

## **WRITTEN SUBMISSION OF MR MATSHELA MOSES KOKO**

I, the undersigned,

**MATSHELA MOSES KOKO**

hereby state that:

### **INTRODUCTION**

1. I am an employee of Eskom Holdings SOC Limited (“Eskom”) of 23 years standing. I have been employed by Eskom since the beginning of 1996, and even before that, while I was an engineering student, I worked for Eskom during university vacations. I had with the assistance of Eskom obtained a place at the University of Cape Town to study engineering, for which Eskom provided financial assistance.
2. I qualified with a B.Sc. degree in chemical engineering at the University of Cape Town at the end of 1995. I additionally have a Master of Business Leadership (MBL) degree from the University of South Africa, conferred in 2016.
3. More information regarding my career with Eskom can be gleaned from document MMK 1 in the accompanying bundle<sup>1</sup>, a document that Eskom put out on its website.
4. My current permanent position with Eskom is that of Group Executive: Generation, i.e. head of Eskom’s Generation Division. The Generation Division comprises Eskom’s electricity generation assets. My permanent post was previously that of Group Executive: Generation and Technology, i.e. the head of Eskom’s Generation

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<sup>1</sup> MMK 1, bundle p 1.

and Technology Divisions, but due to recent restructuring, I am now responsible for the Generation Division only. I first became responsible for Generation on 1 October 2015, when it was added to my responsibilities as head of Technology.

5. To provide context to what I refer to below I provide a brief synopsis of material events relating to the positions that I held in recent times, and to whom I reported from time to time.
6. I was appointed to the position of Group Executive: Generation and Technology in October 2015. The Technology Division provides engineering designs and support for the Generation, Transmission and Distribution Divisions. My previous position was that of Group Executive: Technology and Commercial to which I was first appointed in an acting capacity when the Technology and Commercial Divisions merged in April 2014. I was permanently appointed to the post in November 2014. Before that, from 2010, I held appointment as a Divisional Executive: Technology. During the period from 20 July 2015 to the end of September 2015 I was responsible for Technology only, Commercial having been assigned to the Chief Financial Officer. Generation was added to my portfolio with effect from 1 October 2015.
7. I was appointed as Eskom's interim Group Chief Executive ("Group Chief Executive" or "GCE") during early December 2016 arising from the resignation of Mr Brian Molefe. Mr Molefe left Eskom in November 2016. Eskom's board of directors ("Eskom's Board" or "the Board") then appointed me in December as interim GCE pending a recruitment process for the eventual appointment of a new GCE.

8. I was during 2017, on 16 May 2017, placed on special leave pending the outcome of an investigation that had been undertaken at the behest of Eskom's Board by attorneys Cliffe Dekker Hofmeyr ("CDH"), acting in conjunction with the forensic investigation arm of auditors' firm Nkonki Inc. ("Nkonki"), to investigate the veracity of newspaper reports that alleged that I had, arising from interests that my wife's daughter from a previous marriage had in March 2016 unbeknown to me obtained in an Eskom contractor, Impulse International (Pty) Limited, acted in breach of the fiduciary duties that I owed Eskom and Eskom's policies and procedures. I was subsequently, on 1 August 2017, placed on suspension pending finalisation of disciplinary proceedings that Eskom's Board then decided had to be instituted against me. This occurred despite the findings of the investigators in terms of their report dated 13 June 2017 that:

*"There is no evidence that supported and/or indicated that Mr Koko committed an act which undermined the internal control system of Eskom and no action in terms of Section 15(1) of the Public Finance Management Act was therefore required from the accounting authority relevant to the conflict of interest matter",*

which was supported by a memorandum to similar effect, dated 14 June 2017, from the attorneys, CDH.

9. Eskom's pursuing the disciplinary enquiry despite CDH/Nkonki's findings apparently arose from a report made to Eskom's Board by Mr Khulani Qoma, General Manager in the office of the Chairman of Eskom's Board, on 14 June 2017 to the effect, among other things, that "*(t)he findings of the investigation on the alleged conflict of interest relating to the Impulse International should be viewed within the prisms of the public sentiments as opposed to solely focusing on the legal rationale*" and that I should be dismissed regardless, in conjunction with a memorandum subsequently obtained from a senior advocate of the Johannesburg Bar that was to the effect

that, despite the findings of CDH/Nkonki that had exonerated me, I should answer certain questions in the forum of a disciplinary enquiry<sup>2</sup>.

126. The disciplinary proceedings commenced only on 18 October 2017 before Adv. M. Mthombeni, a member of the Johannesburg Bar, and ran their course on and off until the beginning of December 2017. It became apparent during the proceedings that my issuing instructions early in 2017, after I had been appointed interim GCE, that corrupt senior officials charged with overall responsibility for the Medupi and Kusile projects be moved, pending investigation, from their posts to posts where they would no longer be able to continue with their harmful conduct, was the precipitating turn of events that eventually culminated in my being subjected to disciplinary proceedings. It led to information about my having declared the interests of my stepdaughter in Impulse International (Pty) Ltd in terms of Eskom's policies and procedures being fed to the Tiso Blackstar group of newspapers by the very corrupt officials against whom I had acted. They had realised that I was coming for them, and connived with the journalists who then launched a campaign of vilification of me based on falsehoods and distortions of the truth, which is still continuing. Ironically, charges for misconduct were even added during the disciplinary process relating to the action that I had taken to stop the corruption at Medupi and Kusile. These arose from alleged "whistleblower reports" that had been made by the corrupt officials themselves, who then, eventually, refused to testify before Mr Mthombeni.
  
10. I was on 29 December 2017 supplied with Mr Mthombeni's findings (that had already been issued on 14 December 2017). I was in terms of these found not

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<sup>2</sup> As opposed to simply being given the opportunity to provide explanations in respect of the questions that the advocate had posed, whether to Eskom's Board, CDH/Nkonki, or whomever.

guilty on all the charges that Eskom had chosen to prefer against me.<sup>3</sup> My suspension was at the same time lifted and I have since 8 January 2017 been rendering service to Eskom in my permanent (albeit in the interim restructured) position of Group Executive: Generation.

11. Previously, during the period from 11 May 2015 until 15 July 2015<sup>4</sup>, while I was serving as Group Executive: Technology and Commercial, I together with 3 others of my then colleagues<sup>5</sup>, was also placed on suspension. That was supposedly to allow an “*unfettered enquiry*” while a so-called “*Forensic Fact Finding Enquiry ... into the status of the business and challenges experienced by Eskom*” by the Cape Town law firm, Dentons South Africa, was taking place. Dentons had been appointed by Eskom’s Board to investigate, among other things, “(t)he poor performance of Eskom’s generation plant” and the “(i)negrity of the procurement processes and compliance with legislation as well as Eskom’s procurement policies”. I shall refer in greater detail to the events that gave rise to my suspension below. However, our supposedly being suspended to allow an “*unfettered enquiry*” was simply a ruse and attempt by the Eskom Board, as constituted at the time, to pressurise us to accept separation packages and leave Eskom.<sup>6</sup> This had been engineered by the then Chairman of the Board, Mr Zola Tsotsi. The Chairman of the Board, Mr Tsotsi, resigned shortly afterwards and in the ensuing period the

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<sup>3</sup> Which was not surprising as there was, despite the relentless continuation of the vicious trial by media campaign against me in, principally, publications of the Tiso Blackstar media group on the basis of false and misleading reporting, never a *prima facie* case against me for misconduct, as put across to Eskom’s Board already in June 2017, as referred to above.

<sup>4</sup> I returned to the office on 20 July 2015.

<sup>5</sup> The then Group Chief Executive, Mr Tshediso Matona, the Group Executive: Group Capital, Mr Dan Marokane and the then CFO and Director of Finance serving on Eskom’s Board, Ms Tsholofelo Molefe (the latter’s suspension by the Board occurred a few days after that of Messrs Matona, Marokane and myself).

<sup>6</sup> Which was, for the most part, effective in the end. I was the only one who refused to accept the separation packages offered to us while we were on suspension. Concomitantly, I was the only one of the four who returned to work when Dentons reported on 15 July 2015 that they had found no wrongdoing on our part.

other members of the Board, with three exceptions<sup>7</sup>, resigned or were replaced by the shareholder.

12. As interim Group Chief Executive I reported and was responsible directly to Eskom's Board. Dr Baldwin (Ben) Ngubane was the Chairman of the Board during the period that I actively rendered service as interim Group Chief Executive from December 2016 to 16 May 2017.
13. In my position as Group Executive: Generation and Technology I reported to the Group Chief Executive. From April 2015 until December 2016, the Group Chief Executive was Mr Brian Molefe. He was previously the Group Chief Executive of Transnet SOC Ltd. He was first appointed on an interim basis, on secondment from Transnet (as far as I am aware), but permanently in October/November 2015. Before that, from 2010, the GCE was Mr Brian Dames, who, however, retired during 2014. He was succeeded as GCE by Mr Colin Matjila in an acting capacity. Mr Tshidiso Matona was then permanently appointed as GCE during or about November 2014. He resigned shortly after he was suspended (with me and 2 others, as referred to above) on 11 March 2015. He then returned to Government where he is now the secretary of the National Planning Commission. Mr Zithembe Khoza acted as GCE for a short period before Mr Brian Molefe was appointed in an acting capacity.

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<sup>7</sup> Mr Zithembe Khoza, Ms Venete Klein and Prof Pat Naidoo.

**INVITATION TO APPEAR BEFORE THE PORTFOLIO COMMITTEE ON PUBLIC ENTERPRISES**

14. I received an emailed letter from the chairperson of Parliament's Portfolio Committee on Public Enterprises ("the Portfolio Committee" or "this Committee"), Ms Mnganga-Gcabashe on 14 November 2017.<sup>8</sup>
15. The letter invited me in my capacity "*as the former acting group chief executive of Eskom*" to appear before the committee to testify "*on issues related to the governance at Eskom*". These issues (in respect of which I was requested to make a written submission) are in terms of the letter referred to a:
  1. *The purchase of Optimum Coal Holdings by Tegeta from Glencore.*
  2. *The pre-payment of the coal supply extension at a Board Tender Committee meeting of 11 April 2016.*
  3. *Corporate governance at Eskom.*"
16. The original date of the enquiry was communicated to me as 21 November 2017, but in subsequent communications I was requested to respond to the invitation at the continuation of the proceedings of the Portfolio Committee on Wednesday, 24 January 2018. This document serves as the written submission that the Portfolio Committee has required me to make.

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<sup>8</sup> MMK 2, bundle pp 2 – 3.

