that regard because it provides for that analysis and on that issue Chair you can make a note that the analysis

10 begin at page 1693.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: And Chair the report also notes lack of cooperation which Budlender did not receive from parties who were implicated in this investigation, and we do hope that the lack of cooperation displayed before him is something that will not happen in this Commission. It is for that reason that we took the initiative to extend a hand of cooperation to parties affected, especially McKinsey to say give us your version on specific issue, and we hope that they would cooperate with the commission, in the interest of their future commercial and business relationship in this country, and so Chair ...(intervention)

20 **CHAIRPERSON:** Of course whatever information comes out of this report in regard to this issue of information may be relevant to the dismissals and appointments section of the terms of reference.

ADV VINCENT MALEKA SC: Indeed Chair, indeed. And that's why we for our part have warned some of the most enthusiastic members of our team to rush or to make findings on 1.1 to 1.3 before the completion of the relevant evidence but if you feel

tempted to make provisional findings on that score it will have to be clear that they are provisional because the body of evidence has not yet been concluded.

CHAIRPERSON: Ja, no I think it's important that evidence that may be important for one section to be taken into account for that section, even if it might appear to belong to a particular compartment we are not prisoners of compartments so something that appears to belong here if it has got some relevance to another section then the witness can even be called in regard to the other section and the evidence can be used for both.

ADV VINCENT MALEKA SC: Yes Chair, but we would respectfully suggest that that
10 evidence of information relating to the dismissal of Minister Nene has to be dealt with before you and people must just come tell you what information, if any, they had and how they acquired that information.

CHAIRPERSON: Ja, ja.

ADV VINCENT MALEKA SC: Chair that is the report of Budlender, we summarised the key findings on page 54, and the outstanding questions that we have identified for you are at page 55 and that is our invest ...(intervention)

CHAIRPERSON: I see that my lever arch files now have got information on the spine that we talked about, I am grateful for that and that would facilitate my job quite in terms of finding reports and which lever arch contain what documents. It ought to be also
20 easier into just make a note in your GAP analysis where it refers to, it's got a section that refers to a particular report to just put something that says where that report is in terms of these volumes so it's going to be easier.

ADV VINCENT MALEKA SC: Yes, Chair you will see on this score that the present guidance the investigator sought to do was to give a number before the heading of the report, for instance if you look at page 52.

CHAIRPERSON: Let me get there. Yes.

ADV VINCENT MALEKA SC: Which deals with the report we are looking at, the Budlender report you will see that there's number 10 before the heading Trillion Group of Companies, ten is the file divider number 10.

CHAIRPERSON: Ja.

ADV VINCENT MALEKA SC: Which tells you where you will find the file, but of course we will make it even more clearer.

CHAIRPERSON: If you put the volume number of the lever arch file.

ADV VINCENT MALEKA SC: Indeed.

10 **CHAIRPERSON:** Ja, okay, ja thank you.

ADV VINCENT MALEKA SC: As I said if you have page 55 you will see the GAP analysis that the investigators have identified and so what we for our part will ask the investigators to do to take forward the conundrum which Mr Budlender had is whether they should not invoke the powers of subpoena.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: To call for those records.

CHAIRPERSON: Yes, because he didn't have those powers.

20 **ADV VINCENT MALEKA SC:** Yes, and we were surprised Chair that not even the Chairman who instructed him to undertake an investigation of the CEO of his company would not elicit cooperation by this CEO to produce that information. It was relevant to the image and commercial reputation of the entity.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: Now if the Chairperson did not have that power well you have the power and we will certainly appeal to you to invoke those powers to call for the information, either via a subpoena or a summons.

CHAIRPERSON: Ja.

ADV VINCENT MALEKA SC: Chair that takes me to file 11 which I believe is in Volume 6.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: This is a report of National Treasury relating to the appointment of Tegeta and the coal supply agreement it had with Eskom. It is a report which no doubt will be dealt with by those who will be dealing I think the Brakfontein Mine and it talks about the National Treasury's concerns and the involvement of testing at different testing stations including the SABS which as you know is the domestic
10 accredited institution of sufficient capacity to provide quality stamps on a number of issues. You will see that the report deals not only with the question of the coal quality form the mines owned by Tegeta it also talks about the grant of the water license to Tegeta and how the water license was procured, that you will find from page 1747, in paragraph 5.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: And Chair it talks about the coal supply agreement and it also talk about the price points and the payments, you will find them on page 1755, paragraph 9, it also talks about advance payments Chair, you will find that on page 1758 paragraph 11.

20 **CHAIRPERSON:** Yes.

ADV VINCENT MALEKA SC: And then ultimately it ends with remedial action directed at the Chief Executive Officer of Eskom and the Board as the relevant account authority in paragraph 1764, sorry paragraph 18 on page 1764.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: The analysis of the GAP – GAP ...(intervention)

CHAIRPERSON: The GAP analysis report?

ADV VINCENT MALEKA SC: Yes, is at page 67.

CHAIRPERSON: It's been a long day Mr Maleka.

ADV VINCENT MALEKA SC: Yes Chair, and then the outstanding questions identified at page 68 and as I have said those responsible for Tegeta in relation to Brakfontein Mine we will deal with them on the basis of the questions spelt out from page 67 to 68 of the slides.

CHAIRPERSON: Ja.

ADV VINCENT MALEKA SC: Chair I will move quickly because the rest of the reports
10 are research reports and they fall in the category of the submissions that we believe are useful to the Commission in order to see what had been previously done, especially by academics such as Pari and the reports are set out from file 12 page 1765 up to page 1836, aspects of this report was conversed in evidence by amongst others Minister Gordhan who told you about different components of State Capture including a lot of individuals who are the runners, so he said. Chair the useful thing about that report is that it gives you a very good timeline insofar as Tegeta and Optimum is concerned, you will find that timeline from page 1822.

CHAIRPERSON: 1822?

ADV VINCENT MALEKA SC: Yes Chair, and you will see that it gives you the timeline
20 with reference to the specific individuals involved.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: The timeline goes to the next page, and it's a very useful synopsis of the events which took place during the specific days of the months that have been identified there Chair.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: And we will try to fill up that timeline with reference to live evidence that we will present before you.

CHAIRPERSON: Yes, thank you.

ADV VINCENT MALEKA SC: Chair the next report is – oh – the OUTA Report. It begins at page 1837 by Mr Ted Bloem submitted to the Portfolio Committee on 18 October 2017. Again it is a very useful research document but nothing of significance in terms of the evidence. We have brought it to your attention because it is one of the useful submission that was presented before Parliament and I am not going to ask you to take it further.

10 **CHAIRPERSON:** Yes.

ADV VINCENT MALEKA SC: And then there is something called Eskom's Reference Book. Again by Pare and the graduate school of business. The report starts at page 14 – sorry at File 14 page 1924. And the slides Chair discuss that report from page 77.

CHAIRPERSON: I am sorry what page?

ADV VINCENT MALEKA SC: 77 of the slides.

CHAIRPERSON: Oh of the slides?

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: Yes.

20 **ADV VINCENT MALEKA SC:** And the gaps arising from that report are described in page 79. I can indicate to you that your investigators have not yet gotten to this point of examining the allegations identified in paragraph 1 in relation to the logistics arrangements. I can indicate to you that there is a big legal debate taking place between the Coal Transporters Forum and Eskom and the Department of Energy relating to a different subject that is of the IPP Contracts. Then paragraph 2 of the Gaps Analysis relates to the Disa Contracts. Once again your investigators have not

yet gotten to that point but what I can tell you about 1 and 2 Chair is that these are not allegations which arose for the first time because Pare decided to raise them in this handbook. The potential for these allegations was already identified by Denton in 2015 in the report that we have analysed earlier on. And the board of Eskom was directed to consider that question especially in relation to procurement so there is a historical line which becomes important on how the question arose and when did the board of Eskom's attention was drawn to those questions and how it was advised to deal with them? And here we are in the report of Pare and there is an indication that they were not dealt with. In paragraph 4 Chair deals with the replacement of a damaged
10 generation at Duva in Unit 4.

CHAIRPERSON: You are at 3.

ADV VINCENT MALEKA SC: 3?

CHAIRPERSON: Ja.

ADV VINCENT MALEKA SC: Again your investigators have not gotten to that point but what I can tell you is that there is litigation going on between a losing bidder and Eskom and the winning bidder in relation to the replacement of this generator. It is before the courts Chair and I am not too sure when the courts are going to finally resolve that issue. I can also indicate to you that the issue about the BEE status of the winning bidder Dong Fang it is a matter which is now before the BEE Commission because
20 someone reported to the BEE Commission that the winning bidder did not comply with the BEE requirements of procurement. So a lot is taking place in relation to that issue.

CHAIRPERSON: Ja.