**"THE PURCHASE OF OPTIMUM COAL HOLDING BY TEGETA FROM GLENCORE"**

**Introduction**

17. My assumption is that this issue relates to the acquisition by Tegeta Exploration & Resources (Pty) Limited ("Tegeta")<sup>9</sup> of the shares and claims on loan account held by Optimum Coal Holdings (Pty) Limited ("OCH")<sup>10</sup> in certain of OCH's subsidiary companies, including Optimum Coal Mine (Pty) Limited ("Optimum")<sup>11</sup>, Optimum Coal Terminal (Pty) Limited and Koornfontein Mines (Pty) Limited ("Koornfontein")<sup>12</sup>. My understanding (derived from the internet) is that Optimum Coal Holdings (Pty) Ltd is still a subsidiary of Glencore Operations South Africa (Proprietary) Limited, the South African subsidiary of the London listed Glencore plc<sup>13</sup>.
18. The essentials of the agreement at issue were described in a press release that the business rescue practitioners at the time of OCH and Optimum, Messrs Piers Marsden and Peter van den Steen<sup>14</sup>, issued when the (then conditional) transaction was concluded. A copy is document MMK 3 in the accompanying bundle.<sup>15</sup> Greater particularity regarding the transaction is provided in the "*Reasons for Decision*" of the Competition Tribunal of South Africa, issued on 12 April 2016, in

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<sup>9</sup> At the time jointly controlled by Oakbay Investments (Pty) Ltd and Mabengela Investments (Pty) Ltd. It is now, according to what I could source from the internet, a subsidiary of Shiva Uranium (Pty) Ltd, of which Oakbay Investments (Pty) Ltd is apparently still a shareholder.

<sup>10</sup> At the time in business rescue.

<sup>11</sup> Also at the time in business rescue.

<sup>12</sup> Which were the operating companies in the OCH group. Optimum's mining operations comprise opencast and underground coal mining operations near Middelburg. Koornfontein mining operations are conducted as underground mining operations near eMalahleni, the erstwhile Witbank.

<sup>13</sup> With secondary listings on the Hong Kong Stock Exchange and the Johannesburg Securities Exchange.

<sup>14</sup> The independent business rescue practitioners that had been appointed for OCH and Optimum when the boards of directors of those companies, at Glencore's behest, on or about 4 August 2015 opted for that avenue to avoid the arbitration proceedings that were pending between Eskom and Optimum.

<sup>15</sup> MMK 3, bundle pp 4 – 5.

terms of which that body explained the reasons for its approval on 22 February 2016 of the agreement(s) that had been concluded and the resultant merger.<sup>16</sup> What is relevant to what I state below is an understanding that the transaction included Koornfontein. Koornfontein enjoyed the benefit of a lucrative coal price agreed with Eskom for the supply of thermal coal to Eskom's Komati Power Station.

19. On 14 November 2016, *Business Report*<sup>17</sup> published a so-called "opinion piece" that I had written, titled "*Eskom Tegeta deal is in the interest of South Africa*".<sup>18</sup> It was published after Eskom's Board had at a press conference that was held in November 2016 put out details of agreements that at that time existed between Eskom and Tegeta for the supply of coal. These transactions included a long-standing coal supply agreement that related to the supply of coal for the Hendrina Power Station ("the Hendrina Coal Supply Agreement"), that Tegeta had (via Optimum) become party to arising from the transaction referred to above and had undertaken to honour. The press conference arose to address questions and speculation that had been raised in the media in relation to, among others, the Hendrina Coal Supply Agreement. The article provides some information about the background to the transactions concluded, including those between OCH, represented by the business rescue practitioners, and Tegeta that had been concluded with Eskom's and Glencore's approval. I stand by what I stated at the time.

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<sup>16</sup> MMK 4, bundle pp 6 – 11.

<sup>17</sup> A section of the daily newspapers that are published by the Independent News & Media media group.

<sup>18</sup> MMK 5, bundle pp 12 – 14.

20. The upshot of the overall deal that was struck was that from December 2015 until the expiry of the Hendrina coal supply contract in December 2018, Eskom would derive a real benefit of R3.39 billion from the OCH/Tegeta deal.
21. In his submission to the Portfolio Committee Mr Piers Marsden, one of the independent business rescue practitioners of OCH and Optimum, conveyed that throughout the negotiations with the business rescue practitioners after they had been appointed Eskom exhibited a determination to maximise its economic benefits from any deal to be struck. Mr Marsden was quite correct in what he stated.
22. The benefits derived from the overall deal arose from Eskom's insistence that Optimum continue to deliver coal to it at R150 per tonne until December 2018 in accordance with the Hendrina Coal Supply Agreement that has existed between Eskom and Optimum since 1983 (with effect from 1969 and amended on occasions subsequently).
23. In comparison Glencore, by way of a letter from Optimum to Eskom, dated 30 June 2015 (i.e. shortly before OCH and Optimum went into business rescue)<sup>19</sup>, had tabled an offer at a doubled price of R300 per tonne until contract expiry in 2018, "to allow it (i.e. Optimum) to continue operating". Glencore also proposed that as part of a package deal the contract be extended to 2023 and the price be increased to R570 per tonne from 2019, to be done without Eskom going through any open tender process. The Optimum letter of 30 June 2015, was written after an apparently acrimonious meeting that had taken place on 11 June 2015 between, among others, Mr Brian Molefe, then acting GCE of Eskom, and Mr Ivan Glasenberg, CEO of Glencore.

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<sup>19</sup> MMK 6, bundle pp 15 – 17.

24. In another letter to Eskom, dated 17 September 2015 (i.e. after Glencore had put OCH/Optimum into business rescue),<sup>20</sup> the independent business rescue practitioners proposed a deal that would result in a weighted average price of R443 per tonne until 2023. In terms of this proposal, Eskom would continue to pay R150 per tonne for coal until December 2018, but the contract would be extended until 2023 at a price of R630 per tonne.
25. Eskom rejected both the above proposals, insisting that Optimum honour the Hendrina Coal Supply Agreement (as amended in 1993 and again in 2011) until its expiry during 2018.
26. The fundamental considerations for Optimum Colliery's agreeing amendments to the Hendrina Coal Supply Agreement in 1991 can be gleaned from Schedule 7 of the Hendrina Coal Supply Agreement. These considerations informed my thinking throughout insofar as I participated in negotiations during the business rescue process of OCH and Optimum<sup>21</sup>, as from the time when I first became involved in late August 2015, after I had returned from suspension on 20 July 2015, and then subsequently, when I was appointed the head of Generation with effect from 1 October 2017. By the time I became involved, however, OCH and Optimum had already been placed in business rescue. Insofar as I refer below to what had occurred before my involvement commenced, I rely on what I gleaned from the historical documents, put in context also by what I learnt from my colleagues who had been involved before.

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<sup>20</sup> MMK 7, bundle pp 18 – 22.

<sup>21</sup> That formally commenced on 4 August 2015.

**The Optimum operation commenced in 1969 and converted from a single product operation to a multi-product operation in 1983**

27. The Optimum Colliery's coal mining operations came into being in the 1960's, at the beginning of 1969 as I have it, as part of, as far as I am aware, the operations of Trans-Natal Coal Corporation Ltd. Trans-Natal Coal was at the time (or at some subsequent stage became) part of the General Mining and Finance Corporation Ltd (Gencor) group of companies, that, eventually, fell to the BHP Billiton group. This resulted in Optimum Colliery operating as a division of BHP Billiton Energy Coal South Africa (Pty) Ltd, known as BECSA. Optimum acquired the Optimum Colliery in 2008 as part of an acquisition of business agreement that it concluded with BECSA. Optimum was at the time part of OCH. OCH was at the time referred to as a newly formed black empowerment consortium led by Mr Eliphus Monkoe, apparently a previous Chief Operating Officer of BECSA.
28. The Optimum Colliery's operations were originally launched to serve Eskom's Hendrina Power Station exclusively "for the life of the plant", i.e. 50 years. That rendered the Optimum Colliery's mining operations a "single product operation" or a supplier to the "domestic tied market", i.e. tied to Eskom as the colliery's single domestic customer.
29. The contractual relationship between Eskom (then the Electricity Supply Commission) and Optimum Colliery was initially on a cost plus basis. The relationship was recorded in the Hendrina Coal Supply Agreement that was originally concluded on 24 June 1983 (applying with retrospective effect back to 1969, and to endure until the end of 2018).

30. Eskom had, however, earlier in 1983, on 7 January 1983, approved that the Optimum Colliery could, despite what had been agreed originally, supply coal not only to Eskom, exclusively for the Hendrina mine, but also to the export market. This agreement allowed Optimum Colliery's operations to be converted from a "single product operation" (i.e. supplying thermal coal only to Eskom in the "tied domestic market") to a "multi-product operation".
31. The upshot of the January 1983 agreement was that the mining assets and infrastructure utilised until then by Optimum Colliery for purposes of mining coal exclusively for supply to Eskom, could as from that time be utilised also for purposes of mining export coal.

**Optimum Colliery's changing to a multi-product operation was dependent upon the continued supply of coal to Hendrina Power Station, but also benefitted Eskom**

32. Arising from the January 1983 agreement Optimum Colliery had to invest additional capital in mining and rehabilitation assets to enable it to produce an additional 6.5 million tonnes per year run-of-mine coal for the export market.
33. The coal supply to Eskom for the Hendrina Power Station in terms of the Hendrina Coal Sale Agreement provided revenue security for Optimum Colliery that enabled it to create and maintain the infrastructure and achieve the economies of scale required to enable it to export coal. Without the security of the long-term agreement that was in place with Eskom (until the end of 2018), Optimum Colliery would not have been able to invest in this manner.

34. The benefit to Eskom was an enlarged opencast mine with improved economies of scale, bringing the cost per tonne down, and making it unnecessary for Optimum Colliery to reopen prior (operationally more expensive) underground mining operations to supply Eskom.
35. The working cost projections at the time were based on the assumption that opencast mining operations would continue into the indefinite future for the duration of the agreement (corresponding with the notional 50 year life of the Hendrina Power Station, i.e. until the end of 2018).

**The basis of coal supplies from Optimum Colliery changed from a cost plus arrangement to a fixed price arrangement in 1993**

36. Eskom and Optimum Colliery in 1993 agreed a new pricing structure for the Hendrina Power Station coal offtake. This was specified and agreed in terms of amendments to the 1983 Hendrina Coal Supply Agreement that changed the basis of supply from a cost plus basis to a fixed price basis.
37. BECSA, the owner of the Optimum Colliery prior to 2008, never after 1993 raised the issue of hardship as a result of changed market circumstances that at later times made the fixed price that had been agreed for the Hendrina coal seem low. BECSA executives were aware of the background and context of the pricing structure that had been agreed, as were the executives of its 2008 successor.