ADV VINCENT MALEKA SC: But at this stage the investigators have not yet gotten to it to give us a full account of what is happening. Number 4 is the question of the lucrative maintenance contracts. Again the investigators are not there Chair. So to

sum up Pare raised very important issues relating to Eskom but at this stage the investigators have not yet gotten to them. Others of course as I indicated are matters of court litigation and they will run their course in the courts. But once in the fullness of time the investigators are able to give us the products of their investigation of that issue Chair we will certainly come before you on them and we hope that they will do so in time before we complete our presentation of Eskom's evidence.

CHAIRPERSON: Ja.

ADV VINCENT MALEKA SC: Sadly it will not be in this leg of the February and March presentation.

10 **CHAIRPERSON**: Okay.

ADV VINCENT MALEKA SC: Yes. Chair there is another handbook by Pare. You will find it at page 1950 it is File number 15. The slides deal with that leg of the handbook at page 81.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: And the findings are identified at page 82. And with the greatest of respect to Pare we can indicate to you that insofar as they raise question marks around the replacement of generators at Koeberg. That issue has run its course before the courts and I do recall that you gave judgment in one of the constitutional court matters relating to this procurement. It is the western house case.

20 **CHAIRPERSON**: Oh Now I remember.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: That is the one that was disposed of on locus standi.

ADV VINCENT MALEKA SC: From your judgment.

CHAIRPERSON: From your – ja well from the court's judgment.

ADV VINCENT MALEKA SC: The court's judgment. But remember your predecessor.

CHAIRPERSON: I know that it was not unanimous.

ADV VINCENT MALEKA SC: The order was unanimous but the reasons for it were different.

CHAIRPERSON: No the descent did not agree that the matter could be disposed of on locus standi. It said we should go into the merits and it went into the merits. The descent.

ADV VINCENT MALEKA SC: Then – well I would be slow to describe it as a descent because it did not descend from the order you made. It dismissed the – it upheld the appeal but for different reasons.

10 **CHAIRPERSON**: Oh okay well – ja. That nuance. Ja oh ja, ja. In terms of outcome it was agreeing with the outcome.

ADV VINCENT MALEKA SC: Indeed.

CHAIRPERSON: But for different reasons.

ADV VINCENT MALEKA SC: For different reasons.

CHAIRPERSON: But it – the difference of the reasons relay in locus standi and merits.

ADV VINCENT MALEKA SC: And the merits?

CHAIRPERSON: Ja.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: Okay.

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

CHAIRPERSON: Now I remember ja.

ADV VINCENT MALEKA SC: So there is of course a body of that judgment deals with the merits of the procurement.

CHAIRPERSON: Ja.

ADV VINCENT MALEKA SC: And it concluded that there were no questions around

impropriety relating to the merits of the procurement. But I must be clear that I should not be understood as suggesting that. The issue closed forever.

CHAIRPERSON: Ja all I can just say is speaking for myself there is that I certainly did have certain concerns that I would have had to deal with if the matter had gone into the – if the court had gone into the merits.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: I certainly had certain concerns.

ADV VINCENT MALEKA SC: Yes.

10 **CHAIRPERSON**: From what I had seen in the papers and the minutes of various meetings and the affidavits’.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: And I guess I would say no more than that.

ADV VINCENT MALEKA SC: Yes Chair and because you say no more as you have previously said in the court judgment we would appeal to Pare to respect separation of powers. Principle that there is already a judgment but they may persuade us otherwise.

CHAIRPERSON: Okay, alright.

ADV VINCENT MALEKA SC: Chair that is ..

20 **CHAIRPERSON**: Well I am not sure what that means before we move away from it because there was no pronouncement by the court on the merits that is for sure. So I am just saying since you are saying that.

ADV VINCENT MALEKA SC: Ja.

CHAIRPERSON: Before we move away I must just say I am not sure what that means in the light of that.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: We might not need to – we might not need to discuss it ja.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: Okay.

ADV VINCENT MALEKA SC: Yes. But again I mean if Pare has additional evidence of importance certainly we as the legal team will commend that the investigators should look into it. Where it takes the commission is something else. Chair the report we have dealt with is the NERSA Report. I am not going to say anything about it. That is report in File 16 and that takes you to ...

CHAIRPERSON: That is the same report that you dealt with in the morning?

ADV VINCENT MALEKA SC: Yes.

10 **CHAIRPERSON:** Ja okay.

ADV VINCENT MALEKA SC: And Chair the last report is the submission of Outa to this commission regarding all sorts of aspects surrounding Eskom and we are grateful to Outa that it has made his submission to the commission and that the commission will definitely deal with the issues that it raises. We have identified the scope of the submission or submissions from page 88 of the slides.

CHAIRPERSON: 88?