38. The base price was agreed anew with Optimum as recently as in 2011, when it was by agreement determined at R115 per tonne as at 1 April 2011<sup>22</sup>, with a minimum annual offtake of 1 million tonnes and a maximum offtake of 5.5 million tonnes.
39. The base price of R115 per tonne agreed with effect from 1 April 2011 accordingly still reflected the benefits that the Optimum Colliery derived from the multi-product operations that Eskom had allowed since 1983. This was well-understood by all the parties involved at all relevant times before 2012 and Optimum never raised any issue about the level at which the base price was agreed.
40. Optimum Colliery and its owners from time to time, including Optimum, had the benefit of participating in the export market since 1983 by utilising coal reserves originally earmarked solely for Eskom (and, to some extent, using Eskom's infrastructure) to supply the export market.
41. Eskom had furthermore by agreement with BECSA during 2006/2007 consented to the release for export of Koornfontein coal reserves which were originally also to have been dedicated to Eskom in terms of the relevant coal supply agreement. The benefit of this concession also fell to OCH eventually.

**Optimum claims hardship and institutes arbitration proceedings; the parties agree in terms of the Co-operation Agreement to maintain the *status quo* pending negotiations to resolve all issues that had arisen after Glencore became involved**

42. Glencore became involved in March 2012, after it had, with Shanduka Resources as a BEE partner, acquired OCH and through it, control of Optimum. Optimum later

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<sup>22</sup> In terms of clause 3.5 of the Second Addendum to the 1983 Hendrina Coal Supply Agreement, read with schedule 8 thereto.

stated<sup>23</sup> that Glencore “shortly thereafter identified the risk presented by (the) Hendrina coal supply agreement to the viability of OCM” and “shortly thereafter raised the issue with Eskom, but Eskom was not willing to entertain any amendments to the agreement”.<sup>24</sup> In other words, according to Glencore, it became involved with Optimum without realising the implications of the Hendrina Coal Supply Agreement, allegedly only (shortly) afterwards identifying these. I respectfully state that that is hardly likely. That Optimum very shortly after Glencore’s takeover started complaining about the agreed price and demanded that it be increased, despite its getting involved with Optimum via OCH with open eyes, is telling. It is more likely<sup>25</sup> that Glencore from the very outset knew what it was letting itself in for, and simply thought that it would be able to arm-twist Eskom into agreeing to an increased price.

43. OCM subsequently issued a “hardship notice” in terms of the amended Hendrina Coal Supply agreement. It did so on 3 July 2013. This occurred while discussions between Eskom’s management and that of Optimum about the Hendrina Coal Supply Contract were ongoing. In terms of these discussions Optimum’s stance that it would be unable to continue its operations unless a substantially increased price for the Hendrina coal was agreed was made apparent again and again.
44. The long and short of Optimum’s approach was to try and hold Eskom to ransom with its threats that Glencore would simply cease Optimum’s operations with, quite obviously, very severe potential consequences for Eskom in relation to the generation of electricity at Hendrina at a time when it had already become apparent

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<sup>23</sup> See MMK 9, referred to below, bundle pp 30 – 35.

<sup>24</sup> MMK 9, bundle p 32, 2<sup>nd</sup> to 4<sup>th</sup> paragraphs.

<sup>25</sup> Confirmed by what happened when OCH and Optimum went into business rescue, when OCH wanted to jettison Optimum, but retain Koornfontein.

that Eskom's generation capacity was going to run short in the not too distant future. Glencore's approach was presumptuous and paid no heed to the fact that Eskom was itself financially constrained as a result of, among others, an increasingly assertive approach towards Eskom tariff increases applied by NERSA, the National Energy Regulator of South Africa.

45. Optimum on 28 February 2014, pursuant to the prior "hardship notice" of 3 July 2013, instituted arbitration proceedings in terms of the Hendrina Coal Supply Agreement. Optimum's hardship claim did not attack the base price, but the escalation factors (PPI 60%, 30% CCI (Coal Cost Index) and fixed price 10%) that had been agreed.
46. This gave rise to Eskom's and Optimum then, on 23 May 2014, entering into an agreement referred to as a "Co-operation Agreement".<sup>26</sup> This agreement specified a process directed at addressing and settling outstanding issues relating to Optimum's alleged hardship arising from the fixed price at which it had agreed (as recently as 2011) to supply coal to Hendrina in terms of the amended Hendrina Coal Supply Agreement. The Co-operation agreement also addressed the disputes about penalties that Eskom sought to impose arising from sub-specification coal that Optimum had been delivering over an extended period of time since early 2012. It established a time table that (optimistically) posited that the issues it identified would be susceptible of resolution by early 2015.
47. In terms of the Co-operation Agreement Eskom undertook that it would from 1 May 2014 until termination of the negotiation and settlement process that the agreement envisaged, suspend all penalties that applied to Optimum in terms of the Hendrina

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<sup>26</sup> MMK 8, bundle pp 24 – 29.

Coal Supply Agreement, which penalties had a substantial monetary value, albeit that Eskom had not yet finally calculated and specified the aggregate sum at issue.

**Glencore continues to try to hold Eskom to ransom with its threats of business rescue and liquidation, settlement does not come about and Eskom terminates the Co-operation Agreement; Glencore puts OCH and Optimum in business rescue to avoid arbitration**

48. It is apparent from the documentation that is available that the negotiations (to which I was not a party) did not make much progress towards resolution. This was simply because of the approach that Optimum still pursued, i.e. that Glencore would close Optimum down and put it into liquidation if Eskom did not agree to a substantial increase of the Hendrina coal price (by way of applying much steeper escalation rates to the 1 June 2011 base price) and Eskom's waiving its penalty claims (which claims Optimum posited as a breach of contract entitling it to cancel the Hendrina Coal Supply Agreement altogether). This was confirmed and exemplified in the letter that Eskom received from Optimum on 13 November 2014, supposedly to put forward settlement proposals, but that actually served to threaten Eskom in quite unequivocal terms at a time when load shedding had just started.<sup>27</sup> I refer the Portfolio Committee in this regard specifically to the first two paragraphs of the letter, as well as the last paragraph thereof. The letter also recorded that as at that time Eskom's negotiators had developed and expressed a strong mistrust of Optimum's professed *bona fides* in the negotiations.

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<sup>27</sup> MMK 9, bundle pp 30 – 35.

49. Optimum sent another letter to Eskom of similar import on 22 May 2015.<sup>28</sup> The letter recorded that Eskom had at that time exhibited a willingness to try and assist Optimum with the price for the Hendrina coal, but also that Mr Brian Molefe had on 18 May 2015, allegedly, taken a harder line on the basis that Eskom still intended to enforce the Hendrina Supply Agreement. The letter conveyed Optimum's position that business rescue of Optimum was on the cards and that Optimum would inevitably be liquidated unless Eskom increased the price (despite stating that Optimum "fully appreciates Eskom's difficult financial position and the consequences of increasing the price under the agreement").
50. Optimum closed its export operations in July 2015.<sup>29</sup> This was, apparently, due to "depressed coal prices and ongoing losses" that Optimum had suffered in its export operations. However, such prices had reigned for a substantial period, since well before Glencore became involved with OCH and Optimum.
51. Eskom terminated the Co-operation Agreement by letter delivered to Optimum on 22 June 2015.<sup>30</sup> In his submission to the Portfolio Committee Mr Molefe confirmed what was stated in the letter, i.e. that Eskom terminated the Co-operation Agreement because of its constrained financial position at the time. The letter was, apparently, originally drafted as a response to Optimum's letter of 22 May 2015<sup>31</sup>, but was only delivered 11 days after the meeting that took place on 11 June 2011, attended also by Glencore's CEO, Mr Ivan Glasenberg. Although I did not myself attend the meeting<sup>32</sup>, I later learnt that the meeting did not go well and that Mr Brian

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<sup>28</sup> MMK 10, bundle pp 36 – 38.

<sup>29</sup> See 6<sup>th</sup> bullet point of paragraph 1 on page 2 of MMK 7, bundle p 19.

<sup>30</sup> MMK 11, bundle p 39.

<sup>31</sup> MMK 10. MMK 11 is dated 10 June 2015

<sup>32</sup> Still being on suspension at the time.

Molefe took strong exception to the “*Old South Africa tactics*” that Mr Glasenberg adopted in its course.

52. The letter, MMK 11, had the effect of reinstating operation of the provisions of the Coal Supply Agreement and its addenda, including those relating to price adjustments for sub-specification coal. It also restarted the arbitration process that had been shelved in April 2014.
53. Optimum had for a continuous period from 1 March 2012 to 31 May 2015 failed to supply and deliver coal to Eskom that complied with the quality specifications specified by clause 3.4 of the First Addendum to the Hendrina Coal Supply Agreement. I again point out that the supply of sub-specification coal was already an issue of long standing, as reflected also in the Co-operation Agreement of 23 May 2014, MMK 8.
54. As a result Mr Thava Govender (Eskom’s Group Executive: Transmission), in the capacity as acting GCE<sup>33</sup>, authorised that a letter of demand be sent to Optimum. The Eskom memorandum in terms of which Mr Govender approved that a letter of demand be sent speaks for itself insofar as it sets out the motivations that applied.<sup>34</sup> It carried the approval of the executives who had been involved with the negotiations with Optimum until that time.

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<sup>33</sup> Mr Molefe must have been away.

<sup>34</sup> MMK 12, bundle pp 40 – 41.

55. CDH, acting on behalf of Eskom, issued the letter of demand on 16 July 2015.<sup>35</sup> The letter of demand specified Eskom's claim for penalties in terms of the Coal Supply Agreement as a claim for nearly R2.18 billion.<sup>36</sup>
56. Paragraph 3 of the letter of demand recorded that, "*In the event that Optimum disputes the aforementioned claim, we submit that this letter shall constitute a referral of the dispute to arbitration as contemplated in clause 6.3 of the First Addendum*".
57. In these circumstances the boards of directors of Optimum and OCH on 31 July 2015 adopted resolutions to initiate business rescue proceedings in terms of the Companies Act, 2008. Mr Piers Marsden testified to this committee that the business rescue proceedings (that suspended legal proceedings) were commenced to avoid the arbitration proceedings. The business rescue formally commenced on 4 August 2015, as stated before, and came to an end on 31 August 2016.

#### **The value of Eskom's penalty claim**

58. Ms Daniels stated before this Committee that the original penalty calculation was overstated by some R1 billion as a result of what she referred to as a "spreadsheet error".
59. Mr Clinton Ephron, a director of Optimum and OCH, in a one-on-one meeting that I had with him, conveyed to me that Eskom would be lucky if it came away with its penalty claim for R800 million. My view on the matter, which I had inherited when,

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<sup>35</sup> MMK 13, bundle pp 42 – 43.

<sup>36</sup> That claim had, apparently, been computed from figures that had been determined by an employee in the Primary Energy department, part of the Commercial Division, who went to work for Glencore.

after I had come back from suspension, I became responsible for Generation, was very simple, and I expressed it to Mr Ephron at the time. It was that the final figure had to be determined by the arbitration process that the Hendrina Coal Supply Agreement specified. Mr Ephron, however, made it clear that from Optimum's perspective the value of the claim was actually irrelevant. Optimum's position, representing also that of Glencore, was that Eskom had to waive the penalty claim altogether.

60. Mr Marsden informed the Portfolio Committee that his estimate of the value of Eskom's penalty claim was approximately R700 million.
61. I believe that the Eskom employee from whose figures the calculation of the original claim were done, had gone to work for Glencore. That may explain why Optimum's representatives were able to put figures to the claim that were much lower than the sum for which the claim was instituted – they knew what we did not.
62. The Eskom claim was, eventually, during March 2017, settled at the arbitration hearing at R577 million. The settlement occurred in accordance with a mandate that Eskom's Board had given to Ms Suzanne Daniels, then Eskom's acting Company Secretary and Corporate Counsel. She testified to that effect before this Committee. Ms Daniels was expert regarding Eskom's coal supply agreements and Eskom was represented in the arbitration proceedings by CDH and senior counsel. Although I was not involved, I have no reason not to accept that the settlement was in the right ballpark.
63. I wish again to bring to the attention of this Committee that I was on suspension from 11 March 2015 until 15 July 2015, returning to work from suspension on 20

July 2015. That was after Dentons had on 15 July 2015 issued a report to the effect that it had in its investigation not found any wrongdoing on my part (or on the part of the other 3 executives suspended with me). It is during this period that the Optimum penalty claim was quantified at R2.18 billion and formally instituted, as is reflected in MMK 12 and MMK 13.

64. I was reinstated to the position of Group Executive: Technology. When I was suspended on 11 March 2015 my position was that of Group Executive: Technology and Commercial, but restructuring had occurred in the interim. Responsibility for the Commercial Division had been transferred to the Chief Financial Officer as his ultimate responsibility.
65. As referred to already, Mr Molefe had in the meantime been appointed as acting GCE, being appointed on a permanent basis during October/November 2015. I had never met or dealt with Mr Molefe before.
66. Mr Molefe undertook some further restructuring of the top executive posts within Eskom. The Board, on his recommendation, appointed me as Group Executive: Generation and Technology, in other words Generation was added to my responsibilities (after Commercial had been assigned to the Chief Financial Officer during the period that I was on suspension, as referred to before).
67. Load shedding commenced in South Africa during November 2014 as a result of a lack of generation capacity. Load shedding was still a matter of overriding importance at the time when I was appointed to the position of Group Executive: Generation. In relation to the issues that had arisen in years and months past regarding Optimum and the Hendrina Coal Supply Contract, I had to acquaint

myself with the background facts and deal with the matter in circumstances where Eskom's available generation capacity could not meet demand.

68. Arising from Optimum's being put in business rescue on 4 August 2015 the supply of coal from Optimum to the Hendrina Power Station ceased. The Hendrina Power Station then had to rely on its emergency stockpile of coal for purposes of keeping the power station going during the month of August. However, this impacted on Hendrina's ability to continue supply electricity into the national grid going forward. What would happen if Hendrina's electricity generation came to a halt was a matter of major concern and a talking point within Eskom's managerial echelons at the time.
69. There was no meaningful engagement or communication between the business rescue practitioners that had been appointed and Eskom's management during August 2015 regarding the resolution of the Hendrina Coal Supply Agreement pricing dispute and the penalty issues that had arisen since Glencore had become involved with Optimum. However, shortly before 3 September 2015 I received a call from Mr Clinton Ephron, a director of both OCH and Optimum. I knew him because of my having dealt with him previously in my capacity as the Group Executive responsible for Technology and Commercial. He suggested that we find a solution, at least in the short-term, to enable coal supplies to Hendrina to be restarted. I discussed the matter with Mr Molefe and arranged a meeting between Mr Molefe and Mr Ephron. It took place on 3 September 2015. This resulted in a short terms arrangement for the renewed supply of coal to Hendrina at the contract price of R150 per tonne in accordance with the terms of the Hendrina Coal Supply

Agreement. The terms of the arrangement were recorded and confirmed in a letter compiled by CDH, dated 19 September 2015.<sup>37</sup>

70. The Hendrina coal supply arrangement was short term (after the first 60 days, it was from month to month) and precarious. Overt and veiled threats were still being made not only by the directors of OCH and Optimum still participating in communications and negotiations, but also now from the side of the business rescue practitioners. These were the same as before, i.e. that Glencore would put Optimum into liquidation, unless Eskom came to terms with it, encompassing that Eskom had to agree to a higher price for the Hendrina coal and waive its rights to the penalties that Eskom sought to recover. The continuation of the month to month arrangements was subject to uncertainty and, accordingly, very troubling - the continuing possibility that Glencore would on short notice pull the plug and implement the threats that had been conveyed to Eskom so often since Glencore's involvement had commenced early in 2012 was of major concern.
71. A further concern was that the Department of Mineral Resources had also become involved because of its officials' concerns about whether, given Optimum's apparent precarious financial status, safety and environmental standards continued to be met at Optimum's operations. The Department had for that reason at a stage suspended the relevant mining licence. Mr Molefe had to approach the Minister to ask that the matter be dealt with very carefully in the light of the circumstances that existed, more particularly, Eskom's generation constraints and load shedding that was costing the national economy dearly. As a result the suspension was withdrawn on or about 7 August 2015.

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<sup>37</sup> MMK 13.1, bundle pp 44 – 46.

72. Such communication with the Department of Mineral Resources was not out of the ordinary, usually occurring at the most senior levels. Eskom and the mining companies that supply coal to it exist synergistically and Eskom has always had regular and ongoing interaction with the Department of Mineral Affairs where its interests required it, including sometimes to seek the Department's assistance to iron out difficulties that had arisen with the miners, and sometimes to act as the miners' interlocutor.
73. Eskom's stance had never changed since even before Mr Molefe's meeting with Optimum's CEO on 18 May 2015. Eskom's stance was simply that it was, despite running short on generation capacity, not going to succumb to Glencore's strong arm tactics, but:
  - 73.1 Fully expected OCM to comply with the Hendrina Coal Supply Agreement until its expiry at the end of 2018 at the agreed price of R150,00 per tonne;
  - 73.2 Was not going to waive its penalty claim, but would pursue it to arbitration;
  - 73.3 Was not willing to engage with Optimum at that stage regarding a package deal in terms of which the supply contract was extended until 2023 at a substantially increased price per tonne without going to market.
74. Eskom had, on that basis, rejected the proposals contained in the letter of 17 September 2015<sup>38</sup> received from the business rescue practitioners. In these circumstances, the business rescue practitioners (of OCH and Optimum) indicated that they were seeking a buyer for Optimum. This was recorded in their first

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<sup>38</sup> MMK 7, bundle pp 18 - 22.

Business Rescue Status Report issued on 4 November 2015, as referred to in their second report of 4 December 2015.

75. Even before that, on 28 October 2015, I had a meeting with Messrs Marsden and Van den Steen during which we discussed the avenues that could, potentially, be followed to resolve matters. I was told during the meeting that there was still a third party who was possibly interested in acquiring Optimum's business.<sup>39</sup> The name of the third party was not disclosed during the meeting. I subsequently, on 29 October 2015, received a letter from Messrs Marsden and Van den Steen that recorded the options that had been mooted.<sup>40</sup> It also disclosed Oakbay Investments (Pty) Ltd ("Oakbay") as the potential buyer that the business rescue practitioners could bring to the table.
76. On 24 November 2015 a meeting took place at Megawatt Park when the business rescue practitioners did actually bring representatives of Oakbay to the table. Besides myself, Ms Suzanne Daniels attended the meeting and also Ms Ayanda Nteta, who drafted the minutes of the meeting.<sup>41</sup> Ms Daniels, as referred to already, was regarded as Eskom's expert on its coal supply contracts and had throughout been involved as adviser to the executives dealing with the matter from the time, after Glencore had become involved, when the difficulties with the Hendrina Coal Supply Contract started. Ms Nteta was at the time the acting General Manager: Primary Energy (Fuel Sourcing) in the Commercial Division. The document is an important document insofar as it contemporaneously recorded the status at the time and what the stance was that had been adopted by each of the various parties.

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<sup>39</sup> The business rescue practitioners had conveyed to me earlier that there were buyers that were interested in Optimum. At first they said that discussions were ongoing with three potential buyers, then later, with two potential buyers and eventually with only one.

<sup>40</sup> MMK 14, bundle pp 47 – 49.

<sup>41</sup> MMK 15, bundle pp 50 – 52.

77. At the meeting the business rescue practitioners again conveyed (it had been put across to me before), that their intention was to “rescue” Optimum first and that OCH would come later. At that stage that was to occur by selling Optimum’s business, i.e. its coal mining operations, as a going concern. OCH’s other assets, including Koornfontein, would then be addressed and, potentially, disposed of, separately. Oakbay’s representatives were introduced as representing the remaining potential buyer of Optimum, who was, as I recall, disclosed as intended to be Tegeta, a company within the Oakbay group that already supplied coal to Eskom from its Brakfontein mine.
78. On the basis of the fact that Glencore, Optimum and the business rescue practitioners had regularly before recorded that Optimum was not a viable standalone business, I questioned the viability of its being disposed of separately, given that the Hendrina Coal Supply Agreement had to be honoured<sup>42</sup>. I accordingly conveyed that, although Eskom would support an Optimum sale to Oakbay/Tegeta, a separate disposal of only Optimum or only its business would not be supported by Eskom.
79. Arising from what I conveyed not only the business rescue practitioners and Glencore (representing OCH and Optimum, but also Koornfontein), but also the representatives from Oakbay knew what Eskom’s position was. Arising, however, from the fact that no final conclusions could be reached then and there regarding the way forward in that regard, I requested that the business rescue practitioners indicate what would happen after the end of November 2015 regarding Optimum’s supply of coal to Hendrina. The response was that funding had been obtained to

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<sup>42</sup> Which I am recorded to have confirmed as one of the three issues on which Eskom was not going to change its position.

keep Optimum going and that the coal supply would continue until 15 December 2015, which was the date that the Oakbay/Tegeta representatives indicated as the date by when they aimed to have a deal finalised. In other words, the status remained a precarious and uncertain short-term one. I, accordingly, requested clarity regarding what would happen after 15 December 2015.