ADV VINCENT MALEKA SC: Ja 88 and we have identified the key findings made in that report on page 89. And we point out that the report is not an investigative report but an expression of various opinions contained in the submissions and definitely will
20 take them seriously as and when we present evidence before you and ultimately make submissions. The final report is the SNG Report which you get at page 2088. We identified the report in page 90 of the slides. We take you through the key findings on page 91 and the key finding is in paragraph 3 on that page. And you will see in paragraph 5 the same finding is articulated on a legal basis. The contracts was signed by Dash. That – he did not have a termination clause and that was not in keeping with

the advice he received from the legal department of Eskom. And the last finding of importance is that the conclusion of that contract in circumstances investigated by SNG resulted in irregular expenditure in the sum indicated therein Chair. Again for the purposes of the hearing we are not going to waste much time in regards to that report because it raises an issue that cuts across all of the state owned entities and the investigators have indicated that they will provide a comprehensive report on how TNA was involved in different state owned entities. Chair I have taken you through this elaborate exercise of presenting this – these reports to you. We hope that they give you some appreciation of what has been done by other organisations statutory bodies, constitutional bodies and private entities such as the Chairperson of Trillian Capital PTY Limited about the scale and scope of the state capture project insofar as it relates to Eskom. We will therefore proceed on the premise that there have been findings and those findings in a large measure have not been questioned. We will also proceed on the premise that where we have some concerns about the findings we will seek to determine whether or not the evidence which will unfold before you supports or repudiate those findings. What remains for me is to indicate to you that after the Chairperson of Eskom has testified there may well be a need for us to present additional information but in a truncated format around the disciplinary proceedings that Eskom had initiated and concluded because he will have to explain to us the status of those proceedings. But information which emerged from those proceedings is quite vital because it takes further several findings which have been previously made. And Chair other than that...

CHAIRPERSON: I guess – I guess depending on a number of factors that we need not go into now if and when one looks at information coming from a disciplinary enquiry one would also look at its status via a vie reports such as those coming from Parliament.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: Where I believe those who gave witness evidence would have taken the oath or done the affirmation and so on and so on.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: So – but ja that is fine. That is fine.

ADV VINCENT MALEKA SC: Yes. And Chair as I said what that body of evidence would be is to simply address those issues.

CHAIRPERSON: Ja, ja.

ADV VINCENT MALEKA SC: And you are aware that there are other parallel
10 investigations by law enforcement agencies.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: Who would want to make sure that we do not disturb or prejudice what they are doing.

CHAIRPERSON: Ja, ja.

ADV VINCENT MALEKA SC: And to the extent that they approach us and seek our assistance on how we should guard against presenting some or other form of evidence obviously we will seek your guidance.

CHAIRPERSON: Yes. No, no that is fine. We – I guess we will just have to take each approach or request on its own merits as it comes and weigh the pros and cons of
20 taking a particular approach or not in the light of everything else. But you are correct in saying that wherever possible we would seek co-operation. We would seek to co-operate with them just as we believe they should seek to co-operate with us.

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: Ja okay.

ADV VINCENT MALEKA SC: So the next step of the document presentation Chair is

going to be quick because it relates to the body of evidence that was before Parliament and as I indicated it is into categories. The first is the statements given to the Portfolio Committee by persons who were called upon or decided to testify of their own volition to the Portfolio Committee. And then there is a second body of information which is the transcript of the actual evidence they gave and the record of questions and answers put to them by members of the Portfolio Committee. Chair the person who is best placed to take you through that information is my colleague Ms Norman. She has done a lot of work in order to take you through them. And she has agreed to do so and I am grateful to her. She will definitely do it tomorrow. To avoid information...

10 **CHAIRPERSON**: Yes.

ADV VINCENT MALEKA SC: Overload on our part because as you know once there is a hanger of information overload the first victim is focussed so we would like to avoid that for today. I think...

CHAIRPERSON: Well we have run out of time for today [indistinct].

ADV VINCENT MALEKA SC: Yes.

CHAIRPERSON: Most important one.

ADV VINCENT MALEKA SC: We are...

CHAIRPERSON: Because otherwise you know that when necessary we go beyond four o'clock.

20 **ADV VINCENT MALEKA SC**: Four o'clock.

CHAIRPERSON: Yes.

ADV VINCENT MALEKA SC: Yes. So we will simply ask you to rob the commission of ten minutes of its normal time and adjourn earlier.

CHAIRPERSON: Ja. No that is fine. We will adjourn the proceedings until tomorrow. We will resume tomorrow at ten in the morning. The commission adjourns.

ADV VINCENT MALEKA SC: Thank you.

INQUIRY ADJOURNS

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