80. The conclusion of the meeting of the 24<sup>th</sup> was that discussions were to occur later on the same day between the business rescue practitioners, Glencore and Oakbay/Tegeta to explore how the issue that I had raised, i.e. that a sale of Optimum's business alone would not be acceptable to Eskom, could be addressed. I later learnt that in these and later discussions a composite sale of OCH's assets, i.e. its holdings in its subsidiaries, including in not only Optimum, but also Koornfontein, was tabled and being negotiated as the deal that would have to be made to achieve business rescue by way of a sale to Oakbay/Tegeta.
81. On 1 December 2015 I received a letter from Werksmans Attorneys, acting on behalf of the business rescue practitioners.<sup>43</sup> It stated that coal supplies to Hendrina were confirmed until 31 January 2016. Mr Piers Marsden shortly afterwards came to see me, either on the 1<sup>st</sup> or the 2<sup>nd</sup> December. He was accompanied by a representative from Glencore, but I am not now sure whether it was Mr Ephron, or Mr Shaun Blankfield (who had attended the 24 November meeting as Glencore's representative). They informed me that Glencore had decided to take the Optimum companies out of business rescue and to honour the Hendrina Coal Supply Agreement in its terms, i.e. until 2018. That was a major relief to me. It also had as concomitant that the disputed issues that had arisen

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<sup>43</sup> MMK 16, bundle p 53.

since 2012 would be resolved in accordance with the resolution mechanisms specified in the agreement.

82. On Friday the 4<sup>th</sup> of December 2015 Eskom received an update from the business rescue practitioners, represented by Mr Marsden, by way of their second “Business Rescue Report” in relation to Optimum.<sup>44</sup> It is document MMK 17 in the accompanying bundle. It was directly contradictory of what had been conveyed to me two days before. It was to the effect that the business rescue process of Optimum would continue and that “*the negotiations with the party who expressed an interest in OCM would continue*”, but that “*there is no certainty regarding whether a deal will be concluded and the timing of any deal*”. It again conveyed what had been stated in MMK 16, i.e. that supplies of coal to Hendrina could only be assured until the end of January 2016 (incorrectly recorded as 31 January 2015 in paragraph 4.2 of the report).
83. The change of attitude exhibited (after two days) created major new uncertainty for Eskom, represented by Mr Molefe, who I kept abreast of communications and developments, and me. At this time, as referred to already, Eskom had already communicated with the Department of Mineral Resources regarding its suspension of Optimum’s mining licence and its concerns regarding whether safety requirements were being complied with in Optimum’s constrained circumstances, as well as about potential retrenchment of workers if the situation could not be saved and the availability of financial resources for rehabilitation, among others. The Department of Mineral Resources was accordingly already “in the loop”.

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<sup>44</sup> MMK 17, bundle pp 54 – 57.

84. Between myself and Mr Molefe we decided that we needed to keep the Department of Mineral Resources up to date on the developments that had occurred and to request its assistance, by the means they had, to facilitate a resolution of the impasse that quite clearly still existed despite the potential sale to Oakbay/Tegeta. From our perspective the matter had now to be brought to conclusion one way or the other, i.e. either by sale of Optimum or its business on a viable basis, or Glencore's bringing the business rescue to an end and matters continuing on the basis of the existing Hendrina Coal Supply Agreement.
85. We requested Ms Daniels to draft the required letter. I received a first draft at 18h46 on Friday, 4 December 2015 and after discussion of its contents with her, a second draft on Sunday, 6 December 2015 at 19h55, despatching it by email to the Director General of the Department of Mineral Resources the same evening. Ms Daniels' initial draft with the covering email she sent me is document MMK18 in the accompanying bundle, the covering email for the final draft is document MMK 19, and the letter that went out is document MMK 20.<sup>45</sup>
86. Suggestions have been made that our letter to the Department of Mineral Resources was in some or other manner irregular. I deny that that is the case. We had previously intervened with the Department regarding the suspension of Optimum's operations and it presented an avenue to try to exert influence to bring matters to some form of finality to ensure continued coal supplies to Hendrina. The manner in which we dealt with the matter after receiving MMK17, over the weekend of 4 to 6 December 2015, rather indicates the major concern we had about the continued uncertainty regarding coal supplies to Hendrina, also in the context of further coal supply uncertainties that were looming at other power stations.

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<sup>45</sup> MMK 18, MMK 19 and MMK 20, bundle pp 58 – 63.

87. The Director General of the Department responded to my letter, as I recall, on Monday, 7 December 2015. His letter is document MMK 21 in the accompanying bundle.<sup>46</sup> The letter indicated that the Department favoured a sale and transfer of the relevant Optimum mining right. The Department was, clearly, abreast of ongoing developments and of the identity of the potential buyer. The Director General stated that the Department had already been in contact with the Competition Commission “*to go and plead the case*” and referred to a necessity for “*the project to proceed*”. It went on to request as follows:

*“In return for the new owners honouring the current contract up to 2018, and for driving transformation we would like to propose that consideration be made for some pre-payment to be made for up to one (1) year of coal supply, understanding the upfront capital injections to be made to ramp up production to meet coal supply requirements from these mines. We firmly believe that every possible angle must be considered and offered to ensure that supply is guaranteed at the contracted price for all of these critical mines, thereby averting any national crisis that we as South Africa can ill afford.”*

88. The suggestion from the Department of a prepayment of a substantial sum to the buyers of the OCH mines made sense in the circumstances that prevailed, but it had to be given careful consideration from a legal and practical viewpoint. I, accordingly, forwarded the Director General’s letter to Ms Daniels and discussed with her later that she had to prepare a submission to the Eskom Board for the Board to consider and potentially approve a transaction with Oakbay/Tegeta as had been discussed on 24 November, but on the basis of a deal that included Koornfontein and on the basis that Eskom would prepay for coal to be acquired during the first year, as had been suggested by the Department.
89. My belief at the time was that if that was what was going to be required to save the situation, that was what had to be done, taking into account that prepayments for

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<sup>46</sup> MMK 21, pp 64 – 65.

coal to be supplied in the future (albeit not to the extent that the Department had suggested) was not out of the ordinary in Eskom's operations. The proposal however had to be analysed, assessed and set out in greater detail so that it could be put before Eskom's Board for consideration and approval, also regarding how it would be financed. I requested Ms Daniels to prepare such a submission for the Board's consideration and she did so. I approved the final "*Submission Document*" presented, after she and I had discussed her prior drafts. The document that was produced drew heavily from her expertise and understanding of coal supplies to Eskom, proposing that the prepayment be financed by somewhat decreasing coal stockpiles at other power stations (by for a short while buying less coal from the coal suppliers). The submission eventually, after it had also been approved and agreed to by the Chief Financial Officer, served before and was approved by the Board by way of a round robin resolution.<sup>47</sup>

90. The prepayment authorised in terms of MMK 22 was never implemented. That was because the assumptions on which it was based were not met, particularly that OCM had to be taken out of business rescue. That could not be achieved as a precondition to the prepayment being made.
91. The deal for the sale of OCH's interests in its subsidiaries was concluded between OCH and Oakbay/Tegeta shortly afterwards, I believe on the 10<sup>th</sup> of December 2015. It was announced by the business rescue practitioners in terms of MMK3.<sup>48</sup> The transaction was subject to Eskom's formal approval, which was given by the Board.

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<sup>47</sup> MMK 22, bundle pp 66 – 70.

<sup>48</sup> MMK 3, bundle pp 4 – 5.

**"THE PREPAYMENT OF THE COAL SUPPLY EXTENSION AT A BOARD TENDER COMMITTEE MEETING OF 11 APRIL 2016"**

**Eskom's presentation to SCOPA**

92. Eskom on 30 May 2017 presented submissions to Parliament's Select Committee on Public Accounts ("SCOPA") regarding Eskom's procurement of coal from Tegeta. Ms Daniels, in her capacity as Eskom's acting Corporate Counsel, participated in the drafting of the relevant PowerPoint presentation that was made to SCOPA, as well as in the actual presentation thereof. I did not participate. I had been placed on special leave on the 15<sup>th</sup> May 2017. The presentation was spoken to by Mr Brian Molefe (who had at the time returned to Eskom).
93. A draft of the final presentation specifying Ms Daniels' comments and suggestions that were incorporated into the final version, is document MMK 23 in the accompanying bundle.<sup>49</sup>
94. Part of the presentation addressed criticism that had come from various quarters regarding contracts for the procurement of coal that Eskom had concluded with Tegeta. The presentation dealt with these matters and served to explain also the motivation for and basis upon which agreement was concluded with Tegeta in April 2016 for the supply of coal for the Arnot Power Station, in respect of which Eskom made a prepayment. What was conveyed to Parliament in this regard was in all material respects correct.

**The 2008 mandate given by the Board Tender Committee**

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<sup>49</sup> MMK 23, bundle pp 71 – 105.

95. Eskom's Board of Directors Tender Committee ("the BTC"), a sub-committee of Eskom's board of directors, adopted a resolution during August 2008 that specified a mandate given to the Group Chief Executive "*to negotiate and conclude contracts on a medium term basis for the supply and delivery of coal to various Eskom power stations for the period October 2008 to March 2018*" ("the 2008 mandate"). The 2008 mandate is reflected in the submission made to the BTC. It is the document MMK 24 in the accompanying bundle.<sup>50</sup>
96. The Board Tender Committee approved the 2008 mandate to conclude contracts on a medium term basis for the supply and delivery of coal to various power stations for the period October 2008 to March 2018 in terms of MMK 24. This mandate authorised the Group Chief Executive (at the time Mr Dames) to make advance payments to suppliers up to the value of R700 million to enable them to provide Eskom with the required quantities (subject to approval in accordance with Eskom's "*Delegation of Authority Policy*"). The 2008 mandate was updated in 2014 in terms of document MMK 25 in the accompanying bundle.<sup>51</sup>
97. The 2008 mandate was issued during the coal crisis of 2008 to ensure security of coal supply for the period that it covered and to prevent load shedding during high demand periods (often in winter) arising from circumstances that compromise the usability of coal stockpiles acquired in terms of long term contracts (e.g. excessive rainfall). Approval by the BTC of the procurement of 1.2 million tonnes of coal from Tegeta on 11 April 2016 occurred in accordance with the 2008/2014 mandate.
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<sup>50</sup> MMK 24, bundle pp 106 – 136.

<sup>51</sup> MMK 25, bundle pp 137 – 168.

**The shortage of coal for the Arnot Power Station; the suppliers who could fill the gap**

99. As from 2008 Eskom regularly executed assessments of its coal burn requirements for set periods in the future. An assessment of the 2016 winter supply plan was conducted during 2015. This indicated a shortfall of 2.1 million tonnes of coal at Arnot.
100. A coal emergency for Arnot Power Station was declared by Eskom's Primary Energy Division Tactical Command Centre on 23 December 2015. The minutes of the meeting at which this occurred is document MMK 26 in the accompanying bundle.<sup>52</sup>
101. The emergency had to be addressed by the Primary Energy (Fuel Sourcing) department of the Commercial Division, i.e. Ms Nteta's department. Its representatives approached existing Arnot coal suppliers to make offers to increase their supply to mitigate the load shedding risk that the estimated shortfall at Arnot presented.
102. Delivery time and the quality of coal on offer were the overriding determining factors that governed who the successful offeror suppliers would be.
103. Only two of the Arnot suppliers, Tegeta and Umsimbithi Mining (Pty) Limited, were able to source and supply the volumes required and meet the delivery time and quality requirements.

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<sup>52</sup> MMK 26, bundle pp 169 – 171.

104. Tegeta was at the time already a coal supplier to Eskom elsewhere. Tegeta owned a coal mine, Brakfontein Mine, that supplied coal to the Majuba Power Station on a long term contract. As buyer in terms of the 10 December 2015 deal with OCH it was also at that stage likely to become party, via Optimum, to the Hendrina Coal Supply Agreement enduring until the end of 2018.
105. Tegeta supplied coal to Arnot from coal sourced from Optimum's export coal stockpile. It had purchased the coal in terms of two agreements, each for fixed tonnages of coal, which, however, had fixed termination dates. These contracts had been concluded with the business rescue practitioners of Optimum.<sup>53</sup> The last of the two agreements expired on 15 April 2016.
106. Mr Piers Marden confirmed before this committee that:

*"Optimum Coal Mine never supplied coal to Eskom. We supplied coal to Tegeta on a 30-day payment terms. So the prepayment was a transaction between Tegeta and Eskom..."*
107. Umsimbithi operates the Wonderfontein Colliery that supplies coal to Arnot. It also had a short term contract with Eskom that would expire during June 2016.
108. The offers for the increased coal supply encompassed that the short term contracts with Tegeta and Umsimbithi had to be extended. In Tegeta's case that required that a contract for an extension be negotiated and agreed between Eskom and Tegeta and that Tegeta secure the coal with Optimum.
109. I learnt from Ms Nteta that Tegeta had requested a prepayment in respect of the to be extended short term coal supply agreement. It made a case in this regard on the

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<sup>53</sup> Optimum remained in business rescue until 31 August 2016.

basis that the prepayment would enable it to meet Arnot's requirements from the coal it could source and secure from Optimum's export coal component. This was discussed with me by Ms Nteta and also Ms Daniels and I had no problem with it - securing an adequate coal supply to Arnot for the immediate future was of critical importance at the time.

110. On 11 April 2011 I received a submission that had been prepared in Ms Nteta's department. I first received it in draft form by email in the morning. Ms Nteta brought a hard copy to me for signature later in the day. She explained to me that it was to serve before the BTC on that day. She had signed it, as had Mr Edwin Mabelane, the acting Chief Procurement Officer. I called Mr Mabelane into the meeting and Ms Nteta, Mr Mabelane and I had a further discussion about the contents thereof. I was quite happy to support the submission and I appended my signature. The signed document is document MMK 27 in the accompanying bundle.<sup>54</sup>

**The BTC authorised the prepayment on 11 April 2016 for good reason arising from Arnot's coal supply shortage; I signed the relevant agreement with Tegeta and it was implemented in its terms**

111. A R659 million prepayment (R578 million exclusive of VAT) was authorised by the BTC on 11 April 2016 on the basis of, and in accordance with, the 2008 mandate, which was updated in 2014. The approval was on the basis that adequate and appropriate security had to be provided by Tegeta. It eventually did so in the form of a limited guarantee and pledge of the issued shares of Tegeta.

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<sup>54</sup> MMK 27, bundle pp 172 – 175.

112. The meeting of the BTC on 11 April 2016 took place by teleconference at 21h00. It was set up by Ms Daniels. I received an email in this regard after I had left the office. It is document MMK 28 in the accompanying bundle.<sup>55</sup> I did not participate in the meeting, which, according to MMK 28, was called at the behest of the chairman of the BTC, then Mr Zithembe Khoza. The relevant minute is document MMK 29 in the accompanying bundle.<sup>56</sup>
113. I was subsequently, on 13 April 2015, required to sign the contract document that had been prepared by Primary Energy. I had a discussion about it with Ms Daniels before signing it. She had, apparently, reviewed and authorised it and I was on the basis of that discussion quite happy to sign it. The agreement is document MMK 30 in the accompanying bundle.<sup>57</sup>
114. A 3.5% discount was negotiated with Tegeta for the 5 month early payment that was agreed.
115. The prepayment to Tegeta was not unique - numerous prepayments to coal suppliers had been made since 2008 in terms of the 2008 mandate.
116. Ms Daniels testified before this Committee that it was quite permissible for Eskom to prepay suppliers for future coal deliveries. Ms Daniels also testified that it was perfectly legitimate given the circumstances to contract with Tegeta to supply coal to Arnot and to prepay Tegeta. I agree.

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<sup>55</sup> MMK 28, bundle pp 176 – 177.

<sup>56</sup> MMK 29, bundle pp 178 – 181.

<sup>57</sup> MMK 30, bundle pp 182 – 186.

117. Other than prepayments for coal Eskom had prepaid other suppliers sums amounting to R3.5 billion during the financial year ending 31 March 2016.<sup>58</sup>
118. Cost plus coal mines also enjoy upfront investment of Eskom capital in mining plant and equipment infrastructure at their mining operations – the future investment requirement as at this time is R38 billion that Eskom must pay upfront to secure future coal supply from cost plus mines.
119. An internal audit verification that Eskom conducted subsequently revealed that the prepayment made to Tegeta was fully recovered by coal delivered by Tegeta by 31 August 2016.
120. The other potentially available option at the time, as opposed to acquiring coal from Tegeta and Umsimbithi for Arnot, would have been to buy in diesel for Eskom's open cycle gas turbines ("OCGTs") to ensure no load shedding during the 2016 winter. This option would have been by far the most expensive option as the cost of the coal acquired from Tegeta was, comparatively speaking, R277/MWh and the cost of diesel for the same generation output would have been R2 245/MWh.
121. A further consideration in this regard was the record of decision issued by NERSA on Eskom's 2013/2014 Revenue Claw Back Application in which the NERSA completely disallowed costs of diesel used to generate electricity as a cost recoverable from the consumer. Consequently, the use of diesel had to be the very last option that Eskom would employ.

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<sup>58</sup> That appears from Eskom's 2016 annual financial statements.

122. Additional security was derived from the other underlying contracts for coal supply of Tegeta with Eskom – e.g. the Brakfontein contract extending over 10 years, for a value of approximately R4 billion, against which set-off could, potentially, occur if Tegeta defaulted on the extended Arnot short term contract.
123. I supported the recommendation of 11 April 2016 to the Board Tender Committee to prepay Tegeta. I was alive to the board mandate of 2008 and it was urgently necessary to do so to secure coal supplies to Arnot.
124. As I have referred to already, Ms Daniels had reviewed the submission document before I signed it. Ms Daniels also testified before this committee that she approved of the prepayment agreement with Tegeta which I signed on 13 April 2016.

#### **Carte Blanche**

125. I was a couple of months later, in mid-2016, requested by Carte Blanche to participate in a filmed interview that would be broadcast at a later date. Carte Blanche is a business that has a contract with the M-Net television channel to produce a programme for broadcasting on a weekly basis. The interview was broadcast on 13 June 2016.
126. I have since the broadcasting of the interview been publicly vilified on a regular, relentless basis and at every turn, not only by Carte Blanche, but by the media of all stripes and also within Eskom and elsewhere, for, supposedly having lied during the interview, on camera, about the prepayment for coal to Tegeta, or, as it has often been presented, to a Gupta-linked company. This vilification has been baseless. I did not lie “on camera” at all.

127. During the interview Ms Govender asked me whether Eskom had prepaid Optimum (for coal). I responded that it did not. That response was quite correct. Eskom did not prepay Optimum for coal. The agreement that the BTC approved on 11 April 2016 was for prepayment for coal to Tegeta, which was an entity distinct from Optimum, for coal that Tegeta was able to secure and source from Optimum.
128. It would have been irregular for Eskom to have paid Optimum for coal for Arnot Power Station – Eskom had no contract with Optimum for the supply of coal to Arnot.
129. I was surprised and taken aback when the Carte Blanche interviewer, Ms Govender, then produced a document with my signature that she then suggested confirmed that Eskom had prepaid Optimum. She did not during the recorded interview give me opportunity of checking the full text of the document that she produced, showing me only the last page, which did have my signature on it, at arms' length. The document was document MMK 30 in the accompanying bundle.<sup>59</sup>
130. It is quite apparent from MMK 30 that it is by no means an agreement for any prepayments to Optimum, but to Tegeta, in accordance with the BTC's approval of 11 April 2016. In other words, the Carte Blanche interviewer misrepresented the nature and tenor of the document that she showed to me. I did not recognise the document at the time. I could not recollect at all having signed an agreement with Optimum for the supply of and prepayment for coal, but accepted the interviewer's *bona fides* when she put across that I did, believing at the time that it must somehow have slipped my mind.

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<sup>59</sup> MMK 30, bundle pp 182 – 186.

131. Subsequently, Carte Blanche broadcast bits of the visual parts of the interview many times, but invariably with a voice over stating that I had denied that Eskom had prepaid Tegeta for coal. This maliciously misrepresented what had occurred during the interview, conveying time and again to the viewing public that I had lied and had falsely denied that Eskom had prepaid for coal purchased from Tegeta.
132. I invite the Joint Committee to view the video recording of the 13 June 2016 broadcast (which I am aware is available to the Committee). It will show that Ms Govender asked me during the interview whether Eskom had prepaid Optimum for coal, which I (quite correctly) denied. When she produced the document, showed me where my signature appeared on the last page and then said that it proved the contrary, I, quite clearly, started entertaining doubt about whether my previous denial (that Optimum had been prepaid for coal) was correct, reluctantly conceding that it might not have been. I was, however, not at all asked, nor did I deny, that Eskom had prepaid Tegeta for coal and insofar as Carte Blanche has repeatedly put out broadcasts that I had, it has maliciously committed a fraud on the viewing public at my expense.

#### **CONCLUSION REGARDING THE ABOVE TWO TOPICS**

133. The narrative that has been spun by the media and others is that Optimum was driven into business rescue by Eskom with the intention to enable Tegeta to acquire OCH's assets, and that when Tegeta by April 2015 fell short in putting up the money, Eskom made a prepayment to Tegeta to enable it to make payment. Eskom then, moreover, in 2017 knocked down its penalty claim from R2,18 billion to less than R600 million further to assist Tegeta, all as part of an overall strategy to establish Tegeta as a substantial player in the coal mining sector.

134. As I have made apparent already, I was for a large part not party to the series of events that gave rise to Tegeta's acquiring OCH's assets, but I nevertheless deny that any such overall strategy ever existed. Eskom's instituting its penalty claim against Optimum, which did lead to Glencore's putting OCH and Optimum into business rescue, was an event quite distinct from what happened subsequently. Oakbay/Tegeta as acquirer of, at first, only Optimum's mining operations was introduced and brought to the table by the business rescue practitioners. The proposal of a deal regarding Optimum and/or OCH did not to my knowledge in any manner or way originate from Eskom.
135. I have no knowledge that the prepayment to Tegeta in April 2016 for the emergency coal for Arnot was made at the time that it was, coinciding, apparently, with the time when Tegeta had to pay for acquiring the shares and loan accounts in OCH's subsidiaries (including Optimum), so as to enable or assist Tegeta to stump up the money that it needed to perfect the 10 December 2015 deal made with the business rescue practitioners of OCH and Optimum. I was not party to setting up anything of the sort. From my perspective the prepayment was made to enable Tegeta to secure urgently required coal for Arnot from Optimum. If, however, others within Eskom were party to arrangements to get the money to Tegeta to enable Tegeta to make payment in terms of the 10 December 2015 deal, it would be troubling to me - that was not what had been put across to me at the time.
136. The settling at an even later time of the penalty claim (in respect of which Optimum under Glencore's control had not been willing to pay even a cent), occurred at a figure that was reasonably in the correct ballpark, after it had, apparently, during the build-up to the arbitration proceedings become apparent that a substantial miscalculation of the penalties had occurred originally.

137. I have been the subject of a still-ongoing trial by media by journalists and others, spearheaded principally by journalists employed in the Tiso Blackstar media group, including some, as identified and referred to in Mr Jacques Pauw's book, *The President's Keepers*, who "have contributed greatly to ending the careers of dedicated civil servants". The public and others in government and elsewhere have been taken in by the many falsehoods and misleading reports published about me, that are, on my reading, part of a frenzied campaign calculated to break Eskom and to discredit the Government. I have been caught in the crossfire and, arising from the simple magnitude of the campaign, have been unable to defend myself against it. It has all been very, very hurtful.

**"CORPORATE GOVERNANCE AT ESKOM"**

138. Insofar as I have been requested to make a written submission to Eskom regarding "corporate governance at Eskom", I am somewhat at a loss to understand what I am required to provide to the Portfolio Committee. Eskom, as a corporate entity, is governed in terms of detailed written policies and procedures that are, in the usual course, regularly reviewed in three year cycles and subjected to renewed approval at various levels within the organisation. The most important of these is probably Eskom's "*Delegation of Authority Policy*".
139. Eskom's policies and procedures are carefully crafted documents that have been compiled on the basis of Eskom's institutional knowledge accumulated over many decades, sound business practices and a legal environment constituted of a wide array of regulatory provisions arising in terms of primary and subordinate legislation.

140. In any organisation, and possibly more so in an organisation of Eskom's size, extent and geographical reach, policies and procedures that seek to achieve sound corporate governance can be undermined and circumvented by dishonest and corrupt officials at various levels within the organisation. Such conduct also occurs at Eskom and has, unfortunately, occurred also at senior levels of management within Eskom. I have referred to that already in the context of the action that I took at the beginning of 2017, after I had become Eskom's interim GCE, pending investigation to move senior officials away from the positions where they were able to carry out their corrupt activities (which then, however, backfired on me, as I have referred to already).
141. I can make no further comment save to state that I have throughout my career strived to comply and enforce compliance with Eskom's policies and procedures and have resisted attempts e.g. by a previous Chairman of the board, Mr Zola Tsotsi, as referred to below, to pursue avenues that do not accord with Eskom's internal rules. I continue to subscribe to best practice corporate governance.

**ALLEGATIONS MADE ABOUT ME IN THE PROCEEDINGS BEFORE THE PORTFOLIO COMMITTEE**

127. I now wish to address statements made regarding me before the Portfolio Committee by certain individuals that have testified before it which were false or misleading and calculated to damage my reputation.

**Mrs Venete Klein**

128. Mrs Venete Klein was appointed director of Eskom during or about November 2014. She resigned during May 2017. Mrs Klein was during her tenure as a director of Eskom at a stage the acting Chairperson of the People and Governance Committee of the Eskom Board.
129. Mrs Klein testified before the Portfolio Committee to the effect that the Eskom Board appointed me as interim group executive despite the board's knowledge that I had "defects", supposedly a history of dictatorial conduct in respect of employees reporting to me by moving them around or having disciplinary action taken against them and that by my moving Messrs Abram Masango and France Hlakudi I "went too far". This was followed by the evidence leader suggesting to Mrs Klein that I was a "*Hitler*", to which she agreed.
130. Mrs Klein's statement suggesting that I habitually acted in a dictatorial manner vis-à-vis my subordinates in any period relevant to my appointment as interim Group Chief Executive was untrue and simply made to cast me in a bad light.
131. During my tenure as Group Executive: Technology and Commercial, I was involved in disciplinary proceedings against three executives, being Messrs Sal Laher, Willy Majola and Malesela Sekhasimbe.
132. Mr Sal Laher's position was that of Chief Information Officer. He was well-qualified, competent and a strong personality. He a very good friend of mine within the Eskom employment context.

133. Mr Tshediso Matona,, at the time the Group Chief Executive had received a letter of complaint from Mr Mongezi Ntsokolo, the Chairman of the Executive Committee Tender Committee (known as EXCOPS), alleging that Mr Laher had not complied with Eskom's prescribed commercial procedures. The letter, dated 13 November 2013, is document MMK 31 in the accompanying bundle.<sup>60</sup> Mr Matona handed it to me. He asked me to address the complaint and to take it up with Eskom's Industrial Relations Department. I did so and the representatives of that department requested that, pending investigation of the complaint by the department, Mr Laher should be suspended. I on that basis did suspend Mr Laher.
134. Mr Laher in 2015, while still on suspension, requested a separation package that Eskom agreed to. I was at that time also on suspension. After Mr Laher's leaving Eskom he emigrated from South Africa. I regarded his leaving Eskom as very unfortunate and a real loss. However, apart from acting in relation to Mr Ntsokolo's complaint at the request of Mr Matona, I had nothing to do with his leaving Eskom.
135. It has been suggested during the proceedings of the Portfolio Committee that I was party to forcing Mr Laher out of Eskom to enable a contract for information technology systems with an entity referred to as T-Systems, allegedly a Gupta-linked business, to be extended for two years. The suggestion was unsubstantiated and incorrect. I was not party to anything of the like and do not have knowledge that anything of the like occurred.
136. Mr Willy Majola was again a very good friend and associate of mine within our work context. His position was that of a Senior General Manager in Generation. He had been charged for an act of negligence relating to the reliability of information that he

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<sup>60</sup> MMK 31, bundle pp 187 – 188.

had provided. He was found guilty and the disciplinary enquiry Chairman recommended that he be cautioned and reprimanded. I felt that that sanction was too light in all the circumstances that prevailed at the time, including a complaint from the Minister of Public Enterprises that information emanating from Eskom was often unreliable. After discussion with Mr Majola I applied a more severe sanction of two weeks' suspension of his employment without pay (which is permissible in terms of Eskom's employment policies and procedures). The letter to Mr Majola in that regard, dated 24 February 2017, is document MMK 32 in the accompanying bundle.<sup>61</sup> Mr Majola served his suspension, came back to work and that was that. We continued to work together without difficulty or lingering resentment from his side after his return.

137. In regard to the disciplinary action taken against Mr Sekhasimbe I did play a decisive role.
138. The context was that Mr Zola Tsotsi, then the Chairman of Eskom's Board, came to see me during or about June 2014 to request that I should approve payment of a sum of some R69 million on the basis of invoices that a Japanese company, Sumitomo Corporation, had rendered to Eskom in respect of transformers that it had allegedly manufactured for Eskom that Eskom had not taken delivery of. The issue was that Eskom had never contracted with Sumitomo for the manufacture of the transformers or issued a purchase order for the supply of these. My staff in the Commercial Division was, as a result, not willing to process any payment to Sumitomo.

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<sup>61</sup> MMK 189, bundle p 189.

139. I told Mr Tsotsi quite unequivocally that I could not recommend or approve any payment to Sumitomo for equipment that Eskom did not contract and issue a purchase order for. I conveyed to him that I was not going to intervene and that Sumitomo's request for payment had to be dealt with appropriately in terms of the prescribed procedures. That included, potentially, that the matter be submitted to the relevant tender committee for consideration, which would be the only means through which any informal arrangements that might have been made with Sumitomo could be regularised and any payment could be approved. Mr Tsotsi was not happy with my response.
140. It subsequently came to my attention that, despite the fact that no purchase order had been issued to Sumitomo to manufacture and supply the transformers, Mr Sekhasimbe played an active part to procure that a letter be sent by Mr Tsotsi, in his capacity as Chairman of Eskom's board, to Sumitomo Corporation stating that Eskom would pay for the transformers. Such a letter being issued by the Chairman was irregular for a host of reasons, primarily that no contract existed, no purchase order had been issued and that the letter went out without the matter having been placed before the relevant tender committee to consider in terms of the prescribed procedures and then to approve or reject.
141. In these circumstances I did insist that disciplinary action be taken against Mr Sekhasimbe. He was, as a result, suspended on 2 March 2015. A disciplinary hearing was convened towards the end of 2015 under the chairmanship of an independent chairman, Advocate Afsal Mosal, of the Johannesburg Bar. He found Mr Sekhasimbe guilty of misconduct. Mr Mosal's finding is document MMK 33 in

the accompanying bundle.<sup>62</sup> He later recommended Mr Sekhasimbe's dismissal, which recommendation I accepted and effected.

142. The matter, however, had adverse consequences for me because of my resisting Mr Tsotsi's attempts to persuade me to act in a manner that was not compatible with Eskom's policies and procedures. While Mr Sekhasimbe was on suspension, on Sunday 8 March 2015, Mr Tshediso Matona, the CGE, spoke to me. He told me that he had been instructed by the chairman, Mr Tsotsi, that Mr Sekhasimbe had to be "unsuspended". I told Mr Matona that there were good reasons for Mr Sekhasimbe's facing disciplinary proceedings and informed him of what it was all about. I conveyed that I was not going to take action to "unsuspend" Mr Sekhasimbe. Mr Matona then informed me that we would then be suspended. My response was that there was no reason whatsoever for my being suspended and I was, in any event, not going to succumb to any threats in this regard emanating from the (non-executive) Chairman.
143. It was this event that led to my and, probably, Mr Matona's, suspension on 11 March 2015, engineered by Mr Tsotsi, supposedly to allow Dentons to conduct an "*unfettered*" investigation.
144. It is possibly relevant that Mrs Klein's testimony before this Committee was to the effect that Mr Tsotsi, after our suspension, proposed to the Board that Mr Sekhasimbe be "unsuspended" and be appointed as acting GCE. The Board, apparently, refused.

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<sup>62</sup> MMK 33, bundle pp 190 – 207.

145. Two months later, during the first week of May 2015 and while I was still on suspension, I was called into a meeting with Ms Suzanne Daniels, then recently appointed as Eskom's acting Company Secretary, as well as Mr Zithembe Khoza and Mrs Klein, both directors. I was then, out of the blue, presented with a letter headed "**Proposed Terms for Settlement**" in terms of which I was to agree to my services with Eskom being terminated by my resigning and my then being paid R4 951 410,94 (before tax) in settlement. The letter is document MMK 34 in the accompanying bundle.<sup>63</sup> I refused this outright and was then told by Mrs Klein that I would then face investigation by Dentons. My response was that I had done absolutely nothing wrong and I was quite willing to face investigation or misconduct charges or whatever. Ms Klein stated that I should, in any event, go and think about it. Mrs Daniels about a week later arranged a meeting with me at the Protea Hotel in Midrand. It was with the same people as before. I again informed them that I had no intention whatsoever to resign and take the package.
146. I was subsequently on a number of occasions interviewed by representatives of Dentons. No criticism of me was made in any report that they made to Eskom's board and my suspension was lifted and I returned to work on 20 July 2015.
147. Mrs Klein has in the proceedings before the Portfolio Committee attempted to put me in a bad light because she harbours resentment against me as a result of the fact that I had refused to assist her husband, Mr Harold Klein, to procure a project management contract for his company in respect of the conversion of Eskom's diesel driven OCGT generation plants to gas driven plants.

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<sup>63</sup> MMK34, bundle p 208.

148. Mrs Klein during the second week of January 2017, after I had been appointed interim GCE, phoned me and requested that I should meet with her at her home in Mooikloof, Pretoria. She stated that she had a private issue that she wanted to discuss with me. I complied with the request and met with Mrs Klein at her home on Saturday, 14 January 2017. Her husband participated in the meeting. They informed me that they had a “problem” and Mrs Klein said that she needed me to solve it. They explained the “problem” as being that Dr Klein’s company had tendered for project management contracts on the conversion of the OCGT units to gas project, but was not getting the jobs. Mrs Klein said that she had taken her Absa pension money and had invested it in her husband’s business and he now could not get Eskom contracts due to her being a director of Eskom, while his competition was getting these irregularly. Mrs Klein stated that she wanted me to do something about it. I was surprised by what she put across because it was contrary to every Eskom rule regarding conflicts of interest. I informed her and husband that I had no knowledge of the intricacies of the conversion projects at that time or of any irregularities in relation to the awarding of tenders in respect thereof. I told her that I would, however, look into the matter.
149. I then phoned Dr Klein on, I believe, Monday, 16 January 2017, and arranged a meeting with him. I, for purposes of the meeting, called in Eskom’s Chief Audit Officer, as well as members of the OCGT gas conversion project team. I introduced Mr Klein to them when he arrived and asked them to hear him out regarding his complaints. I then stepped out of the meeting.
150. Mrs Klein’s attitude towards me changed from that time. She must have expected that I would cause the contracts that had allegedly been “irregularly” awarded to be channelled to her husband.

151. Mrs Klein's stating that in moving Messrs Masango and Hlakudi I "went too far" is telling. As I have referred to already, my attempts to move corrupt officials who were harming Eskom in relation to the Medupi and Kusile projects from their positions was the precipitating turn of events that caused that I was taken out of play as Eskom's interim GCE from mid May to the end of December 2017 and that I was eventually charged with misconduct on charges in respect of which there never was even a *prima facie* case.

**MS SUZANNE DANIELS**

152. Ms Suzanne Daniels was before my suspension on 11 March 2015 a Senior Manager in my office (in my capacity as Group Executive: Technology and Commercial) responsible for administration and legal matters in the Commercial Division.

153. Mr Tsotsi resigned as Chairman of Eskom's board shortly after I and my three colleagues were suspended in March 2015. Ms Daniels was then, while I was still on suspension, moved to the Chairman's office to serve in the capacity as Eskom's acting Company Secretary and later its acting Corporate Counsel, i.e. head of the legal department.

154. Ms Daniels was, as I have referred to already, regarded as an expert in relation to the various coal supply agreements in terms of which Eskom procured thermal coal for electricity generation at its coal fired generation plants. She was intimately involved as a draftsperson of documentation, adviser on strategy and participant in negotiations on many contracts, also the Hendrina Coal Supply Agreement.

155. Ms Daniels played an instrumental role to instigate and promote the process that led to my first being put on leave in May 2017 and then being suspended in August 2017, pending the disciplinary hearing that eventually took place.
156. Ms Daniels testified to the Portfolio Committee that I played a role in procuring payment to Trillian Management Consulting (“Trillian”) of millions of Rands in circumstances where Eskom had no contract with Trillian and the payments were irregular, even referring to me as a “thief” in that context. Her statements to that effect, which were also contained in a “report” that she submitted to the Minister of Public Enterprises<sup>64</sup>, were, however, lies. The truth is to the very contrary – it was Ms Daniels who was pivotally involved in procuring payment directly to Trillian of R460 million in circumstances where I, in my capacity as interim CGE, had on more than one occasion declined to approve such payment.
157. Trillian was a so-called “BEE partner” of McKinsey & Company South Africa (“McKinsey”). Eskom’s relationship with McKinsey dates back to 2011 arising from Eskom’s instituting the so-called “Top Engineer” programme. That programme had as its objective to train Eskom engineers to enable them to carry out functions, as employees of Eskom, that would often be contracted out to consulting engineering firms at high cost.
158. McKinsey has before this Committee been described as “*a global management consulting firm committed to helping institutions in the private, public, and social sectors achieve lasting success*”. It had apparently established its South African office in 1995 and was subsequently able to establish a reputation in the public and private sectors in South Africa as a sound business and management consultant.

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<sup>64</sup> Sent to the Minister without Eskom’s Board’s consent or authority.

159. I am not aware of how McKinsey was originally introduced to Eskom. I can say, though, that the “Top Engineer” programme has been very helpful to Eskom to develop the expertise of its engineers. It continues to this day, still with intellectual property that McKinsey had provided, albeit that McKinsey itself is no longer a consultant to Eskom.
160. BTC, Eskom’s Board Tender Committee, on 6 July 2015 approved that Eskom engage McKinsey as consultant in relation to four further areas of its operations, being procurement, coal purchases, generation and claims management, that Dentons had identified as areas of concern. I was not at all involved in the processes that gave rise to the approval as I was on suspension at the time – I had no input in the whole process. The understanding that I achieved later was that the contract then concluded with McKinsey had been contracted on a so-called “risk basis”, i.e. on the basis that McKinsey would be remunerated on a percentage basis calculated with reference to proven cost savings, but subject to agreed maxima.
161. A further contract was concluded with McKinsey on 10 September 2015. The contract was still targeted at the areas in respect of which the BTC had given its approval on 6 July 2015, but was of a more urgent and immediate nature. McKinsey was in terms thereof engaged to assist to resolve the cashflow problems that had arisen for Eskom, to assist to design and develop a strategy within the regulatory environment that Eskom faced so as to enable Eskom to operate within ever more constrained means and to assist to update the “cost to completion” business cases for the Medupi and Kusile projects. The contract was for a fixed price of R101 million running over an eight month period and was approved as a “Sole Source Procurement” arising from McKinsey’s proven expertise as a consultant and its service delivery in the past. I, along with Eskom’s Chief Financial

Officer, Mr Anoj Singh, recommended the engagement of McKinsey on this basis and it served before and was approved by the BTC on that basis. I am not aware that any criticism has been raised about this contract.

162. I do not know how Trillian got involved with McKinsey. However, representatives of Trillian, acting on McKinsey's behalf, started participating in functions executed by McKinsey as from some time at the beginning of 2016.
163. Trillian apparently submitted an invoice for R30,6 million directly to Eskom early in February 2016. I was not aware of it at the time, but became aware on 10 February 2016 during a meeting that I had with Ms Bianca Goodson, then Trillian's CEO.
164. I do not know exactly how the meeting was arranged. Ms Goodson submission to the Portfolio Committee stated that it had been arranged by what she referred to as the "executive assistant" of a Mr Stanley Shane. That is possible, but I cannot confirm it.
165. Ms Goodson utilised the meeting as an opportunity to convey, in a rather emotional manner, that her perception was that McKinsey was side-lining Trillian in relation to the consultancy functions that it was supposed to execute on the McKinsey contracts. I explained to her, kindly, that it was not a matter that I could concern myself with – even if her complaints were justified, it was a matter between McKinsey and Trillian. She did also request that Eskom should pay the invoice that had been submitted directly to Trillian and also that I should agree that future invoices be submitted to Eskom directly and be paid directly to Trillian.

166. I dismissed these suggestions out of hand. To quote what Ms Goodson stated in her submission to the portfolio committee:

*"3.18.7. When we spoke about TMC's direct invoicing to Eskom [as I had been instructed to do], Matshela responded that he understood TMC's request to invoice directly, but could not support it – simply put, there were no contracts in place between Eskom and TMC."*

167. Approximately a year later, during February 2017, I was again confronted with a request that direct payment be made to Trillian, this time of the sum of R460 million. This occurred in terms of a memorandum, dated 17 February 2017, supported, among others, by Ms Daniels, that recommended and requested that I approve direct payment of the said sum to "*McKinsey & Company and the BBBEE partner*". The document is document MMK 35 in the accompanying bundle.<sup>65</sup> I declined to sign off on the document for the same reason as before – I could not authorise payment to an entity with whom Eskom had no contract.
168. I was not involved in the approval of the now controversial payments that Eskom made to Trillian. I did not approve any such payments and first learnt that direct payment had been made to Trillian through the press.
169. The long and the short of it is that Ms Daniels' attributing responsibility to me for Eskom's payments to Trillian is pure fabrication. I had at the very outset, when Trillian became involved with McKinsey at the beginning of 2016, refused that Trillian's invoices be paid by Eskom and I again declined to sanction such payments when MMK 35 was submitted to me for approval. I am not aware of how exactly the payments to Trillian were authorised or processed.

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<sup>65</sup> MMK 35, bundle pp 209 – 210.



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**MATSHELA MOSES KOKO**

21 January 2018  
Johannesburg